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The Regulation of Ownership Rights in the Marriage and Divorce Law of the People's Republic of China

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前言

家庭是主要的历史，社会，法律变化发生的核心。在中国，家庭结构的演变是一个漫长且缓慢的过程。中国的政策制度一直非常重视家庭的发展，而家庭的发展也一直被认为是有助于社会发展和和谐的首要政治结构。与此同时，当立法者订立《婚姻法》时，一个至关重要的话题就是所有权问题，这个问题不仅在婚姻关系内部存在，在离婚案件中亦是如此。1980年以后，在中国进入现代化时代时，婚姻法的结构发生了变化，但是在颁布初期，因深厚的传统文化遗留从而引发了许多矛盾和争议。这些矛盾如今仍然是一个问题，并且反映在了所有权中：中国作为社会主义国家，公共财产和私有财产之间模糊不清的界定仍然是引起在法庭上争议的原因。本文的目的是分析1980年以来家庭的历史和社会学发展，重点关注家庭在决定离婚时，特别是在需要分割财产时，在法庭上面临的所有权问题和争议。本文还将提供两个案例的分析，以强调法律如何在法庭上适用以及家庭在提出离婚诉求时主要的障碍是什么：关于争议，一个重要的话题将与妇女的状况以及她们在要求离婚时是如何经常受到歧视的有关。

本文的第一章是对婚姻法的历史和社会学分析。通过简短介绍国民党和毛泽东时期的传统和第一部法律，本章将探讨1980年以来当代法律的发展。这些年来，在邓小平立法的背景下，议题首次涉及离婚，子女抚养权、废除重婚等议题，并且它们开始有了更大的意义。与此同时，中国公民也面临着现代化，离婚申请大幅增加。然而，1980年的法律并没有代表一条通向现代化的完美道路，并引发了许多重要问题和争议。从1986年开始，立法者公布了许多对法律的解释，并于2001年对法律进行了修订：在这个新文件中，出现了例如家庭暴力，

财产等主题并得到了修正。2001年的修订被认为是一项伟大的成就，它打破了过去的传统中国和新的家庭观念。中国的夫妻们开始提出更多的要求，与此同时，以前为维护国家和家庭和谐而拒绝离婚请求的法官，从1980年开始批准离婚。除了历史框架外，本章还将包括中国家庭在过去几十年中的社会发展。不仅将强调传统家庭的变化以及他们如何受到独生子女政策的影响，还将强调当今的夫妻们是如何不接受联姻，并且他们经常选择不生育子女，这与丁克家庭的现象有关：一方面，长者试图说服自己的孩子遵循传统，另一方面，夫妇们的主要目的变成了一份好的工作，一份良好的社交生活和人际关系。最后一段将集中在最近的民法典上，这代表了中国司法制度的巨大变化。对于中国的民法体系来说，这是成熟和政治稳定的标志：当一个国家决定批准民法典时，这意味着它具有足够的成熟度来制定固定的规则，代表着巨大的象征性成就，因为过去立法者只倾向于制定大法则，例如《婚姻法》。而该法典则包括所有最新的法律，包括2001年修订的《婚姻法》。

本文的第二章主要分为三个段落。第一部分是对中国财产权问题的一般性分析。首先要分析的是2007年最新的物权法，以及政府现在如何看待公有财产和私有财产之间的区别。中国作为一个社会主义国家，一直与公有财产的观念联系更加紧密，但近年来，私有财产也开始受到更多的关注，在离婚的情况下，所有权的权利成为一个至关重要的问题并且现代女性们也开始要求更多的财产权利。国家财产的概念在中国仍然是至关重要的，在第一段中将注意到中国政府如何始终拥有人民用于建造房地产的土地。本章第二段是婚姻关系内财产的管理，以及阐述《婚姻法》中有哪些专门针对该财产的部分。当法院审理所有权案件时，必

须遵循许多原则，尤其是在离婚后财产分割出现争议的情况下。在法律颁布和修订之后，对此做出了许多解释，其中 2011 年最新的解释将与其他解释一起进行分析。本章还将包括共同财产和个人财产之间的主要区别，以及当在法庭上存在争议（包括针对妇女的争议）时，它们是如何运作的。并将强调在中国，当夫妻分割债务、房屋甚至社会财产时会发生什么，以及法院应如何在这些问题上适用法律。在离婚和财产案件中，妇女往往不了解她们对财产的权利，而丈夫则经常会利用这一点。

最后一段是关于当代中国离婚的现状，法律是如何构建的，以及当今中国如何调解和赔偿受损的工作。如今离婚的主要问题之一与妇女在社会中的作用和权利经常被剥夺有关。即使看上去妇女得到了帮助，她们的权利受到法律的保护，但其实在法庭上很少发生这种情况，本章的这一部分可以帮助读者了解司法制度在离婚案件中是如何运作的，在最后一章中将对此进行分析。最后，将提及关于家庭暴力的历史和立法的变化，以及当女性因家庭暴力而想要提出控诉及离婚时，政府是如何帮助她们的。

离婚，暴力及其争议构成了本文第三章，同时也是最后一章的一部分。本章将着重分析两个主要案例。第一个案件的主题是与家庭暴力有关的离婚案例，目的是调查法院在因家暴而离婚的案件中是如何行事以及如何区别对待这对夫妇的。第二个案例具体是与涉及财产分割以及债务分担和财产非法转移有关的争议。其主要目的是强调第二章中与所有权有关的所有问题，以及所有权在婚前，婚中和婚后的运作方式，并解释法院和夫妻是如何面对处理这些案件的。由于上

一章的相关部分着重于针对妇女的争议，因此选择这些案件也是为了强调她们在法庭上必须面对的问题。

对这两个案件的研究将集中在三个不同的阶段：首先是翻译，以强调法庭上所用的法律术语，并着眼于第二章中所述的法律。第二阶段是对夫妇离婚前的情况进行总体分析，描述离婚程序的内容以及是如何结束的。最后一部分则是对过程的分析和个人评论。进行评论的目的不仅是为了帮助读者了解这两个案例的主要话题是什么，而且也是为了让读者了解这两对夫妇不得不面对的主要争议是什么。这两个案例呈现了两种不同的情况：第一个案例的主题是关于家庭暴力的社会学。它将展示尽管现代化和新的法律保护妇女，但是法院是如何仍然遵循传统规则，而不尊重新法律的情况。第二个案例将重点关注已离婚的夫妇，在新的判决中面临的许多问题：主要涉及与非法转移财产和离婚协议期间出现的经济问题，其是当这对夫妻拥有共同债务，行账户和社会财时。

Introduction

The family is the core through which the main historical, sociological and juridical changes take place. In China, the evolution of the family structure has been a long and slow process. Chinese political institutions always gave a lot of importance to the development of the family, always considered as the first political structure that helps the growth and the harmony of the society. At the same time, when legislators had to deal with the Marriage law, a crucial topic was the question of ownership, not only inside the marital relationship but also in the cases of divorce. When China faced the era of modernization, after 1980, the structure of the Marriage law had a transformation, but especially in the earlier stages of the promulgation, a deeply traditional cultural heritage led to many contradictions and controversies. These contradictions are still a problem nowadays and are reflected in the right of ownership too: in a socialist country as China, the ambiguity between public and private property is still a cause of controversies in courts. The aim of this thesis is to analyse the historical and sociologic development of the family since 1980 to nowadays, with a focus on the right of ownership and the controversies that families face in courts when they decide to divorce, especially when they need to separate the property. The thesis will provide also the analysis of two sentences, in order to highlight how the law is applied in court and what are the main obstacles that families find when they want to obtain the request of divorce: regarding the controversies a significant topic will be related to the condition of women and how they are often discriminated when they ask for divorce.

The first chapter of this work is focused on an historical and sociological analysis of the Marriage Law. From a short introduction about the tradition and the first laws during Guomindang and Maoism, the chapter will explore the contemporary development of the law, from 1980. During these years, under the legislation of Deng Xiaoping, for the first time topics as divorce, custody of children and the abolishment of bigamy started to have more relevance. At the same time, Chinese citizens faced a modernization too, with a huge increase of divorce requests. However, the law of 1980 did not represent a perfect road towards modernization: a lot of important issues and controversies arose. From 1986 legislators published many interpretations of the law that led in 2001 to the creation of a revision: in this new document, topics as the domestic violence and issues regarding the question of property arose and were fixed. The revision of 2001 was considered a great accomplishment that constituted a break between the past traditional China and a new concept of family. Spouses in China started to claim more needs and at the same time the judges that before used to deny requests in order to maintain the harmony of the State and the family, from 1980

started to grant divorces. Along with the historical framework, the chapter will also include the social development of Chinese families during the last decades. It will be underlined not only how traditional families changed and how they were affected by the One Child Policy, but also how spouses nowadays do not accept combined marriages and they often choose to not have children at all, with the phenomenon of the Dink Families: on one hand elders try to convince their children to follow tradition, on the other hand the main purpose for the couples becomes a good job, a good social life and interpersonal relations. A last paragraph will be focused on the recent Civil Code, that represents a huge change in the Chinese juridical system. For the Chinese system of civil Law it is a sign of maturity and political stability: when a country decides to approve a civil code it means that it has enough maturity to create fixed rules and it represents a great symbolic accomplishment, since legislators in the past tended to just create big rules, as the Marriage Law. The code includes all the most recent laws, including the Marriage one with the revision of 2001.

The second chapter of the thesis is divided in three main paragraphs. The first one is focused on the right of property in China, from a general perspective. The first thing analysed is the most recent property law of 2007 and how the government nowadays considers the difference between public and private property. China, as a socialist country has always been more connected to the idea of public property, but in the latest years private property started to have more consideration, in the cases of divorce the right of ownership became a crucial issue and with the era of modernization also women started to claim more rights on the possessions. The concept of statal property remains still in China crucial, and it will be noticed in the first paragraph how the government always owns the lands where the people build real estates. The second paragraph of the chapter is the management of the property inside the marital relationship and how there are parts of Marriage Law that are specifically dedicated to it. When the court has to judge cases of ownership, it has to follow many principles, especially when controversies arise in the division of property after divorce. After the promulgation of the law and its revision a lot of interpretations were made, including one of the most recent in 2011, that will be analysed with the others. The chapter will also include what is the main difference between joint and personal property and how they work when there are controversies in the court, including controversies towards women. It will be underlined what happens in China when the couple shares debts, houses and even societies and how the court should apply the law regarding these topics. Women in cases of divorce and property are often not aware of their rights towards property and husbands often take advantage of this.

The last paragraph is about the practice of divorce in contemporary China, how the law is structured and how mediation and compensation of damaged work today in China. One of the main problems in divorce today is connected with the role of women in the society and their rights that

are often denied. Even if women in appearance are helped and their rights are protected by the law, in court this rarely happens, and this part of the chapter can help the reader to understand how the juridical system in divorce should work, preparing to what will be analysed in the sentences of the last chapter. Lastly, a relevant mention will be about the history and the legislative changes on the domestic violence and how the government helps today women in China when they want to denounce and divorce for violence.

Divorce, violence and its controversies constitute part of the third and last chapter of the work. This chapter will be focused on two main cases taken into analysis. The main topic of the first case is the domestic violence related to the divorce issue, with the purpose of investigating how the courts act in cases of divorce for violence and how they treat the couple differently. The second case is about specifically the division of property and the controversies related to the shared debt and the illegal transfer of the property. The main purpose is to underline all the questions of the second chapter related to right of ownership and on how it works before, during and after marriage and to explain how the courts and the couples deal with these cases. Since a relevant part of the previous chapter is focused on the controversies against women, the cases were chosen also to underline the problems they have to face in court.

The study of the two cases will be focused in three different phases: first of all the translation, with the purpose of underlining the juridical language used in the courts and also to look at the laws described in the second chapter. The second phase will be a general analysis of the couple's situation before the divorce, a description of the contents of the processes and how they ended. The last part is dedicated to the analysis and personal comment of the processes. The purpose of the comment is to help the reader to understand not only what the main topics of the two sentences are but also which are the main controversies that the two couples had to face. The two sentences will present two different scenarios: the main topic of the first one will be sociological, on the domestic violence. It will present how courts, despite modernization and new laws on the protection of women, still follow traditional rules and do not respect them. The second sentence will be focused on a couple that already divorced and faced many problems in a new instance judgement: the main aspect will be related to the illegal transfer of property and economic issues that arise during divorce agreements, especially when the couple shared debts, bank accounts and societies.

1. The Evolution of the Marriage Law: An Historical Excursus

1.1 Chinese Marriage and Tradition

China's concept of family has a long tradition and evolution. In more than one occasion the Chinese government has been saying that "family is the most fundamental part of the society". Familiar stability is strictly connected with social stability: since the tradition in the family system everyone was supposed to respect its role, no matter if it was the husband, the son or the wife. Even the Constitution of PRC acknowledged that the State recognized full protection of marriage and family (Art. 49), however, it stated that the rights of one citizen cannot be in contrast with the public interests (Art 51). From the combined reading of both statements, it may be inferred that the family is identified as the fundamental nucleus of society but that its members have to exercise rights that do not harm the harmony and the social order of the whole system.¹

The evolution of Marriage Law can be divided in four phases: the first one during Guomindang and before 1949, the Communist phase during the PRC in 1950, the third one with post Maoism reforms in 1980 and the last one in 2001 with the revision of the previous law. This periodization is relatively connected to the principal political transformations and to the most important regulatory texts: the book about family in the Civil Code during Guomindang and the regulations about marriage of PCC in 1931, the Marriage Law in 1950, the 1980 Law under Deng Xiaoping legislature and its revisions in 2001.²

In the first Civil Code there were rights and duties of spouses, property regime, divorce (still with a lot of obstacles for women). It was a period where the structure and values of China needed a change.³ The new reforms were an answer to all the social changes that China had to face at the beginning of 1900 and even if the conservators tried to stop them, an innovation on the society was necessary. The two main parties, Guomindang and Communist party shared the idea that political

¹ D'Attoma S., "Diritto di famiglia: cenni storici e recenti sviluppi", in Cavalieri R., Bellomo V., D'Attoma S. (a cura di), *Diritto, cittadini e potere in Cina. L'evoluzione del diritto cinese fra tradizione e modelli internazionali*, Sulla Via del Catai, vol. 12, pp. 102-111, Il Portolano Editore, ISSN: 1970-3449, 2015.

² Ajani G., Serafino A., Timoteo M. (A cura di), *Il diritto dell'Asia orientale*, Utet, Torino, 2007.

³ Weber M., *La Cina alla conquista del mondo: la società, la politica, l'economia e le relazioni internazionali*, Newton Compton Editori, Roma, 2006.

and social reforms had to begin from the transformation of the family concept, since it was seen as the main structure of the society.⁴

The traditional family system was completely abolished during Guomindang, all the matters about marriage freedom, heredity and same rights between men and women were incorporated in the IV and V book of the Civil Code. But while the GMD ideology was related to an individualistic idea of the society, the communist party was more connected to Marxism. The Marxist theory saw the family system as a social structure that depended on an economic basis, they wanted to transform the society from the idea of feudalism to the idea of socialism. The reforms about property and family were the principal purpose and the Constitution of 1931, aimed to give maximum freedom to women. The Regulations of the Soviet Republic published in December 1931 contained 7 chapters and 23 Articles that included the principles of freedom and marriage and the freedom of obtaining divorce; they also forbid polygamy (also bigamy and concubinage). It was defined the right age to get married, the obligations of the husband towards children, and the right division of property between spouses and children.⁵

There is not a lot of material that proves if these regulations were really applied; a government document stated that it was really difficult to apply all the aspects about marriage, divorce and division of property, the situation was not mature enough and another revision was necessary, followed by the real first marriage law of the soviet republic, created the 8th April 1934. This led to changes, especially on the recognition of de facto marriage, with the related problem of cohabitation. In addition, the ban on bigamy was also extended to women and the husband's obligation to provide for the maintenance of the ex-wife was applicable only if the spouse had economic difficulties.⁶

After the founding of the People's Republic of China, one of the first measures enacted was the Marriage Law of 1950⁷. The draft of this work began in the winter of 1948 and lasted a year

⁴ Marinus J. Meijer, *Marriage Law and Policy in the Chinese People's Republic*, Hong Kong University Press, 1971.

⁵ Buxbaum D. C., *Chinese Family Law and Social Change in Historical and Comparative Perspective*, University of Washington Press, Washington 1978.

⁶ Watson R.S., Ebrey P.B., *Marriage and Inequality in Chinese Society*, Los Anglos: University of California Press, 1991.

⁷ Sun Yi 孙伊 Lùn zhōngguó fù nǚ hūnyīn de quánli pínkùn 论中国妇女婚姻的权利贫困 (On the Poverty of Chinese Women's Marriage Rights), *Modern China Studies*, 03/2008, available at: <http://www.modernchinastudies.org/us/issues/past-issues/101-mcs-2008-issue-3/1064-2012-01-05-15-35-31.html> (last access: 14/10/2020).

and a half; most of the articles were revised more than forty times before they were approved. It was the Judicial Committee of the Party and the Women's Democratic Association together with the judicial bodies, administrative authorities, Mao Zedong and other important members of the Government who participated in the drafting of this law and gave the related instructions.⁸

In the new law important changes were applied to some issues introduced by the law of 1930.⁹ First, in Article 1, instead of only describing how to contract or dissolve the marriage, were highlighted all the basic elements of a marital family: men, women and children appeared together for the first time. Secondly, a new chapter appeared (Chapter 3) about rights and duties of spouses which provided for a set of moral obligations and judicial responsibility that spouses must observe. Finally, Chapter 4 dealt with the relationships between parents and children. This law fully identified the family, although it needed further changes. The 1950 Law remained in effect until the reform of 1980.

1.2 Deng Xiaoping and the Law of 1980

Social and economic transformations occurred in the late seventies and the early eighties of the last century, including the decline of the *danwei* and the trial of privatization which strengthened the role of the family as an important unit of economic production and consumption, yielded the inadequacy of the content of the 1950 law that was replaced in 1980 by a new legislation.¹⁰ The family was still considered the basic unit of social life and the 1980 Marriage Act can be considered as a new integration and regulation of marriage and family relations implemented by the state in the initial phase of reform and opening.¹¹

The 1950 Marriage Act and the family law system attempted to put into practice important elements in the emergence of political support for the new regime. However, in the post-Mao era, the rapid codification of a Marriage Law was suggested to ensure stability, order and continuity in

⁸ Rofel L., *Other Modernities: Gendered Yearnings in China After Socialism*. Los Anglos: University of California Press, 1999.

⁹ Diamant Niel J., *Revolutionizing the family: politics, love, and divorce in urban and rural China, 1949–1968*, University of California Press, Ltd. London, 2000.

¹⁰ D'Attoma S., "Diritto di famiglia: cenni storici e recenti sviluppi...", *op.cit.pp.105/106*

¹¹ Liúwéifāng 刘维芳, Shì lùn "zhōnghuá rénmin gònghéguó hūnyīnfǎ" de lìshǐ yǎnjìn 试论《中华人民共和国婚姻法》的历史演进 (On the Historical Evolution of "The Marriage Law of the People's Republic of China"), *History of Contemporary China Studies (Beijing) 2014*, n.1, pp.59-66, 07/08/2015 available at: http://www.cssn.cn/fx/fx_hyfx/201508/t20150807_2110632.shtml.

the society. There was also a propensity to strengthen the rights and interests of those who were socially vulnerable, and this influenced certain areas of the Law.

In 1979 there were two main codes: the Marriage Law of 1950 and the Marriage Registration Regulations of 1955. The new Law was introduced by Deng Xiaoping in 1980, as a revision of the 1950 Law and it was then replaced by different new versions: a first new version in 1986, strengthened by the Interpretation of the Supreme People's Court in 1989 and a last one in 1994. An important issue submitted to the Interpretation of the Supreme People's Court in 1989 was divorce. Codes of law were established regarding inheritance and adoptions. The law was established to reshape the protection of minors, the prohibition of prostitution and the abduction of women and children. In 1993 the Law for the Protection of the Rights and Interests of Women was introduced, a fulfilment of the many promises made by the Party to combat traditional stereotypes about women and, more specifically, to prohibit discrimination against women.¹²

The 1980 Marriage Law was approved on the 10th September, in the Third Session of China's Fifth National People's Congress. The purpose of the law was to consolidate and develop socialist marriage and family relationships, as well as facilitate the implementation of the Four Modernizations by providing social stability leading to economic development. The main points of the law included general principles such as freedom of marriage, equality of sexes, monogamy, the prohibition for third parties to meddle in marriage, the prohibition of arranged or forced marriages that already existed in the previous law, the safeguarding of the rights of elderly, women and children and an increase in birth control. In a country with a very low social level, detailed provisions have been introduced regarding family ownership and the obligation to support family members. Finally, the deterioration of marital affection was introduced as the sole reason for requesting a divorce: this sentence was introduced precisely to allow the Court greater flexibility and discretion in the decision of divorce cases.¹³

Another important act to mention is the 1980 Marriage Registration Measures, published by the Ministry of Civil Affairs, measures that were soon replaced by the new Regulations published by the same Ministry in 1986. These Regulations determined measures for the registration of marriage and a possible second marriage, divorce and reinstatement of marriage. All of this was

¹² Croll E., *The Politics of Marriage in Contemporary China*. Cambridge: Cambridge University Press, 1981.

¹³ Jiang Dong, "China's latest Marriage Law Amendment and Family Property: Tradition and Modernity", *Frontiers of Law in China Higher Education Press*, 21/03/2015. Available at: <https://doi.org/10.3868/s050-003-014-0038-0>.

done to strengthen the registration process, to emphasize the rights and duties of spouses, as well as to deal with problems such as bigamy, that arose with the open-door policy.¹⁴

A new amendment was published in February 1994 and aimed to strengthen the administration and supervision of registration of marriages; it also introduced the requirement for a medical examination before marriage. In addition, to improve these aspects for the registration of marriage and divorce, the regulations imposed pecuniary fines on the parties who had obtained such registrations with frauds or cheating.

The Marriage Law and the Constitution had stated that reproduction had to take place only within the family unit at the time it was established that both husband and wife had the duty to practice birth control. The family in the PRC was also required by law to take care of the elderly and infirm. Article 3 of the 1980 Marriage Law established that mistreatment and abandonment between family members were prohibited, and Article 15 that children were obliged to get support and assistance from their parents.

The 1980 Marriage Act had the rights and interests of women, children and the elderly particularly at heart; for the same reason the Supreme People's Court had also issued significant interpretations on this law, with particular attention to the problems concerning the registration of marriage and divorce.

1.3 Marriage and Divorce under the PRC

From a first analysis of the law, it is clear that there was an intense mixture where tradition and modernity coexist together: the government wanted to open to the Western world but the traditional values in the family system were still privileged. It is also evident that compared to the old law for the first time there was a real equality between men and women. Some discriminatory provisions that the previous law dictated in favour of women with regard to the effects of divorce, have been removed, which is certainly an indication of a more realistic approach by the Chinese legislator to family matters¹⁵.

Looking into the details of its structure, the Law it is divided in 5 chapters and 37 articles: some general principles, marriage contract, family relations, divorce, by-laws. The first three articles are about general principles and confirm the institution of marriage as a free choice of the

¹⁴ Palmer M., "The Re-Emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction", in *The China Quarterly*, No.141, pp.110-134, 03/1995.

¹⁵ Timoteo M., "L'evoluzione del diritto di famiglia della RPC", in *Mondo Cinese*, n.63, Istituto Italo – Cinese per gli scambi Economici e Culturali, Milano, Vittorino Colombo Editore, 09/1988.

partners and the equal rights of sexes; for the first time there is also a mention about family planning as a confirmed practice. Bigamy, as already stated in the previous law, is prohibited (it is forbidden to cohabit "more uxorio" with partners). It is evident that in this law the legislator shows the willingness to make the family the central part of the family planning. There's a strict relation between marriage and the one-child policy that is underlined even more by the inclusion of this practice in the duties of the spouses, even if this obligation had some negative conclusions regarding the freedom of the wife to procreate.

The second chapter is about the marriage contract and contains some articles about the minimum age to get married, the cases in which marriage is not permitted and the registration practices. From a further analysis of Article 4¹⁶, while in 1980 it started to be really common to get married as a free choice, at the same time, especially in rural areas, a lot of couples could not choose who would be their husband or wife, and families still chose for them. However, starting from 1980, the idea that it was possible to choose their own spouses between young adults was more common. Families, who were attached to the tradition, tried to mediate with their children, instead of obliging them who to choose as a spouse: from 1980 there was an increase of parental arrangement of marriage after the consultation with the young couple. It is sure that with this article and the situation after 1976 the idea of dating in China was more connected with the Western World, marriage was not an obligation anymore and women started to have the possibility to choose their own partner, even if in a lot of cases tradition would be prevalent and a lot of couple did not date until after they were engaged.¹⁷

Article 5 is related to the marriage age limits, the law sets a higher limit than the previous law, 22 years for men and 20 for women. In contemporary China this was a heavy argument because late marriage was really encouraged. The minimum age for marriage registration allowed by local registration officials varied from place to place. Registration officials may also enforce higher age limits for college students. Late marriage and late childbirth were strongly connected with the One Child Policy and the intention of China's government to control population growth.

Article 6 states the cases in which marriage is not permitted: when the spouses are relatives by blood and the case in which one party is suffering from leprosy or "from any other disease which

¹⁶ "Marriage must be based upon the complete willingness of the two parties. Neither party shall use compulsion and no third party is allowed to interfere." [Affairs, S. P., & Summer, N. "The Marriage Law of the People's Republic of China" in *Pacific Affairs, University of British Columbia Stable*, 1980. Available at: <http://www.jstor.org/stable/2759127> (Last access: 16/10/2020)].

¹⁷ Engel, J. W. "Marriage in the People's Republic of China": Analysis of a New Law. *Journal of Marriage and the Family*, No.46(4), pp. 955-961, 1984.

is regarded by medical science as rendering a person unfit for marriage”.¹⁸ In this case the law is more specific on the restrictions about prohibited relationships, but the second part was strictly criticized because it left plenty of room for the interpretation and the application.

Article 7 provides that marriages in the PRC occurred through registration and not celebration. The basic procedure for Marriage Registration Regulation argued that in order to contract marriage, a man and a woman must go first to a civil officer to register the marriage and receive the certificate.

