The Recently Revised Marriage Law of China: The Promise and the Reality

Charles J. Ogletree Jr.
Harvard University

Rangita de Silva de Alwis
University of Pennsylvania Carey Law School

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THE RECENTLY REVISED MARRIAGE LAW OF CHINA: THE PROMISE AND THE REALITY

Charles J. Ogletree, Jr.* and Rangita de Silva-de Alwis**

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* Jesse Climenko Professor of Law and Vice Dean of Clinical Programs, Harvard Law School.
** LL.B. (Hons), University of Colombo; L.L.M., S.J.D.; Harvard Law School; and Director, International Programs, The Spangenberg Group. This research was made possible by the Ford Foundation and U.S. State Department funded programs on women’s legal services and women’s rights advocacy in China. These projects were funded in part through grant Number S-LMAQM-03-H-0009 of the Department of State. The opinions, findings, and conclusions or recommendations expressed herein are those of the authors and do not necessarily reflect those of the Department of State. The Paper was presented in part to the Comparative Law class at Northeastern University School of Law at the invitation of Professor Margaret Woo.
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Abstract

In April 2001, the Standing Committee of the Ninth National People’s
Congress (NPC), China’s highest legislative body, passed the long-debated
and much awaited amendments to the Marriage Law on the closing day of
its twenty-first session. As stated by one PRC commentator, “In the 50
years since the founding of the New China, there has not been any law that
has caused such a widespread concern for ordinary people.”

Even though the recent revisions to the marriage laws have been
hailed as some of the most significant and positive changes in family law in
China, thus far no empirical evaluation of the laws’ effectiveness in actual
practice has been conducted. Our article raises some questions as to the
practical effect these revisions will have on women’s rights.

We maintain that while the revisions were intended to promote a more
equitable system of property distribution for women at divorce and to
address violence against women in the family, in reality, women will face
major drawbacks in the implementation of these provisions of the law.
Unless the gaps in the law and certain obstacles to the implementation of
these laws are addressed, the revisions will remain largely symbolic. In our
conclusion, we suggest recommendations that will help bring the Marriage
Law in compliance with the international standards set out in the
Convention on the Elimination of Discrimination Against Women
(CEDAW), as well as help deliver on the promise of the revisions to the
Marriage Law.

I. Introduction

Ms. Z was brutally beaten by her unemployed husband during
her marriage to him. . . . If she ever complained to him about his neglect of his family, the beatings became more severe. Due to the battering she received from her husband, she developed severe pulmonary emphysema and was barely able to continue to work to support her family. Once, when returning home early from work, she found her husband in bed with another woman. During the confrontation that followed, Ms. Z was severely beaten and driven out of her home by her husband. Ms. Z filed for divorce and sought custody of their child. During the first trial, the court gave custody of the child to Ms. Z and allowed Mr. Z to remain in the two-bedroom housing unit. Ms. Z was told to find her own accommodations. A legal services lawyer helped Ms. Z appeal the decision. This time, the court ruled that Ms. Z could remain in the apartment’s larger bedroom while Mr. Z stayed in the smaller room. What followed was a nightmarish experience for Ms. Z and her daughter. Her ex-husband would frequently kick the door of her bedroom, cursing and swearing in an effort to drive her away. Since this was the middle of the winter, Ms. Z bore the harassment rather than be homeless. Things continued to degenerate in this unusual living arrangement. Mr. Z started letting out his room for prostitution and boasted to the daughter as to how much he made from this trade. The child lived in constant terror of Mr. Z, and she started performing very poorly at school. On occasion, Mr. Z would pursue his ex-wife and daughter with a knife in his hand and once actually wounded Ms. Z. The situation became unbearable, and Ms. Z and her daughter were forced to flee the apartment. The legal services lawyers once again went to court to ask for a readjustment in the living arrangements. After much negotiation with the owner of the apartment, they agreed to give Ms. Z another apartment in exchange for her former bedroom. 2

The above case illustrates the plight of a large number of divorced women in present-day China. Despite provisions in the law protecting women’s property rights, 3 the reality is that property division at divorce

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3. According to Article 17 of the Marriage Law, properties obtained during the subsistence of marriage belong to both husband and wife. Further, according to Article 39 of the Marriage Law, at divorce, common property must be divided based on mutual agreement. If the two parties cannot come to an agreement, property should be divided by taking into consideration the economic needs of women and children. The Supreme People’s Court has also stipulated certain considerations to be taken into account on distribution of property. These considerations include women and children’s interests, fault of a spouse, whether a spouse is guilty of illegal transfer of property, housing considerations.
will depend largely on the availability of housing units. Frequently, women are faced with the untenable situation of either sharing a bedroom in the ex-husband’s apartment or finding themselves homeless.  

On April 28, 2001, the Ninth Standing Committee of the National People’s Congress adopted a set of revisions to the 1980 Marriage Law. Under the revised laws, civil compensation for fault can be made if there is a finding of bigamy, co-habitation with another, domestic violence or abandonment of family members. The reintroduction of fault into divorce as a factor in determining compensation of parties who are victimized by the actions of the other is in part an attempt to grapple with a high incidence of domestic violence and divorce followed by the feminization of poverty.

Unexamined assumptions in the law and laws that on paper appear to be neutral, might in actual application have unintended consequences on women. This article examines the disparate impact of some of the facially-neutral provisions of the revised marriage law and analyzes how the failure to fully account for the experiences and values of women in the revised marriage law might actually disadvantage women. The aim of this article is to expose those gaps in the law and to suggest how those lacunae might be addressed.

In Part II of this article, we look at the legal provisions safeguarding of the parties, and childrearing responsibilities. See Supreme People’s Court of the PRC, Solutions to Several Problems Concerning the Use and Leasing of Public Houses in Trying Divorce Cases, Problem No. 3 (1993). In dividing property on divorce, different provinces also take into consideration whether a woman has lost her reproductive capacity due to birth.

4. Housing issues at divorce are some of the major problems confronting women. Even though houses can now be bought in the open market, the Real Estate Administration still owns a fair number of houses, which are leased to the public. These houses, however, cannot be sublet nor can leaseholders make a profit off these houses. CTR. FOR WOMEN’S LAW STUDIES & LEGAL SERVS. OF PEKING UNIV., FIVE-YEAR CONSULTING REPORT 17 (2000) [hereinafter CONSULTING REPORT]. Sharon Chaitin also argues that many women who divorce “fight for the right to continue living in the same apartment and to share it with the same spouse, even after divorce, rather than be without danwei [socialist work unit] housing and without the capital to purchase private market housing.” Sharon Chaitin, Shifting Responsibility: A Case Studies Approach to the Rationale for Revising the Chinese Marriage Law in 2001, at 4 (May 1, 2002) (submitted to the Committee on Regional Studies—East Asia in partial fulfillment of the requirements for the A.M. degree in Regional Studies—East Asia, Harvard University) (on file with author).

5. Revised Marriage Law of the People’s Republic of China, art. 47 [hereinafter Revised Marriage Law].

6. Some of the debates that motivated the revisions in the Marriage Law centered on the fact that the 1980 law had not been effective in preventing illegal marriages. This was because it did not stipulate conditions for violating the legal requirements of a marriage and did not clearly state property settlements at divorce. Another debate was whether the property implications of divorce could help deter the rapidly increasing divorce rate in China. Chaitin, supra note 4, at 6–7.
women's property rights at marriage and divorce. By looking at the gaps in the Marriage Law, we examine whether the revised marriage law will have any real impact on women's property rights at divorce.

We first argue that in the absence of a clear and broad definition and recognition of domestic violence, it will be very difficult to obtain civil compensation. Second, we argue that given the weak procedural laws, women will find it difficult to prove their spouse's adultery and/or cohabitation with another in order to succeed in an action for compensation on the grounds provided in the Revised Marriage Law. Third, given the fact that women find it difficult to trace the illegal transfers of property made by their spouses, very rarely will they in any case enjoy a fair distribution of property on divorce. Fourth, despite the recent revisions to the marriage law which provide for civil compensation at divorce, there is no clear understanding as to whether compensation for fault-based divorce includes compensation for pain of mind. Rarely are threats of violence to a woman or threats of harm to her family members considered to constitute domestic violence.

Fifth, the question also arises whether a claim for compensation can be made during the existence of marriage. Sixth, the amount of compensation for fault is not provided and, due to the discretion left to judges who do not have sufficient training in gender issues, similar cases can be decided differently and/or unfavorably to women's interests. Seventh, due to the evidentiary requirements under the Criminal Law, it is very difficult to hold batterers criminally responsible. Under Article 260 of the Criminal Law, the abuse must be continued, consistent, and regular, and meet the requirement of "evil circumstances." Since a public prosecution can be brought only in cases where the damage is severe, most women find it difficult to make a private claim.

Part III analyzes the problems concerning the enforcement of the Revised Marriage Laws. Given the reluctance of the public security bureaus to intervene in family disputes, without corresponding intervention procedures making it mandatory for public security personnel to intervene in domestic violence issues, it will be very difficult to gather proof of such violence. Given the difficulties surrounding the gathering and presenting of evidence, women face the increased burden of maneuvering a difficult legal process.

7. Many scholars have argued that despite various general policies protecting women's rights, there are few mechanisms to implement these rights. See RESEARCH REPORT, supra note 2, at 23; Alford & Yuan, supra note 1, at 17; Yuhong Zhao, Domestic Violence in China: From the Lenses of Chinese Scholar Activists, 18 UCLA PAC. BASIN L.J. 211, 225 (2002). See generally CTR. FOR WOMEN'S LAW STUDIES & LEGAL SERVS. OF THE LAW SCHOOL OF BEIJING UNIV., REPORT AND SUMMARY: SUB-PROJECT REGARDING LEGAL ASSISTANCE AGAINST DOMESTIC VIOLENCE (2002) [hereinafter REPORT AND SUMMARY].
Part IV of the article makes specific recommendations on strengthening the enforcement of women's rights as envisioned by the Revised Marriage Laws. We conclude by examining how China can comply with applicable international norms to better strengthen women’s rights.

II. Background on Women’s Rights Legislation in China

This section will first examine the background in which the Revised Marriage Laws were made and then analyze three important areas that are impacted most by the laws’ changes: married women’s property rights, violence in the home, and civil compensation for fault at divorce.

Prior to the enactment of the 1980 Marriage Law, no-fault divorce was not permitted in China. The 1980 Marriage Law introduced for the first time the complete alienation of mutual affection as grounds for divorce. However, what constituted the alienation of affection was not spelled out until later.

Apart from the Marriage Law, the government has also passed a number of important pieces of legislation protecting women’s rights, including the 1992 Law on the Protection of Women’s Rights and Interests (LPWRI). Even though the LPWRI richly details the specific protections of women’s rights, no enforcement mechanisms are attached to the law.

8. Divorce is allowed if the following facts existed: 1) bigamy or living together with another partner when he or she is still married to his or her spouse; 2) spousal abuse, ill treatment, or abandonment; 3) one party has the habit of gambling, drug addiction, and the inability to get rid of these bad habits; 4) separation for two years, due to break down in affection; or 5) other reasons that result in breakdown of affection. Revised Marriage Law, art. 32. See generally Marriage Law of the People’s Republic of China, art. 25 [hereinafter Marriage Law of the PRC].

9. Supreme People’s Court of the PRC, The Several Opinions on How to Identify that Affection Between Couples Has Broken in Dealing with the Divorce Cases by the Supreme People’s Court, art. 2 (1989) (listing the following examples as constituting breakdown in affection: rash marriage, lack of understanding before marriage, extramarital relations, and difficulty living together); Chaitin, supra note 4, at 36.

10. This law was enacted to meet China’s obligations under the Convention on the Elimination of Discrimination Against Women. CTR. FOR WOMEN’S LAW STUDIES & LEGAL SERVS. OF PEKING UNIV., THEORY AND PRACTICE OF PROTECTION OF WOMEN’S RIGHTS AND INTERESTS IN CONTEMPORARY CHINA—INVESTIGATION AND STUDY ON THE ENFORCEMENT OF UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN IN CHINA 9 (Worker Press 2001) [hereinafter THEORY AND PRACTICE]. Other laws that focus on women’s equal rights to property include PRC CONST. art. 48 (1982) and Inheritance Law, art. 26 (1985), which provides that the widow is entitled to one-half of jointly owned property and that the widowed daughter-in-law or the widowed son-in-law who has fulfilled his or her obligations to his or her parents-in-law should be the first heir.

