

## WOMEN AND GENDER EQUALITY IN CHINESE LAW TODAY

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**ABSTRACT:** *The path towards equality of the sexes before the law has been a long road for China; one whose twists and turns have been sharp and crooked, and whose dips and crevices have been deep. China has made great strides down this road, but there is much ground yet to cover. Women in the world of Chinese law today are far better off than their counterparts a generation, or even a decade, ago; yet true gender equality has yet to be achieved. This paper analyzes the status of women in the law in China. It takes the form of a literature review of both Chinese and English language sources on the subject, drawing primarily from scholarly journals analyzing the subject going back as far as the late 1800s. This paper looks primarily at the status of women in the legal academy and profession, but also delves into the world of civil (that is, family or domestic) law in China and the current situation of the average female litigant in disputes in this area. In both instances, the status of women has been found to be disadvantaged in comparison to that of men. The literature finds that the laconic state of women persists today largely due to entrenched cultural norms and perspectives regarding the role of women as subordinate to men, pressures resulting from a China that has and continues to undergo massive societal and economic transition, and uniquely also from modes and norms of communication and power-sharing (such as “guānxī” and “face”) that seem to disadvantage women socially. These factors act as a countervailing force against more progressive trends that seek to build a more inclusive legal world for women in China, whether stemming from the rhetoric of the Communist Party or from the newer free market model which China has adopted. Progress towards gender equality in the law in China has been substantial, but is still wanting.*

**KEYWORDS:** Women, Law, Feminism, Divorce

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### Historical Overview

The legal status of women in China has changed markedly in the last century. A Chinese woman today enjoys far greater access to legal remedies in dispute settlement in court, and can pursue a legal education and profession in law to a degree unthinkable to her counterpart living one hundred years, or even just fifty years, before today. Yet despite these advances, persistent obstacles remain.

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The evolution of the status of women in Chinese law is as multi-faceted as the evolution of the Law in China it's self. The exact legal status of women in prehistoric times is, of course, unascertainable; though some information can be gleaned from archaeology and anthropology. Likely, prehistoric women occupied a social standing comparable to that of men; but this situation would gradually change as Chinese society transited into that of a sedentary, agrarian society with a more specialized, hierarchical structure. It is generally hypothesized that Chinese surnames were originally matrilineal, as can be ascertained from the character *xìng* (“姓”) meaning “surname”, which is of course composed of the characters *nǚ* (“女”) meaning “woman” and *shēng* (“生”) meaning “birth,” implying that the name one was born with derived from the female line.

Classically, under the state ideologies of first Legalism (法家) and later Confucianism (儒家), women in China enjoyed few, if any, legal rights (Thompson, 1913). Legalism, a philosophy concerning ethics and governance expounded by such notable philosophers as Han Fei-zi (韩非子) among others, would only briefly serve as China's ruling ideology under China's first true Emperor, Emperor Qin Shihuang. Despite its brief tenure, legalism would leave a lasting mark on Chinese history. Under legalism, women were not the equals of men, but they did enjoy some rights that they would later lose under Confucianism. For example, under legalism, the punishment for beating one's wife was the same as for beating any person; under Confucianism, there was no punishment.

With the fall of the Qin Dynasty and the subsequent rise of the Han Dynasty, Confucianism would become China's ruling ideology; a predicament that would prevail for almost two millennia, until Sun Yat-sen's 1912 revolution would overthrow the monarchy. The Confucian epoch was not uniform or monolithic; the original teachings of the Sage Confucius would evolve into an intricate legal and governmental culture during its long reign. As such, the exact legal status of women would differ from one dynasty to another, but in general can be said to have followed the same basic outline.

According to Confucian thinking, the universe is governed by two balancing principles, Yin and Yang. “Yin” represents brightness, masculinity, the sun, hills, superiority, and goodness. “Yang”, by contrast, represents darkness, femininity, the night, inferiority, and evil. In this duality of opposites, Yin is dominant and Yang in subordinate. The yin-yang paradigm would dominate Chinese thought for thousands of years and would inform many aspects of Chinese culture, including its legal norms. This included the role of women, which were thought to be subordinate or inferior to men.