Chinese authorities had given great importance to the registration of marriages by promoting monogamy and free will; they wanted to reduce the possibility that Chinese courts would make an unregistered relationship a de facto marriage rather than a simple cohabitation. Subsequently, the Marriage Law of the Soviet Republic of China of 1934 established that in the case of cohabitation between a man and a woman, whether or not they had registered the marriage, they should be treated as if they had contracted it. However, this was not confirmed by the first Marriage Law of the People's Republic of China of 1950 which, in Article 6, again required that marriage took place through registration by the spouses and with the issue of the certificate to the couple. The requirement of registration was applied throughout the People's Republic after Liberation and was reaffirmed in the most recent version of the Marriage Registration Regulations at Articles 9 and 19.

The failure to register marriage is still an actual problem but is no longer simply a function of the continued influence of customary or “feudal” norms and values. The program of rural reforms of 1980, with the particular attention on the family as a unit production has encouraged to get married early and have children quickly with the consequence of avoiding the marriage registration if it was possible. The 1980 and 1986 Marriage Registration Regulations were attempts to tighten up the administration of the system of registration and they emphasized that the parties who registered their marriage should have lawful rights and interests protected by the law. In addition, the 1980s marriages even if not registered were not considered invalid, they were still recognized during these years.

The revision of the Supreme Court on “unregistered marriages” was made in 1989 with the purpose of assisting the courts when dealing with some cases of divorce in which a couple have lived together as wife and husband without registering their relationship as a marriage. The history of marriage registration in the PRC suggests, however, that this more rigorous approach in marriage registration matters may not be sustainable. The structural influences on intending spouses to avoid

¹⁸ Affairs, S. P., & Summer, N. “The Marriage Law of the People's Republic of China” in *Pacific Affairs, University of British Columbia Stable*, 1980. Available at: <http://www.jstor.org/stable/2759127> (Last access: 16/10/2020).

marriage registration have been strengthened rather than weakened by developments since 1979. Moreover, Article 8 stated that the woman after the registration can become a member of the man's family and vice versa. In this way women were not obliged to abandon their families to be part of the husband's one, but according to the wishes of the spouses they could choose independently: the figure of the woman was not connected anymore to the role of wife or mother, but she started to have more independence. There was a tacit acceptance by the legislator of a new model of family. This article encouraged sexual equality, since it made women just as valuable as men and they did not have to necessarily leave their family of origin when they got married. As the analysis of the Law suggests, women could give to their parents a son in law to live with them and help them in their old age.¹⁹

The third chapter, "Family Relations" is related to equal state of spouses during marriage, the property, the equality on property and the community of property. The concept of family planning was still present in article 12 as a fundamental duty of the family. Article 13 and 14 state the fact that both husband and wife enjoy the same rights in the management of property and manage it at the same level unless they agreed in a different way; they have also to assist each other in an equal way, and if one party fails to assist the other one it has to pay the cost of assistance. Some articles of this chapter are related to the maintenance of minors, the duties that parents have on their children and also duties that children have on their parents and family: article 22 states that even grandchildren have to support and assist their grandparents whose children are deceased. The problem of an economic support of elders was really heavy and it's still a problem today, especially in rural areas.

Chapter four is about divorce, a relevant topic in the new law, since the post-Mao legal reforms have already tried to deal with the problems of unhappy marriages through provision of freedom of divorce. These attempts had improved the position of "unhappy wives" to give them, as in the early 1930s, greater access to divorce. With the 1980 reform there were some developments: first of all the institution with Article 24 of the divorce without a relevant fault was introduced, which did not require a spouse to prove that the other was morally guilty of the deterioration of their marriage bond, with the aim of relief to those women who were imprisoned in impossible marriages and who generally fought against traditional ideas that gave men the virtually one-sided right to divorce or who disapproved the divorce itself. Throughout the history of divorce law in China, in the absence of a clear and specific reason for divorce, the Court has always been required

¹⁹ Engel, J. W, *op.cit.p.* 960.

to preserve the marriage bond and not to terminate it. Chinese authorities have tried to preserve the marriage also by imposing a law against bigamy, considered one of the most frequent reasons in the request for divorce. Thanks to this article the registration office could release the certificate to the couple after they both agreed to divorce and after they equally divided the property and the protection of their children.

Article 25 stated that divorce could be requested from one of the two sides, in that case the organisations concerned could try to do a reconciliation, or the party may appeal to the People's Court for divorce. The family system in China after Mao was seen by the State as an institution that performed key functions; it was, for example, the only institution in which sexual attitudes were allowed. Since a certain intimacy was expected between husband and wife, the Supreme People's Court in 1989 ruled that, under this article failure to engage in sexual intercourse (known as Gǎnqíng pòliè 感情破裂²⁰) was a valid reason to apply for divorce. The first reaction to this change came from the Women's Federation; they expressed their concerns that many of the men who had entered into a "politically correct" marriage during the years of Maoism could take advantage of the new freedom of divorce to get rid of wives whose political and social attributes had been devalued over the years. With this freedom, the divorce rate increased more and more, especially in the event of resentful marriages or due to the interference of third parties. However, a fundamental contradiction was created due to the continuing interest of the authorities in wanting to encourage a new marriage or the restoration of the marriage bond between a divorced couple: judicial mediation still ended up blocking the divorce requests of the disputed cases allowing the judges to reject also the motivation of "lack of affectio maritalis", especially if caused by adultery. Certainly, it was difficult to assess that there was this break in the sentimental bond. The firmness of one party in the request and the ineffectiveness of the mediation was necessary to obtain a divorce.²¹

The authorities during these years became more concerned with the excessive use of judicial mediation to block divorce applications in contested cases and an associated failure of many judges to accept in particular cases the existence of an "alienation of affection". The Civil Procedure Law of 1991 has reduced the emphasis on judicial mediation in civil cases and the main development came in late 1989 with the Opinion of Supreme Court. These Opinions led the courts to adopt a different approach, examining the foundations of the marriage, the state of affection between the

²⁰ Palmer, M. "The Re-Emergence of Family Law in Post-Mao China...", *op.cit.pp.* 120/121.

²¹ Barrett, R., D. Davis and S. Harrell. "Chinese Families in the Post-Mao Era." *Contemporary Sociology No.23*, 1994.

spouses in the early years of marriage and so on.²² The 1989 Opinions were relevant because they identified and clarified specific grounds for divorce. Some of these causes were deducted from the 1980 Marriage Law, such as mental illness, deception, arranged marriage, marriage by purchase and failure to fulfil one's obligations as a spouse. But other grounds served to restrict the ability of conservative judges to bar divorce, even if the petitioner was the guilty party. These included separation, adultery and illegal cohabitation, imprisonment, disappearance, and ill-treatment by one's spouse or by his or her family. Finally, it should be noted that in several circumstances divorce as a remedy was more readily available to the "innocent" spouse for a matrimonial wrong committed by the other, thereby emphasizing the symptoms of break-down rather than the breakdown itself. This reflected the influence of China's rather conservative official attitudes to sexual morality. There were just two cases where divorce was not allowed, specified in the Articles 26 and 27, the case where the spouse was a member of armed forces (the spouse has to wait to obtain the consent from the member concerned) and the case where the wife is pregnant (husband cannot ask for divorce). The topic of divorce will be analysed further in the second chapter. With Article 28 there was the creation of a new office: this article gave the possibility to the couple to resume marriage after divorce, by the application to an office for the registration of remarriage (in the previous law there was not such office, but the couple had to go to the same registration office for a new wedding bond.)

The other articles of this chapter included the legislative consequences after divorce, the fact that the blood ties between parents and children did not end and that the couple had the duty and right to keep caring and educating the children. Article 30 stated that after divorce if one party had the custody of the child, the other party was responsible for part of the costs for the maintenance of the child, with an agreement made by the two parties. The most important willingness of the legislator on this law was to render both parties the most equal possible, nevertheless the Article 31 affirmed that if an agreement between the parties was impossible the court would decide to follow the rights and interests of children and wives (this limitation would not be applied if it was the woman that asked for divorce or if the court established necessary to examine the divorce request of the husband). The last chapter of the 1980 law included some last provisions about the law itself.

1.4 The 2001 Revision

Proposals for a new reform emerged soon after the enactment of the 1980 Marriage Law by some Chinese scholars and academic circles. In 1993 the International Affairs Commission of the

²² *Ibidem.*

National People's Assembly organized a meeting to discuss the necessity of a revision of the Marriage Law, presented by the Supreme People's Court, the State Commission for Family Planning, the Ministry of civil affairs, the Federation of Women of All China and experts in the field. The meeting concluded that a reform on Marriage Act was necessary. There were in the public opinion two different sides, one that felt that the 1980 was too liberal and wanted harder penalties for adultery and in general was more conservative and the other side that wanted more liberalization, as the recognition of same-marriage sex.²³ A formal decision on the revision of this law was made by the Standing Committee of the National People's Assembly in October 1995 at its 16th meeting and the Legislative Affairs Commission was given the task of examining and comparing existing laws, administrative regulations and judicial interpretations, as well as the main foreign legislative precedents.²⁴

Within a little over a year there were four different but not definitive drafts relating to the new law. But all this work was done away from public opinion. Only in 1997 the Ministry of Civil Affairs organized a seminar in Beijing where legal experts and sociologists attended to discuss the draft. It was on this occasion that the work came out and a debate was extended to the whole nation. In 1999 the leading group presented the legal experts' draft to the Committee of Legislative Affairs of the Standing Committee of the NPC. In August 2000, the draft revision of the Marriage Law was sent for the analysis to organizations and interest groups, like research institutes and law schools.

All of these debates led, on the 28th April 2001, to the adoption of the Revision of the Marriage Law with 137 voting members of the Commission (127 in favour, 1 against and 9 abstentions). The law, which originally had 37 articles, was extended to 52 articles and a new fifth chapter, on "remedies and liability" was added. In addition to the issues already presented in the 1980 law, there are extra-marital relationships, invalidity and the revocation of marriage, the division of property in divorce and domestic violence. A second change was made in 2003, with a further revision of the rules governing marriage and divorce registration.²⁵ By examining the continuous evolution of Marriage Law, it is possible to see that the legislative structure of the family itself was reformed to address the problems encountered with the regulatory system of the past years and to respond to the changes that occurred in Chinese society.

²³ Yeung, W.J.J., & Hu, S. "Paradox in Marriage Values and Behavior in Contemporary China." *Chinese Journal of Sociology* 2, No. 3, pp. 447–746, July 2016. Available at: <https://doi.org/10.1177/2057150X16659019>.

²⁴ Chen Jianfu, *Chinese Law: Context and Transformation*, Leiden-Boston, Martinus Nijhoff Publishers, 2008.

²⁵ Wu, C. Z., *Marriage and Family Law Theory*. China Politics and Law University Press, 2002.

The 2001 "Marriage Act" is a response to a number of new problems encountered during China's economic transition and is also a re-regulation of marriage and family relationships through legal means by the State to the beginning of the new century.²⁶ This revision represents the change that Chinese society has been facing since the end of Maoism: after the reforms of Deng Xiaoping people started to feel free to express their sexuality and there was more consciousness of the rights. That is why even divorce was more common even for wives and was not anymore something to be ashamed of.

As the analysis of the revision suggests²⁷, there are a few reasons for the revision of the Marriage Law. The possessions that people own in these years have been growing, families own more houses, cars and so on, there was greater need to protect citizen property. A serious matter for the revision was the problem of bigamy. The principle of monogamy was fixed since the first Marriage Law, but in Southern China bigamy started to be again a real issue and in some cases husband, wife and mistress even live in the same residence. Another problem was the domestic violence, that in the late 1990s had a lot of attention in all the parts of society against children and wives. Lastly, the previous law had a number of weaknesses that had to be fixed (for example the absence of separate property regime or the lack of a general stipulation of kinship and the method to calculate the degree of consanguinity). It is evident that the revision of the Law was mainly done not only because Chinese society was facing a change and it needed a modern review but also because the 1980 Law had some issues to be fixed and it reinforced the idea of marriage as a voluntary contract.

Since Chinese laws are often considered really vague the Supreme People's Court had to add three Interpretations on the Revised Law. The first Interpretation was made in December 2001, when the Court had to focus on terms that were absent in the 1980 Law, such as "family violence" 家庭暴力 (Jiātíng bàolì), or "adulterous cohabitation" 配偶者与他人同居 (pèi'ǒu zhě yǔ tā rén tóngjū), grounds that constitute financial compensation in the moment of divorce.²⁸ The second Interpretation of December 2003 dealt with the problems of personal rights in the marital

²⁶ Liúwéifāng 刘维芳, Shì lùn "zhōnghuá rénmin gònghéguó hūnyīnfǎ" de lishǐ yǎnjìn, *op.cit.pp.*60/61.

²⁷ Ninglan Xue, "Revision of the Chinese Marriage Law in 2001", *zhong guo fa xue wang* 中国法学网 (China Law Network), 05/2002. Available at: <http://www.iolaw.org.cn/showNews.aspx?id=24659> (Last access: 21/10/2020).

²⁸ Davis, D. S. "Privatization of Marriage in Post-Socialist China" in *Modern China*, No. 40(6), pp. 551–577, 2014 available at: <https://doi.org/10.1177/0097700414536528>.

relationship. The third and last Interpretation, in August 2011, dealt with latent protections of communal property²⁹. These Interpretations, that will be analysed in the questions of ownership of the second chapter, reveal the main priorities of the government, the legal context in which marriage and divorce are dealt.

1.5 The Structure of the 2001 Revision

The structure of the reform is really similar to the previous Law. First of all, in Chapter 1, it establishes some general principles on the freedom of marriage (and divorce), on gender equality, on the protection of children and the elderly, on the obligation to observe birth control and fidelity between spouses and the prohibition of bigamy and domestic violence. Apart from issues related to mutual fidelity and the prohibition of domestic violence, many nationals on family planning changes have also been made to policies and practices regarding the mediation of disputes in social life in general or, in particular, within families.

Some of these principles were already determined by the Constitution (1982) and the Marriage Law of 1980, prior to the 2001 revision. An addition on chapter 4 is about caring and respecting each other in the family: the legislator, with a Confucian spirit, point out the respect of the old and the care for the underage and for the first time he dealt about intimate relations.³⁰

Chapter 2³¹ (on marriage) establishes the conditions suitable for contracting marriage or for invalidating it. Article 5 establishes that marriage must be an absolutely voluntary union and prohibits any interference by third parties. As the previous law, the age for marriage to get married is still 22 for men and 20 for women, and the law specifically exhort the couple to have children in adulthood: even if the used word is “to exhort”, in reality many local authorities have imposed this provision by forcing people to marry and have children later, stipulating other rules that provide for a greater age to contract marriage (family planning). Articles 10, 11 and 12 formally established the legal notion of nullity and annulment of marriage and the respective legal consequences, aspects that were absent in the previous law. Chapter 3 (on family relationships) is the longest chapter of the law and deals with supporting the maintenance of family members and relationships regarding

²⁹ *Ibidem*.

³⁰ Parish William, Whyte Martin King, *Village and Family in Contemporary China*, Chicago: Univ. of Chicago Press, 1978.

³¹ All the articles related to the Revision are available online in the latest version: Zhōnghuá rénmín gònghéguó hūnyīnfǎ 中华人民共和国婚姻法 (Marriage Law of the People's Republic of China), 28/04/2001, available at: <http://www.lawinfochina.com/display.aspx?id=1793&lib=law>. (last access:20/03/2021).

ownership. Chapter 4 (on divorce) deals with the dissolution of marriage and the related legal consequences, especially those relating to the division of property and child support and the protection of family members.³²

A new chapter was added in the revision of the law, chapter 5, known as Salvage Measures and Legal Liability: it is a whole new chapter about cases of violence, not only between husband and wife but in the whole family, the cases in which it can constitute a crime, the abandon of a member of the family and all of those cases of bigamy and violence that can constitute a criminal offence, including how the injured party can ask for monetary compensation. In the last chapter as in the previous law (Additional Provisions) the legislator completely repealed the 1950 marriage law (Art. 51), and he reserved the right to issue regulations in derogation from the same law to be applied in areas with national autonomy (Art. 50: regions, provinces, towns or parts of these in which the resident citizens are non-Han Chinese but are part of legally protected ethnic minorities due to the concrete risk of extinction).

As mentioned above in the previous law, marriages in the PRC are concluded by registration, not by celebration. The legal requirement of registration must be fulfilled but it is often ignored by couples and their families, who instead consider the celebration of marriage in the traditional style more important. This has led to various difficulties relating to unregistered unions and the imposition of rules for family planning. The compulsory marriage registration system is still active nowadays, but efforts have been made in the past to give greater recognition to the concept of marriage as a private matter. These changes were introduced in Chapter 2 of the 2001 Marriage Act, the two Supreme People's Court Interpretations of 2001 and 2003, the revision of the rules on the marriage and divorce registration process, and finally the revision of the Women's Protection Law.

The authorities imposed stringent registration requirements and restricted the judicial recognition of unregistered partnerships as 'de facto marriages'. This approach, closely related to family planning policy, was strongly criticized during the debates related to the revision of the Marriage Law and was considered unfair to the interests of peasant women.

A relevant article related to this matter is the Article 4, which recognizes an unregistered relationship in which one party (or both) was a minor and establishes that the union can be recognized as a legitimate marriage from the moment in which the parties reach the suitable age to

³² Yinan Ma 忆男马, *Hunyin jiating fa xin lun 婚姻家庭法新论* (New discussions on Marriage and Family Law), Beijing Daxue chu ban she 北京大学出版社, 2002.

contract the marriage.³³ Article 10 confers on “persons with an interest” (利害关系人)³⁴ the right to apply for void marriage in case of bigamy. In this case mediation can only be used by the Court for questions relating to the division of property and the custody of children: the decision on the effective validity of the marriage itself must be declared in the sentence. Furthermore, the 2003 Interpretation provides that once the request for the nullity of the marriage has been made, it cannot be withdrawn. The Court declares the marriage null and void if it believes the request merits this decision. If there are legal actions that compete for both the Marriage nullity Law and the divorce, the Court will give precedence to the nullity request.

Another significant topic is the discussion of forced marriages (胁迫婚姻). The 2001 Marriage Law, in the Article 11, introduces a new provision in which a party forced to marry can request the annulment of the marriage within one year from the date of registration or from the date on which the party regains his freedom. According to the 2001 interpretation at article 10 only the coerced party can make this application, this interpretation considers these marriages as unions in which a party obliges the other one to get married against his will (by threatening and intimidating the spouse and their families). This was an important step for women’s rights, even if the limit of one year from the date of registration could be a problem for a spouse who has to adjust to the new situation and has to decide if remaining in the forced marriage.

The revised Marriage Law attempted also to deal with the problem of monogamy, since in the late 90s the usage of having concubines appeared again in southern China. In the debates about the revision of 2001 China’s Women Federation tried to render the idea of taking concubines as immoral and some critics also wanted to consider it as a criminal offence. Prohibiting bigamy is a principle of Marriage Law, the clarifications about what types of bigamy are recognized are laid down in the Criminal Law rather than the Marriage Law, and some legal experts during the revision considered that the Marriage Law is part of Civil Law, therefore it belongs to the private legal system. As a consequence, they considered the question of the definition of bigamy not a matter for the context of reviewing the Marriage Law, but it should be considered in the context of Criminal Law. In the end, Article 3 stated that the cohabitation of third parties is prohibited and concubinage is considered as a ground for divorce, even if it is not considered a crime.

³³ Palmer, M. “Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction” in *China Quarterly*, No. 191, pp. 675–695, 2007.

³⁴ *Ibidem*.

During the post-Mao China parental interference in marriage almost disappeared, but in recent time the obstruction of parental marriage by adult children increased (they were anxious for example of losing their inheritance rights). The revised law had to overcome these problems, with a provision in article 30, that forbid children to block the remarriage of a parent. The same article also stated that the remarriage of a parent does not remove the children from the duty to assist their parents. On this matter, Article 19 of the elderly persons law of 1996 safeguards the right of elderly to divide and distribute their property as they wanted and without any obstruction from their children or relatives. It also states that if the supporter fails to fulfil the maintenance obligation, the elderly person has the right to request the alimony payment from the supporter.³⁵

The divorce issue has been subject to frequent and important judicial changes between 1980 and 2001. Statistics showed a considerable increase in the divorce rate during the post-Mao period, from an initial 3% up to 20% in some areas after 1990. This is the result of several causes, such as less willingness of young people to continue an unhappy marriage in a society that is more economically developed and the emergence of a more professional and younger judiciary.

At the same time, the Law continued to perceive a judgmental approach to contested divorce but also put into practice a more effective system for matters of guilt and for compensation: in particular, compensation can be claimed by “the party without fault”, if the end of the marriage is caused by bigamy, cohabitation with third parties, domestic violence or mistreatment and neglect to the detriment of family members.

Particularly important is the content of Article 43, that, as mentioned above in the last paragraph, granted greater protection for women victims of violence, deriving above all from international pressure and the growing tendency for husbands to take revenge against an unfaithful wife. Women who suffered domestic violence continue to be encouraged to request the intervention of the local mediation committee, which was responsible for persuading the husband to stop his deplorable attitude. In the most serious cases, the local public security office must intervene and, at the request of the victim, impose an administrative penalty on the husband. In addition, a wife who has suffered from violence could bring a lawsuit against her husband and both the Public Security Office and the Prosecutor's Office must assist the woman.

³⁵ Zhōnghuá rénmín gònghéguó lǎonián rén quányì bǎozhàng fǎ 中华人民共和国老年人权益保障法 (Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly), (*Central People's Government of the People's Republic of China*) · 01/10/1996 , available at: http://www.gov.cn/banshi/2005-08/04/content_20203.htm (last access: 26/10/2020).

Before 1995 few studies paid attention to this issue but when the revision started legislators and sociologists were already discussing about it and there was a general consensus that the term should be included in the new law. Prohibiting domestic violence and abuse of family members are included in a basic principle in the first Chapter, together with the prohibition of bigamy in the Article 3. Debates about this article continued after the promulgation of the law and a late judicial interpretation makes the law clearer: the term domestic violence “refers to any act that causes physical, psychological and other kinds of harm to other family members by means of battering, binding, forcible restriction to the physical freedom or other means. And frequent or persistent acts of domestic violence constitutes abuse.”³⁶ This explanation can help women victims to seek for legal actions in an easier way. Although mediation processes and the application of administrative sanctions continue to be increased, cases of domestic violence are still very present and are considered not only as private matters but also as public facts that are dealt with by criminal law and to which sanctions are applied judicial.

In the Revised Law Article 32 has some new amendments even if the basic criteria in dealing with the applications for divorce was the same; the new criteria and circumstances in which one party can ask for divorce include the above-mentioned bigamy, domestic violence, bad habits like gambling or drug addictions, separation caused by incompatibility and the other circumstances about the decay of affection (these points were not included in the 1989 judicial interpretation³⁷). These revisions on the divorce chapter led to some debates because people were worried that they would restrict the possibility of getting divorce, and that those would be the only cases to ask for divorce. Legal experts clarified that the provision was added to put into the law the criteria used in court to rend the divorce valid, it sets out the most important principles to guide the judge in the cases. Hence, even if these provisions were added, the possibility to obtain divorce was the same and they were not too different than the ones in the Marriage Law of 1980. The divorce matter after

³⁶ Zuìgāo rénmin fǎyuàn guānyú shìyòng “zhōnghuá rénmin gònghéguó hūnyīnfǎ” ruògān wèntí de jiěshì (yī)(hūnyīnfǎ jiěshì yī) 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）（婚姻法解释一）， Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Marriage Law of the People's Republic of China" (1) (Interpretation 1 of the Marriage Law) , 25/12/2001. Available at: http://www.law-lib.com/law/law_view.asp?id=16795 (Last access: 22/10/2020).

³⁷ Zuìgāo rénmin fǎyuàn guānyú rénmin fǎyuàn shěnli líhūn ànjiàn rúhé rèndìng fūqī gǎnqíng què yǐ pòliè de ruògān jùtǐ yìjiàn 最高人民法院关于人民法院审理离婚案件如何认定夫妻感情确已破裂的若干具体意见, (Several Specific Opinions of the Supreme People's Court on How the People's Court Determines that Mutual Affection No Longer Exists between Husband and Wife), 13/12/1989 (Last access: 22/10/2020).

2001 is strictly connected with the separation of property and it will be clarified in the second chapter.

1.6 Social Changes in Chinese Families after 1980

Along with the modernization of the marriage law and its system the structures inside the family changed too, and with the structures also Chinese people started a process of new self-awareness of their rights. What really helped in this situation was, in a large social context the expansion of education, the development of a wage economy, the opening to the western world. The stability and the structure of Chinese families had great transformations. The function of the family in a traditional way has been challenged and the One Child Policy changed also the priorities that families had in the past.³⁸

Over the past decades a post-socialist concept of the family was developed, especially with the new idea of private ownership: in an economic system that was facing a “Westernization” and was everyday more private and based on voluntary contracts even marriage became more of a personal thing and not a social property. The idea of marriage as something that was built by the family was more uncommon and young couple started to live it as a free choice. In this system, it seemed at first that the law would contradict the promises of prioritizing personal satisfaction and free choice of the couple: as the article about the Privatization of Marriage³⁹ notices the contradiction becomes less heavy if the reader can distinguish between marital fertility (in the concept of the family planning) and sexuality.⁴⁰ Moreover, in the matter of the One Child Policy⁴¹, the leaders wanted to grant control of the birth rates but at the same time if sexual intimacy did not lead to birth, it was threatened as a personal choice and it was protected by the right of privacy.

Before the modernization marriage was seen as something that existed for the purpose of extending the family line and the female virginity (until 1980 a woman that had premarital sex

³⁸ Xu, A. Q. (Ed.). *Chinese People's Love and Marriage in the New Century*. Beijing: China Social Sciences Press, 1997.

³⁹ Davis, D. S. “Privatization of Marriage ...”, *op.cit.pp.560/565*.

⁴⁰ Jacka T., Kipnis Andrew B. and Sargeson S., *Contemporary China: Society and Social Change*, Cambridge University Press, 2013.

⁴¹ White T., *China's Longest Campaign: Birth Planning in the People's Republic, 1949- 2005*, Cornell University Press, Ithaca (New York) London, 2009.

would become a shame and she was not considered good enough to become a wife) and fidelity was a priority, premarital sex and cohabitation were seen as a scandal and there was not a great tolerance. With the above-mentioned Westernization and the opening after 1978 new ideals and values entered in Chinese families along with a new concept of education.⁴² The prevalence of premarital conception, premarital sex and cohabitation before marriage started to be very common, especially in urban areas and in big cities like Shanghai and Beijing.⁴³ At the same time China always faced the double face in the mixture of tradition and modernization, and from the study of Yeung and Hu, it was evident that a lot of young adults still considered marriage as an important value and despite the fact that the government tried to convince people to get married not too early, they still wanted an early marriage, they considered a bad marriage better than being single and they connected the idea of having a child with the obligation of getting married (about 80 and 90%).⁴⁴ The same study shows how in China there's a paradox in the way Chinese government regulates marriage life: in one hand the government still controls childbirth and considers the marriage as the only way to legitimate reproduction, meanwhile in the last years getting a divorce has become really easy and China is considered one of the cheapest places in the world to get it. However, while barriers on divorce are minimal there are still interpretations and acts from the government that show the desire to return to earlier traditions (an SPC interpretation that privileged a claim of a husband's parents over the wife⁴⁵), even if nowadays women can have the same rights of men and can have premarital sex activity without being ashamed or unpowered.