11. Jonathan Hecht argues that the LPWRI is not designed to be used by the victims of discrimination. He writes, “To the extent that it is addressed to society as a whole, the law is essentially a set of normative principles to be inculcated through education and
A serious claim of violence against a woman has to be dealt with under the Criminal Code.\textsuperscript{12}

\subsection*{A. Property Rights at Marriage and Divorce}

Women's property rights are protected by constitutional and legislative guarantees in China.\textsuperscript{13} Apart from the constitutional guarantee of equality, the laws of the PRC provide for the special protection of women under certain circumstances. For example, in the division of property upon divorce, if at the time of divorce husband and wife have failed to reach an agreement, the court is to follow a principle of favoring propaganda.” CHINA RIGHTS FORUM (Fall 1995).

12. Serious acts of domestic violence are covered by the chapter on “Crimes of Disrupting Marriage and Family,” in the Criminal Law. Article 260 provides for the crime of mistreating family members. However, a claim can be made under this provision if the crime is “evil,” in which case the accused can be sentenced to two years or less in prison or placed under criminal detention or control. Those committing crimes provided in Article 260 and causing severe injury or death to the victim can be sentenced to two to seven years in prison. The mistreatment of family members will constitute a crime only if the case is serious and, for example: 1) where the behavior or mistreatment exists for a prolonged period of time; 2) where the mistreatment occurred with high frequency, even if it may only exist for a short period of time; 3) where the motivation behind the conduct is particularly mean, such as coercing the wife into an agreement to divorce because she has given birth to a daughter or because the husband wants to start another relationship; 4) where the means of mistreatment is cruel and inhumane, such as needle punching, fire burning, splashing boiling water, belt whipping, etc.; or 5) where the consequence is grave, such as mental disorder, paralysis, injury and disability, death, and suicide. Zhao, supra note 7, at 226. Courts can also resort to Article 232 and Article 234 of the Chinese Criminal Law. Article 232 provides for the crime of murder and can be used to deal with incidents of murder of women. Article 234 provides for the crime of intentional injury and states that whoever commits the crime in the preceding paragraph and causes a person’s injury is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment; if a person causes a person’s death or causes a person’s serious deformity by badly injuring him, he is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment, or death penalty. While Articles 232 and 234 provide criminal sanctions for perpetrators of domestic violence, punishment can be imposed only in extreme cases, and if there is forensic authentication of a wound amounting to a “flesh” wound. See id. at 227.

13. Women in the People’s Republic of China enjoy equal rights with men in all spheres of life—in political, economic, cultural, social, and family life. See PRC CONST. art. 48. Further, the LPWRI guarantees women’s equal rights to property in joint property relationships derived from marriage or family, in responsibility farmland, approval of housing sites in rural areas, and succession to property. See LAW ON THE PROTECTION OF WOMEN’S RIGHTS AND INTERESTS, art. 28–32 (1992) [hereinafter LPWRI]. Also, property acquired by the husband and the wife during the period in which they are under contract of marriage shall be in their joint possession, unless they have agreed otherwise. Husband and wife shall enjoy equal rights in the disposition of their jointly possessed property. Marriage Law of the PRC, art. 13.
the wife and the child.\textsuperscript{14}

The Marriage Law provides that properties obtained during the marriage belong to both husband and wife.\textsuperscript{15} Property owned before marriage belongs to the individual parties.\textsuperscript{16} An exception is allowed if a prenuptial contract is signed stipulating the terms of ownership of property. Article 19 of the Revised Marriage Law allows for a couple to stipulate the division of their premarital and marital property as under separate ownership, co-ownership, or partially under each of these by written agreement. In the absence of such agreement, Articles 17 and 18 of the Marriage Law will apply. In Article 17 of the Revised Marriage Law, jointly owned property is described as: wages and bonuses, earnings from production and operation, earnings from intellectual property rights, property acquired by inheritance or as a gift, and any other property that is jointly owned by both husband and wife.\textsuperscript{17} Article 18 defines separate property as: premarital property of one party; a medical care payment; a handicapped person's living subsidy or other monies that a party receives

\textsuperscript{14} The jointly held property of the husband and wife should be handled by agreement. If an agreement cannot be reached, the adjudication will be made according to the specific condition of the property and the principle of favoring the wife and the child. Revised Marriage Law, art. 39. The LPWRI provides that "at the time of divorce, husband and wife shall divide their jointly-owned house in accordance with their agreement. If they fail to reach an agreement, the People's Court shall pass judgment in accordance with the principle of giving favourable consideration to the wife and children." LPWRI, art. 44. The LPWRI also provides that the state protect the right of divorced women to the ownership of the house. \textit{Id.} In situations where a child is over two years of age, custody of the child will be given to the party who has gone through the sterilization process. \textit{Id.} at art. 46. Since most often it is women who go through the sterilization process, it can be deducted that the mother will receive custody of the child, and if so, the law will favor the wife and child when making property allocations on divorce.

The public house which can be rented by both sides should be dealt with according to the following principles: first, the side raising children should be considered; second, if husbands and wives are in the same condition, wives should be protected; third, the handicapped; and fourth, the unimpeachable side should be considered.

Supreme People's Court of the PRC, The Several Opinions of the Handling of Housing Policy, art. 3 (1996).

\textsuperscript{15} See The General Rule of the Civil Law of the People's Republic of China, art. 78 (granting joint owners the right to ownership of the jointly owned property and to share related obligations).

\textsuperscript{16} See Supreme People's Court of the PRC, Advice of Several Problems on How to Execute the Civil Policy and Law.

\textsuperscript{17} Further, in joint property relationships derived from marriage or family, the rights and interests enjoyed by women according to law may not be infringed upon. LPWRI, art. 29. Women shall enjoy equal rights with men in allotment of responsibility farmland or grain ration farmland and in the approval of housing sites in rural areas, and women's lawful rights thereto shall not be infringed upon. \textit{Id.} at art. 30. After marriage or divorce, women's responsibility farmland, grain ration farmland and housing sites shall be secured. \textit{Id.}
as compensation for bodily injury; property identified in a will or a gift as belonging to one person alone; an article for daily use for one person alone; or other property belonging to one person alone. The 1993 Supreme People’s Court’s opinion, Concrete Advice of the Problems that People’s Court Try a Divorce Case and Deal with the Property Division, provides a definition of property in common or jointly-owned property. Property in common is described as original common properties and transferred common properties.

An agreement on division of property will be binding on both parties, and if a couple chooses separate property ownership (of property acquired during a marriage), the couple’s debts are separately owned as well. An exception to the prenuptial contract is provided in Article 40 of the Marriage Law, which provides that at divorce, even if there is a pre-existing written agreement providing for the separate ownership of property, “the party that has done more by bringing up children, taking care of the aged, and assisting with the other party’s work shall have the right to ask for compensation from the other party.”

1. Problems Encountered in Property Ownership During Marriage

Even though women in China enjoy a status of equality under the law, legislation regulating access to those rights is not based on standards of 18. The Supreme People’s Court’s advice recommends that husbands’ and wives’ personal property, which includes demobilization pay and military pay obtained by demobilized soldiers and army men transferred to civilian work, medical subsidy and production subsidy brought by demobilized soldiers from the army, and properties bought and used respectively, belongs to the individual spouse. THEORY AND PRACTICE, supra note 10, at 262.

19. The original common properties refer to those that are obtained when their conjugal relations remain and last. They include: earnings and purchased possessions obtained through one side’s or both sides’ labor; properties inherited or received by one side or both sides; economic benefit earned through intellectual property by one side or both sides; profits earned through one side’s or both sides’ production or operating activity such as contracting and renting; creditors’ rights obtained by one side or both sides; and other legal gains of one side or both sides, such as dividends, fortuitous gains, or property transferring gains. Id. at 263.

20. Property in common includes demobilization pay and military pay if the marriage is over ten years. After eight years of marriage, premarital personal property is considered transferred common property, means of substance after four years can be regarded as property in common, and finally, personal property can be regarded as property in common if the litigant cannot give convincing testimony to the contrary. Id.; see also Supreme People’s Court of the PRC, Detailed Opinion on the Management of Property Division Issues in Divorce Cases Tried by the People’s Courts (1993), which stipulates that all property owned by one party before marriage, and expensive living materials after four years, become jointly-owned marital property. Further, Article 4 provides “that when husband and wife live in two separate places, all property used after marriage should be declared jointly-owned marital property.” Chaitin, supra note 4, at 62.
Addressing discriminatory practices and the enforcement of national laws at the local levels has been particularly challenging. Despite protective measures of the law, in reality, women face severe challenges in equitable ownership of property at marriage and property distribution at divorce. Weak enforcement mechanisms of the law, addressed later in this article, have restricted women’s access to economic resources within the family. Economic marginalization has resulted in deprivation of other important rights for women as well.

This section looks at the problems in the laws concerning property distribution and the laws’ response to domestic violence.

a. Illegal Transfer of Property

Case One: Mr. and Ms. Y ran a fuel station by themselves in J. City, G. Province. When they filed for divorce, the husband made use of his connections as a son of a member of the Party cadre to turn the fully-owned fuel station into one partly-owned in partnership with a third party. As a result, the wife lost her full share of the common property.

Case Two: Ms. G and her husband were married in 1981. At that time, they were both ordinary workers. In 1988, Mr. G went into business, was successful and amassed a lot of money and private property. As his wealth grew, he began adulterous relationships with other women. Even though Mr. G told Ms. G several times that they had a million yuan in savings, he never told her in which bank the money was deposited. Mr. G, despite his wealth, was very stingy towards his wife and child. However,

21. Not all jurisdictions provide equal rights to property distribution. For example, the Civil Code of Chile provides that “the marital partnership is to be headed by the husband, who shall administer the spouses’ joint property as well as the property owned by his wife . . . .” CÓDIGO CIVIL, art. 1749 (author’s translation).

22. See RESEARCH REPORT, supra note 2, at 23; Christine M. Bulger, Fighting Gender Discrimination in the Chinese Workplace, 20 B.C. THIRD WORLD L.J. 345 (2000); Zhao, supra note 7, at 225.

23. For example, inequality in property distribution has caused problems for women in custody disputes even though Article 5 seems to favor the woman in custody disputes and states that when both sides have a controversy over the rearing of minors more than ten years of age, the child’s opinion should be taken into account. As to the child above two years old, if both parents request guardianship of the child, favorable consideration should be given to the party who has lost child-bearing ability because of sterilization or other reasons. Consideration will also be given to the financial circumstances of the two parties. In practice, the party with little money and no house will lose custody of the child. Supreme People’s Court of the PRC, Several Opinions of the Handling of the Rearing of the Child, art. 5 (1993)

24. THEORY AND PRACTICE, supra note 10, at 294.
he spent lavishly when it came to his extramarital affairs. Once, when Ms. G confronted him, he beat her savagely and threatened to kill her if she interfered with his affairs. Ms. G was afraid and went to live with her parents. While she was there, her husband filed for divorce. Ms. G visited her husband’s company to ask him for child support and by chance, found the contract for the transfer of a restaurant. Ms. G sued her husband in court demanding that this property be divided as common property.25

A large number of women who seek to divorce in China share the plight of Ms. Y and Ms. G. Despite the facially neutral safeguards in the law, in reality, women have very little knowledge of what property is actually owned and have little recourse to tracing property when it is illegally transferred to a third party by a spouse.26

The law provides that during the marriage neither side can transfer property without the consent of the other party.27 However, as illustrated in the above case, the law does not prevent one party from concealing common property, often making women unable to protect their rights. Given the weak procedural laws, it is very difficult to gather real evidence on property transfers or compel witnesses to testify as to concealed property.28 Married women are often unaware as to the full extent of their husband’s income or property and, even if aware, will rarely be able to offer proof of that wealth.29 Most often, due to poor education and low social status, they are ignorant of their rights and have to share the burden