In Confucian China, women had no right to own real property (Thompson, 1913), the legacy being passed along the male lineage. Women in China were supposed to follow the Confucian “Three Obeys”, father, husband, and son; as one author put it “before a woman is married, she should obey her father; when a woman is married, she should obey her husband; when a woman is old, she should obey her son” (Ayscough, 1937). Divorce in China was inclement upon the man, ultimately only he could decide to divorce his wife. Unlike widows, who were expected to remain unmarried until death, divorcees had no legal obstacle to remarriage; however social pressure typically made remarriage a practical impossibility even for divorcees. When divorce did occur,

it was typically due to an inability to produce offspring. Concubinage was therefore an alternative to divorce.

The practice of taking concubines was regulated by law, though the rules offered by different dynasties varied considerably. As Ayscough (1937) put it: “The codes of different dynasties have diverse rules regarding concubines. The Ming code, for instance, allowed but one. The Ch’ing code permitted an indefinite number.” So wide spread was the practice of concubinage that the vernacular even developed different terms to describe the complicated maternal relationships that inevitably arose in such a system, to quote Ayscough (1937): “*provide-for mother*, she who has brought up a child not of her own household; *legal mother*, the relation in which a wife stands to children of her husband's concubines; *continue-on-the-duties mother*, the term for stepmother; *merciful mother*, relation of a concubine who brings up child of the wife; *married mother*, a child's own mother who after the death of the father has married again; *gone-out mother*, one who is divorced; *concubine mother*; and *milk mother*, one who gives the breast to an infant of the wife”. In the Confucian tradition of China, “law” as a concept, was shunned. Law, argues Confucianism, is essentially a form of negative reinforcement, as it essentially acts as a punitive arrangement between the state and the individual for transgressions. While acknowledging the need for such a system, Confucianism taught that it was better to lead through moral example, and through *Lǐ* (理) “propriety, etiquette, elocution”. Given this aversion to formal legal sanction and law, Confucianism fostered in Chinese culture a strong preference for alternative dispute resolution, such as arbitration, which in turn also led to something of an arrested development in terms of formal legal institutions. Compared to the West, classical China did not develop a dynamic legal system until many centuries later. This paucity of formal legal institutions also included the legal profession. As such, female practitioners of law were essentially nonexistent in traditional China. Even had there been such a profession, it is unlikely that women would have been allowed to participate in any case. Female life in traditional China was strongly bound to the home. Female life was said to occur “behind the baton-door”, so named because the entrance to a woman’s chamber in the home (wherein she would be preoccupied with womanly duties like needle-work) was shaped like the *kui* (royal baton) of a Chinese noble (Ayscough, 1937). Women spent most of their time before marriage indoors studying the “four womanly arts” and other practical skills relating to housekeeping and child rearing. Women were forbidden to learn how to read, and the practice of foot-binding made routine travel outside the home difficult.

With the founding of the Republic of China following the Xinhai Revolution of 1911-1912, China began to aggressively modernize (Thompson, 1913). This included both the development of a modern legal system as well as the emancipation of women and their inclusion into this system. Like so many of the other attempted reforms and projects of the Republic, these attempts had mixed results. Their immediate impact would seem ineffectual to many; however, from a more long-term point of view, the program of the early Republic would lay the foundations for many of the advances later to come.

In 1906, 468,210 students were enrolled in non-missionary schools; of which 306 (0.07%) were women. In 1916, 172,724 girls (4.35%) were numbered among 3,974,454 students nationally. In 1918, the Teachers College for Women first opened its doors. The student movement of 1919

gave a further spur to the Women's movement. In 1920 a number of leading universities, both government and private, admitted women on equal footing with men. In 1922, the number of female students had risen to 417,820 females (6.32%) among 6,615,772 students. The academic year of 1931-32, the percentage of female students enrolled higher education was (11.75%). In 1933-34 the proportion had risen to 13.3% that is, out of a total of 42,933 students in government colleges and universities 5,899 were women (Liu, 2013; Margaret Thornton & Wang, 1998).