Lastly, it is evident that the modernization of the family issued the problem of the One Child Policy, because if the government wanted to render the marriage a private matter, the family planning was in contradiction with this idea and the idea of privacy rights, but today the CCP tries to give more personal autonomy, more economic freedom and tries "to extend the logic of voluntary contracts to intimate relationships"⁴⁶ and to de-privatize the institution of marriage. Zhan

⁴² Guo, Z., *Contemporary Chinese Population Development and Family Changes*. Beijing: China Renmin University Press, 1995.

⁴³ Yeung, W. J. J., & Hu, S., *op.cit.pp.450/461*.

⁴⁴ *Ibidem*.

⁴⁵ Davis DS. "Privatization of Marriage..." *op.cit.pp.560/565*.

⁴⁶ *Ibidem*.

Hu and Xizhe Peng⁴⁷ in their study show some statistic data in the Chinese census from 1982 to 2010, where the increase in the number of family households but also a simplification of the household itself is shown. Families with just elders are growing up while the percentage of elders that live with children has become really low.⁴⁸

Between the new family system and the connection with the tradition, in the last years a new type of family has emerged, a family that is a mixture of the family planning and the restrictions related to it and the climate of liberalism of the society and its economic dynamism: the Dink family. It is a phenomenon that appeared a couple years after the beginning of the family planning and it is estimated that already in 2002 more than 600.000 families in China decided to live this kind of life, especially in large and medium-sized cities.⁴⁹ As the analysis of Alessandra Melis in her Phd Research⁵⁰ states, DINK refers on the word “double income no kids” (in chinese *dingke* 丁克: *shuang shouren* 双收入, *wu zinu* 无子女), a family without any children but just the couple. There is not really a clear sociologic or demographic definition of these new families, but they are becoming really common in the big cities and they are usually couples with a high level of education and have an intense social life, linear with the modernization of the cities. A dink family is a family with different values than before, the priorities changed during the years and the idea of having children is not necessary anymore; on the other hand, the main purpose become a good job, a good social life and interpersonal relations. Couples do not get married just for the family, but love has become the centre of the marriage. This choice has also an explanation that can be related to all the restrictions that the government has made during the years with the family planning: a lot of couples due to the obligation of having an only child, decided to renounce to have children at the beginning of their marriage and when it was too late, they just gave up and started to enjoy that kind of life. The new type of woman that emerges is stronger and has more self-awareness, she doesn't accept to be just a wife and knows what rights she wants, she is out of the traditional model even if

⁴⁷ Hu, Z., & Peng, X. “Household Changes in Contemporary China: an Analysis Based on the Four Recent Censuses”, *Journal of Chinese Sociology*, Vol.2,9, pp.1-20 (2015).

⁴⁸ Wang, Y. “Analysis of the structural changes of the contemporary Chinese families”. *Social Sciences in China* Vol.11, pp. 96–108, 2006.

⁴⁹ “More Dink families appear in China”, *China Daily*, 21/08/2002, available at: <http://www.china.org.cn/english/2002/Aug/40040.htm> (Last access: 05/12/2020).

⁵⁰ Melis A., “Nuove e vecchie “jiating”: i cambiamenti intercorsi nell’istituzione familiare cinese a partire dal 1911”, dottorato di ricerca, *università degli Studi di Cagliari*, 2010/11.

at the same time she respects her family and her parents. In this context of self-awareness women are also more financially independent and it's easier for them in the case of divorce to win the cause; they are not afraid of being alone and the man is not their boss anymore. The main difficulty for these couples is related to their families of origin, that want them to continue the heritage and they pressure them to have children: there are a lot of cases where pressure is the only reason why they have children and they end up leaving them to be raised by the grandparents, as a proof of their rebellion against the tradition.⁵¹

In this situation relationships between couples but also between children and parents change too: the cultural and traditional values become everyday weaker. Since the above-mentioned “*danwei*” is destroyed, individuals are members of the family instead of member of an “unit”⁵², even if unlike the Western countries, family is still considered not only as an economic unit for the reproduction but also a basic unit for welfare and education. Moreover, even if the government tries to intervene with new reforms for the families it is always more difficult to cope with all the transformations.⁵³ As the article of Hu and Peng⁵⁴ concludes, it will be a big issue for China in the future to improve family reforms and policies as its economy will continue to develop and the demographic structure will still change. All of these transformations will lead to new challenges to social stability.⁵⁵

1.7 The Civil Code of 2020

A last paragraph on the matter of the Marriage Law is related to the project of the Civil Code: this project has been part of a long and complex process of legal reforms accompanied by a huge circulation of foreign models and it represented a huge achievement for Chinese society⁵⁶.

⁵¹ Song C., “Chinese Family Values: How They Affect Life in China, *China Highlights*, 15/09/2019, available at: <https://www.chinahighlights.com/travelguide/chinese-family-values.htm> (Last access: 26/10/2020).

⁵² Hu, Z., & Peng, X., *op.cit.pp.10-11*.

⁵³ Mann, Susan L., *Gender and Sexuality in Modern China*. Cambridge: Cambridge Univ. Press, 2011.

⁵⁴ Hu, Z., & Peng, X., *op.cit.pp.14-20*.

⁵⁵ *Ibidem*.

⁵⁶ Timoteo M. “China Codifies, The First Book of the Civil Code between Western Models to Chinese Characteristics”, in *Opinio Juris in Comparatione*, No.1, pp. 23/44, 2019.

A first draft of a Civil Code was enacted in China during Guomindang, with influences from the German Civil Code (BGB) and Japanese Civil Code. The topic of Civil Code emerged again with Deng Xiaoping, in 1979, after China launched market-oriented economic reforms,⁵⁷ but the legislature abandoned the project and replaced it by an enactment in 1986 (General Principles of Civil Law- GPCL). Other attempts appeared later, as the one of 2002, but they did not work out, the legislators could not find a good basis to build up a legislative consensus and the drafts did not have consensus even among the members of the drafting group⁵⁸. In the 2003 legislative plan of the NPC there was no mention of a hypothetical Civil Code, while a drafting work of the Real Rights Law was highlighted. This law was approved in 2007 and then the Law on the Applications of Laws to Civil Relations with Foreign elements followed in 2009 and 2010.⁵⁹

After more than ten years in which the topic of a Civil Code was in the air under the leadership of Xi Jinping and Li Keqiang the idea of a real civil code became a fundamental part of the political agenda, with the approval of the Resolution of the Communist Party Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China, at the end of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC), held in Beijing from 20 to 23 October 2014. The legislature decided to work in two steps: first to adopt a Code's General part, enacted as General Provision of the Civil Law (Mínfǎ zǒngzé 民法总则) and then to draft the other parts of the code, referred as Separate Parts.

On the 15th March 2017 the first book of the Chinese Civil Code was approved for the first time. The definitive code was supposed to be approved on March 2020 and then was rescheduled for May: on 28 May 2020 the third session of the 13th National congress voted and approved the first official Civil Code, that came into force on the 1st January 2021.

This Code represents an important cultural goal that reveals the maturity of Chinese society and its political stability. A written code has a rigid structure, and it is very difficult to change. This means that China has enough stability to have its own fixed laws after years of uncertainty. This

⁵⁷ Changhao Wei, "2020 NPC Session: A Guide to China's Civil Code (Updated)", *NPC Observer*, 05/07/2020. Available at: <https://npcobserver.com/2020/05/21/2020-npc-session-a-guide-to-chinas-civil-code/> (Last access: 10/11//2020).

⁵⁸ Zhang, X., "The new round of Civil Law codification in China" *University of Bologna Law Review*, No. 1(1), pp. 106/137. 2016. Available at: <https://doi.org/10.6092/issn.2531-6133/6308>.

⁵⁹ Timoteo M. "China Codifies...", *op.cit.pp.23/44*.

current law codification can provide a new market development and legal modernization⁶⁰. The code becomes now the pivot of the civil system but also of the Chinese legal system: every law from now on will depend on it. The code does not have a great practical impact, it is really conservative because it is the result of a debate of several years between two different schools, one that wanted a new and original written code and the other, that prevailed, who imagined and created a “compile code”, a code of special rules on major topics put together and coordinated with each other. The new Civil Code is divided in 7 chapters and 1260 articles, a general part with basic definitions, property, contracts, personality rights, marriage, successions, civil responsibility and some additional provisions.

As mentioned above, the code include all the previous laws, the 5th book (Hūnyīn jiāting 婚姻家庭) combines the Marriage Law and adoption law and has five chapters. On the 1st January 2021, after more than 70 years of gestation the Civil Code was officially implemented. In addition, a first batch of seven new judicial interpretations formulated by the Supreme People’s Court to complement the Code has been issued and was implemented together with the promulgation of the Civil Code. The first batch of cases in which the code can be applied has already been placed and the country is officially entered in a new era for the legislation.⁶¹ The old regulations are replaced by the "Civil Code" and the related judicial interpretations will also be invalid.⁶² To conclude, the Civil Code still has just a symbolic relevance, since it was just approved: as far as it is seen, the code does not have any change in the structure or application of the Marriage Law.

⁶⁰ Zhang, X., “The new round of Civil Law codification...”, *op.cit.pp.110/120*

⁶¹ Peng Fei 彭飞, “Kāiqǐ mínfǎ diǎn shídài 开启民法典时代 (The Opening of the Civil Code Era)”, online article *CNKI.NET*, 23/01/2021, available at: <https://kns.cnki.net/KXReader/Detail?TIMESTAMP=637488546223916015&DBCOD= CJFD&TABLEName=CJFDAUTO&FileName=FRZZ202101010&RESULT=1&SIGN=oLxc3Q0Q3GLWTKwNLI sX0TIGT XE%3d>.

⁶² Zhang Xiaoli, 张晓黎, 2020 Nián hūnyīnfǎ líhūn tiáojiàn de guīdìng yǒu nǎxiē 2020 年婚姻法离婚条件的规定有哪些 (What are the requirements for divorce conditions in the Marriage Law of 2020), *China Law Network*, 17/09/2020. Available at: <https://www.66law.cn/laws/87783.aspx> (Last access: 05/11/2020).

2. The Right of Ownership in the PRC

2.1 Right of Property in China

Along with the development of the Marriage Law, the concept of private property in China has been a slow process too, that culminated with the promulgation of the Law in 2007. The question of property is a relevant topic in the disputes of marriage and divorce and the chapter will be dedicated to the analysis of these regulations. Before discussing the ownership inside marriage, it is necessary to analyse how general property works and what are the main regulations valid today.

The Chinese word for property is 财产 (Cáichǎn), which include intangible and tangible property.⁶³ As well as with other legal systems, the Chinese one differentiates between movable and immovable property.⁶⁴ The property is protected by articles in the Constitution and in the laws. The first modern Law about property was done after a long drafting, approved by the V plenum of the X National People's Assembly the 16 march of 2007. The project of this law has been modified seven times in five years, and the entire process was criticized by the new and the old left party. In addition to the Property Rights Law, China regulates real property through a series of other laws and regulations, including the PRC Law on Land Management⁶⁵, the land registration measures and other laws. This law regulates the matter on real rights and represented a great step into the elaboration of the Civil Code, where it was integrated in chapter second, called indeed Wù quán 物权, real rights.

The basis of the Chinese Constitution recognizes the State based on the socialist public propriety: the law distinguishes for this reason between statal property, collective property and

⁶³ Alsen, J., "An Introduction to Chinese Property Law", *Maryland Journal of International Law*, Vol. 20, No. 1, 1996. Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol20/iss1/>.

⁶⁴ Jean O. & Walder A. [eds.] *Property Rights and Economic Reform in China*. Stanford, CA: Stanford Univ. Press, 1999.

⁶⁵ Zhang, L. "China: Real Property Law", *The Law Library of Congress, Global Legal Research Center*, 2015, <https://www.loc.gov/law/help/real-property-law/china.php> (Last access:22/01/2021).

private property. State property has always been considered sacred, whereas collective and private properties, especially in the past, were simply protected by law, state property had a higher legal status; a lot of times when a dispute on private property arose the first question was to see if the ownership was lawful. Today the situation is more equal, even if the socialist system is still the main driving force of the Chinese thinking. Nowadays the public property for the first time is not considered as the main type of property, the three types of property are not equal, but the legal protection is on the same level. From this point of view the law represents a change on the discrimination towards the private property: during Maoism the idea of private property was abolished, in favour of the socialist idea of the common land. At the same time ideas as the division of property in the marriage matter was an unclear concept during those times. The concept of “state property” , Guójiā suǒyǒuquán 国家所有权, did not coincide with the same concepts of the civil law systems. It was a notion that consisted of a fusion between the classic concept of property right from the European models and the communist theory of Karl Marx. Even the soviets were in doubts about the use of this word, because it belonged to a notion that was developed in the civil law world and expressed different values and rules than the ones typical of the socialist systems. ⁶⁶

Chinese intellectuals that created the law were conscious of the ambiguity of the usage of the same category for two situations (the state property and the private property) that couldn't be in general considered similar. The main doctrine states that in the civil right system the state property and the private property can be added in two under categories of the property, referring to different subjects, and they keep sustaining a proprietary dimension, the one of the Government. It is interesting to underline the role of the statal property because it has always had a relevant position in the Chinese concept of the land: the private property of the land as we intend it in China is excluded for a constitutional right.⁶⁷ Currently, the maximum term for urban land-use rights granted for residential purposes is seventy years. According to the law, when the term for the right to use land expires, it will be automatically renewed. In addition, individuals can privately own residential

⁶⁶ Putterman, L. "The Role of Ownership and Property Rights in China's Economic Transition" in *China Quarterly*. No.144: pp.1047-64, 1995.

⁶⁷ The constitution on the possession of property states that Chinese individuals cannot privately own land natural resources. The Constitution provides that land in urban areas must be owned by the state, whereas land in rural and suburban areas must be owned by the state or the individuals can, however, obtain the right to use land from the state. The land-use right under the Property Rights Law is a “usufructuary right” that allows the right-holder, the usufructuary, estate registration. local collectives. In urban areas, the state grants or allocates to legally possess, use, and benefit from property owned by another.

houses and apartments on the land (the so-called home ownership), although not the land on which the buildings are situated. The land-use is an “usufructuary right” that allows the right-holder, the usufructuary, to legally possess, use and benefits from property owned by another.⁶⁸

The doctrine on the statal property presents some difficulties: to the state council is recognized the right to exercise the right of property on the goods of the state; to the administration of the State there is the right to have and use goods, whether they are real estates or movable property, on which they exercise their own direct power.⁶⁹ Before the law on the real rights, the build of the new economy in China was progressive and without officially arriving to a real recognition of the private property, *sī rén yǒu quán* 私人有权. Individuals can privately own a real estate but not the land in which these houses or apartments are situated; article 64 states that individuals can enjoy the ownership of immovable or movable properties as their lawful incomes, houses, articles for daily use, tools of production and raw materials⁷⁰: the law itself represents then the result of the economic transformations and for the first time gave to the right of property law more freedom, and for the first time the discrimination towards that kind of right was eliminated from the strength of the morality and the stigma, sign that in the modern era a person can grow up and can build its own future thanks to their abilities and their strength. The private property gave to Chinese people a better autonomy and the opportunity to the society itself to grow. The law does not distinguish the concepts of real estate and movable property, even if those rights are fundamental for all the real rights in the law. The real estates in the Chinese law include soil, buildings and other parts that are under the naturalistic classification. The property of the state includes mineral deposits, water and sea, as well as urban soils, and also radio and infrastructures (like stations, telecommunications, highways etc.).

⁶⁸ Zhang, L. “China: Real Property Law”, *The Law Library of Congress, Global Legal Research Center*, 2015, Available at: <https://www.loc.gov/law/help/real-property-law/china.php> (Last access:22/01/2021)

⁶⁹ Stein, G.M., *Modern Chinese Real Estate Law: Property Development in an Evolving Legal System* (1st ed.), Routledge, 2012

⁷⁰ “Article 64: All individual persons shall be entitled to enjoy ownership of such immovables and movables as their lawful incomes, houses, articles for daily use, tools of production, and raw and semi-finished materials”

Between the main points of the law there is the discipline about the “Usage Right”, with Article 136⁷¹. The right of use of the land is relevant because it helped to overcome the concept of public property as the only form of property accepted. Thanks to this type of right, Chinese society started to face a process of privatization. The system of the rights of use on the funds had a connection on the fund of statal and collective property with the market economy. It is important to not forget that in the Chinese system there is a differentiation between statal and collective public property.

Regarding the question of the private property (including the one that the couple manages within marriage and divides after divorce), the Constitution in China states in Article 13 that “the State in accordance with law, protects the rights of citizens to private property and to its inheritance” and that “The State may, in the public interest and in accordance with law, expropriate or requisite private property for its use and shall make compensation for the private property expropriated or requisitioned.”⁷² About the public property of the land the privates have only the right of use (on the construction in cities or on lands with the purpose of living there in the countryside.) The individual property is related in China more to consumer goods, earnings, or other goods that can become object of the heredity.

In the matter of private property, the intervention of the notary is not considered mandatory, and its role appears in a law of the 1st March 2006. Its activity is limited to an activity of certification or legalization of a document: it is interesting to notice that its role is more related to the questions of contracts, successions, testaments and the questions about family rights, children and the division of property. In the matter of the division of property the notary has the role of giving an activity of consultancy. Given the consultation, the notary has to inform the parties about the significance and the juridical consequences. After that, he gives a certification or a legalization within 15 days from the request or from when the party gave the whole necessary documentation.

⁷¹ Article 136: The right to the use of land for construction may be separately created on the surface, above or under the ground. The newly created right to the use of land for construction shall not infringe on the usufruct which has already been created thereon.

⁷² It is present in the Constitution: the disposition after 1982 was modified in 2004 with a first part of the Article that states that the private property is inviolable.

2.2 The Management of Ownership within the Marriage

2.2.1 Principles on the Management of Property

The number of families that get a divorce in China nowadays is gradually increasing. When the couple decide to get a divorce, whether the couple has children or not, one of the main problems that arises is the division of property.⁷³ In the process of managing the question of marriage and divorce, the law established clearly that to the innocent part is reserved the right to ask for damages and at the same time to have more rights in the manage of property.⁷⁴ For example, it is clearly established that it is necessary to guarantee that in the management of some cases of divorce, the property between husband and wife has to be distributed in a reasonable way and that both parties have to receive the same treatment in the trial.⁷⁵

In the matter of property and its division there are some principles that today the court should follow along with the regulations that will be described in this chapter.⁷⁶

The first one is the principle of equality between men and women⁷⁷, which is not just reflected in the laws related to marriage, but it is also a guide for the People's Court in the management of marriage. The principle of equality is strictly connected with the question of ownership because both spouses have the right to divide equally the common property, without

⁷³ Davis D. "Talking About Property in the New Chinese Domestic Property Regime" in *Frank Dobbin (ed.), The New Economic Sociology*. New York: Russell Sage Foundation, pp. 288-307, 2004.

⁷⁴ Yáng héng 杨姮, "Mínfǎ diǎn shìjiǎo xià líhūn cáichǎn fēngē zhàogù wú guòcuò fāng de lǐlùn yǔ shíwù tànsuǒ. 民法典视角下离婚财产分割照顾 无过错方的理论与实务探索 (The Theoretical and Practical Exploration of the No Fault Party for the Division of Divorced Property from the Perspective of Civil Code)", *Fǎzhì yǔ shèhuì 法制与社会, (Legal system and society)*. Vol.34, pp.7-8, 2020. Available at: doi:10.19387/j.cnki.1009-0592.2020.12.004.

⁷⁵ Lin, X. X., *Studies on Family and Marriage Law*. China Politics and Law University Press, 2001.

⁷⁶ Cohen, M., *Kinship, Contract, Community and State: Anthropological Perspectives on China*. Stanford, CA: Stanford University Press, 2005.

⁷⁷ He, J. L., "On the Application of the Principle of Equity in Chinese Divorce Property Division", *Studies in Law and Business*, Vol.1, pp.104, 2005.

discrimination.⁷⁸ The second paragraph of the 2nd Article⁷⁹ of the Marriage Law, states that the marriage system has to take care of freedom of marriage but mostly of all, the equality between women and men, that has to be reflected in the divorce too. Joint debts have the same obligation of extinction too. It is not permitted to assign a property to just one party and not the one that has faults too. At the same time, it is not permitted to present more properties as a condition for divorce.⁸⁰ In the matter of the protection of women there is today an improvement in China on the judiciary system. In the past the question was not central in the creation of the Marriage Law, the woman had less rights and she had just to take care of the household and children, but with the development of economy the social status of women has improved. The laws in China had a change and started to take care, at least apparently, of the rights and the protection of women.

Women in the process of divorce have to take care of two principal problems: the separation from the spouse and the maintenance of children and division of property. The social situation in the law system provides same treatment to both men and women, but since still today there is a difference between the social status of men and women, the ones that need more help and tend to be victims in the processes of divorce are women. Connected to the principle of equality it is interesting to quote the law about the Protection of Rights and Interest of Women: adopted at the 5th session of the seventh National People's Congress of the People's Republic of China on 3 April 1992, and amended at the 17th Session of the Standing Committee of the 10th National People's Congress on the 28 August 2005⁸¹, it protects not only in familiar questions but also on politics, cultural and educative rights, with the main purpose of the government of achieving gender equality. In the process of divorce and property the law clearly states some articles related also to the Marriage Law, as for example Article 30 that guarantees that women enjoy equal rights, while

⁷⁸ Bernhardt, K. *Women and Property in China, 960-1949*. Stanford, CA: Stanford Univ. Press, 1999.

⁷⁹ Article 2: Marriage and family are protected by the State. A marriage system based on freedom of marriage, monogamy, and equality between men and women is implemented. The lawful rights and interests of women, minors, the elderly, and persons with disabilities are protected.

⁸⁰ Wáng lì 王莉, “Fūqī líhūn cáichǎn fēngē yuánzé dōu yǒu nǎxiē 夫妻离婚财产分割原则都有哪些, (What are the principles of divorce property division?)”, *Lǜ tú 律图 (Law Chart)*, 26/02/2020, available at: <http://www.64365.com/zs/827021.aspx>.

⁸¹ Zhōnghuá rénmín gònghéguó fùnǚ quánlì bǎozhàng fǎ (xiūzhèng) 中华人民共和国妇女权利保障法 (修正) Law of the People's Republic of China on the Protection of Women's Rights (Amendment), 03/04/1992 (revised in 2005), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/Protection%20of%20Women%27s%20Rights.pdf> (last access: 25/01/2021).

Article 32 that establishes that women have to enjoy of the same rights of men regarding the management of the rural contracts, the distribution of the incomes and the acquisition of the lands. Article 33 establishes that “No unit or individual can violate women's rights and interests in the collective economic organization based on women's statues of as single, marriage divorce or widow. Both husband and children enjoy the equal rights and interests as other members of collective economic organization when he moved to his wife's residence after his marriage.”⁸² Article 47 provides the system of financial compensation for divorce. Coherently to the dispositions of the marriage law, article 48 states that the court has to consider the principle of take care of the woman when the house is divided.

The second principle is to take care of the interests of children and women: when there are issues related to property, it is important to focus on the women’s needs, who are the ones that take care of the household and represent the weak part inside the couple. Their economic conditions are often worse than men’s. For women it is difficult to search for a job and live independently during marriage and after divorce, they need more social assistance and for that reason it is recommended not only to divide equally the property but also to give them a good accommodation in cases of divorce, where they can live. Children are important too because when the couple has to divide the property, they should also protect the property rights of minors, which cannot be divided from the common property of husband and wife.⁸³

The third principle is related to have good conditions of life. The management of the common property includes also that the utility and the economic value of the property cannot get damaged. The production materials used or managed by one party shall be distributed to the other one using or operating as much as possible and the other part may be distributed to other properties or as compensation. As for the various means of life, we must also consider the needs of both sides and their children and to divide them reasonably and realistically. If it is not suitable for division, it shall be reasonably adequate and assessed according to the source of ownership and actual needs.

The fourth principle is to take care of the party without fault. Fault refers to the act of mistreating, abandoning or harming a spouse, the act of third party or bigamy, the act of causing a conflict to break up feelings, etc. In cases of divorce arising from the fault of one party, it is not

⁸²*Ibidem.*

⁸³ Xinjīn guó, 信金国, “Líhūn cáichǎn fēngē yuánzé shì shénme? 离婚财产分割原则是什么? (What are the principles of property division in divorce?)”, *Lǜ tú 律图 (Law Chart)*, 26/10/2020, Available at: <http://www.64365.com/zs/679216.aspx> (last access: 20/01/2021).

only necessary to differentiate between right and wrong, but also to give to the wrong party punishment or legal sanctions.

The last principle states that the interests of the State, the collective and others shall not be prejudiced. The division of joint property between spouses shall not divide property belonging to the State, the collective and others. The property of the State, the collective, or others must be returned as many times as it has been acquired by taking the opportunity to divide the common property; if the circumstances are serious, it should be sanctioned according to law in the case of a partnership with another person, the joint property of the husband and wife shall be divided.⁸⁴

2.2.2 The Structure of the Marriage Property Law

The question of the property and its division inside marriage emerged for the very first time in 1993 when the People's Supreme Court expressed some opinions about the rules to apply in case of divorce⁸⁵ and gave a definition of property in common or jointly-owned property: the opinion was necessary because there was a lack of specified norms on this topic. It was stated that the property bought by the spouses during marriage was considered joint property, the property bought after marriage and used separately by husband and wife was considered joint property of both of them. When the property is divided and there is a disparity, the part that has more property will give to the other part equivalent property.⁸⁶ Women's property rights since then have been protected by constitutional and legislative guarantees in China. The laws in the PRC provide for a special protection of women under certain circumstances, especially when dividing the property, there is a tendency to favour the wife and the children.⁸⁷

Changes in property right in Chinese households have been linked to marriage-related legal changes since the establishment of the People's Republic of China in 1949. The revision of the

⁸⁴ Wáng lì 王莉, "Fūqī lǐhūn cáichǎn fēngē yuánzé dōu yǒu nǎxiē... *cit.*

⁸⁵ Guānyú rénmin fǎyuàn shēnlǐ lǐhūn ànjiàn chǔlǐ cáichǎn fēn fú wèntí de kǔ gàn qí tǐ yìjiàn , 关于人民法院审理离婚案件处理财产分服问题的若干其体意见 , (Some specific opinions on People's Court about divorce cases and treat the question of the property division), 3/11/1993 Available at: <http://gongbao.court.gov.cn/Details/b98fdcf4aa3f51981e13b1b09167.html> (last access:27/01/2021).