25. RESEARCH REPORT, supra note 2, at 15–16.
26. THEORY AND PRACTICE, supra note 10, at 293.
27. The handling of the jointly owned property by partial owners when joint ownership still exists is generally considered invalid. Supreme People’s Court of the PRC, Opinion on Article 89 Issued by the General Rule of Civil Law of PRC (1988). Transference of properties during the period of litigation is prohibited. The specific article states that the side who has illegally concealed, transferred and refused to hand out the shared properties of both sides, or illegally sold or destroyed the shared properties should be designated a smaller share or even no property. See CIVIL PROCEDURE LAW OF PRC, art. 102, available at http://www.qis.net/chinalaw/prclaw34.htm (last modified Feb. 10, 1998). Anyone who attempts to conceal, transfer, sell, or damage joint marital property during a divorce, or tries to falsify debts, will receive a smaller share or no share of the divided property. Revised Marriage Law, art 47.
28. Firstly, the articles about the couple’s property relations in our present marriage law are too simple, which could not accommodate the changes of citizen’s income style and the complex reality. Secondly, women have little legal idea of the couple’s property relation. So it is hard for them to protect their own legal rights and interests. Thirdly, China’s tax system for personal income and profit of the private company is not perfect, so it is hard for the government to make clear the citizen’s definite property.
29. Id. at 294.
of repaying a spouse’s individually incurred debts.\textsuperscript{30}

Even though a husband’s transfer of property in common to a third party without permission is invalid by law,\textsuperscript{31} in reality, women find that there are many obstacles to enforcement. First, the property that has been transferred must be proven to be common property and not personal property. Also, if the buyer bought the property in good faith, the sale is valid,\textsuperscript{32} and the party transferring the property has to reimburse the other party.\textsuperscript{33} As seen in the above cases, the challenges surrounding proving the ownership or concealment of property constitute an insurmountable burden to women in China.\textsuperscript{34}

\textit{b. The Problem of Shared Debt}

Debts incurred during marriage are considered common debts and are the responsibility of both parties.\textsuperscript{35} Common debts have been defined as costs associated with the raising of children and care for elders, purchase or repair of houses, purchase of articles for daily life, and debts incurred for

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 293–94.
\item \textsuperscript{31} Revised Marriage Law, art. 47.
\item \textsuperscript{32} Supreme People’s Court of the PRC, Opinion on Article 89 of Notions on Several Problems in Implementing and Carrying out the General Articles of Civil Law (1988).
\item \textsuperscript{33} Interpretation of the Supreme People’s Court Regarding Enforcement of the General Rules of Civil Law of the People's Republic of China, art. 89 provides that “if third party acquires the property in good faith and non-gratuitously, the corresponding loss of the other co-owners shall be compensated for by those who arbitrarily disposed of the property.” THEORY AND PRACTICE, supra note 10, at 489–90.
\item \textsuperscript{34} The most important problem is to induce evidence of the property. In these cases, such as marriage, cohabitation, succession, loan, economic issues, there always have such phenomenon that property is transferred or hidden. The most difficult adding evidence of property is to adduce evidence as currency and security. To find these properties needs to go to bank \textit{[sic]}, securities company, administration for industry and commerce, administration of taxation, financial control agency of unit to investigate and gain relating evidence. Clients never can realize such actions by themselves, even in the process of investigating and gain relating evidence with help of lawyers, the right of investigating and gaining evidence often can not be realized. Some agencies, such as bank, securities company, only accept the investigation from public security organization and procurator and court, never accept the investigation from lawyers. It is just for the reason that there have no enough and effective evidence \textit{[sic]}, the legal property of clients can not be confirmed and supported by law. Such situation connives and even encourages the actions of privately transferring and hiding property.
\item \textsuperscript{35} “When divorced, the debt shouldered originally by the couple during the common life should be cleared off by the properties obtained during the common life.” Marriage Law of the PRC, art. 42.
\end{itemize}
means of production. On the other hand, debts incurred for personal benefit have to be shouldered individually. These debts are defined as debts incurred without mutual consent and debts incurred to help relatives that the parties have no financial responsibility under law to support.

Some judicial discretion is available under Article 41 of the Revised Marriage Law, which states that when joint property is insufficient to pay debts incurred during marriage or where there is separate ownership of property, if a payment agreement cannot be reached, the court will make a judgment. However, the capacity of each party to pay back the debt may be taken into consideration, and the party that has no capacity to discharge the debt might be exempted from its repayment.

Despite these discretionary provisions, certain gaps in the law have a 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.

c. Challenges to Equitable Property Distribution at Divorce

Under Article 13 of the Marriage Law, property has to be distributed equally, and according to Article 39, common property must be divided based on mutual agreement at divorce. The Supreme People’s Court has stipulated certain considerations to be taken into account upon the distribution of property. These considerations include: women’s and children’s interests, fault of a spouse, whether a spouse is guilty of illegal

36. Theory and Practice, supra note 10, at 270.
37. Marriage Law of the PRC, art. 41.
38. Theory and Practice, supra note 10, at 270.
39. Because of the family situation and the social degree of the housework, the two sides could not pursue advanced studies at the same time, so usually at the expense of one side (usually the wife’s side) the other side could succeed. The couple’s property was consumed and transferred into special knowledge or the ability for technology, so when the husband’s side can obtain more profit by his special knowledge and skill, the wife’s side possessing nothing, which is unfair. So a system of the couple’s property transformation should be set up. If the husband’s side obtains profit due to the transformation of the couple’s property, when they divide their property in common, the husband’s side should share little and the wife’s side should share more. If the quality of the property in common is not sufficient, the wife’s side should be compensated correspondingly, considering the social value of the special knowledge and skill.

Id. at 286.
transfer of property, housing considerations of the parties, and child-rearing responsibilities. In dividing property at divorce, different provinces also take into consideration whether a woman has lost her reproductive capacity due to childbirth. Further, the Civil Procedure Law provides that, "[t]he side who has illegally concealed, transferred and refused to hand out the shared properties of both sides, or illegally sold or destroyed the shared properties should be designated a smaller share or even no property." Article 9 of the Supreme People's Court's Explanation of a Few Problems Involving the Use and Rental of Housing in Divorce Case Trials (1996) provides that when husband and wife jointly purchase "partial property rights" housing, which is public housing allocated by the housing unit, each party can reside in half of the apartment upon divorce. Article 3(1) provides that when both husband and wife rent an abode, the party caring for the child should be favored. In certain regions, if the couple rented public housing and the marriage lasted over five years, the wife can continue to rent public housing. Further, the LPWRI and the Revised Marriage Law also recommend that not only should the rights and interests of women be considered in settling property at divorce, but that if the wife has no house to live in and the husband has favorable conditions, he should be made to support his ex-wife. Despite the provisions outlined above, the lack of clarity in the area of property ownership in China, as well as rather vague, overly-broad, and oftentimes unenforceable guidelines, will prove inadequate to provide concrete protection to women at divorce.

Even after economic reforms in China, except for those wealthy enough to purchase private housing, such housing is still dependent on

40. Supreme People's Court of the PRC, Notions on Several Problems in Implementing and Carrying out Civil Policies Law, art. 20 (1984).
42. Revised Marriage Law, art. 47.
43. Chaitin, supra note 4, at 63.
44. THEORY AND PRACTICE, supra note 10, at 288.
45. If at the time of divorce, one party has difficulties supporting himself or herself, the other party shall render appropriate help from his or her personal property such as a dwelling house. Specific arrangements shall be made between both parties through consultation. If they fail to reach an agreement, the People's Court shall make a judgment. See Revised Marriage Law, art. 42.
46. THEORY AND PRACTICE, supra note 10, at 289; Alford & Yuan, supra note 1, at 17.
47. Alford & Yuan, supra note 1, at 17, 21 (arguing that the general terms of the law fail to provide real guidelines on how to provide assistance to divorced women, and that the oblique nature of the law leaves considerable discretion to officials who might limit those very rights enumerated in the law).
one’s place of work or work unit.\textsuperscript{48} Housing and work are inextricably linked, and housing often becomes a key criteria governing marriage. Marriages are hastily registered based on an upcoming allocation of housing units for married couples. The housing unit’s capacity to govern marital relations extends beyond the duration of the marriage. The housing unit possesses the capacity to govern property relations between couples, and the wishes of a housing unit can influence a court’s decision regarding property division on divorce, as well as whether or not a court decision will in fact be enforced.\textsuperscript{49}

As in the case of Ms. Z mentioned in the introduction to this article, in present day China, many women are faced with the choice of sharing a bedroom in the ex-husband’s apartment or scrambling for shelter.\textsuperscript{50} Sometimes this is allowed by the court as temporary housing for a stipulated period of time or until the woman remarries. The confusing state of the law is evident in two cases from a recently published volume of Women’s Legal Aid Cases.\textsuperscript{51}

\textit{In 1996, X filed for divorce from her husband on the grounds of alienated marital affections. Just after the birth of their daughter in 1991, X and her husband had been allocated a two room apartment from their work unit. They purchased the apartment in 1994. In a long protracted struggle for divorce, X argued that since the apartment was allocated to them as a couple it fell under the category of work unit–allocated welfare housing which confers partial property rights based on the 1996 Supreme People’s Court opinion on public housing in divorce cases. On appeal, X’s husband was given both the apartment and custody of the child, and X was allowed to live in the smaller room for a}

\textsuperscript{48} Until the reforms in 1990, individuals obtained housing through one’s place of work or work unit otherwise known as danwei. One’s work in a particular work unit was dependent on the possession of the correct household registration in a given area. Even though housing became available in the open market in the last two decades, given the high purchase price, danwei affiliation and its related housing and benefits were fundamental criteria in marriage transactions. Chaitin, supra note 4, at 1–2, 20.

\textsuperscript{49} Certain provinces stipulate that a woman whose husband is a serviceman, a woman whose husband is working in another city, a woman who is a member of a revolutionary martyr’s family, a woman who is bringing up young children at divorce, a disabled woman’s worker, a widow, or a senior unmarried woman should be favored in distributing property. Measures taken in Anhui Province for the Carrying out of People’s Republic of China Guarantee Law of Women’s Rights and Interests, art. 28 (1994), in \textsc{Theory and Practice}, supra note 10, at 287.

\textsuperscript{50} Chen Mingxia, \textit{The Marriage Law and the Rights of Chinese Women in Marriage and the Family} (unpublished paper on file with author) (writing that in one northeastern province a woman was found by police spending the night in freezing weather following divorce).

\textsuperscript{51} Chaitin, supra note 4, at 44–49 (quoting from a recently published volume of Women’s Legal Aid Cases (Funu Falu Yuanzhu Anli: Zhinan)).
The maximum period of sixty days after the judgment. Her husband was to pay 9,000 RMB as compensation for her part of the house.52

The second case involves rights to rental property following divorce. The facts are as follows:

Y and Z registered their marriage in order to take advantage of Z's work unit's (the army's) housing allocation. The army unit allocated army housing to the couple a few months after their marriage. Y filed for divorce on the grounds of alienated marital affections. When Y filed a second divorce petition, upon her first being rejected, Z transferred out of his original work unit (danwei) in order to give up his rights to the apartment and thereby prevent Y from exercising her rights. On the second appeal hearing the court awarded Z child custody and the right to rent the larger room in the original apartment and gave Y the right to rent the smaller room until she remarries.53

Despite the fact that most provinces and autonomous regions and municipalities state that women workers enjoy equal rights to housing units, many units allocate houses to men as principal residents.54 While certain units allocate dwelling houses only to male workers, some others allocate housing units only at marriage.55 As seen in the above case, men and women are known to get married in order to be eligible for such allocation. Divorced women often are at the lowest end of the spectrum of eligibility for housing.56 In fact, as evidenced above, some husbands are known to return the house to the work unit in order to prevent the wife from accessing housing after divorce.

Although the Supreme People's Court has regulated that a house which cannot be divided in two should be assigned to one party, and that party should compensate the other party for half the value of the house, this practice works unfairly for women. Women usually do not have the money to reimburse husbands, so the house automatically goes to him. Even though Article 42 of the Revised Marriage Law states that a party who is having problems subsisting at the time of divorce should be helped by the other party, this provision, without any corresponding enforcement mechanism, remains merely symbolic and an attempt to inculcate moral values.