A number of notable women pursued law during this early period. For instance, Sou Meicheng, who trained in France, attained the judicial bench. A number of others who have studied abroad or in China would later practice in the courts. Miss Lily Tie was a barrister-at-law of the Middle Temple, London, who took four academic degrees. A Jamaican-born-Chinese, Lily Tie was the daughter of a Chinese business man from Kingston and studied in Kingston, St. Mary's Hall, and Newnham College, Cambridge University. Miss Irene Ho Tung, B.A. Hongkong, M.A. Columbia, Ph.D. University of London, who in 1936 was offered an appointment by the Chinese Government in the Ministry of Education (Ayscough, 1937).

The Republic also saw an expansion of women's rights. Civil law during the republic sought to modernize and westernize Chinese family law. Polygamy was outlawed, divorce was legalized, and courts were, for the first time in Chinese history, established as a place for dispute settlement in China.

The People's Republic of China, at least initially, was even more progressive in its early days; but would later fall into decadence during the Cultural Revolution. Marxist dogma emphasizes the full emancipation and integration into society of women as the complete equals of men as a part of socialist construction. China at this time began to follow a Marxian view of the law, as elaborated in the USSR under the term "Socialist Legality". The Marxian theory of law postulates that: "(1) the law is a product of evolving economic forces, (2) that law is a tool used by a ruling class to maintain its power over the lower classes, and (3) That, in the communist society of the future, law as an instrument of social control will 'wither away'" (Bodenheimer, 1962). Marx himself said of the law: "Your jurisprudence is but the will of your class (the bourgeoisie) made into law for all, a will whose essential character and direction are determined by the economic conditions of your class" (Bodenheimer, 1962; Marx, 1848).

Whether Marx's criticism of the law was a mere indictment of law as realized in so-called "bourgeoisie society", or of the very concept of law in its self, is unclear. What is clear, however, is that early Soviet legal theorists like Pashukanis, Vyshinsky, Kerimov and Stuchka interpreted Marx's criticism as the former, arguing that in the future society of communism there would be no such thing as "law". Pashukanis even went so far as to argue that "law" was an ingredient of social regulation necessary only in market-based economies, where horizontally equal agents seek to secure their own interests through the power of contract; such an arrangement would be unnecessary in a society that had achieved communism, under which individual interests will have been harmonized through a collective economy (Bodenheimer, 1962). Law would be out of place in such a economic arrangement, having been replaced by "social-technical rules" defining how

to carry out collective action. Ultimately, early Soviet theorists rejected “law” as a concept (Bodenheimer, 1962).

This view of law was carried over into the PRC early on; a view which quickly found currency with the latent views inherited from by-gone Confucianism in China. As such, the early PRC had an extremely dim and suspicious view of law, and was hesitant to establish modern or westernized institutions of law. Like the USSR, the early PRC had an essentially utilitarian view of law, and frequently resorted to extra-legal methods to carry out its ends. This point notwithstanding, the early PRC did establish a number of important achievements in law, including as it related to women. The Divorce Law of the PRC, promulgated almost immediately after the founding of the People’s Republic and based on a similar statute under the Yan’an Soviet, greatly emancipated women, especially in the countryside. Although the Republic had also legalized divorce, it had never been able to fully enforce its provisions, and the PRC statute went further. The PRC also expanded primary, secondary and tertiary education to women; offered gynecological and sexual education classes to women, including disadvantaged women living in rural areas; and expanded women’s access to health and contraception.

Nevertheless, not all achievements at this time came without fuss. The Divorce Law was repealed in the late 1950s, the government claiming that all “feudal marriages” (marriages conducted before communism) had been extinguished, and that all subsequent and remaining marriages therefore represented free, personal choice on the part of the woman. There was therefore no need for divorce.