⁸⁶ Zhou Xiujuan, Li Nan, "Studies and Investigations on Overseas Divorce Property Division", *Cross-Cultural Communication*, Vol.9(5), pp. 55-58, 2013 Available at: <http://www.cscanada.net/index.php/ccc/article/view/j.ccc.1923670020130905.2724>.

⁸⁷ Ogletree Jr, C. J., & Alwis, R. de S. "The Recently Revised Marriage Law of China: the Promise and the Reality." *Texas Journal of Women and the Law*, No.13(2), pp.251-312, 2004.

2001 Marriage Law adds the provisions already included in the interpretation of 1993 and it further elaborates the definition of personal property within marriage, stating that the properties obtained during marriage belong to both husband and wife, while property owned before marriage belongs to the individual parties (an exception is made in the case of a prenuptial contract stipulated in terms of property ownership ⁸⁸).

In the third chapter of the Law, in the section about family relations, from Article 17 there is a description of what is considered joint property inside the marriage. Giving a further look at the Article, there are specified the properties in joint possession acquired under the contract of marriage: the law takes into consideration wages and bonuses, proceeds of productions, intellectual property rights, property acquired from inheritance or presentation and other property. It also takes into consideration and underlines how both husband and wife should have equal rights when it comes to share the property.⁸⁹

Article 18 ⁹⁰ allows one party to have the belonging of a property in some specified cases (such as a property bought before marriage or a property that is in the possession of one party as

⁸⁸ *Ibidem*.

⁸⁹ Article 17: The following items of property acquired by husband and wife during the period in which they are under contract of marriage shall be jointly possessed:

- (1) pay and bonus;
- (2) earnings from production and operation;
- (3) earnings from intellectual property rights;
- (4) property obtained from inheritance of gift except as provided for in Article 18(3) of this Law; and
- (5) Any other items of property which shall be in his or her separate possession.

第十七条:夫妻在婚姻关系存续期间所得的下列财产，归夫妻共同所有：

- (一) 工资、奖金；
- (二) 生产、经营的收益；
- (三) 知识产权的收益；
- (四) 继承或赠与所得的财产，但本法第十八条第三项规定的除外；
- (五) 其他应当归共同所有的财产。

夫妻对共同所有的财产，有平等的处理权。

⁹⁰ Article 18: The property in the following cases shall belong to one party of the couple:

- (1) the property that belongs to one party before marriage;
- (2) payments for medical expenses received by one party who suffers physical injury, subsidies for living expenses granted to the disabled subsidies, etc.;
- (3) the property to be in the possession of one party as determined by will or by an agreement on gift;
- (4) articles for daily use specially used by one party;
- (5) other property which should be in the possession of one party.

第十八条:有下列情形之一的，为夫妻一方的财产：

- (一) 一方的婚前财产；
- (二) 一方因身体受到伤害获得的医疗费、残疾人生活补助费等费用；

determined by will or by an agreement or other properties that for some reasons are in the property of one party). For example, property purchased from a personal mortgage before marriage by one of the two parties, even if the loan is repaid together after marriage, according to the regulations, if there is no agreement in the civil code, it will obviously be recognized as a personal asset before marriage at the time of division. The share of the repayment of the joint loan will be repaid by the owner. The value-added part of the property is obviously enjoyed by the owner and this should be the principle. It is clear that the judge can also provide assistance and compensation to the party who is in difficulty in the judgment of the owner as provided by the judicial interpretation. But this will not be a division of common property.⁹¹

Lastly, Article 19⁹² confirms the fact that the couple has to conclude a written agreement to establish which possession to consider separately or joint and that if the agreement is lacking the judge should just apply the provisions on articles 17 and 18.⁹³

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- (三) 遗嘱或赠与合同中确定只归夫或妻一方的财产；
 - (四) 一方专用的生活用品；
 - (五) 其他应当归一方的财产。

⁹¹ Peng Kun, 彭琨, “Shénme shì fūqī gòngtóng cáichǎn? 什么是夫妻共同财产?”, (What is the joint property of husband and wife?)”, *Lǜ tú 律图 (Law Chart)*, 12/09/2020. Available at: <http://www.64365.com/zs/647370.aspx> (last access: 27/01/2021).

⁹² Article 19: So far as the property acquired during the period in which they are under contract of marriage and the prenuptial property are concerned, husband and wife may agree as to whether they should be in the separate possession, joint possession or partly separate possession and partly joint possession. The agreement shall be made in writing. The provisions of Articles 17 and 18 of this Law shall apply to the absence of such an agreement or to a vague one. The agreement reached between the husband and wife on the property acquired during the period in which they are under contract of marriage and on the prenuptial property is binding on both parties. If husband and wife agree, as is known to the third party, to separately possess their property acquired during their marriage life, the debt owed by the husband or the wife to any other person, shall be paid off out of the property separately possessed by him or her.

第十九条:夫妻可以约定婚姻关系存续期间所得的财产以及婚前财产归各自所有、共同所有或部分各自所有、部分共同所有。约定应当采用书面形式。没有约定或约定不明确的,适用本法第十七条、第十八条的规定。夫妻对婚姻关系存续期间所得的财产以及婚前财产的约定,对双方具有约束力。夫妻对婚姻关系存续期间所得的财产约定归各自所有的,夫或妻一方对外所负的债务,第三人知道该约定的,以夫或妻一方所有的财产清偿。

⁹³ The article also states that the agreement concerning the property obtained during the existence of marriage and pre-marital property shall be binding upon either party and that where husband and wife agree to individually own their property, the debt of either the husband or the wife shall be cleared off by the individual property of the debtor if the creditor has the knowledge of the said agreement. It tries to state how the property during marriage should be written down and agreed for the couple to be clear who owns what.

In the section about divorce, articles from 39 to 41 are the ones about the division of property. Article 39⁹⁴ discusses about the procedure to apply in case of divorce: if the couple fails to reach an agreement they can go to the court, which will make a judgement taking in consideration the circumstances of the property and the interests of children and wife (since she has always been considered the part with less protection. The rights and interests of both parties in the management of family land must be protected in accordance with the law.⁹⁵ An agreement on division of property will be binding both parties and if a couple chooses to separate property their debts are separately owned as well.

An exception on the prenuptial contract is made in Article 40⁹⁶, which is related to the agreement of the spouses on the division of property under the contract of marriage and that if one party has performed more duties with children and take care and assist the elders, when divorce comes that party has the right to request the other party to make compensation for the above and the other party should approve without problems. Article 41⁹⁷ states that in the time of divorce the

⁹⁴ Article 39: At the time of divorce, the disposition of the property in the joint possession of husband and wife is subject to agreement between the two parties. In cases where an agreement cannot be reached, the people's court shall make a judgement in consideration of the actual circumstance of the property and on the principle of caring for the rights and interests of the wife and the child or children.

第三十九条: 离婚时, 夫妻的共同财产由双方协议处理; 协议不成时, 由人民法院根据财产的具体情况, 照顾子女和女方权益的原则判决。夫或妻在家庭土地承包经营中享有的权益等, 应当依法予以保护。

⁹⁵ Peng Kun 彭琨, “Fūqī gòngtóng cáichǎn yào zěnmē fēngē? 夫妻共同财产要怎么分割? (How to divide the joint property of husband and wife?)”, *Lǜ tú 律图 (Law Chart)*, 14/09/2020 Available at: <http://www.64365.com/zs/636165.aspx> (last access: 28/01/2021).

⁹⁶ Article 40: According to a couple's written agreement, the items of property acquired during their marriage are in the separate possession. In this connection, if one party performs more duties in rearing their children, looking after their elders and assisting the other party in work, he or she shall have the right at the time of divorce to request compensation from the other party who shall make the compensation.

第四十条: 夫妻书面约定婚姻关系存续期间所得的财产归各自所有, 一方因抚育子女、照料老人、协助另一方工作等付出较多义务的, 离婚时有权向另一方请求补偿, 另一方应当予以补偿。

⁹⁷ Article 41 At the time of divorce, debts incurred by the husband and wife during their marriage shall be paid off out of their jointly possessed property. If such property is insufficient to pay off the debts or, the items of the property are in the separate possession, the two parties shall work out an agreement with regard to the payment. If they fail to reach an agreement, the people's court shall make a judgment.

第四十一条: 离婚时, 原为夫妻共同生活所负的债务, 应当共同偿还。共同财产不足清偿的, 或财产归各自所有的, 由双方协议清偿; 协议不成时, 由人民法院判决。

debts that the couple had during marriage will be paid by the joint property and if it is not enough both parties have to reach an agreement on the payment of the debt.

Another important Article is the 47: if one party transfers or forges debts in an attempt to encroach upon the property of the other party; in that case the former may get less or no property when the property in joint possession is divided and after divorce, if the other party discovers the above the “victim” can go to the People’s Court and demand for a re-partition of the property.

2.2.3 Judicial Interpretations

On the topic of marriage, the Supreme Court expressed three different judicial interpretations in which property was a relevant topic and that had the main purpose of promoting women’s rights.

The first two were promulgated in 2001 and 2003: according to the first interpretation if one spouse has some difficulties to maintain basic standards of life the other part has to guarantee to transfer his or her personal properties and to offer housing ownership (Art.27): this interpretation was supposed to be helpful especially for women who were not independent and did not work during marriage but were just responsible for the house and the children. The interpretation also stated how husband and wife had equal rights, as the principle wants, and that when dealing with the joint property due to daily needs, either party has the right to decide.⁹⁸ Moreover, if the husband or wife does not need to make important decisions about the joint property of the husband and wife due to their daily needs, they shall negotiate on an equal footing and reach a consensus. If another person has reason to believe that it is the common intention of the husband and wife, the other party shall not use disagreement or ignorance against a third party in good faith.⁹⁹

The second Interpretation of 2003 clarifies some duties that the couple has to respect when there are issues regarding the property. It stated that the dispositions in the divorce convention or the agreement that the two parties had on the division after divorce are legally binding for both men and women. It also stated, as we will see further in this paragraph, the moments where the court can accept or deny the modification or the revoke of the agreement on the division in order for the parties to have the opportunity in some cases to define again how to divide the property or if there were cases in which one party did wrong and destroyed the property, the other one could ask the

⁹⁸ Peng Kun 彭琨, “Guānyú fūqī gòngtóng cáichǎn de fǎlù guīding yǒu nǎxiē, 关于夫妻共同财产的法律规定有哪些 (What are the legal provisions on the joint property of husband and wife)”, *Lǜ tú 律图 (Law Chart)*, 18/09/2020. Available at: <http://www.64365.com/zs/701036.aspx> (last access: 28/01/2021).

⁹⁹ *Ibidem*.

court for a new division. The Interpretation of 2003 also gave clarifications on Article 17 of the Marriage Law, analysing the goods that should belong to the common property and which property can be considered personal. It also helped with the cases in which husband and wife divided stocks, obligations, investments in the common property, helping also the court to divide them in proportion, as well as the cases where the couple had to divide joint societies.¹⁰⁰ It also defined the cases in which the couple was obliged to have the property recognised as joint, especially in the cases where the house was bought after marriage¹⁰¹ and it helped the court in the cases where the couple did not reach the agreement and it had to make a choice for them. Based on the situation and on how the couple want to proceed judges can choose the best solution on property and can decide for the couple what to do in cases of controversies. The interpretation also stated that after the parties have gone through the divorce registration formalities with the marriage registration authority, if a request for damages is submitted to the People's Court on the grounds of Article 46 of the Marriage Law, the people's court should accept it. However, if the parties have clearly stated to abandon the request when the divorce is negotiated, or the request is submitted one year after the divorce registration formalities have been processed, it will not be supported. This interpretation was approved on the 1st April 2004.¹⁰²

¹⁰⁰ Article 16 of the Interpretation stated that: people's courts hearing divorce cases involving the division of the joint property of the husband and wife in the amount of capital contribution in a limited liability company in the name of one party and the other party is not a shareholder of the company shall be dealt with in the following circumstances:

- (1) If the husband and wife agree to transfer part or all of the capital contribution to the shareholder's spouse through negotiation, and if more than half of the shareholders agree and other shareholders expressly waive the right of first refusal, the shareholder's spouse may become a shareholder of the company;
- (2) After the husband and wife have reached an agreement on the transfer of capital contributions and the transfer price, if more than half of the shareholders do not agree to the transfer but are willing to purchase the capital contribution at the same price, the people's court may divide the property obtained from the transfer of the capital contribution. If more than half of the shareholders do not agree to the transfer and are unwilling to purchase the capital contribution at the same price, it shall be deemed that they agree to the transfer, and the shareholder's spouse may become a shareholder of the company.

¹⁰¹ Article 19: If a house leased by one party before marriage or purchased with joint property after marriage, if the house ownership certificate is registered in the name of one party, it shall be recognized as joint property of the husband and wife.

¹⁰² Zuìgāo rénmin fǎyuàn guānyú shìyòng 〈zhōnghuá rénmin gònghéguó hūnyīnfǎ〉 ruògān wèntí de jiěshì (èr) de bǔchōng guīdìng 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)的补充规定, (Supplementary Provisions of Interpretation (2) of the Supreme People's Court on Several Issues Concerning the Application of the "Marriage Law of the People's Republic of China), Amendment of 01/03/2017 Available at: <https://www.66law.cn/tiaoli/1191.aspx> (last access: 05/02/2021).

However, in 2011, the Chinese Supreme Court decided to reinterpret the divorce law for the third time. This interpretation addressed important property issues and reversed the property protection for women in the case of divorce. The reform transferred ownership of the family home to the registered buyer, mostly often the husband, in the event of divorce. It is important because is one of the latest interpretations on property concerning marriage before the promulgation of the civil code. It is relevant to point out some articles of the interpretation concerning the property. It clarified in the Article 4 the cases where the court accepts during the marriage contract the request of division of goods (the cases of transfer or damage of property). The Court also stated in Article 8 that if a party abused of the other party or he/she damaged the property other people with the role of guardianship can change the relationship in accordance with special procedures.¹⁰³ In Article 10, according to the Interpretation if before marriage one of the spouses signed a contract for the purchase of immovable property (like a real estate), in the case this spouse already paid for his or her individual property and took out a bank loan and during the marriage mortgage payments were made with community property and the immovable property was registered in the name of the spouse that made the down payment, at the time of divorce the spouses should reach agreement on the disposition of the property. If the spouses are unable to agree, a People's Court may rule that the property belongs to the registrant and that the unpaid mortgage payments are the individual liability of the registered owner. The court also clarified that if one spouse sells a jointly owned property unit without the other spouse's consent and a third party purchases it without malicious intent and if he pays a reasonable consideration and goes through the property right registration procedures the people's court will not support the claim. However, if the disposition of the spouse on a joint property causes losses to the other spouse that led him/her to ask for compensation for damages, the People's Court in this case should accept the claim (Art.11). Moreover, when a loan agreement is concluded between husband and wife using the couple's joint property as a loan to one of the spouses who is engaged in individual business activities or who uses it for other individual matters, it should be regarded as an agreement made by both parties for disposition of the couple's joint

¹⁰³ Zuìgāo rénmin fǎyuàn guānyú shìyòng “zhōnghuá rénmin gònghéguó hūnyīnfǎ” ruògān wèntí de jiěshì (sān) 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) (Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Marriage Law of the People's Republic of China" (3)) 09/08/2011 Available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=156539 (last access: 05/02/2021).

property, and at the time of divorce, it may be handled according to the loan agreement that had been concluded (Art. 16.).¹⁰⁴

When analysed in the context of social norms, this reform on divorce adversely affected women. In the Chinese traditional beliefs, the man is considered the head of the household and the homeowner, and families often purchased houses for the male son; parents at the same time did not help the daughter to purchase a home before marriage and for this reason the majority of family homes in China are registered with the name of the husband. Chinese women are expected to be wives who take care of the household, children and elderly. They are a fundamental part of the family but these efforts when the Supreme Court published the interpretation had not a great consideration and the guide of 2011 gave more rights on the property to men.

With many houses being more expensive in the latest years, many women and their families gave financial assistance to husbands to purchase a home with a huge contribution, even if the tradition is still related to the fact the one who buys the house is the man and his family. For this tradition, even if the wife helps to purchase, her name does not appear in the contract of the house and many times the financial contribution is not evident (also because they could not anticipate all the modifications on the law on 2011). This means that even if they invested a lot of money in the household and helped during the marriage in the housekeeping and furnishing, men still got a more valuable asset when the couple decides to end the marriage, because they can declare that the property is in their hands.

There are a few reasons why China decided to publish such a controversial law. As it is noticed by the study of Emma Zang¹⁰⁵ there are four major forces behind this legal change. First, with the advancement of Chinese economy a stronger need to protect personal property more than joint property was needed. China had a transition from a collectivist to an individualist society. Moreover, the concept of property in the legislation had to face a change too. That is also one of the reasons why in 2007 the law on property was published. Another reason that led the legislator to

¹⁰⁴ Zeldin W., “China: Supreme People’s Court Issues Third Interpretation of Marriage Law”, *Library of Congress Law*, 19/09/2011, available at: <https://www.loc.gov/law/foreign-news/article/china-supreme-peoples-court-issues-third-interpretation-of-marriage-law/> (last access:06/02/2021).

¹⁰⁵ Zang, E., “When Family Property Becomes Individual Property: Intrahousehold Property Ownership and Women's Well-Being in China.” *Journal of Marriage and Family*, Vol. 82: pp. 1213-1233, 2020. Available at: <https://doi.org/10.1111/jomf.12658>.

publish this interpretation was that since the early 2000s, China has experienced a dramatic real estate boom, with over a 10 percent increase per year in housing prices between 2003 and 2014. As a result, the husband's family spent a larger portion of their household wealth to purchase a family home. Thirdly, divorce rate in China has been increasing steadily over time and dramatically since the early 2000s.¹⁰⁶ Fourth, social media began to play an important role in supervising the government's actions: there was a need for the courts to have a divorce law that was clear, simple and specific and was consistent with the spirit of property law of 2007.

Even though the Supreme Court declared the law as gender-neutral, transferring the property rights to spouses could affect the well-being in a different way between men and women. In a really patriarchal society like the Chinese one it was really common that the son would have more rights and preferences inside the family, something that led to less care about the daughter's asset. As a result, it was expected to have the property rights transferred from men to women, while the opposite was considered unacceptable. Women were negatively affected by the law because with the reform they may lose the home they expected to retain, although the provisions that will be described in the next paragraph should represent the opposite.

2.2.4 What do Joint and Personal Property Include within the Marriage?

The articles in the Marriage Law that have been described in this chapter state a few general dispositions on the joint and personal property of the spouses. To get more specific, it is relevant to see that, based on the content of Article 17, when in China the court has to deal with property inside the marriage, this includes the common property and the personal property of husband and wife. During the period in which the marriage contract is active, property acquired by the couple belongs to the common possession of husband and wife, if this is not decided in a different way before. Husbands and wives have the same rights in the disposition of the common property.¹⁰⁷ The law in China provides that marriage has effect in the day of the registration of the contract: if both parties registered a marriage, even if there is not ceremony, the purchase of a house when a party contributes, or the notarial authentication of the contract of property of the husband and wife is personal property of the investor.¹⁰⁸ The joint possession stated in the article means that husband and wife have both the same rights to decide how to treat the property and if one of them has to take

¹⁰⁶ *Ibidem*.

¹⁰⁷ Davis, D., "Who Gets the House? Renegotiating Property Rights in Post-Socialist Urban China." *Modern China*, Vol. 36, No. 5, pp. 463-92, 2010.

¹⁰⁸ Peng Kun 彭琨, "Shénme shì fūqī gòngtóng cáichǎn..., *cit.*

important decisions on the joint ownership because of their daily needs, husband and wife have to negotiate on an equal footing and reach a consensus.¹⁰⁹

Specifically on Article 17, the property on joint possession while the couple is under the contract of marriage includes salaries and bonuses, that more specifically refer to bonus income, various income and welfare benefits of one or both parties during the lifetime of the relationship.¹¹⁰ Salary generally refers to the various retributions of work based on the national ranks of the total salaries, including standard salaries, various bonuses, allowances and subsidies with prescribed standards. Bonus refers to the labour remuneration of the total wages by the state, the government and other authorities. These kinds of bonuses have to be included in the common property.¹¹¹

The joint possession also includes the income of production and the functioning of both husband and wife during the whole relationship. The production and the management, referred to one or both spouses registered with the approval of individual enterprises in industrial and commercial activities, is the income obtained in the exercise of productive activities. The law of corporate right and other regulations provide production and commercial activities. If husband and wife use the joint possession to invest on marriage, the income that derives from one or both parties will belong to the common property of both of them and controversies should not appear. If a spouse invests in his personal property, conducts business or invests alone without the consent of the other party, independently whether the income from production or activity should belong to the joint ownership of the spouse, it is established that the income arising from the production and functioning of the couple during the marriage relationship must be the joint property of the couple. This kind of production income include all types of production, from farmers to industry and information technology.¹¹² The legal system of marital property in China is based on a joint system

¹⁰⁹ Peng Kun 彭琨, “Guānyú fūqī gòngtóng cáichǎn de fǎlǜ guīdìng yǒu nǎxiē...”, *cit.*

¹¹⁰ Peng Kun 彭琨 “Nǎxiē shì fūqī gòngtóng cáichǎn?, 哪些是夫妻共同财产?” (What is the joint property of husband and wife?), *Lǜ tú 律图 (Law Chart)*, 20/10/2020. Available at: <http://www.64365.com/zs/634692.aspx> (last access: 05/02/2021).

¹¹¹ Zhang Lizhe 张丽珍, “Fūqī líhūn cáichǎn zěnyàng fēnpèi, líhūn cáichǎn rúhé fēngē, 夫妻离婚财产怎样分配, 离婚财产如何分割 (How to divide the divorce property of husband and wife)”, *Lǜ tú 律图 (Law Chart)*, 29/01/2021, <https://www.66law.cn/laws/9677.aspx> (last access: 05/02/2021).

¹¹² Peng Kun 彭琨, “Nǎxiē shì fūqī gòngtóng cáichǎn...”, *cit.*

of income after marriage. This means that if an income after marriage (including personal investment income) is not agreed, it should be the joint property of the husband and wife.¹¹³

Another type of common property is the intellectual property right that is in possession of one or both spouses during the relationship. It refers to all the results created from the intellectual activities for brands and the reputation of commercial activities, including copyright, related rights, trademark rights, trade name rights, trade secret rights, patent rights, invention and discovery rights and other rights on scientific and technological results. They are a combination of personal and property rights. Personal rights on intellectual property are reserved exclusively to the owners only and not shared in the marriage. A spouse that has an intellectual property signed a contract of usage with another person; besides the fact that the owner of intellectual property has been paid, the remuneration is considered as common property between husband and wife. Moreover, the income of intellectual property refers to the property income obtained during the marriage relationship.

The right of intellectual property has a strong personal nature and is inseparable from the person. If these rights are acquired by a party after marriage, they belong to that party. However, the economic benefits obtained from intellectual property rights all belong to the common property of the husband and wife, such as the share of manuscripts obtained for publishing works or a transfer fee obtained for the transfer of patent. Although intellectual property rights are intangible, they are all "right-based property rights" that can bring wealth. Therefore, in the current divorce cases, the intellectual property rights involved can also be considered as the joint property of the husband and wife.¹¹⁴

Another property taken into consideration is the one acquired from inheritance or presentation. Inheritance income means the acquisition of property rights, not the actual ownership of the property. Even if there is no actual possession before the termination of the marital relationship, as long as the inheritance takes place during the duration of the relationship, the inherited estate should be considered as the joint property of the couple.¹¹⁵

The system of common property is focused more on the family as a whole than the individual. In this system the property that is inherited by a spouse has the same treatment of the

¹¹³ Zhang Lizhe, 张丽珍, "Fūqī líhūn cáichǎn zěnyàng fēnpèi, líhūn cáichǎn rúhé fēngē...", *cit.*

¹¹⁴ *Ibidem.*

¹¹⁵ Peng Kun 彭琨, "Líhūn cáichǎn bāokuò nǎxiē? 离婚财产包括哪些? (What does divorce property include?)", *Lǜ tú 律图 (Law Chart)*, 29/10/2020, <http://www.64365.com/zs/694976.aspx> (last access: 05/02/2021).

other properties: it should be added to the joint property of the couple. In the estate of the will, the estate which the testator has handed over to the spouse to inherit may be regarded as property left to the whole family and if one of the parties is not authorized to share with his spouse, he may specify in the will that the property belongs to only one party. If a property is donated to a spouse, the property is considered as donated to the whole family, but also owned by the spouse. If the donor wishes to donate only to one of the spouses, the donation contract may specify that the property belongs to only one of them.

The last thing taken into consideration are other types of common property in joint possession. It is a general disposition, since the concept of property in Chinese economy is considered in a continuous expansion and the types of property are always growing.

Based on the dispositions of the actual Civil Code and the “Opinions of the Supreme People’s Court on various issues related to the implementation of civil policies and laws”¹¹⁶, the personal property of husband and wife should also include five aspects besides the ones that are present specifically in the law:

- the first one is the prenuptial property of one party, acquired before marriage. It includes movable and immovable property but also incomes and intellectual property. The period defined for premarital property is the date of registration of the marriage. Before the registration of the contract, the property that will become joint-owned, only belongs to one party. After the date of registration of the marriage, a party acquires the property alone or both parties jointly own the property unless otherwise provided by law or agreed by the parties.¹¹⁷
- The second aspect are medical expenses, subsistence allowances for the disabled, etc. received by one of the parties due to physical injury that can be only used as personal property, not as joint property of the couple.¹¹⁸

¹¹⁶ Chén fú zhōng, 陈浮中, “Zuìxīn líhūn cáichǎn fēngē yuánzé shì zěnyàng de?, 最新离婚财产分割原则是怎样的? (What is the latest divorce property division principle?)”, *Lǜ tú 律图 (Law Chart)*, 09/02/2020 <http://www.64365.com/zs/880166.aspx> (last access: 06/02/2021).

¹¹⁷ Peng Kun 彭琨, “Líhūn cáichǎn bāokuò nǎxiē...” *cit.*

¹¹⁸ The analysis underlines the example of when a person had physical injuries and received money as a compensation and sanitary assistance. These expenses were incurred directly as a result of physical injury and were used directly for the specific treatment and consumption damages for disability. Therefore, the compensation can only be owned by the victim, and the other part cannot claim to be divided from the joint property of the husband and wife.