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52. Case on file with the authors; Chaitin, supra note 4, at 46–49.
53. Chaitin, supra note 4, at 44–46.
54. THEORY AND PRACTICE, supra note 10, at 286.
55. Id.
56. Chaitin argues that when housing is obtained as a couple and economy of distribution is based on the conjugal unit, "there is not enough available housing to distribute to divorcés and single-parent families . . . ." Chaitin, supra note 4, at 3.
d. Rural Women's Property Rights

Rural women encounter unique challenges to property rights which have not been fully addressed by the Marriage Law. In 1998, the government passed a Land Management Law that provided farmers with a thirty-year land use right, extending the original fifteen-year contract term. Under this law, a household's children can inherit the household rights—that is, the unexpired part of the thirty-year term when their parents die. Within the thirty-year term, the household can rent out its lands to others or even sell the remaining years of the use rights. While the thirty-year contract protects the rights of the household, it does not sufficiently protect the rights of women as individual members. Several categories of women—namely unmarried women who remain in their home village, married women when they move, women who marry non-rural residents but stay in rural areas, and women who are divorced or widowed—face discrimination in land distribution.  

Traditionally, young women usually move to their husbands' villages when they marry, and divorced or widowed women may have to move back to their villages of origin. Because of these moves, while men may inherit parental land, women must rely more heavily on adjustments in landholdings to obtain land. With growing official discouragement and legal limitation of readjustments, women increasingly have difficulty obtaining land in their husbands' villages or retaining land in their parents' villages. Also, while men can inherit land use rights in their parental villages, women often may not be able to do so because of their move to the husbands' villages. Unmarried women are allocated a smaller share of land than males or no share at all. Women who are widowed or divorced are faced with the problem of either retaining land in their husbands' villages or being allocated land in their parents' villages.

The LPWRI, too, provides women with equal rights to "responsibility land." These rights are protected during marriage and at divorce.

57. The All-China Women's Federation in 2000 found that in areas where land is under intense pressure because of expanding non-agricultural uses, the villagers will often vote to determine whether women applicants can have land. These include both new wives moving to their husband's village and women who marry but do not move to the husband's village. For example, in Huoqui County in Anhui, there were forty-five married women who stayed in their villages of origin; their farmland and residential land was taken away by force by the village committee. They sued the village, and the court ruled in their favor. But the village leader said: "You may have won the suit, but we are still not going to give you anything. You can bring Jiang Zemin here, and we still won't give you anything." The forty-five women remain landless. Cases like this can be found around the country. Zongmin Li, Women's Land Rights in Rural China: A Synthesis 8 (unpublished paper on file with the author).

58. Men and women are equal in dividing responsibility fields, responsibility
However, in practice, women are discriminated against in their rights to property. The lack of administrative remedies further exacerbates these problems. After a rural woman gets divorced from a husband who lived in the city, she usually has to return to the collective economic organization of her original family unless she gets remarried. However, rural cadres often do not reallocate the responsibility land to her. A widow returning to her village faces similar problems. Even though the law provides for equal treatment of married and unmarried women, in practice a married woman is generally considered in common parlance to be “water splashed out” who therefore loses the right to land in her village.

The new Rural Land Contracting Law, which came into effect on March 1, 2003, provides some safeguards to women. For example, Article 6 provides that equality guarantees in laws such as the Law on Protecting Women’s Rights and Interests and the Inheritance Law apply to land contracts. Article 30 will protect the rights of girls when they become women, marry, and move to their husbands’ villages until they receive land in the new villages. Article 28 specifies types of land to be used for “readjustment of contracted land or contracted to newly added populations mountains, self-preserved fields, and self-preserved mountains. “Responsibility land” is defined as land tenure rights/land use rights. When rural women marry or divorce, the village to which their residence belongs should allocate the relevant fields or mountains to them. LPWRI, art. 30.

59. THEORY AND PRACTICE, supra note 10, at 308.
60. ld. at 307.
61. ld.
62. For example, Tan, a peasant woman from a village in Yanta District, Xian of Shannxi, married a peasant from another county of the same province. Instead of transferring her registered residence to her husband’s village after getting married, she kept it in her original village and also kept her contracted and rationed farmland. Time went by, and Tan gave birth to her first daughter. Because it was not a son, the couple decided to have another child. Tan submitted a request to her original village (where she was registered) for permission to have a second child. Upon being granted permission, she gave birth to a second child. Neither of Tan’s children, however, got their share of farmland from her village, which later also reclaimed her share of land during land redistribution, on the basis that she had married into another village. Since she was not a registered resident of her husband’s village, she was not granted any land there either. A dejected Tan had to appeal again and again to cadres in her village for land, but all she was told was that it was impossible because she had married into another village. Soon after, she underwent sterilization hoping this would persuade the Village Committee to grant her land. Then, in 1997, when land in her original village was expropriated, all villagers except Tan and her children were given 25,000 yuan each in compensation. (Case on file with authors.)

Divorced women from rural areas face equally difficult problems. For example, Wang, a rural woman in Wuhan City, Hebei Province, remarried and moved to another village. In the new village, the land contract could not be changed for three to five years, and she and her family had to purchase grain for subsistence at a black market price. THEORY AND PRACTICE, supra note 10, at 308.
63. THEORY AND PRACTICE, supra note 10, at 308.
within the village,” and Article 28(1) also states that at the end of the thirty-
year allocations, land could be set aside for allocation to new wives in the
future.64

However, these laws lack implementation mechanisms. Despite the
fact that the All China Women’s Federation (ACWF)65 has supported land
readjustments in order to accommodate the demands of wives who marry
into their husbands’ villages, the only circumstances in which the new law
allows for readjustments are “where a natural disaster has seriously
damaged contracted land and other special circumstances.”66

Another major drawback in the new law is that it only has prospective
application and does not address the problems of women who have already
lost their land rights. Much will depend on how much these changes in the
law are communicated at the local level and on the level of respect the local
agricultural committees have towards those laws.

B. Problems Concerning the Law’s Response to Domestic Violence

Even though the Revised Marriage Laws make domestic violence a
ground for divorce as well as allow for civil compensation at divorce,
without a clear definition of what constitutes domestic violence it will be
difficult to achieve the laws’ objective.67 Although the Interpretation by

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64. But since a second cycle of redistribution and new contracts was accomplished in
the 1990s, it will take some time to realize the full impact of this change. Also, under
Article 27, any readjustments must be agreed upon by “2/3 of a villagers’ meeting of the
collective economic organization or 2/3 of the villagers’ representatives,” and must also be
“reported to and approved by the agricultural or administrative department of the township
people’s government and of the county people’s government.” A similar provision in the
Land Administration Law made it very difficult to get approval for readjustments for the
benefit of women, and this provision in the Rural Land Contracting Law will likely have the
same effect. Li, supra note 57.

65. The ACWF, established in 1949, is the largest women’s organization in China. The
ACWF has an extensive network across the country and is the bridge between the Chinese
Communist Party, the People’s Government, and women.

66. Rural Land Contracting Law, art. 27.

67. In the United States, even though there is no compensation for fault-based divorce
as in China, since the abrogation of interspousal immunity, courts recognize torts emerging
from divorce proceedings. Some states have also recognized a cause of action for
intentional infliction of emotional distress. A majority of the interspousal intentional
infliction of emotional distress suits involve claims of physical abuse. A few courts have
recognized the tort of intentional infliction of emotional distress without any physical harm.
Not all states in the United States allow divorce suits to be joined with tort suits. In the
which has been hailed as a legal breakthrough in the fight against domestic violence, the
New Jersey Appellate Court approved the existence of a new continuous tort for domestic
violence. One problem here is that tort remedies cannot directly help poor women because
their abusive partners do not have the monetary resources to satisfy a judgment. But on the
whole, the availability of tort remedies is an important development from the point of abuse
The Supreme People's Court on Several Issues Regarding the Marriage Law of China, which was passed in December 2001 in order to clarify some of the provisions of the revised marriage law, defines domestic violence as acts of violence that limit women's freedom and cause bodily or mental damage, this definition can still be otherwise interpreted by the courts. Therefore, many acts that are considered violence against women in international instruments and in other jurisdictions, such as sexual abuse in marriage, fall outside of the law in China. This section looks at why the revised laws will not achieve all that they set out to achieve in controlling and regulating violence against women in the family.

1. How is Domestic Violence Defined?

The term "domestic violence" entered the Chinese lexicon for the first time in 1995 in the State Council's National Program for Women's Development.68 "Curb family violence" was one of the provisions mentioned in the Program.69 Women's rights scholars in China since then have argued that without a proper legal definition of domestic violence, very few men and even women are able to identify what constitutes domestic violence.

In a recent survey conducted in the outskirts of Beijing, residents were asked whether there was domestic violence in the community. The response was "no." When the question was reframed and residents were asked whether people beat their wives, the answer was "yes, of course, people everywhere get into arguments and beat their wives."70

Domestic violence is not broadly understood to cover threats of violence to the woman and/or her family members, psychological damage, sexual abuse, or rape within marriage.71 In the absence of the criminalization of domestic violence, for a woman to bring a charge of such a crime under the law on Crimes of Disrupting Marriage and Family under Article 260 of the Criminal Law, she has to meet a very high standard of proof by showing that the crime was particularly "evil" and the abuse was "continued and consistent." In a significant case, thirteen instances of abuse during a twenty-year marriage were considered insufficient to prove
a crime of evil by the court. The court stated that:

[The private prosecutor and the accused have been married for over 20 years and often quarreled because of their different natures. The fact that the accused beat the private prosecutor 10 times has been proved. But the assault and battery of the accused occurred only by accident; it was not regular, continuous and consistent and there was a good reason for it.\(^\text{72}\)]

Article 260 of the Criminal Law is most often interpreted by courts as an injury that results in severe bodily harm (broken limb, loss of eyesight, etc.). Most courts and prosecutors will not address what is considered “minor” physical injuries as domestic violence.\(^\text{73}\) In order to bring a charge of intentional injury under Article 234 of the Criminal Law, the injury has to amount to at least a flesh wound, and there has to be forensic authentication of the wound.

Accordingly, psychological injury caused by domestic violence is rarely an actionable wrong.\(^\text{74}\) Also, because only violence perpetrated by a spouse is actionable, civil compensation will not be available for a woman who is abused by a family member or partner other than a spouse or by an ex-spouse.\(^\text{75}\)

Historically in China, as well as in other parts of the world, double standards informed the law on family violence, and violence against women has been considered a lesser offense. In China, during the Tang dynasty, the husband would not be prosecuted for bringing false charges against the wife, beating her, or seriously wounding her. The husband who murdered his wife could be sentenced to only three years of imprisonment. On the other hand, the wife who brought a false charge against her husband would be sentenced to three years of imprisonment, while the wife who murdered her husband would receive the death sentence.\(^\text{76}\)

Wife beating has also been sanctioned throughout history in varying cultures.\(^\text{77}\) In Nigeria, for example, certain jurisdictions still allow

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\(^\text{72}\). REPORT AND SUMMARY, supra note 7, at 13.

\(^\text{73}\). Both Article 232 and Article 234 of the Criminal Law provide criminal sanctions for perpetrators of domestic violence only where death or severe bodily injury was intended or actually resulted. Also, the people’s procuratorate seldom prosecute the case unless the injury is very serious.

\(^\text{74}\). REPORT AND SUMMARY, supra note 7, at 21.

\(^\text{75}\). The only exception is if it is severe physical harm. Article 260 addresses the crime of mistreating family members. The law provides for sentences of up to two years in prison in cases of particularly odious physical abuse and sentences of up to seven years if the violence results in serious injury or death. See supra note 12 (explaining the extreme situations in which physical abuse is deemed serious enough to be actionable).

\(^\text{76}\). THEORY AND PRACTICE, supra note 10.

\(^\text{77}\). "Laws explicitly mandating ‘wife obedience’ still govern marital relations in countries including Mali, Sudan, and Yemen. Sudan’s Muslim Personal Law Act of 1991
husbands to inflict physical punishment on their spouses in order to chastise them. Section 55 of the Nigerian Penal Code states, “Nothing is an offence which does not amount to the infliction of grievous hurt upon any persons which is done: . . . by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law or custom in which such correction is recognized as lawful.”

Under the English Common Law, the “rule of thumb” was that a man did not abuse his wife so long as he used a rod not thicker than a thumb. Anglo-American law allowed a husband as master of the household to subject his wife to corporal punishment or chastisement so long as he did not inflict permanent injury upon her. In the United States, the under-enforcement of crimes involving family members was of epidemic proportions up until the 1970s. Not only were batterers exempt from the law, there was hardly any public discussion of wife beating. The crime of domestic violence was not even named in the United States until the 1970s. Even when the right to beat one’s wife was repudiated by the authorities, men who assaulted their wives were often granted formal and informal immunity from prosecution so as to preserve family harmony and

provides that a husband’s rights in relation to his wife include ‘to be taken care of and amicably obeyed.’ Yemen’s Personal Status Act of 1992 even enumerates the elements of wife obedience, including the requirements that a wife . . . ‘must obey his orders,’ and that ‘she must not leave the conjugal home without his permission.’” Jessica Neuwirth, Sex Discriminatory Laws: A Challenge to the Integrity of International Law, 29 HUM. RTS. Q. 3 (2002).