In her study of the depiction of women in communist literature, Hsia (1963) noted that, while the values and rhetoric espoused by literature tended to be progressive, the depiction of women in communist literature was not always equal to that of men. In early literature from the 1960s or before, women were seen as agents of the collective. Literature from this period typically depicted women as forward thinking and industrious, but ultimately as tools of the larger collective order, whose principle purpose was to contribute to production. Many of the obstacles faced by women in these stories tended to be simplistic and inundated with a traditionalist view of village women. This is not to say that there weren’t exceptions, including stories that broke what traditional feminist’s describe as “sexing” (or “gendering”) in literature. That this depiction even exists betrays the continued existence of stereotypes in China.

The Cultural Revolution would bring with it two decades of internal turmoil that would see the undoing of much of what had been built up until this time. After the end of this chaotic epoch, China embarked on yet another reform of its legal system, this time seeking to implement the “Rule of Law” as a social institution. Since this time, China has sought to modernize and develop its legal system. The role of lawyers and judges has been expanded, and with it the drive to include women as part of the legal sphere. The Civil Code and the Marriage Law, among other statutes, have been expanded and amended. This brings us to the current discussion of Chinese women in Law.



**Women in the Legal Academy and Legal Profession**

In 1998, Margaret Thornton and Weiping Wang carried out a study of women studying law and working in the legal profession in China; Xiaonan Liu carried out a very similar though unrelated study more than a decade later in 2013. While both studies were unrelated to one another, the results of each were strikingly similar. The findings of both studies seemed to indicate a growing trend of participation by women in both the legal academy and the legal profession. Most remarkably, women actually made up the majority of law students, especially at the pre-graduate level, at many universities. Nevertheless, a pyramidal structure was clearly observed, in which the higher one moved up the scale, the less women were involved. Another striking finding was that, when compared to men, women had a harder time entering the legal profession after graduation, despite the dominance of women in legal education.

Ultimately, both Margaret Thornton and Wang (1998) as well as Liu (2013), found that the development of a more inclusive legal system in China had been arrested as a result of several factors. These factors included: systemic sexism stemming from traditional Chinese views towards women inoculated by culture, a dynamic social landscape changing as a result of economic transition from a command economy to a more free market model, and indirect prejudice through social conventions (such as “*guānxi*”) that, while not overtly “sexist”, nonetheless seem to favor men.

There exists today a large gap between low level and high level female law students in China, and between low level and high level faculty. Although the findings of Liu (2013) show marked improvement when compared to those of Margaret Thornton and Wang (1998) in this regard, nonetheless both researchers show that a pyramidal trend exists in the world of legal education, with more women occupying positions on the bottom than on the top.

Year	1980	1984	1990	1995	2000	2005	2010
Number of female students	268,137	399,980	695,100	1,029,000	2,278,900	7,353,200	11,350,981
Percentage	23.44%	28.6%	33.7%	35.4%	40.98%	47.08%	50.86%

Table 1: Number and Percentage of Female Students in Higher Education (Liu, 2013)

	Total Students	Males	Females	Percentage that are Female
1. Graduate students	1,538,416	802,186	736,230	47.86
- Ph.D	258,950	167,063	91,887	35.48
- Master's degree	1,279,466	635,123	644,343	50.36
2. Ordinary undergraduate	22,317,929	10,966,948	11,350,981	50.86
- Bachelor's degree	12,656,132	6,369,152	6,286,980	49.68
- Vocational training	9,661,797	4,597,796	5,064,001	52.41
3. Adult education	5,360,388	2,512,717	2,847,671	53.12
- Undergraduate	2,250,457	1,014,973	1,235,484	54.90
- Vocational training	3,109,931	1,497,744	1,612,187	51.84
4. Other kinds of formal higher education	-	-	-	-
- Master's and PhD students with full-time employment	420,294	266,386	153,908	36.62
- Online (e-learning) undergraduate students	4,531,443	2,348,070	2,183,373	48.18
- Bachelor's degree	1,640,403	807,811	832,592	50.76
- Vocational training	2,891,040	1,540,259	1,350,781	46.72

Table 2: Female Students in Higher Education in 2010 (Liu, 2013)

At most Chinese Universities or other institutions of higher learning that offer legal education, the number of female entry level or bachelor students often exceeds that of the number of male students enrolled. However, this trend drops off precipitously as one moves further up the ladder. The proportion of female graduate students to male, while still greater, is less pronounced than at the undergraduate level; and the proportion of graduate students engaged in research (i.e. doctoral students or equivalent) even less so.