- The third aspect is the property determined by a testament and the donation contract;
- The fourth aspects are called “Yīfāng zhuānyòng de shēnghuó yòngpǐn 一方专用的生活用品”, daily needs for a part, that means those daily needs used by a part on their normal life, for example, clothes, shoes, cosmetics and other special articles that a part uses in the daily routine.
- The last aspect are other goods that should belong to one of the two parties, for example goods that a part should use in order to exercise a job, sanitary expenses, work projects that one of the parties already started and are not connected with the other party, and other goods. Other aspects on personal property also include: the case when parents help to buy the house before the marriage and the contribute will be considered as a personal gift to one of the children (unless parents express officially that the house is a gift they are giving to both of the parties ¹¹⁹). Moreover, during the relationship, the property bought as a personal property by one of the two parties, who causes changes in the material form, will be considered personal property unless stated in a different way.

On the other hand, when is it allowed to divide the property?

During the marital relationship, if a spouse asks for the division of property, the People’s Court won’t do it apart from a few exceptions. The division is allowed if a part hid, transferred, sold or destroyed the common property or if he/she created debts for the family, seen as something that can damage the common interests of the couple.¹²⁰ Moreover, it is permitted to divide the property when one of the spouses has a legal maintenance obligation and requires medical care for a serious illness, and the other party does not agree to pay the related medical expenses. The income generated by the personal property of a spouse after marriage must be considered as the common property of the spouse, with the exception of natural appreciation. In some cases, the property is considered in common even after marriage: if the rights of property on a house bought by the parents of both parties are registered with the name of one of the children, the movable property can be considered joint property of both parties, unless there is a previous different agreement.

¹¹⁹ Wáng Li, 王莉, “Guòcuò fāng líhūn cáichǎn fēngē bǐlì shì zěnmē guīdìng de 过错方离婚财产分割比例是怎么规定的 (How is the ratio of divorce property divided by the wrong party regulated)”, *Lǜ tú 律图 (Law Chart)*, 13/10/2020 <http://www.64365.com/zs/852301.aspx> (last access: 06/02/2021).

¹²⁰ Jiao, C. B., “On Chinese Divorce Property Division Legislation Defects.” *Journal of Tangshan Teachers College*, Vol. (1) 28, 2006.

During the duration of the marriage relationship, if both parties use the joint ownership of husband and wife to buy a house that participates in the housing reform on behalf of one of the parents and property rights are registered in the name of one of the parents, and the other party supports the division of the house according to the common property of the couple at the time of divorce, the people's court will not support it. The capital contribution to the purchase of the house can be treated as a debt.¹²¹

When one of the spouses has not retired at the time of divorce and does not qualify for pension insurance, and the other party requires that the pension insurance can be divided according to the joint ownership of the couple, the court will not support it; the pension insurance premium must be paid by the joint property of the husband and wife after marriage, and when one party claims at the time of divorce, the People's Court should support the division of the husband and wife's common property into the part of the actual personal payment during the marriage relationship on the pension account.¹²²

During the duration of the marriage relationship, the inheritance which a spouse may inherit as heir under the law has not been divided between the heirs and the other party requires division at the time of filing the divorce, the People's Court informs the parties to bring another case after the inheritance has been effectively divided.

When a loan contract is concluded between husband and wife and the joint ownership of the husband and wife is lent to one of the parties for personal business or other personal business, is considered as an agreement between the two parties to have joint ownership of the husband and wife and can be managed in accordance with the loan agreement in the event of divorce.¹²³

Another issue is how to divide the equity when it comes to have a society. In the case of a joint stock company in which husband and wife hold shares, the participation shall not be regarded as an agreement on the joint ownership of the husband and the wife. The shares should be divided equally during the division. If the husband and the wife want to continue to hold shares, the shares shall be divided equally. At the same time, if husband and wife are not prepared to hold shares, half of the share price should be compensated to the reluctant party, the company should be converted into a limited liability company or new shareholders shall be found joining. If the husband and the

¹²¹ *Ibidem.*

¹²² *Ibidem.*

¹²³ Peng Kun 彭琨, "Guānyú fūqī gòngtóng cáichǎn de fǎlù guīding yǒu nǎxiē, *cit.*

wife are not prepared to continue their activities, they may auction or liquidate the assets of the holding and they may divide the assets after the liquidation and cancel the company.¹²⁴

In the case of a public limited company in which one party invests in common properties and shares with others, if the husband and the wife agree to transfer part or all of the capital contribution to the spouse of the shareholder by negotiation, and if more than an half of the shareholders agree and the other shareholders expressly waive their right of pre-emption, the spouse of the shareholder may become a shareholder of the company; if husband and wife agree on the share of the capital grant transfer and the transfer price and if more than half of the shareholders do not agree to the transfer, but are willing to buy the capital grant at the same price, the husband and wife will share the assets resulting from the transfer of the grant into the capital account. If more than a half of the shareholders do not consent to the transfer and do not intend to purchase the capital contribution at the same price, they shall be deemed to consent to the transfer and the spouse of the shareholder may become a shareholder of the company. When one or both spouses use common ownership to invest in shares, as a silent shareholder, during the lifetime of the relationship between husband and wife, if both spouses or one of the parties contribute to their joint ownership on behalf of a third person, and if both spouses are actual shareholders of the hidden name and sign a hidden capital injection agreement with the third person, the part of the property belongs to the common property, it should be divided.¹²⁵

Another important issue in the division of property when the couple decides to divorce is the division of the house. When the topic is about the management of a shared houses bought and built together during marriage or a house bought together before marriage, it is either ways considered a joint property and it has to be divided equally as a common property. When the two parties cannot reach the agreement the People's Court will decide for them: it is accepted if both parties claim to get the house and accept to obtain it by an offer on the market: in this case the evaluation body should evaluate the house at a market price, and a party should be compensated by the other one who obtains the ownership of the house; in the case where the parties do not claim the property of the house, the house will be auctioned based on the request of the parties and the income will be divided. The common practice in the court is that if the shared house can be divided and used it can actually be divided and used, whether if it cannot be used separately it can be assigned to a part as a price and the other one can obtain a compensation. In the moment when in the court judges have to

¹²⁴ Wáng lì 王莉, "Fūqī líhūn cáichǎn fēngē yuánzé dōu yǒu nǎxiē...", *cit.*

¹²⁵ *Ibidem.*

decide to who give the house, the court should always consider the situation on household by both parties and should have in consideration the part who takes care of the children. The court, since their delicate situation, should always have a preference on women.¹²⁶ Moreover, if one of the two parties has economic difficulties the other party should help them, he/she should give assistance and part of their property as an accommodation.¹²⁷

As a general rule, if the house in controversy is acquired after the registration of marriage, it should be determined as a common property; if it is acquired before the registration of marriage it should be recognized as a personal good of one of the parties. If a public house rented by one of the spouses before marriage is a joint possession during the period of marriage, the house is considered common property. In this kind of situations, there are a few scenarios: a public house leased before marriage is acquired on the basis of the distribution of welfare policy and acquired after marriage with the purchase of common property as the property right. Since the exchange value of the right to use the original public house cannot be embodied during the marriage relationship, the separate attribution of the value of the right to use the original public house may not be taken into account when the divorce separates the property.

For public places that were rented by the husband or one of the wife's parents before marriage and purchased by the couple's common property immediately after marriage, the exchange value of the original right of use of the public house refer to Article 22 of the "Interpretation of the Marriage Law"¹²⁸, who is presumed to belong to a parent. The gift of both spouses can be directly divided into common property in the event of divorce. Although the

¹²⁶ Zhèng zhào, 郑召, "Fūqī gòngtóng cáichǎn fēngē bǐlì shì zěnyàng de? 夫妻共同财产分割比例是怎样的? (What is the division ratio of the joint property of husband and wife?)", *Lǜ tú 律图 (Law Chart)*, 14/12/2020, <http://www.64365.com/zs/754899.aspx> (last access: 08/02/2021).

¹²⁷ *Ibidem*.

¹²⁸ Article 22: Before the parties get married, if the parents contribute to the purchase of houses for both parties, the capital contribution shall be deemed to be a personal gift to their children, unless the parents expressly stated that the gift is made to both parties.

第二十二条: 当事人结婚前, 父母为双方购置房屋出资的, 该出资应当认定为对自己子女的个人赠与, 但父母明确表示赠与双方的除外。

[The latest version of the amendment: Zuìgāo rénmin fǎyuàn guānyú shìyòng "zhōnghuá rénmin gònghéguó hūnyīnfǎ" ruògān wèntí de jiěshì (èr)(2017 xiūzhèng) 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)(2017 修正) Interpretation of the Supreme People's Court on Several Issues

Concerning the Application of the Marriage Law of the People's Republic of China (II) (2017Amendment).

Available at: <http://en.pkulaw.cn/display.aspx?cgid=2a94712eabb1b472bdfb&lib=law>. (Last access: 08/02/2021).

purchase is made in the name of one of the spouses, it is not made with the common property of the spouses but with the property of one of the parents.

The last case analysed on the matter of the houses are the ones that still did not obtain the rights of property at the moment of divorce¹²⁹. It means that both spouses did not obtain ownership of the house where they lived at the time of their divorce. Houses that have signed a sales contract during the duration of the marriage but have not obtained a certificate of ownership. If both spouses, as buyers, fail to pay the full purchase price and do not obtain the certificate of ownership, they may be treated in accordance with the relevant regulations. The People's Court should not decide about the property of the house, and the house should be used by the parties according to the actual situation. After the parties have obtained full ownership, in case of dispute, they may file a case with a People's Court separately. If all the price of the house has been paid, the legal relationship of ownership of the house is relatively clear and only need to improve the procedures of registration of the property, the People's Court may recognize the following situations as common property of husband and wife and deal with the property, division and compensation of the house: acquired during marriage, whether in the name of the husband or wife or in the name of the husband and wife, acquired on behalf of both spouses before marriage and lastly, acquired with the common ownership of both spouses before marriage, which belongs to joint ownership before marriage, and the nature of the property remains the common property of the husband and wife after marriage.

When the couples decide to divorce, they can ask for prescription on property. The parties have to request a re-division of the common property within the deadline, because otherwise the request could be not be accepted by the Court. The limit of time on the request of division of divorce is three years, established by the civil code.¹³⁰ The limitation period should be calculated from the date when the right-holder knows or should know that the right has been damaged. If the law otherwise provides, it should do so in accordance with its provisions. However, if the rights are not protected by a People's Court for more than 20 years from the date of the injury, the People's Court may, on the application of the right-holder, decide to extend them.¹³¹ It is also possible to

¹²⁹ Zhèng zhào, 郑召, “Fūqī gòngtóng cáichǎn fēngē bǐlì shì zěnyàng de..., *cit.*

¹³⁰ Peng Kun 彭琨, “Líhūn cáichǎn fēngē shíxiào shì duōjiǔ, 离婚财产分割时效是多久 (How long is the time limit for divorce property division)”, *Lǜ tú 律图 (Law Chart)*, 10/11/2020, <http://www.64365.com/zs/705931.aspx>. (Last access: 08/02/2021).

¹³¹ Zhèng zhào, 郑召, “Fūqī gòngtóng cáichǎn fēngē bǐlì shì zěnyàng de..., *cit.*

withdraw the contract of division. First of all, the contract is a negotiation between the partners, so it can come back before it goes into law. The moment when the negotiation enters in act is when the divorce is completely done, if the negotiation on divorce is still going on, the separation of property is not valid. Before the divorce is managed, the court has to judge and approve the certificate of divorce, only after that the management on the property can have effect and eventually renegotiate. This means that the court can accept some cases where the couple regret the division made within a year from divorce, with an agreement and a request to modify or revoke the agreement of division of property. After the process, if the People's Court does not see any fraud or coercion in the conclusion of the agreement on the division of property, it can regret the request for litigation of the two parties. This means that in case of fraud or other problems, the agreement can be revoked within one year and the division can be requested again. If in the future the joint property of husband and wife should be divided again, the term of prescription for divorce is agreed of one year and the term of prescription is two years.¹³²

2.3 Divorce in China today

2.3.1 The Structure of the Divorce Law

In the contents of this chapter it was highlighted how in the questions of ownership divorce constitutes a crucial topic. The development of the law is strictly connected to the analysis of the last chapter of this work. The freedom of divorce, as long as the freedom of marriage is considered today crucial in China, since it is the expression of individual freedom: the main difference between them is that marriage has always been recognized as a fundamental right years before the right of divorce. When divorce in China started to be taken into consideration as a proper solution to end the marriage, the society was still not ready and it was considered as an egoistic and individualistic choice, whereas Chinese society was more connected with the idea of collectivism. When divorce started to be considered as a normal process in the personal life of a couple, this did not mean that everyone could obtain it without problems: it was usually the choice of the husband and it was made with the repudiation of the wife. It is interesting to underline that in the earlier stage of the practice of divorce, judges in the courts were still attached to really conservative ideas and it was really difficult for women to get divorced, meanwhile for men was really easy and they could ask for divorce even with the simple purpose of marrying other women.¹³³

¹³² *Ibidem*.

¹³³ Farrer J. & Sun Zhongxin. "Extramarital Love in Shanghai." *The China Journal*, No. 50, pp. 1-36, 2003.

The situation changed after 1980, when in the social context of modernization, the couple started to be considered as a private nucleus and marriage itself was not anymore something that the family decided for the couple, but it became a personal choice. As long as the privatization of the marriage concept, even divorce started to be considered as a private matter, and one of the reasons why a couple could get a divorce could be the lack of love between them.

The structure in the section of Divorce in the Marriage law (which is included, from the beginning of 2021, in the Civil Code) analyses general norms that include the rights of the spouses, the question of children and the property. The first Article (Art.31) states the general principles that provide the freedom of divorce and the fact that the court should allow the two parties to get divorce if both of them are willing to do so. Moreover, it also states how the marriage registration office should give the couple a certificate of divorce in the case both husband and wife agreed and they do not have disputes on property or children. After the promulgation of the law and especially after its revision in 2001 there was a huge increase of the cases of divorce, especially thanks to the Article 24 (that became 32 in the 2001 revision) ¹³⁴ that showed the cases where mediation fails. With this situation it became easier to start and end divorce proceedings. Since the judges often lacked professionalism, in a first moment it was really difficult to have a balance in the divorce cases. To help to cope with this situation the Supreme Court in 1989 published an Opinion with 14 cases. The main purpose was to help the judges to consider during divorce agreements the reasons of the lack of affection and to analyse if the affection between the couple was really compromised. If the law of 1980 was important to create the system of a divorce without fault (no-fault based), with the law of 2001 there was a definitive passage into the modern concept of marriage and divorce. The Law of 2001 does not modify the article 32 itself but it adds some obliged cases that the judge can pronounce in cases of divorce. In the revised Law the 14 cases were reduced to 5. The amendment still left judges with a great deal of discretion because it did not really give a detailed

¹³⁴Article 32: Where either the husband or wife applies to get divorced, the departments concerned may make mediations, or he or she may file a suit at the people's court for divorce. The people's court shall make mediations in the process of hearing a divorce suit; divorce shall be granted if mediation fails because mutual affection no longer exists. Divorce shall be granted if any of the following circumstances occurs and mediation fails:

- a. either party is a bigamist or a person who has a spouse but co-habits with another person;
- b. there is family violence or maltreatment or desertion of any family member;
- c. either party is indulged in gambling, drug-abuse or has other vicious habits and refuses to mend his or her ways despite of repeated admonition;
- d. both parties have lived separately due to lack of mutual affection for up to two years;
- e. other circumstances that have led to the nonexistence of mutual affection as husband and wife.

If either party has been declared by court as to be missing and the other party applies to be divorced, divorce shall be granted.

interpretation for other situations (for example the case of a party sentenced to prison or the case of disease for sexual intercourse were not present in the revision).¹³⁵ Moreover, the seriousness of the cases is left to the judge choice: besides the part about domestic violence the Opinion of the Supreme Court does not really give interpretations about words like “affection discord or “desertion”.

Under this situation and a dominant practice of mediation in China many people believed that a mediated reconciliation was the dominant *modus operandi* for practice of divorce: before 1980 it was common for the judge to first investigate the real reasons of divorce, then he would emphasize family and social stability with the purpose of convincing the couple to understand which were the values that a proper Chinese family should follow. It was really common for the couple to “confess” their mistakes in court and they ended up considering divorce as a bad option.

After 2001, several scholars kept noticing for many years how common that kind of mediation was.¹³⁶ However, today, especially in bigger cities, the practice of mediation is less common, couples that decide to get divorce today are affected by mutual consent, not only a husband’s choice. An interesting analysis on mediation is made by Xin He¹³⁷ with the conclusion that in the late 21st century a common form of adjudicated denial has replaced the mediation reconciliation, even if several judges preferred mediation because there was not need of enforcement nor risk of being appealed against. When adjudicated denial replaced mediation reconciliation a certain number of mediated reconciliations were still created. Moreover, when the parties have to separate property and they have to decide on the custody of the child, disputes on property arise.

Article 36 of the Revised Law states the duties of both husband and wife to rise and educate the children and that after a divorce they are still considered children of both parents, with the add that the mother has the custody of a “breast-fed infant after divorce”. After this period and if there is a dispute on the custody of the child the couple can discuss it in the court and the People’s Court can judge the situation in accordance with the rights and interests of the child and the situation of the parents. It is also relevant to notice that especially in rural areas mothers do not get the custody of the child, even if the law gives that kind of right to women: this is mainly because women that belong to a traditional environment are obliged to go away from the house, without the permission to take with them their children and the husband will take care of them (in these areas for some

¹³⁵ He, X. “Routinization of Divorce Law Practice in China: Institutional Constraints’ Influence on Judicial Behaviour”, *International Journal of Law, Policy and the Family*, No. 23(1), pp. 83–109, 2009.

¹³⁶ *Ibidem*.

¹³⁷ *Ibidem*.

women is also difficult to get married again after a first divorce, because their reputation is compromised).¹³⁸

Article 37 is about the living and necessary expenses for the children, that have to be borne by the parent who does not have the custody. Article 38 states that the parent who does not have the custody has the right to visit his or her child and if there are not agreements the court will make a judgement on how to divide the time. If the child is having problems with the other parent (not conducive to the physical and mental health of the child), the People's Court can decide to terminate the relationship.¹³⁹

In general, in divorce proceedings, the issues on custody of minors are supplementary and collateral to divorce issues, which means that parents will act both as the parties concerned in divorce proceedings and as the representatives of the child.¹⁴⁰ In several cases parents are already exhausted with the disposition of property, and the judge would probably just accept the parenting arrangement decided by the parents. In these cases, the arrangements made on custody and visitations will probably not be on the best interests of the child.¹⁴¹

2.3.2 Compensation of Damages and the Assistance for Women inside the Divorce

When a couple gets a divorce important issues arises, especially when the problems are related to the division of property: in these disputes an important practice is the compensation of damages, that sometimes gives to one of the spouses the right to claim compensation and to the other one the fault for a series of cases.¹⁴² The fifth chapter in the Marriage Law called "Salvage Measures and Legal Liabilities" contains these provisions on compensation. Article 46 states that when two parties get a divorce in some circumstances one of them can claim for compensation: "when bigamy is committed, when one party who has a spouse cohabits with another person of the opposite

¹³⁸ Chen, W., *Studies on Chinese Marriage and Family Law Legislation*. Beijing People Press, 2000.

¹³⁹ All the Articles about divorce are available here: Zhōnghuá rénmín gònghéguó hūnyīnfǎ 中华人民共和国婚姻法 (Marriage Law of the People's Republic of China), 28/04/2001, available at: <http://www.lawinfochina.com/display.aspx?id=1793&lib=law>.

¹⁴⁰ Chen, W., & Xie, J. "A commentary on the principle of the child's best interests-the weakness and improvement of marriage and family law", *Frontiers of Law in China*, Vol.3(1), pp.51-64, 2008.

¹⁴¹ *Ibidem*.

¹⁴² Xu Li, "Compensatory Damages in Divorce Proceedings Under the Marriage Law of China", in *Perspectives on Contemporary Legal Developments in Chinese Law*, Singapore Journal of International & Comparative Law, 2003.

sex, when violence is committed and when a family member is maltreated or abandoned”. The category of compensation for damages inside the divorce is considered as a different topic than the damages present in general in the Chinese juridical system. On the 27th December 2001, the Supreme Court published an Interpretation on the question of compensation, stating what the judge should intend for damage: not only damages on the property (as for example the bad management of common resources) but also physical damages and moral ones, as for example a bad trauma after marriage.

The compensation for damages is a good method to help a victim that is in a disadvantaged position inside the couple. Even if both men and women have the same rights as a basic principle in Chinese law, it is usually the woman who seeks for help. The essay *Mínfǎ diǎn shìjiǎo xià líhūn cáichǎn fēngē zhàogù wú guòcuò fāng de lǐlùn yǔ shíwù tànsuǒ* 民法典视角下离婚财产分割照顾无过错方的理论与实务探索¹⁴³ underlines how many request for compensation made by women often did not work out and that the legislative effect in the Chinese system was not the one that the court would expect: many problems arise during the years, especially on the protection of women.

The main problem in marriage and compensation is the one related to the system of financial assistance, the traditional method to divorce. Since 1950 the law helped people who did not get married again and had difficulties in life after marriage, but it presented and still presents several problems.

First of all, the system adopts the absolute standard of “difficulties in life” that tends to extremize and to render the applications too strong. In the various interpretations of the law there are different explanations of the word “difficulties”: it was considered as the incapacity of maintaining a basic life based on the personal property or the one assigned after divorce. If one party does not have a place where to live, it has to seek for help. But as the scholar Wang Geya¹⁴⁴ states, this explanation was vague and ignored the real difficulties in life of women when they got divorced. The conditions of application of the absolute difficulty of life for women made the application of this kind of system of assistance too difficult and some women that got divorce could not obtain the compensation they deserved. Moreover, there are not specified regulations related to the financial assistance and the legislation tends to be really abstract. The law provides financial assistance for divorce as it follows: “during divorce, if a party has difficulties in life, the other party

¹⁴³ Yáng héng 杨姮, “Mínfǎ diǎn shìjiǎo xià líhūn cáichǎn fēngē zhàogù wú guòcuò fāng de lǐlùn yǔ shíwù tànsuǒ...”, *cit.*

¹⁴⁴ *Ibidem.*

that can afford has to give a good assistance and if the agreements fails the court will decide on a sentence” (Art. 42). This regulation did not solve the problems right above, it did not respond positively to the specified connotations and definition of “life difficulties”, neither specified the origin, the form and the entity of the patrimony for the controversies that needed assistance.

With the system of compensation there are three main problems:¹⁴⁵

- First of all, the legal reasons listed to ask for compensation are too limited and generic, the legislation just lists four reasons but the cases where the marriage is violated are a lot more. The law tries to add more guilts to the four cases supra mentioned but the application of the dispositions has still to be proved in the practice.
- A second problem is the difficulties that women encounter when they have to show proves. There are a few situations where the party that is considered as the “victim” could not be compensated because it did not present valid proves, also because of the question of privacy and the protection of the other party. The intrinsic ethic and the privacy of marriage do not help to collect proves. On the other hand, the reduction of the rights of divorced women is strictly connected with the strength of the proves. For example, when women ask for compensation on damages after divorce, the reasons to ask for a compensation, as bigamy, domestic violence, are more difficult to prove due to their strong privacy.
- The third point is that is difficult sometimes to analyse the amount of damages, especially mental damages, that a lot of times request the discretionarily of the judge.

In the past year, to May 2020, there were more than 1.714.181 cases of controversies on divorce, in which women had to deal on question of separation, children and division of property. In the last years divorce has increased a lot, from 2014 to 2018 it has passed from 2.7% to 3.2%. Women in the past have been in a bad position also to their disadvantaged role in the social division of job. Even though freedom is officially recognized, there are still insufficient protections on the division of property, on the children’s stability, financial assistance on divorce and the compensation on damages. The common practice is that women are recognized as the ones that just take care of the household and many judges do not take care of their changed role in the society. Since their role in the society is everyday more important, controversies in the latest years have increased.

¹⁴⁵ Jiang Dong, “China’s latest Marriage Law Amendment...”, *op.cit.pp.604/605*.

The research on the article written by 杨姮 (Yáng héng)¹⁴⁶ proves first of all, how Article 32 of the revised Marriage Law is one of the most discussed in court, how it has been quoted in many trials and its application is strictly connected to the freedom of divorce for women. In the disputes, where women are the ones who ask to get the divorce, the reasons that led them to go to the court can include disappointment, frequent quarrels, lack of communication, problems of violence or cheating. In many cases, the judge would try first to mediate and to see if there is hope for recovery, especially if the couple has children and if the wife does not have enough proves for the divorce.

Secondly, this survey analysed how several cases when controversies arise are related to the maintenance of children and the organization of visits by one of the parents who does not live in the house anymore. In the Law on the protection of women there is a provision for women that become sterile, to help and give them more privileges:

“Art. 50: At the time of divorce, if the wife becomes sterile because of the sterilization operation or any other reasons, the problem to bring up the child (children) shall be so handled that, while to the advantage of the rights and interests of the child (children), due consideration shall be given to the wife's reasonable demands.”¹⁴⁷

However, in the processes of divorce, it is not easy for both women and men to achieve an agreement on the custody of children. In the judiciary practices besides the statements of the law on the division of children and how to act when they are little, it is important to act on the maximization of their interests: this means to analyse the economic and psychological conditions of both parents and often even if the legislation gives assistance to women with children of less than two years old, in the division of family they are the ones that do not own money and do not have a solid income. Even though they have protection, the principle established in the law does not give to women the right to obtain directly the custody of the children. For what concerns the visits the legislation clearly says that the part that does not have the custody has the right to visit and the other one to accept it, unless said in a different way during the trial.

¹⁴⁶ Yáng héng 杨姮, “Mínfǎ diǎn shìjiǎo xià líhūn cáichǎn fēngē zhàogù wú guòcuò fāng de lǐlùn yǔ shíwù tànsuǒ..., *cit.*

¹⁴⁷ Zhōnghuá rénmín gònghéguó fùnǚ quánlì bǎozhàng fǎ (xiūzhèng) 中华人民共和国妇女权利保障法 (修正) Law of the People's Republic of China on the Protection of Women's Rights (Amendment), 03/04/1992 (revised in 2005), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/Protection%20of%20Women%27s%20Rights.pdf> (last access: 25/01/2021).