80. Id.; see also 1 WILLIAM BLACKSTONE, COMMENTARIES (Layton Press 1966) (1765).
82. “Wifebeating was called ‘domestic disturbance’ by the police, ‘family maladjustment’ by marriage counselors and social case workers. Psychiatry, under the influence of Helene Deutsch, regarded the battered woman as a masochist who provoked her husband into beating her.” ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 20 (2000).
83. Id.
84. The right to chastise wives was grounded in English Common Law. Id. at 14. For some misdemeanors, only “moderate chastisement” was permissible. In the U.S., the Mississippi Supreme Court stated in 1824 that a husband should be allowed to “exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions . . . .” Bradley v. State, 1 Miss. 156 (1824). In 1871, the Alabama Supreme Court held that a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. “The wife is not to be considered as the husband’s slave.” Fulgham v. State, 46 Ala. 143 (1871).
privacy. According to a U.S. Bureau of Justice statistic, ninety percent of women killed by their abusers have called the police at least once, and fifty percent have called five or more times.

In the last decade, many countries have passed legislation on domestic violence. The United Nations International Children's Educational Fund (UNICEF) records that domestic violence legislation has been enacted in forty-four countries around the world; seventeen countries have made marital rape a criminal offense; and twenty-seven countries have passed sexual harassment laws. It is useful to look at the strengths and weaknesses of some of these laws.

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. Among other things, the Act amended the Federal Rules of Evidence to adopt a federal rape shield provision excluding evidence of a victim's prior sexual conduct from use in federal proceedings involving sexual misconduct. It also installed federal grant programs enlisting federal, state, and local governments, domestic violence agencies, law enforcement, and courts as partners in the fight against domestic violence.

Some of the highlights of VAWA include: increased penalties for sex offenders and domestic abusers, a doubling of the maximum term of imprisonment for repeat sex offenders and the authorization of severe federal sentences for abusers who travel interstate with the intent to injure, harass or intimidate a domestic partner or violate a protective order.

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85. The rationales were stated as preserving the sanctity of the domestic circle, closing the courthouse doors to trivial complaints, and encouraging the parties to make the matter up and live together as man and wife should. In one instance, the court stated that parties should “draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.” SCHNEIDER, supra note 82, at 17 (citing Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2168-69 (1996)).


88. The civil rights remedy of the VAWA has been ruled unconstitutional. See United States v. Morrison, 529 U.S. 598 (2000).

89. This includes funds to assist states in restructuring law enforcement responses to crimes of violence against women.

90. Despite the fact that these policies protect victims and send a strong message to the batterer that his or her action is criminal in nature and that consequences are unavoidable, it has also been argued that the mandatory arrest law eliminates police discretion and removes the decision from the hands of the victim. Another concern is that “[a] ‘no-drop policy’ denies the victim of domestic violence the option of withdrawing a complaint at her discretion once formal charges have been filed, and limits the prosecutors’ discretion to drop
States, territories, and tribes can use funds authorized through VAWA to develop domestic violence shelters, train law enforcement officers and new prosecutors for specialized domestic violence or sexual assault units, and to coordinate domestic violence hotlines. In addition, VAWA provides grants to facilitate mandatory arrest and pro-arrest policies and has increased penalties for sex offenders and domestic abusers.  

In Japan, the Domestic Violence Prevention Law was introduced in April 2001. This legislation defines violence between husband and wife as a violation of human rights, and it covers not only wives and husbands, but also common law marriage partners and ex-spouses. The law obliges national and local governments to prevent domestic violence and recommends the establishment of centers that can be used for consultations and shelters by battered women. However, one of the law's shortcomings is that it defines domestic violence as only physical violence. In addition, although the new law makes provision for financial assistance, there are only forty shelters nationwide.

On the other hand, the 1995 Ecuador law on domestic violence is a clear-cut prohibition of physical and mental assault. Current and former cohabitants and parties in non-marital intimate relationships are included in the legislation, and psychological violence is explicitly defined.

Peru was among the first countries in Latin America to adopt special legislation on domestic violence. The Law for Protection from Family Violence, adopted in 1993 and subsequently revised in 1997, established a distinct and expedited procedure for dealing with cases of domestic violence and sought to define more clearly the respective roles and responsibilities of those within the justice system who are involved with such cases.

The most recent innovation has been a system of one-stop centers for victims of domestic violence where women can find female police officers,
medical personnel, and state prosecutors all under one roof. Nevertheless, there are certain challenges in this law. It privileges conciliation over prosecution, thus making it difficult to prosecute abusive conduct against women. Also, the law only extends protection to women in cases where the victims live with their abusive intimate partners. Furthermore, the definition of domestic violence does not cover marital rape. Thus, even though the marital rape exemption was removed from the Peruvian Criminal Code in 1991, if a married woman wants to file a rape complaint, she does not have access to the streamlined process available to other women victims of domestic violence.

The South African Domestic Violence Act of 1998 provides a model for other countries to follow. It broadly defines not only domestic violence as covering physical, sexual, emotional, verbal, psychological, and economic abuse, but also intimidation, harassment, stalking, and damage to property. Further, it provides protection of the law to a broad category of persons in a domestic relationship, including persons who are married; persons of the same or opposite sex who are living together or have lived together; parents of a child or persons who have parental responsibility for a child; family members related by consanguinity, affinity, or adoption; or parties who are engaged, dating, or in a customary relationship including whether they are in an actual or perceived romantic, intimate, or sexual relationship of any duration; or persons who share or recently shared the same residence.96

2. Lack of a Legal Recognition of Marital Rape

While Article 236 of the Criminal Code of China sets out the grounds for the crime of rape, it leaves silent the issue of marital rape. Sexual abuse or rape within marriage is also not addressed by the Revised Marriage Law. It has been argued that forced sexual intercourse within a marital relationship can constitute a crime of intentional injury, but not rape.97

Article 236(1) stipulates that anyone who rapes a woman by violence, threat, or other means will be punished by law.98 In the absence of an

96. In Central and Eastern Europe (CEE) and the Commonwealth of Independent States, Ukraine was the first country to adopt a law on the prevention of violence in the family. A law on social and legal protection from domestic violence has been approved in Kyrgyzstan. Kazakhstan has also developed a domestic violence law, which is now in the process of public discussion. See United Nations Development Programme, Drafting Gender-Aware Legislation: How to Promote and Protect Gender Equality in Central and Eastern Europe and in the Commonwealth of Independent States (UNDP Democratic Governance Series) (2003).
98. A person found guilty of raping a woman may be imprisoned for a term above three years but not exceeding ten years. A person found guilty of fornication with a girl under the
explicit marital rape exemption, a strict interpretation of these rape laws could include marital rape. Some scholars have recognized marital rape in specific instances, for example, when the husband: 1) forces his wife to have sex with others; 2) aids and abets others in raping his wife; 3) rapes his wife under mistaken identity; or 4) when husband and wife are living apart or in the process of divorce. Other scholars are willing to recognize the injuries sustained by the act of marital sexual abuse as crimes of intentional injury under Article 234 of the Criminal Law. However, in practice, marital rape has yet to be acknowledged and does not constitute a ground for civil compensation under the Revised Marriage Law.

Historically, the English common-law definition of rape exempted husbands from criminal liability. By marriage, the husband and wife were considered one person in law, with that one person being the husband. It has only been since the late 1970s and 1980s, after much struggle on the part of the women’s movement and after a national campaign for the repudiation of the marital rape exemption, that the exemption has been abolished in the United States.

A person whose conduct falls into any one of the following categories (rape “when the circumstances are odious,” rape of multiple women or girls, rape in public, rape of a woman in concert with others, or rape causing serious injury or death) will be sentenced to a minimum of ten years of fixed term imprisonment, life imprisonment, or death. Criminal Law of the People’s Republic of China, art. 236.

99. THEORY AND PRACTICE, supra note 10, at 453.

100. Sir Matthew Hale’s pronouncement that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract,” is considered the historical justification for marital rape exemption. Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1396 (2000) (citing 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (Robert H. Small ed., 1847) (1736)); see also Weishaupt v. Commonwealth, 315 S.E. 2d 847, 850 (1984).


102. Of the three main categories of marital exemption law, the first category includes states in which, similar to China, a husband cannot be prosecuted for rape unless the couple is living apart, legally separated, or has filed for divorce in order for protection. These states include Kentucky, Missouri, Oklahoma, and South Carolina. Twenty-four states fall into the second category of partial exemptions, where husbands can be prosecuted for raping their wives in certain circumstances but are exempt from prosecution in other situations that are prosecutable for non-marital rape. A majority of these partial exemption states exempt husbands only from prosecution for less harmful forms of rape, which do not involve force or threat of force. Four states have a partial exemption that exempts husbands from prosecution for the more serious first-degree rape. Another group of states exempt husbands who rape wives that are under the age of consent or who are mentally or physically disabled. Finally, twenty-two states have completely abolished the marital rape exemption, choosing to make no distinction between marital rape and non-marital rape. All in all, twenty eight
Up until 1999, only seventeen states and the District of Columbia had completely repudiated the marital rape exemptions. The remaining states have a variety of exemptions including rigorous reporting guidelines or in the limited time period within which marital rape can be reported. Other states have reduced the seriousness of the offense.103 For example, in Pennsylvania, “spousal sexual assault must be reported within ninety days, while the statute of limitations for firstdegree rape is five years.”104 Also, the maximum penalty a spouse would receive for sexual assault would be far less than if the assault involved a non-spouse.105 In Virginia, marital sexual abuse has lower sentencing requirements than non-marital sexual assault,106 and prosecution for marital rape can be allowed only if the victim reports the assault within ten days.107 In Ohio, the prosecution may only continue if the two spouses lived separately at the time of the assault.108

Having excluded marital rape immunity from its rape statute in 1977, Oregon became the first state to prosecute a husband for raping his wife in 1978.109 In New York, the marital exemption was eliminated in the landmark case of People v. Liberta.110 The state’s highest court held that there was “no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions . . . or are simply unable to withstand even the slightest scrutiny.”111 The court asserted that a sexual assault victim is more severely traumatized when the assailant is a spouse rather than a stranger and that marital rape exemptions were violative of the Equal Protection Clause of the United States Constitution. Following the court's decision, the legislature adopted a new rape statute which provides that “any person who engages in sexual intercourse . . . with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree.”112

In countries where the legislature still does not recognize marital rape, court decisions have recognized marital rape as a crime. For example, the

105. Schelong, supra note 86, at 107.
106. Lincoln, supra note 104, at 1237.
107. Schelong, supra note 86, at 106.
109. See id. at 1226.
111. Id. at 573.
112. Id. at 579.
Supreme Court of Nepal recently declared that husbands who force their wives to have sex can now be charged with rape. The Court also directed the Nepali parliament to amend the present laws relating to rape so that they reflect the new ruling, including the right to self-defense against their husbands in the event of rape or attempted rape. The landmark ruling issued last May was a result of a July 2001 petition filed by the Forum for Women, Law and Development, a women's rights organization in Nepal that challenged the Country Code's Chapter on Rape as discriminatory.

Currently, China has a partial marital rape exemption. Some other countries, however, still carry full marital rape exemptions. For example, India, Malaysia, Papua New Guinea, and Yugoslavia, to mention a few, explicitly exclude marital rape from the crime of rape. Even though there is also no full marital rape exemption in China, there is, however, no understanding that marriage is never a defense to the crime of rape, and although rape victims in China can pursue assault charges, these remedies are often inadequate.