Year	1951	1961	1973	1981	1991	2001	2008
Number of female faculty members	1,902	33,608	30,000	64,455	115,800	210,500	564,600
Percentage of all faculty members	10.98%	21.17%	22.73%	25.79%	29.6%	39.57%	45.62%

Table 3: Full-Time Female Faculty in Higher Education Institutions (Liu, 2013)

Year 2010	Total	Number of Women	Percentage of Total
Professors	152,115	40,842	26.85%
Associate Professors	394,299	169,272	42.93%
Instructors	542,174	272,499	50.26%
Assistant Instructors	244,238	134,228	54.96%

Table 4: Professional Titles of Full-time Female Faculty in Higher Education Institutions (Liu, 2013)

Chief Secretary of the CCP	13
Deputy Secretary of the CCP	28
Dean	6
Deputy Dean	37
Joint Chief Secretary of the CCP & Deputy Dean	3
Joint Deputy Secretary of the CCP & Deputy Dean	2
No Women in Leadership Positions	18

Table 5: Gender Structure of Leaders in Some Law Schools in China in 2012 (Liu, 2013)

The management structures of Most Chinese institutions of higher learning show a similar trend (Liu, 2013; Margaret Thornton & Wang, 1998). In China, most dean-level university faculties follow a common format, with dean, deputy deans, chief party secretary, and deputy party secretary. Given this uniformity, Liu (2013) was able to survey the participation of women in these roles at universities throughout China. As with law students, law faculty possessed a similarly pyramidal structure with women occupying more roles on the bottom of the pyramid than on the top, compared to men.



A number of explanations are offered by Liu and Thornton to explain these trends. This includes Chinese cultural views towards the superior or inferior capacity of women regarding modes of thought or study that make women preferential in certain roles and handicapped in others, a statistical tendency of women to perform better at standardized tests in China as compared to men, a tendency of men to matriculate into the work force sooner than women, and modes of communication and social conventions prevalent in professional settings, such as *guānxī*, that tend to exclude women.

With regards to the abundance of women in legal education, even outnumbering men in many cases, both Liu and Thornton offer the same explanation. In China, there is a cultural perception that women are better at humanities, where as men are better at science and mathematics. A popular colloquialism describes this predicament thusly: “女人喜欢文，男人喜欢理”. This cultural perception has the effect of fostering an over abundance of women in the humanities at many institutions of higher learning. For example, as Liu (2013) states: “in 2000, 72% were women students in the major of literature; 61 percent were women students in history; 61% were women students in law; 60% were women students in foreign language; 85.6% were men students in physics; 78.3% were men students in mechanics and engineering; 73.1% were men students in mathematics; 65.4% were men students in computer technology; and 65.3% were men students in chemistry and chemical engineering.”

Further, in China, “humanities” is defined in such a way as to include a number of disciplines that in the West would not necessarily be considered a part of the humanities; this includes archaeology, anthropology, management science and law, among others. This, more so than any increase in opportunities for women, may explain the abundance of female law students. Another contributing factor may be the tendency of male students to matriculate to the work force and leave formal education sooner than women, who are less likely to find employment in the legal profession and so may remain in education longer.

With regards to the pyramidal structure of women in the legal academy, one contributing factor could be the tendency of male teachers to eschew female graduate assistants. According to interviews conducted by both Liu and Thornton, there exists a culture, spoken or unspoken, of male teachers favoring male students over female ones. This tendency is present in many cultures, but is very acute in China due to its Confucian traditions. Both Thornton and Liu record a number of interviews with examples of both overt and systemic sexism experienced by female law students seeking male academic supervisors.