Thirdly, the survey shows how the division of property in the trials has been quoted more than 25.000 times, meaning that nowadays is a huge debate in the courts and women are more aware of their rights. Even if the law establishes the common property of husband and wife, with the diversification of the economic development, the increase of the incomes of the families and the vacuity and uncertainty of its dispositions (still not really strong in the Chinese legal system), difficulties in the judiciary practises can be overwhelming. The Chinese legislation provides the protection of women and children, but in the reality, the application of this principle in the question relative to the house and other type of properties is inferior than other principles. Their rights during the questions of divorce are not always cared. This means that in the law the dispositions try to be in favour of the rights of the women and to protect them, while in the court, as we will see in the cases that will be analysed the lack of specific real dispositions does not help the women.

The difficulties of the judiciary application on the matter of divorce is not only related to the proves that women have to present but also to issues related to the roles inside the courts¹⁴⁸. First of all, the role of the judge is insufficient. In the process of divorce, the court has a central role in validate and actuate the dispositions on marriage and it should also take care of the protection of women. The issue is that the court many times does not really care to protect women's rights and the situation tends to show a lack of enthusiasm in the battle for their freedom. Since the number of cases is generically relatively high, judges have to consider the question of the efficiency in the management of the cases. Women who were for a long time in a disadvantaged position, especially rural women, do not know how to apply the law to protect their rights due to their really bad juridical awareness. Some of them just give up easily and do not fight for their rights also because it is difficult to prove some evidences due to privacy problems: courts should also help women to have more awareness of the law and their rights. A second problem is that the court does not have enough departments and people specialized in the protection of women's rights. Courts did not create special departments to deal with these special cases, neither they received a specialized formation for judges, ignoring cases that involve the protection of divorced women's rights. The third problem related to the inefficiency of the judiciary system is the bad education in in the courts on these matters and to the problem of the profession: in the questions related to divorce, one of the reasons why women find difficulties is that some of them cannot seek for help from professional institutions or lawyers because they have financial problems or they cannot present good requests.

¹⁴⁸ Yáng héng 杨姮, "Mínfǎ diǎn shìjiào xià lǐhūn cáichǎn fēngē zhàogù wú guòcuò fāng de lǐlùn yǔ shíwù tànsuǒ...", *cit.*

2.3.3 Domestic Violence

Besides the problem of compensation, another last important issue to mention in marriage is domestic violence and the development of the laws on the protection of women. It is relevant to analyse violence also because it is strictly connected with the question of divorce and the rights on property. The interest on the study of violence was brought up principally in the late Seventies of the past century, but only in the late years governments worldwide started to pay real attention on the topic and started to analyse the situation in terms of the rights of women.¹⁴⁹

In a first moment when women started to ask for help and demanded equality with men they would be just ignored and their requests of getting divorce would not be considered. This kind of treatment was common during the years of Maoism and changed just in recent years even if women still today find difficulties to prove violence and other questions on divorce. It is clear that a lot of problems have been present during the years also because the society in China was deeply patriarchal, women were obliged to obey and when violence happened, they were just too scared of the reaction of the society against them and they would not denounce or ask for divorce for fear.

In the traditional concept, the problem of violence, as well as problems as bigamy or cheating, had to be an exclusively private phenomenon, it stopped for a long time the courts from dealing seriously with problems like those and created a lot of obstacles for women. On an international level, the United States' Violence Against Women Act (VAWA) of 1994 was the culmination of many years of struggle by women's rights advocates to get the legislature to address a near epidemic of domestic violence. These acts included: increased penalties for sex abusers, a doubling of the maximum term of imprisonment for sex offenders and the authorization of severe federal sentences for abusers who travel interstate with the intent to injure or intimidate a domestic partner.¹⁵⁰ An important change was made in the Women's Fourth Worldwide Conference, in 1995. In that period, after the conference, a lot of organizations with the purpose of sensitize on the matter of violence, with education in the schools and legal assistance for the victims.

A first draft on a law against violence was suggested by the China Law Society, the last one is related to 2011 and in the first draft of the domestic violence law on the 25 November 2014, the law was passed by Parliament in July 2015, and took effect on March 1, 2016. The law reaffirms the advancements made in previous laws. Before 1995, the year of the first conference, laws in

¹⁴⁹ Hao J. "Legal Countermeasures for Domestic Violence: From the Perspective of Family Law in China.", *Frontiers of Law in China*, No.5(2): pp. 302-318, 2010.

¹⁵⁰ Ogletree Jr, C. J., & Alwis, R. de S., *Op.cit.pp.*260-270.

China did not have the expression of “jiatingbaoli 家庭暴力”, but in laws like the marriage one all the topics on domestic violence were indicated as: “kill”, “insult”, “hurt”, in a generic lexicon. The domestic violence expression appears for the first time in the revision of the law in 2001¹⁵¹, when the legislator introduces the concept of “jiatingbaoli 家庭暴力” and he gets more specific on what are the cases where the spouse can be denounced.¹⁵² However, what it is missing in the law is a specific definition of the category of domestic violence and there is in general a technical problem for the courts on what could be condemned as domestic violence. This led the Supreme Court to talk about the matter on the first interpretation of the law, in 2001, where it defines what can be considered as a proper domestic violence,¹⁵³ after the promulgation of the law and the articles about violence (the section on remedies provides protection of the family members that are victims of violence¹⁵⁴). This interpretation emphasized physic violence more than the psychological one and did not include the sexual violence either.

It will be also seen in the analysis of the sentence on the next chapter how in court women who suffer of domestic violence still nowadays do not receive any help and court tend to not believe them.

¹⁵¹ In the chapter on the Salvage Measures and Legal Liabilities, Art. 43 states if a person indulges violence or maltreats a family member the victim has the right to ask for help in the court and the person can be investigated for criminal responsibility in accordance with the law.

¹⁵² Hao J., *op.cit.pp.*310-315.

¹⁵³ It was considered a “conduct by which a person causes proven physical or mental injury to a member of his family through beatings, mutilation, coercive restrictions on personal liberty or other methods. Frequent and continuous family violence constitutes ill-treatment.”

¹⁵⁴ Article 43 of the Marriage Law: In the case of family violence or maltreatment of any family member, the victim thereof shall be entitled to make petitions, and the villagers' committees, the relevant urban residents' committee, villagers' committee or the entity where the victim is a staff member shall make dissuasions or mediations.

The victim shall be entitled to make petitions concerning the family violence that is happening, and the relevant urban residents' committee or villagers' committee shall make dissuasions, and the public security organs shall stop such acts.

Where the victim of family violence or maltreatment makes a petition, the public security organ concerned shall give administrative punishment to the actor according to the provisions on the administration of public security.

3. Analysis and Translation of Two Sentences on Divorce and Right of Ownership

3.1 Preliminary Details

In the matter of the controversies related to property, the law provides to help victims of injuries and the court has the duty of taking legal actions to defend them.

Even if women in China under law legislation have a status of equality, discriminations have been a real problem in the cases of divorce, protective measures are present but, in the reality, women face a lot of challenges in equitable ownership of property in marriage and property distribution in divorce. In the past years women's access to economic resources within the family has been restricted and this economic marginalization had as a result a deprivation of other important rights regarding the property as well.

The first case analysed is related to domestic violence and divorce. The first time that domestic violence was mentioned in relation with property was when in 2011 in the draft of the law it was included in the category the damages on economic control and not only physic, psychological damages but also damages on property. Moreover, the phenomenon of violence is really reflected also in the problem of divorce and the issue of division of property. The matter of divorce in the context of violence is vague in the Chinese legislation, because still nowadays it is related as one of the possible solutions that the victim can ask for, as a last remedy. On the topic about the division of property, it takes in consideration these factors also as a compensation on damages in the guide of the Supreme Court: the victim has to receive a common property of at least 70% that can be increased to the 80% if the other spouse tries to hide or transfer money of the common property in the moment of the division during divorce practices. The victim in the case violence is the reason for divorce, cannot get a diminution of the property or in general of the type of life that was having before divorce. The tribunal has to protect the interests of the victims. In recent years women started to have more protection but a lot of rights are still denied.

The second case analysed includes transfer and debts towards joint property: generally, the term of prescription to ask for a new division of property for hiding, transfer, sell or destruction of the property or for falsification of debts is of two years, calculated from the day after the parties discover them. Article 47 gives the right to one party to ask again for a division of property in the cases where the other party tries to destroy it. If a modify or revoke on the contract is requested, a

cause between husband and wife has to be requested within a year, and it has to confirm the validity of the agreement on the joint property or to regret it, with the purpose of modification or annulment. If the sharing of the spouse is omitted from dividing in the moment of divorce, the term of the litigation to ask to divide the property again is still two years.¹⁵⁵

An example provided in the essay on the revision of the Marriage Law¹⁵⁶, shows how in some cases husbands feel the right to not tell how much money the couple has in the banks, men take care of all the saving of the family and in that case specifically, the husband spent moneys on extramarital affair and when he had to confront her, he just used violence against the wife. Therefore, when he asked for divorce, she sued the husband and asked for a proper division of property. The main problem in the matter of separation of property is that even if in appearance the women are safeguarded and as it was analysed previously, the law provides them a priority when it comes to give houses and general protection, they have very little knowledge of what property is, they have little recourse to trace property when it is illegally transferred to a third party by a spouse. The law in China states that during marriage neither side of the two spouses can transfer property without the consent of the other party. The problem is that even though the law states otherwise, it fails to protect women's rights. With weak procedural laws, it is difficult to gather real evidence on property transfers and women do not even know how big the property of the family is, even because of their poor education and low social status they are not aware of their rights. Although an husband's transfer of property in common to a third party without permission is not valid, women find a lot of obstacles. First of all, the property that they have to transfer has to be proven to be common property and not a personal property of the husband. Secondly, if the buyer bought the property in good faith, the sale is valid and the party that is transferring the property has to repay the other part. This means that nowadays the challenges proving the ownership of property constitute an insurmountable burden to women in China¹⁵⁷. A second problem related to the same case is the problem of Shared Debt: debts in the marriage law are considered a responsibility of both husband and wife. Common debts are for example the costs regarding the children raising or the care of elders, houses together and purchase of articles for daily life, or the cases of means of

¹⁵⁵ Zhang Xiaoli, 张晓黎, "Líhūn hòu cáichǎn fēngē sùsòng shíxiào, 离婚后财产分割诉讼时效 (Limitation of Property Division Actions after Divorce)", *Lǜ tú 律图 (Law Chart)*, 27/03/2020, <https://www.66law.cn/laws/314401.aspx> (last access: 11/02/2021).

¹⁵⁶ Ogletree Jr, C. J., & Alwis, R. de S., *Op.cit.pp.* 260-270.

¹⁵⁷ *Ibidem.*

production in the cases the couple have work responsibilities together. On the other hand, debts for personal benefits have to be borne individually.

The question of debts is already present in the Article 41 of the revised law¹⁵⁸, but it is interesting to take into consideration that in the moment in which the parties have to pay back the debt, the party that has not the economic possibility and has social problems, most of the cases the woman, should be exempted by the repayment. Moreover, on this issue, the revised law article underlines how there are certain gaps in the law that have a huge discriminatory impact on women: “For example, loans taken to cover educational expenses are not considered a personal debt and have to be shared in common. Most often, debt is incurred for a husband's education and/or specialized training, and the wife will be called upon to share in repaying the loan upon the dissolution of marriage. Even though only one party continues to benefit from the education, the debt is considered to be a common debt to be shared by both parties at divorce.”¹⁵⁹ The first case will be focused on how the court often act against women and deny divorce even when they prove violence and reasons to obtain it, the second case is more related to the controversies on transfer of property and joint debts.

3.2 Domestic Violence: the Case of Shang XX and Wang XX

The following case is between a couple where the appellant is the wife, Shang XX and the defendant Wang XX, the husband.¹⁶⁰ They both took part of the litigation in court. The preliminary analysis of the case stated that the couple celebrated marriage and went for the registration in 1993, in the municipality of Xuijiahe. Moreover, the couple started to have problems in the relationship only in the latest years:

¹⁵⁸ Article 41: At the time of divorce, the debts jointly incurred by both husband and wife for the common life shall be paid out of the jointly owned property. If the jointly owned property is not enough to pay the debts or if the property is individually owned, both parties shall agree upon the payment of the debts. If both parties fail to reach any agreement, the people's court shall decide on the payment of the debts.

¹⁵⁹ Ogletree Jr, C. J., & Alwis, R. de S., *Op.cit.pp.*280-300.

¹⁶⁰ “Shàng mǒu mǒu yǔ wáng mǒu mǒu líhūn jiūfēn shàngsù àn, 尚某某与王某某离婚纠纷上诉案 (Appeal Case of Divorce Dispute Between Shang XX and Wang XX)”, 24/11//2014. <https://www.pkulaw.com/pfnl/a25051f3312b07f39e0127050d92b0c808fd00b3736a394dbdfb.html?keyword=%E5%B0%9A%E6%9F%90%E6%9F%90%E4%B8%8E%E7%8E%8B%E6%9F%90%E6%9F%90%E7%A6%BB%E5%A9%9A%E7%BA%A0%E7%BA%B7%E4%B8%8A%E8%AF%89%E6%A1%88> (last access 14/03/2021).

“2013年9月尚某某受伤在庆阳市人民医院住院数日。2014年2月，尚某某离家外出打工，双方分居。后尚某某起诉要求离婚。”

“In September 2013, Shang XX was hospitalized in Qingyang People’s Hospital for several days. In February 2014, Shang left home for work and the couple separated. Afterwards, Shang sued for divorce.”

From a preliminary analysis it is clear how in this divorce sentence the husband does not really want to accept the divorce request and how the court wants to deny the marriage. The fact that the couple does not have any other problems regarding property, children and other marriage issues will not help Shang to win the cause, but the court will try to find every reason to not believe Shang’s words on domestic violence. It is clear that the problems started only several years after marriage.

3.2.1 The Process and Analysis of the Case

Shang was the party that sued for divorce. The main reason why she asked for divorce was the domestic violence she had to suffer while living together. She also presented few photos of injuries.

The process consisted in two trials: the court of first instance rejected at the beginning Shang’s statement and request for divorce, because it was not clear that Wang actually hurt her and the court judged that the proves of the injuries she presented not enough to grant divorce: on the basis of the Article 32 the couple was declared not enable to divorce.

The wife still presented a second appeal: in that second appeal she declared how the couple was obliged to get married and since day one of marriage their relationship was not good, she also stated (without any proves) that besides domestic violence, Wang cheated on her too. Shang declared that the relationship was broken since 2013, when they both started to work abroad and when she was hospitalized because of the violence he caused. The relationship was officially interrupted on February 2014. Shang in the second instance request clearly tried to ask for a revision of the trial, she blames in this situation the lack of love between the two of them, stating that even before marriage the couple lacked of “liaojie, 了解”, understanding:

“尚某某不服环县人民法院上述民事判决，提出上诉称：上诉人与被上诉人系父母包办成婚，婚前缺少了解，结婚后关系一直不睦。被上诉人有严重的暴力倾向，并公然与其他异性保持不正当的男女关系。”

“Shang XX refused to accept the above-mentioned civil judgment of the Huan County People's Court, and filed an appeal stating that: the appellant and the appellee were arranged to get married by their parents, they lack of understanding before marriage, and the relationship has been incompatible after the marriage. The appellant had serious violent tendencies and openly maintained inappropriate relations with other men and women of the opposite sex.”

In this second instance trial Wang refused all the accusations of Shang, stating that he did not assault nor cheated on Shang and that the two of them just decided to separate. He also claimed the fact that he was not a bad person and also helped financially for the education of their children:

“王某某称尚某某离家后，三个孩子的生活及学习费用均由其承担，2014年农历二月尚某某离家后双方分居。尚某某对王某某的陈述认可。”

“Wang XX claimed that after Shang XX left home, the living and study expenses of the three children were borne by him, and that the two separated after Shang XX left home in February 2014.”

Shang, on the other hand stated how when he beat her, she was afraid to go to the police because of what this could cause to the children's education and life, stating that she was afraid that if he would have problems with the police then the family would start having economic problems. Since they did not seem to have problems with the common property and he even helped the family after their separation, the court just confirmed the facts of the first instance, stating that since the couple has been married for more than 20 years, they should understand each other and try to have a better relationship. Therefore, it was not possible to establish the appeal for divorce:

“且双方于2014年2月分居，原审判决不准予离婚，符合《中华人民共和国婚姻法》第三十二条第三款第（四）项“因感情不和分居满2年的”等规定的情形。依据《中华人民共和国民事诉讼法》第一百七十条第一款（一）项、第一百七十五条之规定，判决如下：驳回上诉，维持原判。”

"Furthermore, the two separated on February 2014, and the original judgment did not allow the divorce, which complies with the "Chinese People's Republic of China Marriage Law" Article 3, paragraph 3 (4) "because of emotional discord and separated for 2 years"

In accordance with the provisions of Article 177, Subparagraph (1) and Article 117 of the "Chinese People's Republic of China Litigation Law", the judgment states as follows: the appeal is rejected, and the original judgment is upheld."

The process was concluded with the deny of the divorce appeal and the couple had to try to rebuild their relationship.

The case just described is interesting to analyse for a few reasons. First of all, the topic of divorce and domestic violence: as the essay by Michelson¹⁶¹ addresses “in China, uncontested no-fault divorces are readily attainable outside the court system. Courts, by contrast, granted divorces in fewer than half of the cases they adjudicated. Despite an abundance of formal legal mechanisms designed to provide relief to victims of marital abuse, a plaintiff’s claim of domestic violence does not increase the probability the court will grant the divorce request. Chinese courts’ highly institutionalized practice of denying first-attempt divorce petitions and granting divorces on subsequent litigation attempts disproportionately impacts women and has spawned a sizable population of female marital-violence refugees. These findings carry substantive and theoretical implications concerning the limits and possibilities of the local penetration of global legal norms.” This case shows how the courts do not take care of the evidences that women present nor the needs of women when they ask for divorce. Shang was not believed, even if she tried to prove the violence and to show how he did not respected the marriage by repeatedly cheating on her, the court did not take into consideration her needs.

Another important issue is how when she was desperate, she stated in court that they did not love each other. Since in the first instance the court did not believe in the domestic violence, she appealed on the idea of the lack of “*affectio maritalis*”.¹⁶² Moreover, the fact that they did not seem to have other problems seemed to not help Shang. Wang also had a reason to be believed by the court: he was financially helping his family and assured that his kids could have an education, he was a good father, the court found a way to believe that the violence actually did not happen.

The question of property is brought up in a few parts of the sentence. It appears at the beginning where it describes the joint property of the couple:

“夫妻共同财产有：农村住宅一处（婚前修建）、“时风”农用三轮车 1 辆、150 型摩托车 1 辆、“长虹”双缸洗衣机一台、牛 1 头及粮食若干等。”

¹⁶¹ Michelson E., “Decoupling: Marital Violence and the Struggle to Divorce in China”, *Indiana Legal Studies Research Paper* No.399, pp.1-125, 2018, Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3245030>.

¹⁶² One of the reasons why divorce is permitted, in Article 32 is “where both parties have separated from each other for two full years for lack of mutual affection.”

“The common property of the husband and wife includes: a rural house (built before marriage), an agricultural tricycle “Shifeng”, a 150-type motorcycle, a “Changhong” double-cylinder washing machine, a cow, a few grains, etc.”

The second part where the property is mentioned is during the second instance appeal, when the court declared that the couple decided to divide the property equally. It is interesting to underline how in China was common for women many times to have cruel and violent husbands that in the moment of divorce would try to take the house and leave them without anything. In this case Wang apparently was not cruel and probably that is another reason why the court succeeded to convince the couple to try for marriage again.

This case shows how divorce is often hard for women in China, how even if China tries to promote gender equality courts often ignore and use abuse claims to justify denying women’s divorce petitions. The fact that women claim on violence does not support them and does not improve their chances of obtaining a divorce, sometimes (as the case of Shang) is also not productive.¹⁶³ The final judgement of the court also proves how even if Chinese law says that mutual consent is a condition of divorce, mutual consent is important at the end in the court trials: the courts can change their minds if one of the parties (especially men) does not approve the divorce and what happens most of the times is that defendants oppose divorce in almost half of all adjudicated divorce trials.¹⁶⁴ Moreover, the case shows how the controversies described in the second chapter are really common. As we saw, divorce requests are known to be increased in the past years, but this led also to an increasing of a few problems for women. For Shang it was impossible to obtain the divorce, and that shows how courts do not take care of women’s role in the couple. Even if the law and its improvement apparently help women and recognize the equality within the couple, the system has too many contradictions and it does not protect them. What we saw in the description of the divorce in the previous chapter and can be connected with the case of Shang and Wang was how the judges try to mediate and to see if there is a hope for the recovery, especially when the couple has children, but also how the judge does not take care at all of the fact that she even has proves. The judge in this case is a perfect example of how in China they are still too attached to the idea of harmony and to a traditional concept of family, as something that has to appear strong and connected with the idea of the government stability. However, in families like the one of Shang, it would have been necessary to help her to get the divorce and the court lacked sensibility and empathy.

¹⁶³ Michelson E., op.cit.pp.10-25.

¹⁶⁴ *Ibidem.*

3.2.2 Translation of the Case

Appeal case of divorce dispute between Shang XX and Wang XX

Intermediate People's Court of Qingyang City, Gansu Province

First Civil Judgement of the Intermediate People's Court of Qingyang City, No. 668/2014

Appellant (plaintiff in the original trial) Shang XX

Appellee (defendant in the original trial) Wang XX

The appellant Shang XX filed an appeal against Civil Judgment No. 1055 of the Intermediate People's Court of Huan County (2014) for the divorce dispute between her and the defendant Wang. After its acceptance, the Court constituted a collegial panel in accordance with the law and held a public hearing. The appellant Shang XX and the appellee Wang XX both attended the court and participated in the litigation. The case has now been concluded.

The investigation found that: on the 4th October 1993, Shang XX and Wang XX held a wedding and went through the formalities of marriage registration at the People's Government of Xujiahe Township, Huan County. The eldest daughter of Wang XX is a student at Lanzhou University of Technology; the second daughter is now studying in the first year of the Middle School of Huan county; the last son graduated from Xujiahe Junior High School. The two parties have had conflicts over family trivial matters in recent years. In September 2013, Shang XX was injured and was hospitalized in Qingyang People's Hospital for several days. In February 2014, Shang XX left home for work, and the two decided to separate. Later, she sued for divorce.

The common property of husband and wife includes: a rural house (built before marriage), an agricultural tricycle "Shifeng", a 150-type motorcycle, a "Changhong" double-cylinder washing machine, a cow and a few grains, etc.

The above-mentioned facts were confirmed by the statements of both parties, copies of household registration books, photos and other evidences.

The court of first instance held that: Shang XX lived with Wang XX for many years and had three children, Shang XX sued for divorce on the grounds that Wang XX committed domestic violence against her and submitted photos of the injuries, but there was no evidence to prove that Wang XX caused the injuries and her request for divorce was not supported. According to Article 32 of the "Marriage Law of the People's Republic of China", it was decided that Shang XX and Wang XX were not allowed to divorce. The case handling fee of 100 yuan shall be borne by Shang XX.

Shang XX refused to accept the above-mentioned civil judgment of the Huan County People's Court and filed an appeal stating that: the appellant and the appellee were arranged to get

married by their parents, they lack of understanding before marriage, and even later the relationship has been incompatible. The appellant had serious violent tendencies and openly maintained inappropriate relations with both men and women. In June 2013, the appellant was unable to live at home and went to work abroad. The appellee threw away all the appellant's daily necessities, he falsely claimed that he would also go to work, he tricked the appellant to go back home and beat her with an iron rod. The appellant was hospitalized for treatment. In February 2014, the appellant went out again, but this time the appellee did not search her: the relationship between the couple was broken. The request is to revoke the original judgment and grant divorce. Common property and other means of production and living are divided equally; the litigation costs of the first and second instance shall be borne by the appellee.

Wang XX replied that: he did not assault the appellant, nor did he have any unfair relationship with men and women. Both husband and wife were in good relationship and he did not agree to divorce.

After a cross-examination in the second instance court, both parties have no objection to the facts found in the first instance judgment. Wang XX claimed that after Shang XX left home, the living and study expenses of the three children were borne by him, and that the two separated after Shang XX left home in February 2014. Shang XX recognized Wang XX's statement. Shang XX said that in September 2013 she was hospitalized for injuries made by Wang XX and that she did not call the police because she was afraid that the three children's care could be affected if Wang XX would get punished.

Since both parties have no objection to the verdict found in the first instance judgment, although Shang XX said that Wang XX caused domestic violence and improper relations with men and women, but she did not provide evidence to prove it, the second instance confirmed the facts found in the first instance judgment.

This court believes that Shang and Wang have been married for more than 20 years and they had three children. That shows that both parties have a good marriage foundation and a good relationship between husband and wife. Although there have been conflicts between the two parties in recent years, they should understand each other and cherish the relationship between husband and wife. Shang XX claimed that Wang XX had committed domestic violence against her and had an improper relationship with men and women, but she did not provide evidence to prove it. The facts found in the original judgment were clear and the applicable law was correct, and Shang XX's appeal for divorce could not be established. Moreover, if the two parties separated in February 2014, the original trial would never grant a divorce, in accordance with the provisions of Article 32, paragraph 3 (4) of the Marriage Law of the People's Republic of China, "because of emotional

discord and separated for 2 years”. In accordance with the provisions of Article 170, Paragraph 1, Item (1) and Article 175 of the "Civil Procedure Law of the People's Republic of China", the judgment states as it follows:

The appeal was rejected, and the original verdict was upheld.

The appeal case acceptance fee is 100 yuan, which shall be borne by the appellant Shang XX.

This decision is final.

Presiding judge Zhang Zhini

Acting Judge Chuangjun Guo

Acting Judge Xiaodong Lu

November 24, 2014

Clerk Zhang Li

3.3 Illegal Transfer of Property and Debts: the Case of Zhang and Wu

The second case is a second instance civil judgement between a couple, Zhang and Wu.¹⁶⁵ The couple divorced and divided the property in a previous agreement but there were some questions not solved, regarding the division of some bank accounts and some joint debts that they shared. The previous court did not help to divide that part of the property and in the new instance Wu accused Zhang of transferring illegally moneys that should belong to her. Differently from the previous case analysed, the sentence of Wu and Zhang is more related to economic issues and the principal topic is how courts treat couple during divorce agreements and how the lack of a good division of property can cause in the future problems between the spouses.