If the new revisions are to have a full impact on the rights of women, it will be important for China to recognize sexual abuse in marriage as constituting domestic violence. As in Nepal and in some states in the U.S., judicial decisions triggered changes in the law. It is important that in China women's rights advocates press for judicial recognition of marital rape in order to reform the law in this area. The movement to abolish the marital rape exemption should be viewed as part of a continuum of reforms

114. Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not rape. INDIA PEN. CODE § 375.
115. Sexual intercourse by a man with his own wife by a marriage that is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape. MALAYSIA PEN. CODE § 375.
116. Any person who has carnal knowledge of a woman or girl not his wife, without her consent or with her consent if the consent is obtained by force . . . is guilty of a crime which is called rape. PAPAU NEW GUINEA CRIM. CODE § 357 (1974).
117. Whoever compels a female person into a sexual relationship with whom he is not living in marital community, by using force, or threatening to directly attack the life and the body of the female person or of someone close to her, will be punished by a prison term from one to ten years.
118. Furthermore, in certain countries such as Ethiopia, Lebanon, and Uruguay, laws exempt men from punishment for rape if they subsequently marry their victims. See Neuwirth, supra note 77.
119. In England, even though the marital rape exemption has not been revoked by legislation, the judiciary has rejected the marital rape exemption as placing married women at a disadvantage in relation to non-married women. Melissa J. Anderson, Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland, 27 GA. J. INT’L & COMP. L. 139, 156–57 (1998).
to improve the legal status of women in China and to change the traditional view of a woman as her husband’s chattel who impliedly consents to rape by her husband at marriage. Implied consent and arguments based on privacy and marital reconciliation cannot be reasons to continue the subordination of married women. Interestingly, the Supreme Court of Georgia, in the U.S., has held that because “there has never been an expressly stated marital exemption included in the Georgia rape statute,” a woman should not be forced to give up her right to state protection from violent acts simply because she is married. Likewise, until marital rape is recognized by law, in the absence of an explicit marital rape exemption, women’s rights advocates in China can urge judges to interpret the rape provision under Section 236 of the criminal law “broadly” and “plainly” as did the Georgia Supreme Court when it included rape of married women.

C. Civil Compensation for Fault-Based Divorce: Some Problems

In China, though the revisions on civil compensation go far in attempting to shield women from impoverishment at divorce, there are certain questions on which the law is silent. Some of these problems are discussed below.

1. The Amount of Compensation Not Defined

Although Article 46 of the Revised Marriage Law allows for compensation for fault during marriage, the amount of compensation is not defined and is left to the judge’s discretion. Unless there is greater sensitivity on the part of judges and law enforcement agencies to women’s needs and experiences of violence after the breakdown of a marriage, this provision will fail to have the required impact. As Alford and Shen Yuan Yuan argue, although the revised law recognizes the rights of both parties to property and the role each party has played in the welfare of the family, these provisions are ambiguous in their scope and “provide no real guidance as to the particular circumstances in which different types of payment might be required.”

Apart from the problems associated with leaving interpretation of overly broad laws to the judiciary, there are some other critical questions that are left unresolved by the revised marriage laws.

120. See Alford & Yuan, supra note 1, at 21.
121. Id. at 17.
2. Is Compensation Available During Marriage?

Even though civil compensation for fault is available at divorce, it is not clear whether compensation for fault is available during a marriage. In the following case, the Beijing University Legal Aid Centre argued and won compensation for a victim of violence during an ongoing marriage. However, this is the only recorded decision of its kind.

_Wang caused severe injuries to Zhang throughout their marriage. Once he poured gasoline over Zhang and caused third degree burns. At first, the procuratorate asked, “who will take her to the doctor if we arrest the husband?” and refused to investigate the case. It was only after Zhang’s sister contacted a legal aid centre lawyer that the lawyer managed to get the forensic authentication of the wounds. The conclusion was that Zhang had burns to such a degree that she was temporarily disabled from working. Due to the severity of the injuries, the procuratorate instituted a public prosecution. The legal aid lawyer filed a separate claim for civil compensation for injuries. In the course of a hearing for compensation for injuries caused by a husband to his wife during marriage, the judge considered the fact that the marriage was still intact and that no petition for divorce had been submitted. Since the property belonged to both, the judge was of the opinion that it would be difficult to divide it. The attorney for Zhang insisted that Wang should compensate Zhang with his separate property since he had caused her serious damage. If not, the attorney argued that he should pay it from his half of the shared property. This would ensure the equitable distribution of property in the event the parties decided to divorce. The court held that Wang’s conduct constituted the crime of “intentional injury,” and he was sentenced to a fixed-term imprisonment of 14 years and was asked to pay 80,000 yuan as compensation to Zhang. This was one of the first times that compensation for financial loss was granted during an ongoing marriage._

3. Are Post-Divorce Earnings Included?

The shift towards fault-based divorce in China reflects a move towards addressing the worsening financial situation of divorced women. Role equality in the context of socioeconomic factors that typically disadvantage women in the market might be inadequate.

For example, it is not clear whether in China an ex-spouse is entitled

122. _REPORT AND SUMMARY, supra_ note 7, at 7.
to share in the other’s post-divorce earnings. Chinese advocates have argued that it is important to conceptualize earning power as an asset of each spouse. This will offer women who have supported their husbands during school and work, at the sacrifice of their own education and career, some degree of compensation. It is interesting to look at the law in the United States on this issue.

Beginning with California in 1970, states across the United States started passing no-fault divorce legislation and divorce no longer remained the unilateral release of a spouse from his or her marital obligations as justified by the breach of the other spouse.

After more than three decades, there is some debate in the United States as to whether the no-fault divorce has been responsible for the feminization of poverty. Even though no-fault divorce reforms broadened the definition of property deemed available for distribution at divorce, treating most assets as marital property regardless of title, these efforts have been regarded as insufficient to improve the worsening financial position of women after marriage.

Actual financial well-being for women after divorce would require not just equitable property distribution at divorce, but also more of their former spouses’ post-divorce income.

Equitable property distribution is almost always insufficient to recover from the economic upheaval that usually accompanies divorce. In China, the argument can be made that equitable property distribution in the context of inequality between two parties does not produce equal results. The different socioeconomic positions of women and men in China suggest that, at least for the foreseeable future, genuine reform can only be

123. In practice, we can usually find that most of the couple’s Property in Common is used for the educational investment of one party (especially the husband’s side), for example, going abroad for advanced studies or studying for an academic degree or studying special technology. Whether the party is successful or still unsuccessful in his or her study, if he or she asks for divorce, it will affect the other party, especially the wife’s side, heavily. THEORY AND PRACTICE, supra note 10, at 285–86; see also supra note 39.


125. Id. at 2318.

126. See, e.g., O’Brien v. O’Brien, 489 N.E.2d 712 (N.Y. 1985) (holding that the husband’s newly acquired license to practice medicine was marital property subject to equitable distribution under N.Y. DOM. REL. LAW ANN. § 236(B)(5) (1985)). In some jurisdictions, courts may award “reimbursement” for expenses incurred. Other than New York, few other appellate courts have adopted the view that a professional degree is property divisible upon divorce. In China, academic qualifications obtained during a marriage are not considered common property during the distribution of property, nor is one spouse’s contribution to the acquisition of the degree by the other. In fact, a loan taken to cover educational expenses is not considered a personal debt; it is considered a common debt to be shared by both parties at divorce.
achieved through a rational, but potentially unequal, division of economic assets between husbands and wives at divorce.127 This represents a more gender-sensitive attempt to achieve parity in position between the spouses.

Unless gender bias in the courts is addressed clearly, law reform will have little effect on women. The important role that judges play in interpreting laws can be seen by looking at the South Korean experience. When South Korea revised its family laws in 1991,128 for the first time in South Korea’s history, women obtained legal rights equal to that of men at divorce.129 Shortly after the marriage law revisions came into effect, women in South Korea petitioned for equitable division of property and ran into judicial resistance. A scholar writing about the changes in South Korea’s marriage laws argues that “...the marital property division cases decided under the revised law to date starkly illustrate the problem of laws that depend on broad judicial discretion. In a society where women are still regarded as the primary caretaker at home or relegated to secondary jobs, even an equal division means a gross disparity in the living standards after divorce.”130 It is further argued that “where the common property is so meager that even a substantial portion would result in inequity, the party with more career assets should be ordered to make support payments after divorce. Even where the property is substantial, post-divorce payments may be necessary in some cases for the parties to maintain the customary living standards.”131

Most of all, the writer fears that leaving property allocation to the vagaries of judicial discretion would result in arbitrary and capricious decision making.132 Even though she acknowledges the impossibility of avoiding judicial discretion altogether,133 she argues that unfettered

127. THEORY AND PRACTICE, supra note 10, at 286.
128. Korean law, like Chinese and Japanese law, provides for divorce by agreement and judicial divorce. While divorce by agreement requires little judicial involvement, in contested cases, the conciliation council in the family court will help reconcile the couple. Divorce will be granted only if reconciliation fails. Kay C. Lee, Confucian Ethics, Judges, and Women: Divorce under the Revised Korean Family Law, 4 PAC. RIM L. & POL’Y J. 479; Shotaro Hamura, Liberalization of Grounds for Judicial Divorce in Japan, September 2, 1987 Decision, 3 TRANSNAT’L LAWYER 465 (1990).
129. The new family laws were a victory for the women’s movement led by women’s organizations formed by the All Women’s Federation to Revise South Korea’s Family Laws. Lee, supra note 128.
130. Id. at 497.
131. Id. at 500.
132. Id. at 499-500.
133. In the United States too, judges have much discretion over governing alimony in divorce cases. For example, in New York’s statutory rule governing alimony, it specifies that: “The court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has
discretion is inimical to the quality of women in traditional societies. She concludes that "without judicial self-examination of taken-for-granted social assumptions, broad judicial discretion can easily turn into a tool that perpetuates discriminatory societal norms."  

4. Can a Separate Property Regime Be Created?

In the context of violence in a marriage, women’s rights advocates in China have argued that it is important to separate joint property when there is violence in a marriage. Advocates have argued that similar provisions are available in France, Germany, Switzerland, and Italy. The following case illustrates a successful advocacy effort on the part of women’s rights lawyers to create alternative mechanisms for protecting women’s property rights.

Li Ying married Zhang Xiacheng. Over the course of their marriage they amassed substantial amounts of wealth. However, during this time, Zhang started beating Li with sticks, iron rods and beer bottles and threatened to kill her many times. Zhang also deprived Li access to their joint income. Li filed for divorce. At the mediation process, Zhang apologized for his bad behavior and pleaded for a chance to make amends. Li’s attorney advised Li that even if she agreed to the mediation, a division of the property should be made so as to safeguard Li’s share. This would secure Li’s property even in the event of a future divorce. The legal aid attorney helped Li to notarize the agreement as to the separate property arrangement.

This example of creative advocacy highlights that such steps are necessary to fill in the gaps in the absence of explicit provisions in the revised marriage law.

III. Barriers to the Enforcement of Women’s Rights in China

The gaps and biases in the law are heightened by various weak
enforcement procedures. As Professor Chen argues, the role of law enforcement officials takes on a greater significance when there is ambiguity in the laws.\textsuperscript{140} What follows is a discussion of some of the obstacles to enforcement of the law.

\subsection*{A. Problems with the Judiciary}

Ms. Y was constantly abused physically during her marriage. She was hospitalized sixteen times for treatment for her injuries. As a result of this violence, she suffered two broken ribs, impaired eyesight, dizziness, and a concussion. The county court judge before whom a case of domestic violence was brought held that he could not find the defendant guilty of mistreating family members. He based this on the grounds that ten instances of battering over a twenty-year period of marriage did not fulfill the offense's high standard requiring that mistreatment occur with high frequency. The judge also opined that each instance of mistreatment occurred with good cause because the wife had been disobedient to the husband.\textsuperscript{141}

Most judges in China are not sensitive to the fact that domestic violence is a criminal offense; they tend to view domestic abuse as a personal problem instead of an issue to be settled by law.\textsuperscript{142} Even though the above case is an extreme example, the lack of awareness of and sensitivity to domestic violence raises concerns as to the extent to which the revisions of the Marriage Law, which stipulate that civil compensation should be paid to the party who is seeking divorce on the ground of domestic violence, will have any impact. Given the ambiguity in certain laws, especially those dealing with compensation for fault, the distribution of property at divorce and those defining domestic violence, the discretion of judges comes into focus.\textsuperscript{143} This makes it doubly important for judges to be aware of gender perspectives and women's special experiences of discrimination.