As one interviewee put it: “When I applied for a particular college, it was able to identify the fact that I was a woman from my name. However, it was assumed that a classmate with a gender-neutral name was male and she received a letter of acceptance. When the college discovered that she was a woman, it contacted her and told her that it had changed its mind; it did not want her any more” (Margaret Thornton & Wang, 1998). These experiences parallel those of female legal professionals. Cultural perspectives in China often see men as more suited to positions of authority and women are more suited to administrative or other complimentary roles.

This situation is exacerbated in the world of the practicing legal profession. The prevalence of women in legal education, in which they outnumber men in many instances, does not translate into a similar prevalence in the legal profession. Although female legal professionals are on the rise, most law firms, government agencies and other venues of professional legal practice prefer to hire men, fire women more often than their male counterparts, pay their female professionals less, and female workers tend to retire sooner than their male counterparts.

This predicament prevails due to many of the same cultural perceptions regarding women already given above: that women are less suitable to positions of authority or responsibility, the tendency on the part of men to feel uncomfortable working with or around women, and a culture of communication that is male-driven due to conventions like *guānxī* (关系).

With regards to *guānxī* (关系), Margaret Thornton and Wang (1998) quote one interviewee: “I heard from women lawyers that legal practice is a “man's world”. Judges are usually men and the outcome depends on *guanxi*, which means going to a sauna or nightclub together. This is very difficult for women lawyers; they are very uncomfortable with this kind of life, and they don't smoke. We can get more money by being lawyers but we lose our self-respect. We may remain poor but we keep our self-respect ... I also don't want to be a lawyer because of my personal experience with divorce. We agreed to divorce by agreement and our savings were to be for our daughter, but my husband developed new *guanxi* with the judge and decided to take me to court for the money. The judge was biased and the lawyers wouldn't speak up. *Guanxi* is much more important than law in China, which means you have to give up your self-respect to be a lawyer [early career scholar]”.

However, female legal professionals also face additional negative pressures. Unlike students, working professionals (and especially women), face strong social pressure to marry, have children, rear family and care for elderly relatives. Also, China's changing socio-economic landscape further exacerbates this predicament. The migration from the countryside into the city and the opening-up of the Chinese economy to market forces and the subsequent rolling back of the “Iron Rice-Bowl”, or SOE-administered welfare state, has had a negative impact on housing and family for many Chinese, including women in the legal profession. A contributing factor to the paucity of female legal professionals includes social pressures placed upon women to marry and have children, as well as discrimination in housing and discrimination towards women in the hiring process. This takes much the same form as the discrimination towards women by male professors during college matriculation discussed above. The pressure to provide a family is greater for women than men, and when coupled with the nascent sexism described above, may explain why female legal professionals are outnumbered by male professionals, despite the reverse being true in legal education; and why a pyramid predominates overall.

Although massive strides have been made as regards women working in the Chinese legal system, there still linger the same basic factors and obstacles contributing to sexing and gender bias in China. Some apparent progress even masks systemic sexism, such as the growing abundance of female law students and teachers, which occurs more due to a cultural perception of female

“suitability” for training in “humanities” (non-mathematically rigorous disciplines) than to progress (Liu, 2013).

### Women in Civil (Domestic or Family) Law – Divorce

Non-Exhaustive List of some Important Legal Instruments concerning women and matrimony in the PRC	
Year	Statutes (法律)
2014	Interpretation of the NPCSC on Art. 99-1 of the Civil Code and Art. 22 of the Marriage Law 全国人大常委会关于《中华人民共和国民事诉讼法通则》第九十九条第一款、《中华人民共和国婚姻法》第二十二条的解释
2009	The Chinese Civil Code (as amended 2009) 中华人民共和国民法通则(2009 修正)
2005	Women's Protection Law (as amended 2005) 中华人民共和国妇女权益保障法(2005 修正)
2001	Marriage Law of the PRC (as amended 2001) 中华人民共和国婚姻法(2001 修正)
1992	Women's Protection Law 中华人民共和国妇女权益保障法
1986	Chinese Civil Code 中华人民共和国民法通则
1980	Marriage Law of the PRC (1980) 中华人民共和国婚姻法(1980)
1950	Marriage Law of the PRC (Repealed) 中华人民共和国婚姻法[失效]
Year	Judicial Interpretations (司法解释)
2011	Interpretation No. 3 of the SPC concerning certain problems relating to the application of the Marriage Law 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(三)
2003	Interpretation No. 2 of the SPC concerning certain problems relating to the application of the Marriage Law 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(二)
2001	Interpretation No. 1 of the SPC concerning certain problems relating to the application of the Marriage Law 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(一)
1993	Opinion of the SPC concerning the Interpretation of Article 134-3 of the Civil Code 最高人民法院关于如何适用《中华人民共和国民事诉讼法通则》第一百三十四条第三款的复函