3.3.1 The Content of the Process and Analysis

The process is mainly constituted by a few requests of Wu, who accused her husband of transferring and doing some illegal actions on their joint property and it presents two instances. In the first instance judgement Wu claimed money that Zhang should have given her by their divorce agreement, and she wanted Zhang to pay the taxes of the divorce trial. The judgement supported Wu's request and it was declared that Zhang did actually transfer money that belonged to their joint

¹⁶⁵ “Wú mǒu, zhāng mǒu líhūn hòu cáichǎn jiūfēn èrshěn mínshì pànjúeshū, 吴某、张某离婚后财产纠纷二审民事判决书, (Second-Instance Civil Judgment on Property Disputes after the Divorce of Wu and Zhang)”, 16/10/2020. Available at: <https://www.pkulaw.com/pfnl/a6bdb3332ec0adc4aec4a0f9483ca2bbe9ab20cd23fc31cbbdfb.html?keyword=%E8%B4%A2%E4%BA%A7%E7%A6%BB%E5%A9%A%20> (last access 15/03/2020).

property. On the other hand, Zhang wanted her to revoke the question of money, to revise the situation and to give the responsibility of the costs of litigation to Wu.

On the revision of the sentences the court analysed the patrimonial situation of the couple. What is clear from the very first analysis is that the main problem in the divorce proceeding is that the couple failed to divide all the joint property and that in the division “there was no factual basis” and “the writing of property [...] in the divorce agreement is not very clear”. There were a few financial managements assets that were considered common property but were actually the personal property of Zhang. At the same time there were a few funds that should have been divided because they were part of the joint property and in the moment of the divorce agreement the couple did not provide to divide. The controversy in this case proved also that Zhang and Wu failed to divide in the first divorce agreement some joint debts and that Zhang in the first instance trial should have file a counterclaim where he proved that he also paid for a part of the mansion in the divorce agreement.

On the basis of this first analysis made by the court, Wu argued saying that Zhang in the period before divorce transferred a huge sum of money that belonged to both of them for economic transactions to other societies, purchased some materials and did some transactions with his credit card that in the opinion of Wu belonged to both of them: she stated that she wanted Zhang to pay back, that the court should divide a sum of “wealth management purchased by Zhang in the name of his father before the divorce” and other taxes Zhang should pay back to Wu.

The court of first instance analysed the property that the couple had, stating that they divorced on 2017 and underlining which property was in the name of Wu, which one in the name of Zhang and that when they agreed to divorce there were still belongings like funds and bank transfers.

Zhang to prove the fact that he did not illegally transfer the property to third parties showed to the court the recordings of the chat between him and his wife: in the conversation it is clear that he told her the transactions he was making, he gave her the sum of money expected, she accepted everything and did not seem to have problems.

At this point of the sentence there are some declarations on which bank transactions Zhang made with his father (the third party he used to transfer the property) and what he did actually purchase as a wealth management. As it is noticed in the sentence:

“一审法院认为：吴某与张某于 2017 年 9 月 18 日签订的离婚协议书系双方当事人真实意思表示，合法有效，该协议对双方均有法律约束力。根据法律规定，离婚后确有尚未处理的夫妻共同财产的，应依法予以分割。”

“The Court of First Instance held that the divorce agreement between Wu and Zhang, which was signed on September 18 2017, was an expression of the true meaning of the parties and was valid and legally binding on both parties. If after a divorce there is indeed a joint property of the couple that has not yet been dealt with, it shall be divided according to law.”

This means that the property that the couple did not divide should be divided also to end the controversy. The couple divided in the previous agreement house and vehicles but they did not include other relevant parts like bank deposits, neither the funds that Zhang gave to his dad and even if Zhang stated that the division was made in a reasonable way and it succeeded to clear out all the debts and property of both parties, there were still some controversies to analyse.

The court declared that Zhang paid all the money to his wife, so the claims of Wu were not supported. It also stated that Wu’s claim of dividing money and interest losses that he paid to his father was not supported either, because the money he used with his father were transferred back to Zhang’s bank account right when the two parties decided to divorce.

After analysing the bank balance and the property situation of both spouses the court decided that Zhang had to pay a sum of money to Wu but other Wu’s claims were not supported and she did not have enough proves: Zhang had all the chats so it was difficult for her to obtain more compensation. At the same time, even if both of them wanted the other one to pay for the judgement, the court decided to divide the tax to both of them.

The parties did not specify the real value of the relevant property and the part that is necessary for the life of the couple is not covered in the divorce agreement, the court stated how both parties should have deposits or enjoy external claims but the divorce agreement did not involve this. The court also says that:

“综上，本院认为，根据吴某与张某所签订离婚协议关于财产分割的约定，双方在签订离婚协议时应该对夫妻共同财产进行了全面考虑，离婚协议所涉大额财产分割是双方对夫妻共同财产综合平衡后的结果，因此，吴某与张某所签订的离婚协议应为对夫妻共同财产进

行了概括性约定，除离婚协议所涉财产外，其他财产应视为归持有财产一方所有。一审判决对离婚协议外的其他财产予以分割不当，本院予以纠正。”

“According to Wu and Zhang's agreement on the division of property, both parties should consider the joint property of the husband and wife comprehensively when signing the divorce agreement, therefore, the divorce agreement signed by Wu and Zhang should be a general agreement on the joint property of the husband and wife. Except for the property involved in the divorce agreement, other property shall be deemed to belong to the party holding the property. The first-instance judgment improperly divided other property outside the divorce agreement, this court shall correct it.”

In the end Zhang's request was partially obtained and also the request of withdrawing the appeal should be granted. The judgement stated also to revoke the first civil judgement and to dismiss Wu's litigation request.

This sentence is longer and more complex than the previous one. It is more strictly related to the question of property and money debts. First of all, it is quite recent because the controversy is made in 2020. The couple in this case was already divorced, and the main problem was to revise the division of money that the court made in the first divorce agreement. As already seen, the property acquired together during marriage belongs to the joint property of the couple, but the main issue in this case is that in the first divorce agreement property was not divided equally and some properties were just ignored during the first trial: this led Wu to ask for money and to claim for more rights. What was even worse is that the court in the first instance sentence also did some mistakes on calculating the balance of Zhang bank account.

The sentence appears divided in different parts: first of all, there are the requests made by Wu, the response of Zhang and the facts and reasons of the court, as well as an analysis of the transactions made by the couple, with the last part dedicated to the verdict of the court.

There was also the problem that the couple did not divide the debts that they had with customers of their activity and since they were accumulated during marriage were considered joint debts. The sentence describes the exact division of property made by the couple in the divorce agreement: by reading the division there is not any apparent controversy, the couple divided some buildings and vehicles they owned, giving to the wife most of the property (for example the car, the Home Furnishing store management and other job projects).

What changed the sentence and gave to the court the possibility to analyse the financial problems of the couple were some chat records on We-chat between Zhang and Wu. By analysing these chats and the balance accounts of the couple, and all the bank transfers to third parties it is

even more clear how Wu wanted more money than she expected and was trying to make Zhang look like he was “the bad guy”, but it is also clearer that, as the court will state, if the couple does not divide the property in a correct way, and if they do not divide everything they own together (not only the lands but also all the money they share in their common account) problems like that could arise, and one of the two parties could take advantage of the situation. The main lack of division is made to the bank deposits and to the funds that Zhang had delivered to his father for financial management.

The first instance was concluded with the mention of Article 17 of the marriage law on which property is considered joint during marriage as well as the mention of the article on the interpretation of the supreme court, the last one of 2011: the verdict gave reason to Zhang and some Wu’s claims were just dismissed. On the other hand, the second instance claim consisted just in Wu’s request of withdrawing the appeal and in the end the judgement allow her to withdraw but it dismissed her litigation requests.

As well as the first case, this sentence of divorce represents how the courts deal with cases of divorce, in this case regarding the right of ownership and it reflects that issues described in the second chapter. The judgement made by the judges in the various instances shows how in the trials the question of property constitutes a huge deal and can led to many problems. First of all, this case is a clear example of how women nowadays are more aware of their rights and how to act against their husbands in the cases of divorce. Wu does not accept the first instance judgement and even if at the end she does not win the whole cause, this shows how she knows what to say and represents the fact that women today in China are more independent and know how to deal with business cases. Wu is the perfect example how a woman that does not totally depend on her husband, she is not just a housewife, but she also knows the problems around their society and their bank accounts. However, the case is placed in the Dongying province of Shandong: this means that the couple lives in a big reality, and it demonstrates how the family system in bigger cities is usually more developed than the ones of rural areas. Moreover, from a deeper critical analysis, the way the court treated the couple in the instances shows how even if the law has many dispositions that were object of a process of modernization from 2001, as we saw in the past chapter, with the development of the economy and the diversification of the families structures, nowadays they are still uncertain and in the courts that vacuity is demonstrated by the difficulties that Wu and Zhang had in splitting in a proper way the property. Even if in the divorce agreement they did not have too many problems, the court failed to divide everything: this is a sign that the Chinese legal system, also in the questions related to property inside the marriage, is not really strong and sometimes judiciary practices can be overwhelming. Another problem related to the poor legal system is probably the fact that in the

judiciary structure, as seen in the previous chapter, the court does not have enough departments and people specialized in the protection of women's rights. Courts did not create special departments to deal with these special cases, neither they received a specialized formation for judges, ignoring cases that involve the protection of divorced women's rights. Another problem related to the inefficiency of the judiciary system is the bad education in the courts on these matters and to the problem of the profession: in the questions related to divorce, one of the reasons why women as Wu find difficulties is that some of them cannot seek for help from professional institutions or lawyers because they have financial problems or they cannot present good requests. In the case of Wu and Zhang, besides the fact that at the end the problems of the shared bank accounts were solved, it was the judiciary system the main problem of the couple, that failed at its job. However, at the end, after a deeper separation of property and after analysing the whole financial background of the couple, the court knew how to judge Wu and Zhang and the couple reached a sort of agreement.

3.3.2 Translation of the Case

Second-instance civil judgment on property disputes after the divorce of Wu X and Zhang X

Intermediate People's Court of Dongying City, Shandong Province

Civil judgement

Civil Judgement of the Intermediate People's Court of Dongying City, Shandong Province

No. 1305/2020

Appellant (plaintiff in the original trial): Wu X.

Entrusted litigation agent: Cui X.

Appellee (defendant in the original trial): Zhang X.

Entrusted litigation agent: Wan Guodong, lawyer of Shandong Zhuojue Law Firm.

In the case of property disputes after divorce the appellants, Wu X and Zhang X, filed an appeal against the Civil Judgment No. 1302/2020 of the Dongying District People's Court, Dongying City.. After the court filed the case on the 6th August 2020, a collegial panel was formed in accordance with the law to conduct the trial. The case has now been concluded.

Wu's appeal request:

1. To change the judgment of a suit for the payment of 150,000 yuan of the 600,000 yuan in Wu's divorce agreement, and for other claims involving people outside the case, she separately claimed her rights and waived the appeal for other parts;

2. The costs of the proceedings of the first and second instance shall be borne by Zhang X.

Facts and reasons: in the first instance, there was no evidence to substantiate the erroneous finding that Zhang X had delivered 150,000 yuan to Wu X, and that 600,000 yuan in the divorce agreement had not been paid to Wu X. Before the divorce, Zhang X took a large amount of cash and transferred the joint property of the husband and wife, and his claim that there is no evidence should not be supported.

Zhang's appeal request:

1. To revoke the first part of the first-instance judgment, and to send the case back for re-examination or to revise the sentence according to the law after the facts are proved;

2. To uphold the second judgement of the first-instance judgment;

3. The first and second-instance litigation costs shall be borne by Wu X.

Facts and reasons: The court of first instance found that the financial management funds and the balance of 150.379,65 yuan in Zhang's bank account were mistakes in the joint property of husband and wife.

1. The divorce agreement signed by Zhang X and Wu X has divided all the property of the two parties. The court of first instance found that after the divorce, there was no division of the joint property of the two spouses, and there was no factual basis: 1. The writing of the property handling part in the divorce agreement between Zhang X and Wu X was not very clear. The financial management funds and balance in Zhang's bank card are the customer's decorative material funds, not the joint property of Zhang X and Wu's as husband and wife; 2. The divorce agreement between Zhang X and Wu X divided the vehicles worth only a few thousand yuan. If the financial management funds are the joint property of the husband and wife, it is impossible not to divide them; 3. Zhang X and Wu X indicated "none" in the records of other contents in the divorce agreement, which also fully stated that the financial management funds and balance in Zhang's bank card were not the joint property of the husband and wife.

2. Zhang X Huaxia Bank's account is mainly used for store operations. When the two parties agreed to divorce, there was a large amount of customer funds that were not paid to the manufacturer. The essence was that Zhang X and Wu X did not divide the joint debts of husband and wife at the time of the divorce. The financial products attributable to the customer and the balance of 150.379,65 yuan in the account were classified as the joint property of the husband and wife, and the division was wrong.

3. After both parties agreed to divorce, Zhang X alone paid 613.750 yuan due to the mansion in the divorce agreement. Zhang X did not file a counterclaim during the first instance. If the court of first instance determined that 150.379,65 yuan is the joint property of the husband and

wife, then the two sums should be offset in accordance with the law. Wu X argued that Zhang X transferred a huge amount of joint property before the divorce. In the six months before the divorce, the record of cash withdrawals was 1644.000 yuan. He paid more than 1.7 million yuan to Zhongshan Huaguoshan Wood Products Co., Ltd. to purchase building decoration materials, which also belonged to the undivided common property in the divorce agreement. In addition, within three months after the divorce, Zhang X transferred the 1.7 million yuan to the Zhang Lianlian card, shifted before the divorce, back to his bank card and he purchased bank financial management. Wu X appealed to the court of first instance:

1. To order Zhang X to pay her 600.000 yuan in accordance with the divorce agreement signed by both parties and to pay interest losses calculated at 6% per annum from the 31th January 2018 to the date of actual settlement. Among them, the interest loss on the 31th January 2020 is 72.000 yuan;

2. Order to divide the 1.5 million yuan of wealth management purchased by Zhang in the name of his father before the divorce, and Zhang X will pay Wu's economic compensation of 750.000 yuan and the interest loss calculated at the annual interest rate of 6% since the date of the lawsuit;

3. Order to divide Zhang's 1.5 million yuan of bank deposits before the divorce, and Zhang X will pay Wu's economic compensation of 750.000 yuan and the interest loss calculated at 6% per annum since the date of the lawsuit;

4. The litigation costs shall be borne by Zhang X.

The court of first instance determined the following facts: Wu X and Zhang X were originally married. On the 18th September 2018, the two parties negotiated a divorce at the Civil Affairs Bureau of Dongying District, Dongying City, the property disposal section of the divorce agreement stated:

Husband and wife jointly own a shop located in the A District of Shengshi Longcheng××Rooms×× Street××Road××No.××No.×× Street××Shop, the above three properties belong to the man; the common BMW EL×××× belong to the man; the managerial authority of the common Ginza home furnishing store belongs to the man; the common Warner Music Mansion No. 43 is owned by the woman; all the project income from the joint ownership of Weihao is owned by the woman; the jointly owned Jianghuai car Lu E×××× belongs to the woman; the jointly-owned Xingkai Home Furnishing store management rights belong to the woman; the woman also gave the man another 600.000 yuan (100.000 yuan), which was agreed to be paid on the 30th January 2018. After Wu X and Zhang X agreed to divorce, there are still a lot of funds exchanges and bank transfers between each other. The WeChat chat record between Zhang X and Wu X submitted by Zhang X on the 21st

February 2018 shows that Zhang X stated: "How much money do you count?", and Wu X replied "Right now you are drawing me 160.000 yuan." Zhang X replied: "I don't have that much money, I will give you 150.000 acceptances and 10.000 transfers"; after Zhang X sent an acceptance draft for his choice to Wu X, stating that "You wrote a receipt and cleared the account completely," he transferred 10.000 yuan to Wu X via We-chat, and he stated that "I gave you all my dad's car money and the 600.000 yuan from the divorce, they are all cleared." After that, the two parties talked about other content. An audio recording of a call between Wu X and Zhang X on the 10th January 2020 showed that Zhang X had given money to his father to buy wealth management products, and Wu X said she did not know. Zhang X acknowledged that in January and February 2017, he had handed over 1.2 million yuan in cash to his father Zhang Zhaoxing to purchase wealth management products. However, during the period from the 7th March 2017 to the 8th August 2017, his father transferred some of the funds and some personal deposits totalling 1.74 million yuan back to Zhang's bank account, of which 400,000 yuan were transferred on the 7th March 2017, 240.000 yuan on the 1th April, 100.000 yuan on the 23th May, 200.000 yuan on the 18th June, 100.000 yuan on the 30th June, 100.000 yuan on the 5th July, 100.000 yuan on the 21th July, and 500.000 yuan on the 8th August.

During the trial, Wu X applied for the access to the bank flow of the Industrial and Commercial Bank of China (ICBC) account from the 1st January 2015 to the 31st December 2017, Zhang X applied to retrieve Wu's ICBC account from the 1st October 2015 to the 1st October 2017. The bank records have been retrieved in accordance with the law. Wu's application to retrieve Huaxia bank account of Zhang Zhaoxing, an outsider in the case, from the 1st January 2015 to the 31st December 2017 is not permitted due to the length of time and the privacy of the outsider involved.

The transaction details of Zhang's Huaxia Bank account showed that he started to purchase wealth management from the 3rd January 2017. By the 11th September 2017, the total purchase amount of wealth management was 5492.000 yuan, and the amount of redeem and mobile phone wealth management products was 53.50913,48 yuan. The difference was 141086,52 yuan, of which the mobile banking financing subscription amount on the 11th September 2017 was 150.000 yuan, and the account balance was 379.65 yuan.

The transaction details of the account show that the counter cash withdrawal was 394.000 yuan on the 26th January 2017, 490.000 yuan on the 8th February 2017, 270.000 yuan on the 13th February 2017, on the 14th February 2017, it was 490.000 yuan, totalling 1.644.000 yuan. The transaction details of Zhang's ICBC account with the tail number 8884 show that he purchased 400.000 yuan of wealth management on the 6th January 2017 that was redeemed on the 3rd February

2017, and then he transferred 390.000 to his Hua Xia Bank account on the 6th February 2017; on the 17th September 2017, the account balance was 1080.36 yuan. According to the transaction details of Zhang's ICBC account with the tail number of 4092, on the 8th September 2017, the account balance was 6,01 yuan. The transaction details of Zhang's ICBC account with the tail number of 6460 showed that on the 14th August 2017, the account balance was 54,41 yuan. According to the transaction details of Wu's ICBC account with the tail number 0044, on the 17th September 2017, the account balance was 51027,52 yuan. Wu X submitted an application stating that because of the interests of persons outside the case, she requested the transfer of funds to the outsiders Fu Yulin and Zhongshan Huaguoshan Wood Products Co., Ltd. after the agreed divorce, from the Zhang Huaxia Bank account involved before the divorce. The transfer of 550.000 yuan to Zhang X and the 960.000 yuan of financial products purchased by Zhang X will not be handled in this case, and he will claim his rights separately.

The Court of First Instance held that the divorce agreement between Wu X and Zhang X, which was signed on the 18th September 2017, was an expression of the true meaning of the parties and it was valid and legally binding on both parties. If after a divorce there is indeed a joint property of the couple that has not yet been dealt with, it shall be divided according to law.

The divorce agreement signed by Wu X and Zhang X divided the house, vehicle, and shop management rights, but did not involve the bank deposits in the dispute in this case, and the funds that Zhang X delivered to Zhang Zhaoxing, an outsider, for financial management, etc. Zhang X advocates that the division of property in the divorce agreement is based on a comprehensive weighing of all the property, claims and debts of both parties, however, the corresponding evidence was not submitted for verification, and the defence was not accepted.

Regarding the 600.000 yuan and interest losses agreed in the divorce agreement claimed by Wu X: through the chat records and transfer records submitted by Zhang X, it can be determined that he had paid all the 600.000 yuan agreed in the divorce agreement to Wu X on the 21st February 2018, Wu's request for this lawsuit lacks facts and the legal basis is not supported.

Wu X claimed that her transfer to Zhang X after the divorce agreement should be deducted, because the parties had other financial or business dealings after the divorce, and her transfer to Zhang X on the basis of that kind of legal relationship was not related to the post-divorce property dispute under consideration in the present case, so the defence was not accepted.

Regarding Wu's claim to divide Zhang's 1.5 million yuan and interest losses that Zhang X paid to his father Zhang Zhaoxing's financial management: according to Zhang's account transaction details of the Industrial and Commercial Bank of China, Hua Xia Bank's account transaction details, and the parties' statements in court, it can be seen that in January and February

2017, Zhang took the 1.644.000 yuan in cash and handed it over to the outsider Zhang Zhaoxing for financial management. During the period from the 7th March to the 8th August 2017, Zhang (Zhaoxing) had transferred 1.74 million yuan back to Zhang's bank account. This means that since the two parties divorced by mutual agreement, there has been no case that Zhang Zhaoxing, an outsider of the case, possessed and used the joint property of Zhang X and Wu X for financial management. Wu's request for this lawsuit was not supported.

Regarding Wu's claim of 1.5 million yuan in bank deposits and interest losses held by Zhang: regarding the funds used for wealth management purchase and redemption in Zhang's Huaxia Bank account, the difference between the purchase of wealth management and wealth management redemption and wealth management products entry was 14106.52 yuan; on the 11th September 2017, just before the divorce was agreed upon by the two parties, Zhang X made a financial claim of 150.000 yuan and a balance of 379.65 yuan for the bank account; both Wu X and Zhang X agreed that the main source of income before the divorce negotiated by the two parties was the income from the joint operation of the store. Zhang X claimed that the funds in his Hua Xia Bank account were customer pre-deposits, but the evidence submitted by them was insufficient to prove that the two parties still agreed to divorce. There are funds that have not been paid to the factory or there are still operating costs that have not been paid, etc. Therefore, the amount of 150379.65 yuan should be divided as the joint property of the husband and wife. The balance of Zhang's ICBC account with the end number of 8884 of 1080,36 yuan, the balance of the ICBC account with the end number of 4092 of 6,01 yuan, and the balance of the ICBC account with the end number of 6460 of 54,41 yuan shall be divided as joint property of husband and wife. The total amount of the above payment is 151520,43 yuan. The balance of 51027,52 yuan in Wu's ICBC account with the tail number 0044 should also be divided as the joint property of the husband and wife. After the two items are discounted, Zhang X should pay Wu X 50246,5 yuan, and Wu's claim shall not be supported. Regarding Zhang's transfer of funds to Fu Yulin and Zhongshan Huaguoshan Wood Products Co., Ltd. before the divorce agreement between the two parties, Wu X said that the interests of the outsiders were involved, and she claimed her rights separately. Therefore, this part of the money will not be processed. In accordance with Article 17 of the "Marriage Law of the People's Republic of China", Article 18 of the "Interpretation of the Supreme People's Court on Application of Certain Issues (3)", and Article 64 of the "Civil Procedure Law of the People's Republic of China", the verdict: 1. Zhang X paid Wu X 50246,5 yuan within ten days from the effective date of the judgment; 2. Wu's other claims are dismissed. The case acceptance fee is 24176 yuan, which is reduced and charged 12088 yuan, with 11808 yuan paid by Wu X and 280 yuan by Zhang X.

In the second instance, Zhang X submitted evidence 1. Five pages of WeChat chat records, proving that on the 14th May 2018, Wu X asked Zhang X for 126,000 yuan in WeChat, which has nothing to do with the 600,000 yuan in the divorce agreement, by transferring 28,000 yuan to Bi Junxiang, 97,000 yuan to Wu X and 1,000 yuan oil card for repayment, it can be confirmed that as of the 14th May 2018, Wu X recognized that Zhang's arrears amounted to 98,000 yuan, and that the 150,000 yuan agreed in the divorce agreement had been paid to Wu X; evidence 2: a copy of the "Wooden Door Sales Contract" and "Fire Door Sales Contract", proving that Zhang X and Wu X used Jinan Timber Building Materials Co. Ltd., Dongying Yuru Decoration Engineering Co. Ltd., and Dongying Luerya Decoration before their divorce. Engineering Co. Ltd. signed the above-mentioned contract with Huaner Wanhai Construction Co., Ltd. The contract price was 2280498,3 yuan, and It stipulated that the settlement payment should be used to deduct the house payment.

Evidence 3: a copy of the "Warner Yuefu Phase II Fireproof Door, Anti-theft Door, Fireproof Roller Blind Purchase and Sale Contract", which proves that after the divorce on the 3rd November 2017, Zhang X and Warner under the name of Dongying Luerya Decoration Engineering Co. Ltd, signed the above-mentioned contract with Wanhai Construction Co. Ltd., the contract price was 936,997 yuan, and the contract stipulated that the settlement payment should be used to deduct the house payment.

Wu X cross-examined that there was no objection to the authenticity of Evidence 1, but the settlement of each payment was the business settlement between Zhang X and Wu X, and it had nothing to do with the settlement of divorce payments between Wu X and Zhang X. Evidence 2 and 3 are all photocopies, their authenticity is not recognized, and even if their contents are true, they cannot achieve Zhang's proof purpose. The final payment of the mansion etc. belongs to Zhang's obligation to obtain the real property estate.

This court believes that the first evidence submitted by Zhang X has no relevance to his appeal request, and the second and third series of evidence are copies, Wu X does not recognize its authenticity and does not accept the above-mentioned evidence.

The facts established in the second instance trial are consistent with those found in the first instance and are confirmed by the court. Wu X submitted an application to withdraw the appeal to this court on the 23rd September 2020, and she withdrew the appeal of the case. The focal issue of the dispute between the parties in the second instance of this case is whether the first-instance verdict that Zhang X should pay Wu X 50246.5 yuan is correct.

This court believes that the divorce agreement signed by Wu X and Zhang X on the 18th September 2017 is the true expression of both parties, it has been verified by the civil affairs authority, it is legal, effective and binding on both parties.

In the divorce agreement, Wu X and Zhang X divided the husband and wife's joint property, which involved real estate, shops, vehicles, store management rights, and project income. Judging from the content of the property division in the divorce agreement, although the two parties have divided the real estate, shops, vehicles, store management rights and project income, the two parties did not specify the value of the relevant property in the agreement; the property involved in the divorce agreement is high-value property for a family, and the property that is necessary for the life of the spouse to live together is not covered in the divorce agreement; judging by a common sense of life, during the duration of the relationship between Wu X and Zhang X, both parties should have deposits or enjoy external claims and debts, however, the divorce agreement did not involve this.

In summary, the Court believes that, according to Wu X and Zhang X's agreement on the division of property, both parties should consider the joint property of husband and wife comprehensively when signing the divorce agreement, therefore, the divorce agreement signed by the couple should be a general agreement on the joint property of the husband and wife. Except for the property involved in the divorce agreement, other property shall be deemed to belong to the party holding the property. The first-instance judgment improperly divided other property outside the divorce agreement, this court shall correct it.