A major obstacle to judicial independence is that judges must defer to administrative organs in interpreting regulations.\textsuperscript{144} Regulations are drafted not by the National People's Congress, but by the Ministries, and are sometimes the result of short-term political pressures.\textsuperscript{145} Inappropriate administrative actions can rarely be reviewed and courts find it difficult to

\begin{footnotes}
\item[140] Chen Mingxia, \textit{supra} note 50, at 19.
\item[141] Zhao, \textit{supra} note 7, at 232.
\item[142] Chen Mingxia, \textit{supra} note 50, at 19.
\item[143] \textit{Id}.
\item[144] Bulger, \textit{supra} note 22, at 386.
\item[145] \textit{Id}. at 232.
\end{footnotes}
enforce judgments against administrative organs.\textsuperscript{146} Local law enforcement authorities, too, can resist court judgments,\textsuperscript{147} and enforcing court decisions is one of the major problems facing women’s rights protection in China.\textsuperscript{148} Requirements for holding judicial office are not standardized. Even though there is concerted action on the part of the Chinese government to raise the skill levels of its judicial officials, this will take time and currently, without a system of case reporting or precedent, there is no consistency or uniformity in judicial decision-making.\textsuperscript{149} In reality, courts are not very strong institutions and are influenced by local interests.\textsuperscript{150}

Judges, due to poor pay and inadequate legal education and formal training, are also subject to bias.\textsuperscript{151} A research report of the Centre for Women’s Law Studies and Legal Services, one of the most important legal aid centers in the country specializing in women’s rights cases and law reform, cites the following factors as constituting ineffective judicial decision-making: 1) certain law enforcement officials do not strictly observe the legal procedures in a case; 2) judges are frequently absent from court hearings; 3) lawyers are not notified of hearings; 4) extended hearings are granted without a specific reason being given; 5) indefinite delay; 6) judges accept gifts and favors from the litigants; 7) insensitivity to the rights of the poor; and 8) ignorance of the law.\textsuperscript{152}

However, a positive trend has been China’s growing corps of lawyers who are paying more attention to the reform of the judiciary, including better legal training for judicial officers.\textsuperscript{153} There is also a change in the role of judges. Even though in the past judges served as educators or counselors in dispute resolution, today they are playing an increasing role as arbiters of justice.

Without awareness of gender bias in the court and measures to address this bias, women will be denied equal treatment by the court system. In the United States, women’s unpaid labor for family businesses and their contributions to the marital property and assets through keeping house and

\textsuperscript{146} Bulger, \textit{supra} note 22, at 385.
\textsuperscript{147} \textit{Id.} at 376.
\textsuperscript{148} \textit{RESEARCH REPORT, supra} note 2, at 23.
\textsuperscript{151} \textit{RESEARCH REPORT, supra} note 2; Bulger, \textit{supra} note 22, at 376–79.
\textsuperscript{152} \textit{RESEARCH REPORT, supra} note 2, at 23.
\textsuperscript{153} Margaret Woo recommends greater training of judicial personnel on gender-related issues. She also argues that despite the fact that women are joining the legal profession in increasing numbers, women only constitute 20\% of the judiciary. Margaret Woo, \textit{CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA}, Roundtable on Holding Up Half the Sky: Women’s Rights in China’s Changing Economy (Feb. 2003), \textit{available at} http://www.cecc.gov/pages/roundtables/022403/index.php.
bringing up children are often invisible and go unacknowledged in the division of marital property. Judges' insensitivity to the loss of economic opportunity for women, who have devoted long years to unpaid labor, is often manifest in property distribution at divorce. Judges assume that women will either remarry and thus be taken care of by another man, or that women will have no problems re-entering the market.154

B. Problems with Public Security Agencies

Case One: Ms. Z was pushed to the floor and brutally battered by her husband because she returned home from work at 8:00 pm in the evening. After the beating, her husband poured gasoline over Ms. Z's face and body and set her on fire. Ms. Z was severely burnt and hospitalized. As soon as she regained consciousness, she sought help from the public security bureau. The public security officers responded that they were unable to interfere in a matter that arose because of a husband's suspicions of his wife's moral conduct.155

Case Two: Ms. Wei was physically and mentally abused by her husband during her marriage to him. Once after a dispute, the husband poured gasoline on her body and lit a fire which resulted in Ms. Wei being severely burned. When Ms. Wei's elder sister reported this case to the local public security officials, the officials refused to intervene on the grounds that it was a family dispute. Ms. Wei lived in terror for her life, and being disfigured, she was unable to earn a living or mix in the community. Even when a legal services lawyer contacted the public security agency on her behalf, their response was, "If they were to arrest her husband, who would pay her medical bills?"156

As illustrated by the above cases, public security agencies are reluctant to intervene in instances of domestic violence. The private/public divide still informs public security personnel who consider violence outside the purview of the law’s protection. Many women's rights advocates, too, are skeptical about the use of the 110 hotline.157 In the absence of a police

154. Male perspectives on family life have skewed decisions in equitable distribution cases... They think any woman—no matter her age or lack of training—can find a nice little job and a nice little apartment and conduct her later years as she might have done at age twenty-five. See Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 11, 73 (1986–87).
155. Zhao, supra note 7, at 231.
156. RESEARCH REPORT, supra note 2, at 8.
157. Interview with women’s legal services providers, Hebei Province, China (June 2002, October 2003). The “110 hotline” is Shanghai’s emergency line; for more
report, it is very difficult for women to prove a pattern of domestic violence.

A women's rights advocate in China writes,

[T]he “110” police hot-line does not respond to domestic violence calls, nor do the police intervene in wife beating. Some claim that their responsibility is to keep public order, not family order. Others say they are shortstaffed and do not have time to handle domestic affairs. . . . Still others blame the battered wives, telling them that “one palm does not make a sound.” They say that women should not ask the police to punish their husbands who are their closest family members. . . . Numerous articles in the China Women News and unpublished reports on domestic violence cases show that many battered women go to relevant agencies for help without success until tragedy finally occurs.158

In the United States, until the Violence Against Women Act was passed in 1994, police departments adopted a non-arrest policy for incidents of domestic violence. Consequently, domestic violence was characterized by low prosecution rates and steep dismissal rates. It took the renewed vigor of the 1970s women's rights movement and a series of court challenges to reform the manner in which police, prosecutors, and judges looked at domestic violence.

Civil protection orders, which are a form of injunctive relief, are said to be the front line in the war against abuse of women in the United States.159 These civil protection orders, granted by a majority of states in the United States, give broad and discretionary scope to courts all over the country to authorize: 1) orders to refrain from other physical or psychological abuse, or even to restrict any contact with an alleged victim; 2) orders to vacate a domicile or to allow exclusive use of certain personal property; 3) orders to enter counseling; 4) orders to pay restitution or attorney fees; 5) orders granting temporary custody of minors to the victim; and 6) orders limiting visitation rights to minor children.160 However, these civil protection orders remained widely under-enforced until the enactment of the VAWA, which enacted a full faith and credit mandate.161
C. Difficulties Present in Collecting and Presenting Evidence

In China, domestic violence is not defined as a separate offense under the criminal law, therefore a charge of domestic violence has to be brought under the rubric of maltreatment of family members. Since the state only prosecutes cases where injuries are major, in all other cases the victim has to initiate a private prosecution. In such cases, the victim must show that the maltreatment was continuous and regular and that the injuries come within the forensic standard on minor bodily injury, which is the measurement used for minor bodily injuries in criminal proceedings. This has proven very difficult for women because most injuries are not considered grave enough to meet the high standards required for a conviction. Second, due to lack of knowledge and resources, very few women are able to obtain forensic evidence. Also, a private action against an abusive husband leaves many women vulnerable to retaliation; therefore, women frequently drop charges.\(^1\)

As explained earlier, another problem is that very often in cases involving domestic violence or adultery leading to divorce, spouses in China attempt to transfer property to a third party so as to avoid the equitable distribution of property as demanded by the law.\(^1\)\(^2\) It is almost impossible to collect evidence of such transfer. Bank records, tax records, and other financial records are only available to the procuratorate and the court.\(^1\)\(^3\) Private lawyers, legal aid workers, and Women's Federation officials find it difficult to obtain financial records from banks, security companies, tax forms, financial agencies, or the work units. Some agencies only allow investigation by the procuratorate, court, or public security organization. Given this difficulty, women's rights advocates and lawyers are unable to collect vital evidence of instances of domestic abuse.\(^1\)\(^4\)

\(^{162}\) Chen Min, \textit{supra} note 158, at 39–40.
\(^{163}\) id. at 396.
\(^{164}\) Theory and Practice, \textit{supra} note 10, at 295.
\(^{165}\) Interview with women’s rights protection officials of the provincial level women’s federations, China (June 2002, October 2002).

Fault compensation in divorce between Fang and Yu is a representative case involving violations of marriage and family rights. . . . Fang had frequent extramarital relationships. If Yu tried to stop him, she would get beaten. She brought a divorce suit and requested fault compensation but withdrew for lack of evidence. After that, Fang started to co-habit with another woman as husband and wife. Yu went to court for the second time but again had to withdraw because the court was not convinced that there was sufficient evidence against Fang. The Center got involved when Yu brought a divorce suit for the third time in August 2002 and requested division of mutual property,
Article 64 of the Law of Civil Procedure states, "If the client or his or her law agent cannot collect proof by themselves, for some objective reason, the people’s court should collect it." Despite this provision in the law, courts do not exert themselves to collect evidence of bank accounts and financial transactions that a spouse finds difficult to access; if courts do not exercise this right, these assets are often invisible.

According to the Chinese Criminal Procedure Law (CPL), lawyers can gather evidence from witnesses or work units only with their consent. Also, "lawyers must obtain permission from the people’s procuratorates or the courts in order to collect evidence from victims or witnesses provided by victims." As lawyers lack access to officially-collected evidentiary materials, this provision might hinder their efforts to collect evidence.

Another drawback is that in China witnesses are not willing to testify in court. Ping Yu, analyzing the recent revisions to the Chinese Criminal Procedure Law, argues that for the very reason that lawyers lack the means to collect their own evidence, they should be presented an opportunity to call witnesses to testify on the stand. However, he argues, lawyers face many problems in doing this. Even though the revisions to the CPL were aimed at correcting situations where witnesses were not called upon to testify in court, witnesses still either are exempted from attending a trial by a decision of the court or many witnesses choose to ignore the court order. Even though Chinese courts have subpoena powers, given the fact

\[\text{CTR. FOR WOMEN'S LAW STUDIES & LEGAL SERVS. OF PEKING UNIV., SUMMARY REPORT 9-10 (2001-2002).}\]


167. \textit{Id.}

168. \textit{Id.}

169. \textit{Id.} at 850. Yu further states:

Some authorities attribute the failure to bring witnesses to the stand during trial to the ambiguity of the CPL because it does not stipulate which side should be responsible for guaranteeing the presence of witnesses. One commentator insists that the laws or regulations should provide the resources and legal guarantees that can secure the presence of witnesses at trial. Others suggest that there should be an appropriate legal penalty if witnesses refuse to attend. Judges often cite safety concerns as an excuse for witnesses not being called to the stand.

\[\text{CTR. FOR WOMEN'S LAW STUDIES & LEGAL SERVS. OF PEKING UNIV., SUMMARY REPORT 9-10 (2001-2002).}\]


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that there are no legal penalties for the failure to abide by a court's subpoena, most often written testimonies are what is presented in court. Jerome Cohen argues that not only do witnesses usually not appear in person to testify in trials, they also refuse to be interviewed; they will very rarely offer even a written testimony. The reasons range from indifference and fear, to loss of income and expenses incurred in the whole exercise. In domestic violence cases, many witnesses feel that the male spouse will remain in the house while the woman leaves. Therefore, witnesses, who are often neighbors, feel that this will cause further tension in the community. Experts also rarely testify in court; even doctors who attend to domestic violence patients only provide written testimony due to the expenses related to attending court.

Even though medical evidence can play a critical role in domestic violence cases (a medicolegal personnel's evaluation of the nature and extent of injuries determines the legal classification of incidents of domestic abuse and, consequently, the seriousness of the charges), concerns about the medicolegal system in the context of domestic violence remain largely theoretical. This is because in the overwhelming majority of cases, the police simply do not conceive of domestic violence as a criminal matter, nor do they refer victims for medicolegal evaluations. Additionally, the police do not appear to be aware that a charge of criminal "assault" does not always require the victim to have sustained physical injury.