1993	最高人民法院关于企业或个人欠国家银行贷款逾期两年未还应当适用民法通则规定的诉讼时效问题的批复
1993	Several concrete opinions of the Supreme People's Court on the problems of bringing up children in divorce cases handled by the Supreme People's Court 最高人民法院关于人民法院审理离婚案件处理子女抚养问题的若干意见
1988	Notice of the SPC on the Promulgation of Certain Opinions Concerning Implementation of the Civil Code 最高人民法院印发《关于贯彻执行〈中华人民共和国民事诉讼法〉若干问题的意见(试行)》的通知
1979	Opinions of the Supreme People's Court Concerning the Implementation and Enforcement of Civil Affairs Policy and Law 最高人民法院关于贯彻执行民事通则法律意见
Year	Mass Group Regulations (团体规定)
2005	Notice of the All-China Women's Federation et. Al. concerning implementation of the Women's Protection Law 全国妇女联合会、全国人大常委会法制工作委员会、中共中央宣传部等关于做好《中华人民共和国妇女权益保障法》宣传贯彻工作的通知
2005	Notice of the All-China Worker's Federation on Implementation and Study of the Women's Protection Law 中华全国总工会办公厅关于认真学习宣传贯彻修改后的《中华人民共和国妇女权益保障法》的通知

Table 6: Non-Exhaustive List of Some Important Legal Instruments Concerning Women and Divorce in the PRC

Although divorce and family law are a separate topic from women and the law, the two are nonetheless obliquely related. Marriage as a social institution directly impacts women in society. Moreover, in the context of China with its Confucian traditions and patriarchal history, the struggle for a fair and modern system of civil divorce has become something of an icon in the larger political question of the role of women in society. Mao himself saw the question of divorce as being of utmost importance to female emancipation. Following Marxist doctrine, Mao sought to integrate women as workers on equal standing with men in the socialist collective; even coining the maxim “women hold up half the sky” (Margaret Thornton & Wang, 1998; Woo, 2003). One of Mao’s first acts as leader of the new PRC was to implement a very liberal divorce law, one modeled after a similar, very successful divorce statute used in the Yan’an Soviet. Ultimately, this divorce law would be repealed for reasons of politics and population control. The topic of divorce law would not be revisited until after the Cultural Revolution (Palmer, 2007; Woo, 2003).

The first statute to revisit the topic of marriage and divorce after the Cultural Revolution was The Marriage Law of 1980, later amended in 2001. This is the principle statute dealing with the topics of marriage and divorce in China, and forms the basis of Chinese law on the subject. This statute is supplemented by a host of other legal instruments, though these are either subordinate to this statute or else only tangentially expand upon this legal area. In China's system of socialist legality, legislative power is not held exclusively by the legislature but is diffuse, with different bodies exercising the power to create law. This power is not wielded equally, however, and legal instruments created by different organs of the state hold different weight; thus forming a "hierarchy of laws". Typically, the statutes created by the National People's Congress, which hold the highest authority under the constitution, will be highly generalized and laconic, defining broad areas and basic concepts of law; the finer details are filled in later by subordinate instruments. So it is with the Marriage Law, which is supplemented predominately by inferior instruments issued by bodies other than congress.