During the trial of this case, Wu's request to withdraw the appeal did not violate the law, and this court allowed it.

In summary, Zhang's appeal request is partially established. Wu's request to withdraw the appeal should be granted. In accordance with Article 170, Paragraph 1, Item 2, and Article 173 of the "Civil Procedure Law of the People's Republic of China", the judgment is as it follows:

1. Allow Wu to withdraw the appeal;
2. To revoke Civil Judgment No. 1302/2020 of the Dongying District People's Court, Dongying City;
3. To dismiss Wu's litigation request.

The first-instance case acceptance fee is 24,176 yuan, halved and charged 12088 yuan, the second-instance case acceptance fee is 4304 yuan, and the halved fee is 2,152 yuan, both of which are borne by Wu X. This decision is final.

Judge Ding Wenqiang

Judge Yu Qiuhua

Judge Tong Yuhai

16 October 2020

Assistant to the judge Li Lan

Book reporter Yuqi Liu

Conclusion

This work was structured in order to guide the reader in a detailed analysis of the main regulations concerning the right of ownership inside Marriage and Divorce in the contemporary People's Republic of China. The main purpose was to underline with practical examples how the paternalistic attitude typical of judges in the courts is reflected in cases of property disputes. Contemporary China lives in constant ambivalence: a first side is the country that opens to the world with a constant economic growth and tries to stay modern with the organization of the family; the other part is the traditional one, that still sees the family as a hierarchical structure where women are only mothers and wives, but not workers. Legislation since 1980 have tried to enhance the family structure. The government knew that in order to start a process of modernization of the political and economic structure, the family nucleus had to be the first organization to focus on, considered the pivot from which every economic activity starts. My work started from these questions: was the Chinese system ready for that process of modernization of the concept of family in 1980 and is the family actually evolved today? Where can we find the modernization in the concept of ownership?

By analysing a first historical and sociological framework on the first part of the work it was possible to evaluate how the change took place and how the opening of China in 1980 has revolutionized the whole concept of family over the years. However, it has also highlighted some loopholes in the Marriage Law and in some cases also worsened the condition of some women inside the families, especially the rural ones. On one hand, the possibility to divorce became more affordable for everyone and the laws became clearer. Topics such as equality, respect within the couple were central in the drafting of the 1980 Law, although the issue of violence was not yet mentioned (the question of domestic violence only came up in the 2001 revision). On the other hand, the new juridical system created began to conflict with the reality: in the courts the law was not always applied, and the judges often appealed to the concept of family harmony. Through the practice of mediation, they often rejected requests for divorce, inviting couples to try to love each other and solve their relationship problems together, instead of separating, especially if they had children. Another mention that underlines the very fragile system of those years is the One-Child policy that disadvantaged the condition of women. The disadvantage of being a wife inside marriage and divorce is a central topic of the work. Over the years, women became more independent inside marriage and divorce. After 1990, domestic violence began to have a huge relevance all over the world and in China too, which led to include the topic of violence in the 2001

revision. Another important contradiction is the generational one, analysed in the sociological part of the chapter. Today's couples, born from that process of modernization started in 1980, are in an ongoing conflict against parents and families that belong to the past generation. Parents believe in tradition, in arranged marriages for economic reasons and in the role of the man as the head of the family, while the woman is just mother and wife with the main obligation of taking care of the house. Unfortunately, in rural areas today the situation is very anchored to ancient values: the greatest contradictions are seen in these areas, where women often do not work, do not play a relevant role even in the cases of divorces and husbands often take advantage of the situation trying to deceive them in the questions related to ownership. At the same time, a new type of modern couple emerged in recent years, the “Dink family”: they do not want to have children, they do not want to follow the tradition, wives and husbands are on the same level, they both work and prefer a modern life. The last mention of the chapter is linked to the promulgation of the Civil Code at the beginning of 2021, a major milestone which, however, is only at the beginning of his life, so the effects are still to be seen in the months to come.

The central topic of my study was the right of ownership in Marriage and Divorce. I divided the analysis into two macro areas. In the first part I discussed the regulations, the principles and how they are applied in courts, with the related disputes. It was underlined how the concept of private property in China had a much slower path than the situation in the other parts of the world. China, with its strong socialist system, struggles with the concept of “private” as we see it: something that totally belongs to us. The Property Law of 2007 modernized the land system, but at the same time it stressed that land ownership always belongs to the State. The citizens can own and build real estates but not the territory where these houses or apartments will be located. It was evident that the law gave more possibilities to the private citizens to own real estate and it was a sign of a more concrete freedom and autonomy towards the Government.

The right of ownership is strictly linked to the topic of marriage: when spouses decide to get married have right and duties that they have to follow, including the ones related to ownership. My study focused on how the issue of property in marriage is handled within the law, what is considered personal property and what is joint property in the latest revision of the Law, how the pre-nuptial property is considered and what happens in the divorce division of property, especially if the couple does not only share real estate but also debts, societies in common and valuable assets such as bank accounts. After an analysis of what are the current regulations, I wanted also to underline the problems inside divorce disputes regarding compensation for damages and the disputes that women encounter in divorce when they have to divide the property. The main problem in the courts is that women, especially in rural areas, are not aware of their rights of ownership: they

have a very low level of education and therefore tend to ignore certain issues within marriage. When they get divorced, relevant problems arise. Husbands often claim the right to obtain the properties in their name or they transfer them illegally. The latest provisions on the judicial interpretations of the Law have contributed to discredit the position of women, since property is often distributed to those who bought it. The man's family usually buys the house of the spouses, so men still got a more valuable asset when the couple decides to end the marriage and women are still in a disadvantaged position. In courts, despite this, judges often have a paternalistic attitude and tend to give more help to men rather than women.

The second part of my analysis is connected to the disputes in courts, highlighting real examples of two judgments on the issues of divorce and property. I chose two short cases that I translated and analysed, focusing on the attitudes of the courts towards the two couples and on how the law, that was described in the second chapter, was applied. The first case concerned the divorce requests for domestic violence. In this analysis I found that despite the evidence that the wife showed to the court, she is not believed, and the husband manages to win the cause. Moreover, when the judge refused to grant divorce, he appealed to the concepts of family harmony and mediation, he rejected the appellant's request and "convinced" her to give to marriage a second try, underlining that the spouses have children to support and that they did not even have relevant problems in dividing and sharing the property. The second analysis is dedicated to an accuse of illegal transfer of joint assets and debts: in this case the sentence focuses on the couple's economic problems and how the court failed to properly divide the joint property. It is clear that the issue of discrimination is less marked than the first case and it is more linked to a divorce agreement that has already been completed and resolved. My intent was to highlight two different situations with two types of disputes, where the first was more linked to the question of the condescending attitude of the judges towards the couple and the wife in particular, meanwhile in the second case I wanted to focus on the non-compliance of the courts and how the law is applied in the accusations of illegal transfer of property.

Therefore, from my analysis I was able to observe that in China even practical legal issues are often object of inconsistencies and it is difficult to have an objective opinion on the simplest and clearest legislative issues. The decisions of the courts are ambiguous, sometimes the judges follow more the ideas of harmony than the application of the law. At the same time, Chinese society today is constantly evolving, despite the miles of contradictions that have always distinguished it, and the concept of family evolves too every day. As seen in the work done, new families continue to be created, changing the corporate structure every day. Finally, I reserve the right to refer to other

reflections on how the legislative system will certainly change with the advent of the Civil Code era and how this will change the situation even within the courts.

Appendix 1

The case of Shang XX and Wang XX

尚某某与王某某离婚纠纷上诉案

甘肃省庆阳市中级人民法院

(2014)庆中民终字第 668 号

上诉人（原审原告）尚某某

被上诉人（原审被告）王某某

上诉人尚某某与被上诉人王某某离婚纠纷一案，不服环县人民法院（2014）环民初字第 1055 号民事判决，向本院提出上诉。本院受理后，依法组成合议庭，公开开庭进行了审理。上诉人尚某某与被上诉人王某某均到庭参加诉讼。本案现已审理终结。

经审理查明：1993 年农历十月初四，尚某某与王某某举行婚礼，在环县许家河乡人民政府办理结婚登记手续。生育长女王某某 1，现就读于兰州理工大学；生育次女王某某 2，现就读于环县一中；生育儿子王某某 3，毕业于环县许家河初级中学。双方近年来因家庭琐事发生矛盾。2013 年 9 月尚某某受伤在庆阳市人民医院住院数日。2014 年 2 月，尚某某离家外出打工，双方分居。后尚某某起诉要求离婚。

夫妻共同财产有：农村住宅一处（婚前修建）、“时风”农用三轮车 1 辆、150 型摩托车 1 辆、“长虹”双缸洗衣机一台、牛 1 头及粮食若干等。

上述事实，有双方当事人陈述、户口本复印件、照片等证据证实。

原审法院认为：尚某某与王某某共同生活多年，生育三个孩子，尚某某以王某某对其实施家庭暴力为由起诉离婚，并提交其受伤的照片，但无证据证实系王某某致伤，对其要求离婚的请求不予支持。遂依据《中华人民共和国婚姻法》第三十二条之规定，判决：不准尚某某与王某某离婚。案件受理费 100 元，由尚某某负担。

尚某某不服环县人民法院上述民事判决，提出上诉称：上诉人与被上诉人系父母包办成婚，婚前缺少了解，结婚后关系一直不睦。被上诉人有严重的暴力倾向，并公然与其他异性保持不正当的男女关系。2013年农历六月，上诉人实在无法在家生活下去，去外地打工，被上诉人将上诉人的生活用品全部扔掉，谎称其也要出去打工，将上诉人骗回家用铁棒殴打，致使上诉人住院治疗。2014年农历二月，上诉人再次外出，被上诉人并未寻找，双方夫妻感情确已破裂。请求撤销原判，准予离婚。共同财产及其他生产生活资料均等分割；一、二审诉讼费由被上诉人负担。

王某某答辩称：其未殴打上诉人，也无不正当男女关系问题，双方夫妻感情尚好，不同意离婚。

经二审庭审质证，双方当事人对一审判决认定事实均无异议。王某某称尚某某离家后，三个孩子的生活及学习费用均由其承担，2014年农历二月尚某某离家后双方分居。尚某某对王某某的陈述认可。尚某某称2013年9月其被王某某致伤住院治疗，当时考虑到如果报警王某某会受到处罚，三个孩子的抚养可能会受影响，所以未报警。

鉴于双方当事人对一审判决认定事实无异议，尚某某虽称王某某有家庭暴力及不正当男女关系问题，但未提供证据证明，故二审对一审判决认定事实予以确认。

本院认为：尚某某与王某某结婚二十多年，生育三个孩子，说明双方婚姻基础及夫妻感情较好。近年来双方虽然发生矛盾，但应当相互谅解，珍惜夫妻感情。尚某某称王某某对其实施家庭暴力并与其他人存在不正当男女关系问题，但未提供证据证明。原判认定事实清楚，适用法律正确，尚某某上诉要求离婚的理由不能成立。且双方于2014年2月分居，原审判决不准予离婚，符合《中华人民共和国婚姻法》第三十二条第三款第（四）项“因感情不和分居满2年的”等规定的情形。依据《中华人民共和国民事诉讼法》第一百七十条第一款第

(一) 项、第一百七十五条之规定，判决如下：驳回上诉，维持原判。

上诉案件受理费 100 元，由上诉人尚某某负担。

本判决为终审判决。

审判长 张责逆

代理审判员 郭闯君

代理审判员 卢小栋

二〇一四年十一月二十四日

书记员 张丽

Appendix 2

Second-instance civil judgment on property disputes after the divorce of Wu and Zhang

吴某、张某离婚后财产纠纷二审民事判决书

山东省东营市中级人民法院

民事判决书

(2020)鲁 05 民终 1305 号

上诉人（原审原告）：吴某。

委托诉讼代理人：崔某。

上诉人（原审被告）：张某。

委托诉讼代理人：万国栋，山东卓爵律师事务所律师。

上诉人吴某、张某离婚后财产纠纷一案，均不服东营市东营区人民法院（2020）鲁 0502 民初 1302 号民事判决，向本院提起上诉。本院于 2020 年 8 月 6 日立案后，依法组成合议庭进行了审理。本案现已审理终结。

吴某上诉请求：1.改判张某支付吴某离婚协议中 60 万元中 15 万元的诉讼请求，对于其他诉讼请求因涉及案外人，另行主张权利，对于其他部分放弃上诉；2.一、二审诉讼费用由张某承担。事实与理由：一审对于张某已将 15 万元承兑交付吴某的事实认定错误，该认定没有证据予以证实，离婚协议中的 60 万元并没有支付给吴某。张某在离婚前即大额提现转移夫妻共同财产，其没有证据的主张不应得到支持。

张某上诉请求：1.撤销一审判决第一项，将案件发回重审或查清事实后依法改判；2.维持一审判决第二项；3.一、二审诉讼费用由吴某承担。事实与理由：一审法院认定张某银行账户内的理财资金及余额 150379.65 元为夫妻共同财产错误。一、张某与吴某签署的离婚协议

书对双方的财产已全部进行了分割，一审法院认定双方离婚后还有夫妻共同财产没有分割，没有事实根据。1. 张某与吴某的离婚协议中财产处理部分书写不是非常清晰，张某银行卡内理财资金和余额是客户的装饰材料款项，不是张某和吴某的夫妻共同财产。2. 张某和吴某离婚协议对价值只有几千元的车辆都进行了分割，如果理财资金是夫妻共同财产，不可能不进行分割。3. 张某与吴某在离婚协议书中其他内容的记载中注明了“无”，也充分说明张某银行卡内理财资金和余额不是夫妻共同财产。二、张某华夏银行的账户主要作为店面经营使用，双方协议离婚时有大量的客户资金没有付给厂家，其实质是张某与吴某在协议离婚时的夫妻共同债务没有分割，将张某账户内归属于客户的理财产品及余额 150379.65 元作为夫妻共同财产进行分割错误。三、张某在双方协议离婚后，独自支付了离婚协议书中别墅欠款 613750 元，张某在一审期间没有对此提出反诉，一审法院如认定 150379.65 元为夫妻共同财产正确，那么该两笔资金也应依法抵销。

吴某辩称，张某离婚之前，便转移了巨额夫妻共同财产。在离婚之前半年内提取现金的提款记录有 1644000 元。向中山市花果山木制品有限公司打款 170 余万元购买建筑装饰材料，该建筑装饰材料也属于离婚协议中没有分割的共同财产。此外，张某在离婚后三个月内将其离婚前转移到张莲莲卡上的 170 万元转回自己的银行卡，并购买银行理财。

吴某向一审法院起诉请求：1. 判令张某按照双方签订的离婚协议书向吴某支付协议款 60 万元，并支付自 2018 年 1 月 31 日起至实际清偿之日止按照年利率 6% 计算的利息损失，其中至 2020 年 1 月 31 日期间的利息损失为 72000 元；2. 判令分割张某离婚前以其父亲名义购买的 150 万元理财，由张某支付吴某经济补偿金 75 万元，并支付自起诉之日按年利率 6% 计算的利息损失；3. 判令分割张某离婚前的银行存款 150 万元，由张某支付吴某经济补偿金 75 万元，并支付自起诉之日起按年利率 6% 计算的利息损失；4. 诉讼费用由张某承担。

一审法院认定事实：吴某与张某原系夫妻关系。2017年9月18日，双方在东营市东营区民政局协议离婚，离婚协议书财产处理部分载明：我们夫妻双方共同拥有位于盛世龙城A区××室房××街××路××号××号商铺××街××号商铺，以上三处房产归男方所有；共同的宝马汽车鲁E L××××归男方所有；共同的银座家居店面经营权归男方所有；共同的华纳乐府别墅43号楼归女方所有；共同拥有伟浩所有工程收入归女方所有；共同拥有的江淮牌汽车鲁E××××归女方所有；共同拥有的星凯家居店面经营权归女方所有；女方另外给男方60万元（陆拾万元整），约定2018年1月30日付清。吴某与张某协议离婚后仍有诸多资金往来，互有银行转账。张某提交的2018年2月21日其与吴某之间的微信聊天记录显示，张某陈述“你算一下多少钱吧”，吴某回复“你在绘我16万正就行了”，张某回复“我没有那么多钱，给你15万承兑，一万转账”；在张某向吴某发送可供其选择的承兑汇票后，陈述“你写个收到条，把账彻底清下来”，后张某通过微信向吴某转账1万元，并陈述“把我爸的车钱及离婚中60万全部给你了，全部清了”，之后双方又聊了其他内容。吴某提交的2020年1月10日其与张某之间的通话录音显示，双方离婚之前，张某曾将款项交给其父亲购买理财产品，吴某表示不知情。张某认可2017年1月份、2月份曾将120万元左右的客户款以现金形式交给其父亲张召星购买理财产品，但2017年3月7日至2017年8月8日期间，其父亲已将该部分资金并部分个人存款共计174万元转回张某的银行账户，其中2017年3月7日转入40万元、4月1日转入24万元、5月23日转入10万元、6月18日转入20万元、6月30日转入10万元、7月5日转入10万元、7月21日转入10万元、8月8日转入50万元。庭审过程中，吴某申请调取张某中国工商银行账户、华夏银行账户自2015年1月1日起至2017年12月31日期间的银行流水，张某申请调取吴某中国工商银行账户自2015年10月1日起至2017年10月1日期间的银行流水，均已依法调取。吴某申请调取案

外人张召星华夏银行账户自 2015 年 1 月 1 日起至 2017 年 12 月 31 日期间的银行流水，因时间跨度较长，且涉及案外人隐私，不予准许。张某华夏银行账户的交易明细显示自 2017 年 1 月 3 日起其开始申购理财，至 2017 年 9 月 11 日，共计申购理财金额为 5492000 元、赎回和手机理财产品入账金额为 5350913.48 元，差额为 141086.52 元；其中 2017 年 9 月 11 日手机银行理财申购金额为 15 万元，账户余额 379.65 元。该账户交易明细显示，2017 年 1 月 26 日柜台现金取款 394000 元，2017 年 2 月 8 日柜台现金取款 49 万元，2017 年 2 月 13 日柜台现金取款 27 万元，2017 年 2 月 14 日柜台现金取款 49 万元，合计 1644000 元。张某尾号为 8884 的中国工商银行账户交易明细显示其于 2017 年 1 月 6 日购买 40 万元的理财，2017 年 2 月 3 日赎回，2017 年 2 月 6 日转入其华夏银行账户 39 万元；2017 年 9 月 17 日，该账户余额为 1080.36 元。张某尾号为 4092 的中国工商银行账户交易明细显示，2017 年 9 月 8 日，该账户余额为 6.01 元。张某尾号为 6460 的中国工商银行账户交易明细显示，2017 年 8 月 14 日，该账户余额为 54.41 元。吴某尾号为 0044 的中国工商银行账户交易明细显示，2017 年 9 月 17 日，该账户余额为 51027.52 元。吴某提交申请，表示因涉及案外人利益，请求对涉案张某华夏银行账户于协议离婚前向案外人付瑜琳、中山市花果山木制品有限公司的转款，以及协议离婚后案外人张莲莲向张某的转款 55 万元、张某购买的理财产品 96 万元，不在本案中进行处理，由其另行主张权利。

一审法院认为：吴某与张某于 2017 年 9 月 18 日签订的离婚协议书系双方当事人真实意思表示，合法有效，该协议对双方均有法律约束力。根据法律规定，离婚后确有尚未处理的夫妻共同财产的，应依法予以分割。吴某与张某签订的离婚协议书中对房屋、车辆、店铺经营权等进行了分割，但未涉及本案诉争的银行存款、张某交付给案外人张召星用于理财的资金等，张某主张离婚协议书中的财产分割系就双方全部的财产、债权债务等进行综合权衡后的

分割意见，但未提交相应证据予以证实，对其该项抗辩，不予采信。关于吴某主张的离婚协议中约定的 60 万元款项及利息损失。通过张某提交的聊天记录、转款记录等，能够认定其于 2018 年 2 月 21 日已将离婚协议书中约定的 60 万元全部支付给吴某，吴某的该项诉讼请求，缺乏事实和法律依据，不予支持。吴某主张协议离婚后其向张某的转款应予抵扣，因双方在离婚后尚存在其他经济或业务往来，其基于何种法律关系向张某转款，与本案审理的离婚后财产纠纷无关，因此，对其该项抗辩，不予采纳。关于吴某主张的应予以分割的张某交于其父亲张召星理财的 150 万元款项及利息损失。根据张某的中国工商银行账户交易明细、华夏银行账户交易明细以及当事人当庭陈述，可以看出 2017 年 1 月份、2 月份，张某将 1644000 元款项取现后交由案外人张召星用于理财，张召星于 2017 年 3 月 7 日至 8 月 8 日期间，已将 174 万元款项转回张某的银行账户，即双方协议离婚时，已不存在案外人张召星尚占有、使用张某与吴某夫妻共同财产用于理财的情形。对吴某的该项诉讼请求，不予支持。关于吴某主张的由张某持有的银行存款 150 万元及利息损失。针对张某华夏银行账户中用于理财申购、赎回的款项，申购理财与理财赎回、理财产品入账的差额为 141086.52 元；2017 年 9 月 11 日双方协议离婚前夕，张某该银行账户申购理财 15 万元、余额 379.65 元；吴某与张某均认可双方协议离婚前的主要收入来源为共同经营店铺的收入，张某主张其华夏银行账户中的资金为客户预存款项，但其提交的证据不足以证实双方协议离婚时仍有资金未支付给工厂或仍有经营成本未支付等，因此，该 150379.65 元款项应作为夫妻共同财产予以分割。张某尾号为 8884 的中国工商银行账户中的余额 1080.36 元、尾号为 4092 的中国工商银行账户中的余额 6.01 元、尾号为 6460 的中国工商银行账户中的余额 54.41 元均应作为夫妻共同财产进行分割。上述款项合计 151520.43 元。吴某尾号为 0044 的中国工商银行账户中的余额 51027.52 元亦应作为夫妻共同财产进行分割。两项折抵后，应由张某

支付给吴某 50246.5 元，吴某主张的超出部分，不予支持。关于张某于双方协议离婚前向案外人付瑜琳、中山市花果山木制品有限公司的转款，吴某表示涉及案外人利益，其另行主张权利，因此，对该部分款项不予处理。依照《中华人民共和国婚姻法》第十七条，《最高人民法院关于适用若干问题的解释（三）》第十八条，《中华人民共和国民事诉讼法》第六十四条规定，判决：一、张某于判决生效之日起十日内支付吴某 50246.5 元；二、驳回吴某的其他诉讼请求。案件受理费 24176 元，减半收取 12088 元，由吴某负担 11808 元，由张某负担 280 元。

二审中，张某提交证据一、微信聊天记录 5 页，证明 2018 年 5 月 14 日，吴某在微信中向张某索要 126000 元，该 126000 元与离婚协议中的 60 万元无关，张某通过向毕俊祥转款 28000 元、向吴某转款 97000 元和 1000 元油卡进行了偿还，可以证实截至 2018 年 5 月 14 日吴某认可张某的欠款数额为 98000 元，也可证实离婚协议中约定的 15 万元已经支付给吴某的事实；证据二、《木门买卖合同》《防火门买卖合同》复印件各一份，证明张某和吴某在离婚前以济南材层建材有限公司、东营玉如装饰工程有限公司、东营绿尔雅装饰工程有限公司名义与华纳万海建设股份有限公司签订了上述合同，合同价款为 2280498.3 元，合同约定以结算款抵扣房款。证据三、《华纳乐府二期防火门、防盗门、防火卷帘购销合同》复印件一份，证明 2017 年 11 月 3 日张某在双方离婚后以东营绿尔雅装饰工程有限公司名义与华纳万海建设股份有限公司签订上述合同，合同价款为 936997 元，合同约定以结算款抵扣房款。

吴某质证称，对证据一的真实性无异议，但其中各款项的结算是张某与吴某之间经营发生的业务结算，与吴某、张某之间离婚款项的结算没有关系。证据二、三均系复印件，对其真实性不认可，且即便其内容真实也不能达到张某的证明目的，该别墅的尾款等都属于张某取得

该项不动产应当承担的义务。

本院认为，张某所提交的证据一与其上诉请求无关联性，证据二、三系复印件，吴某对其真实性不予认可，对上述证据均不予采信。

二审审理查明的事实与一审认定的事实一致，本院予以确认。吴某于2020年9月23日向本院递交撤回上诉申请，撤回对本案的上诉。

本案二审双方当事人争议的焦点问题为一审判决张某应支付吴某50246.5元是否正确。

本院认为，吴某与张某于2017年9月18日签订的离婚协议书系双方的真实意思表示，且经民政机关审核确认，合法有效，对双方均具有约束力。在离婚协议书中，吴某和张某对夫妻共同财产进行分割，财产涉及房产、商铺、车辆、店面经营权及工程收入等。从离婚协议关于财产分割的内容来看，双方虽然对房产、商铺、车辆、店面经营权及工程收入进行了分割，但双方在协议中并没有对相关财产价值予以明确；离婚协议所涉财产对于一个家庭而言均为高价值财产，关于夫妻双方共同生活必须的财产离婚协议未涉及；按生活常理判断，吴某和张某夫妻关系存续期间双方理应有存款或对外享有债权及负有债务等，然而，离婚协议对此也未涉及。综上，本院认为，根据吴某与张某所签订离婚协议关于财产分割的约定，双方在签订离婚协议时应该对夫妻共同财产进行了全面考虑，离婚协议所涉大额财产分割是双方对夫妻共同财产综合平衡后的结果，因此，吴某与张某所签订的离婚协议应为对夫妻共同财产进行了概括性约定，除离婚协议所涉财产外，其他财产应视为归持有财产一方所有。一审判决对离婚协议外的其他财产予以分割不当，本院予以纠正。

吴某在本案审理期间提出撤回上诉的请求，不违反法律规定，本院予以准许。

综上，张某的上诉请求部分成立。吴某提出撤回上诉的请求，应予准许。依照《中华人民共和国民事诉讼法》第一百七十条第一款第二项、第一百七十三条规定，判决如下：

一、准许吴某撤回上诉；

二、撤销东营市东营区人民法院（2020）鲁 0502 民初 1302 号民事判决；

三、驳回吴某的诉讼请求。

一审案件受理费 24176 元，减半收取 12088 元，二审案件受理费 4304 元，减半收取 2152 元，均由吴某负担。本判决为终审判决。

审 判 长 丁文强

审 判 员 于秋华

审 判 员 童玉海

二〇二〇年十月十六日

法 官 助 理 李 兰

书 记 员 刘玉琪

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