Arguably the most important instruments in the law of marriage and divorce after the Marriage Law are the three judicial interpretations of the statute handed down by the Supreme People's Court. These judicial interpretations are meant to guide judges in constructing the Marriage Law when adjudicating cases; but this implication carries with it modification in the law. Other instruments of note include some other statutes whose domain is other than marriage law, but which touch upon marriage and divorce, such as the "Civil Code" and the "Women's Protection Law".

By the late 1990s, the divorce rate in China had sky-rocketed from a mere 3% in the 1980s to a margin of 20% (Palmer, 2007). This sparked a debate as to the suitability of the 1980 Marriage Law and eventually led to the 2001 amendment. The 2001 amendment sought to strengthen protection of female victims of domestic violence (article 43). It also sought to better compensate parties for blameworthy behavior on the part of the spouse they sought to divorce, as can be seen from article 46 of the marriage law and articles 23 and 27 of the SPC Interpretation number 3. The 2001 marriage law also clarified points relating to custody of children (article 36) as well as the division of the matrimonial estate.

In the ladder case, article 47 provided a punitive reduction in the shares of the estate awarded to parties who attempt to hide assets. Article 17 provided that gains from intellectual property enjoined during the duration of marriage shall be divided between divorcing parties, but that ownership remains with the inventor. Article 18 provided that investment income, endowments, insurance benefits, and property benefits form part of the matrimonial estate. The 2003 SPC judicial interpretation clarifies certain guidelines to judges in adjudicating and awarding shares in such disputes. The 2003 interpretation also provides a clearer demarcation between matrimonial property and individual property, stipulating that property obtained during marriage is to be considered joint property, while property obtained before marriage is to be considered individual property unless it was drawn upon to provide for the family during the duration of the marriage. This last stipulation greatly benefited unskilled women in divorce cases (Palmer, 2007).



Articles 21 through 23 of the Marriage Law provide stipulations for housing arrangements of divorcing parties. This provides divorced spouses with a better safety net when getting divorced, but has sometimes resulted in situations wherein formerly married couples would divide a single domicile between them or be forced to provide succor to a recently divorced spouse. Work units that provide housing are admonished to provide housing to divorced spouses without other housing arrangements, even if they are not themselves employees of the work unit.

Despite these progressive provisions, the stipulations for divorce have not always worked out in practice. Woo (2003) researched the prevalence of divorce among women in China, as well as the perception and impact that divorce had upon women's lives. Woo (2003) ultimately concluded that the 2001 Marriage Law and its provisions on divorce had had a positive impact upon Chinese women, but noted systemic societal pressure against women seeking divorce; clandestine sexism in the administrative system its self, which often times prevented women from fully pursuing their interests; as well as general ignorance and malaise amongst the Chinese populace concerning the law, which negatively impacted the ability of Chinese people to pursue legal remedy.

In her many interviews with divorcees, Woo (2003) found that many women shared much of the same criticisms regarding divorce in China. While noting that the letter of the law seemed progressive in places, and regressive in others, it was ultimately the construction and administration of the law which hindered the advancement of women. The construction of the law was dominated by procedural niceties that were parochial in character and tended to arrest accountability and transparency of the legal process. This, in turn, presented many opportunities for well connected individuals to influence the system. While this injured the integrity of the law generally, women in particular were at a disadvantaged in such a predicament. Without the tools of transparency and accountability, there were few mechanisms at the disposal of women to countervail systemic sexism in the legal system. Nevertheless, Woo (2003) did report on women interviewees who had had a positive experience with the law in divorce.

## **CONCLUSION**

Chinese law would seem to have progressed markedly from its original starting point in terms of women and the law. However, there is much progress yet to be achieved. From its traditionalist beginnings, China today aggressively pursues modernist goals including the advancement of women. While this push has had an impact, there remains a wide gap between policy objectives and actual implementation. This may stem from any number of factors, including socio-economic pressures, lack of institutional accountability and transparency, or from an essential discrepancy between policy formulation and pursuit of policy resulting from a top-down decision making process. All of these explanations have been proffered in the literature, but it remains to be seen if China will ultimately overcome them and whether gender equality will be achieved in the law.

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