Victims of violence face problems not only in the collection of medical evidence, but also in its use in the courtroom. Medicolegal personnel, members of the procuratorate and judges are not trained with respect to the issue of women and violence and have a superficial and simplistic understanding of the evidentiary scope and legal role of forensic evidence.

IV. Recommendations

China must adopt a multi-disciplinary approach to combat domestic

170. Id.
172. Related to the authors' conversation with women's rights protection officials of the provincial level women's federations.
173. Chen Mingxia, supra note 50 (writing that most law enforcement personnel receive training in professional ethics but not in gender sensitivity).
violence and ensure fair distribution of property at divorce. Civil damages alone will prove to be largely symbolic if the battering spouse has no money to pay, if judges are not willing to enforce compensatory awards, or if compensatory awards are minimal. In fact, the new revisions to the marriage law will have little effect on addressing violence in the family and property rights of women unless further changes in the law enforcement mechanisms are not adopted. As Margaret Woo argues, true legal reform cannot take place until the culture of legal rights and the enforcement of these rights are firmly engrained and entrenched in ordinary citizens.\footnote{174}{Woo, supra note 153.}

With this in mind, we suggest the following recommendations.

\section*{A. Need for Strong Implementation Mechanisms in the Law}

Legislative reform can perpetuate the myth that women occupy a position of high status in a given society; the reality, however, is different. It is important to shift the focus towards the discriminatory effects of legislative provisions rather than on mere rule-based anti-discrimination legislation.

The implementation of the policies on equal rights has proved to be largely ineffective. This is because although facially equitable laws prohibiting discrimination in employment, property ownership, inheritance, marriage, and divorce have been enacted, the difference between equality in law and equality in fact lies with the implementation of those laws. The lack of corresponding enforcement mechanisms is a major drawback in the effectiveness of these laws. Despite legal guarantees of equality, women’s rights in the areas of marriage, divorce, and property continue to face procedural obstacles.

Women’s rights lawyers and advocates have identified the lack of punitive provisions in the laws as one of the chief barriers facing the exercise of women’s rights in China.\footnote{175}{REPORT AND SUMMARY, supra note 7.} The marriage law contains sketchy provisions on the distribution of housing and lacks strong legal mechanisms to prohibit the illegal transfer of property. Legal services lawyers have also criticized the enforcement mechanisms in the criminal law regarding family violence. As discussed, the CPL demands that women bring private prosecution for injuries sustained in instances of family violence unless the injuries are extremely grave. Many women are reluctant or lack support to bring a private claim pressing charges against a spouse or other family member. Even if a woman brings private prosecution, she is unable to properly investigate the case.

Many women’s rights advocates and women’s legal services lawyers
in China have drawn attention to the need to promulgate special sanctions and enforcement mechanisms such as restraining orders and mandatory arrests to control family violence.\(^{176}\) Certain provinces such as Shaanxi and Hunan have passed innovative laws to address family violence. Shaanxi Province passed the Methodologies of the Implementation of the LPWRI, and Hunan Province passed a decision to protect and stop family violence (including sexual abuse as a form of domestic violence). The Women's Federation of Liaoning Province has enacted the Regulations on the Protection and Stop of Family Violence. All of the above-mentioned regional laws have specific provisions for law enforcement in family violence. The laws also hold authorities accountable for failure to intervene in domestic violence. The function of public prosecution has been strengthened as well.\(^{177}\) The experiences of these local provinces should inform any future national law on domestic violence.

Most importantly, mechanisms to enforce judgments should be strengthened.\(^{178}\) One of the major problems in China involves the difficulties concerning the enforcement of court decisions and arbitration awards. If compensatory awards cannot be enforced against the erring husband, the new revisions to the Marriage Law will have very little effect on the women it sets out to protect.

1. Strengthen Law Enforcement Mechanisms

The private/public distinction still permeates the thinking of law enforcement officials and judges in responding to domestic violence issues. To successfully prove a crime of intentional injury, victims of domestic violence have to adduce forensic evidence to determine the degree of harm.\(^{179}\) Despite the fact that Article 22 of the Regulations on Punishment in Respect of Management of Public Security calls upon public security officials to intervene in a timely manner, public security agencies, however, are not called upon to do anything more than attempt to mediate between parties.

Law enforcement officials also very frequently refuse to provide

\(^{176}\) See REPORT AND SUMMARY, supra note 7; Rong Weiyi & Song Meiya, Summary of the Conference on Combatting Domestic Violence Against Women and the Commemoration to the Second Anniversary of the International Day for Elimination of Violence Against Women, in DEMOCRACY AND LEGAL SYSTEM (DALS) DOMESTIC VIOLENCE IN CHINA: RESEARCH, INTERVENTION AND PREVENTION PROJECT 6–9 (China Law Society ed., 2002).

\(^{177}\) REPORT AND SUMMARY, supra note 7.

\(^{178}\) Even when judgments favorable to the victim are made, legal aid lawyers spend much time and energy in attempting to enforce those judgments. Individuals and units concerned shall be responsible for assisting with the enforcement of judgments. Revised Marriage Law, art. 48.

\(^{179}\) Criminal Law of the People’s Republic of China, art. 234.
authentication of injuries, which can prevent many victims of domestic violence from proving the degree of harm inflicted upon them. For example, in a case handled by the Beida Centre:

Ms. Z was beaten on the head and face with bricks and iron sticks. The police officers who were called to the scene of the crime considered it a family dispute and refused to make a record of the wounds inflicted upon Ms. Z. Acting upon the lack of authentication by the police, the court refused to file the case as a public prosecution.\textsuperscript{180}

This case is not a unique one, and the attitude of law enforcement officials has made it more difficult for legal services lawyers representing women in private prosecutions to gather evidence from family members, neighbors, and friends. The indifference of law enforcement officials has a widespread influence on the community, which in turn refuses to cooperate fully in prosecuting domestic violence claims.\textsuperscript{181}

Law enforcement institutions, the police, prosecutors, and judges should undergo rigorous training in women's rights. Law enforcement officers should be required to file reports of calls made on the domestic violence hotline and of investigations conducted on reported incidents of domestic abuse. These police reports can then later be made available in the event a spouse wants to file for divorce and wants to prove domestic violence. It is imperative that all law enforcement officers be required to document and investigate all complaints. It is also important that medical practitioners receive sensitivity training in how to identify and screen for evidence of domestic violence in patients. Many women do not want to admit domestic violence fearing that they will not be believed.

The barriers existing in the process of collecting proof of domestic violence should also be highlighted. The law as it stands requires a high standard of proof to hold batterers criminally responsible. In order to invoke Article 260 of the Criminal Law on Crimes Disrupting Marriage and Family, a woman has to prove that the crime was particularly evil and that the abuse was continued and consistent. On the other hand, the crime of intentional injury requires forensic authentication of the injury and that the injury be at least a flesh wound. Without corresponding intervention procedures to make it mandatory for public security personnel to intervene in domestic violence issues, it will be very difficult for women to gather forensic authentication and proof of domestic violence. Thus, law enforcement officials should be trained and sensitized to collecting critical evidence on domestic violence.

Challenging inaction through litigation may be one way to ignite

\textsuperscript{180} REPORT AND SUMMARY, supra note 7, at 25.

\textsuperscript{181} Id. at 25–26.
social change and increase visibility of laws. In the United States, the first case challenging the nonintervention of law enforcers was brought in 1976 by the Legal Aid Society of Alameda County in Oakland, California. The legal aid lawyers argued that the Oakland Police Department failed to respond, or responded in an ineffectual or threatening manner, to the domestic violence calls. They also argued that the police had breached their duty to protect the women and to arrest their abusers.

In 1979, three years after the case was filed, a negotiated settlement mandated that police would: 1) respond promptly to domestic violence calls; 2) make an arrest whenever there was probable cause that a felonious assault had been committed or a misdemeanor had been committed in the officer's presence; 3) refrain from using threats of adverse consequences to pressure the victims into dropping charges; 4) inform each woman of her rights and of the availability of counseling; 5) enforce civil restraining orders; 6) apply federal funding for support services for battered women; and 7) pay the plaintiffs' attorneys' fees and court costs in this case.

Soon after, the New York Legal Services Program and the Center for Constitutional Rights filed a class action suit on behalf of twelve married battered women against the New York City Police Department and the New York Family Court. The New York City Police Department entered into a consent decree with the plaintiffs, similar to the settlement reached in the above case.

Finally, in Thurman v. City of Torrington, a federal jury in Connecticut awarded Ms. Thurman $2.3 million on the basis that the Torrington police breached their duty to protect her from her violent husband. The potential risk of lawsuit and liability encouraged the development of state domestic violence laws.

2. Improve Legal Services and Other Social Support Networks for Women

Even though legislation is a positive transformative force, discriminatory practices cannot be tackled by legislative measures alone. Although there might be a greater rights consciousness among women in China, few women find it easy to navigate the intricacies of the legal system. It is difficult for women to collect evidence or present evidence

without help from a lawyer. As Margaret Woo argues, there is a maldistribution of legal services over China’s vast geography and in the subject areas requiring representation. There is a tremendous dearth of lawyers for women litigants in need. As argued in this article, when husbands hide money and keep other property out of the reach of a wife who is seeking a divorce, lawyers have an increasing role to play in investigation and collection of evidence.

Legal services specifically for women are available at some law schools and through the rights protection divisions of the women’s federation, but these centers are insufficiently staffed and funded to manage the huge demand by poor women for services.

There are also inadequate social support networks available for women seeking to leave abusive husbands or fleeing violence in the family. Several shelters that opened in the late 1990s have shut down due to lack of resources or in the face of intimidation. If women are to be protected from family violence, prohibitive legislation alone is inadequate. Safety nets that allow women to leave an abusive environment and that put into motion a safety plan are some of the most critical measures in protecting women from violence.


187. Based on the authors’ own experiences of working with some of China’s legal services providers, including: Beijing Centre for Women’s Law Studies and Legal Services, the Wuhan University Centre for the Disadvantaged, the Hebei Women’s Federation, the Hubei Women’s Federation, the Shaanxi Research Association for Women and Family, and Qianxi County Rural Women’s Legal Services Center, Hebei Province. The Peking University Centre views itself as a role model to several of the women’s legal services centers and is held in high regard for its cutting edge work in law reform on women’s issues. The Centre focuses on impacting litigation on pressing issues concerning women’s rights. To that extent, it is not a traditional legal aid organization based on a traditional model. The Shaanxi Research Association for Women and Family Services is an independently registered non-governmental organization that is active in domestic violence advocacy. The Wuhan University Centre for the Disadvantaged is one of the first university-run legal aid centers. The Hubei and Hebei Women’s Federation legal services use a decentralized process including village, town, city, and provincial level centers. Very few of the Women’s Federation officials are lawyers, and the Women’s Federations make use of volunteer private attorneys in serious cases.

188. Shanghai Nanfang Shelter for Women and Children, which was established in January 1996 and within its two month operation had sheltered twenty-one battered women and answered 250 phone calls from abused women, was forced to close in two months for lack of a license. No procedural rules were available to issue a license for such an institution. The Wuhan New Sun Women’s Shelter, established in 1995, was forced to close down when the founders of the shelter were threatened with violence by former spouses of women who received shelter. Chen Min, supra note 158, at 33.
3. Strengthen Legal Research on Violence Against Women and a Continued Critique of "Imperfections" in the Law

One way of grappling with some of the problems associated with the new revisions would be to support more analysis of the law. The work of the Centre for Women's Law Studies and Legal Services of Peking University demonstrates the interrelationship among law, theory, and practice. Their litigation efforts galvanize public attention, which in turn generates law reform efforts.

By engaging in research, the Centre has developed novel ways in which to enforce women's rights. One such innovative advocacy method has been to promote a separate property regime in cases where there is violence in the family. Thus, even if separation and divorce are not imminent, women's economic rights may be protected.

In another test case, the Centre argued for compensation for fault to be paid during the existence of marriage. In one of the first cases in which a court awarded 80,000 yuan as compensation for fault to a wife during marriage, the Centre lawyers combined creative legal skills, astute advocacy and research on women's unique experiences of violence, and economic need to persuade the court to make a seminal award.

Burgeoning feminist consciousnesses, along with exposure to theories and practices from other jurisdictions, have begun to inform lawmaking in China. A feminist theoretical framework that adapts western and non-western theories to local needs has started to sprout. Proof of this is that many Chinese women's rights scholars have critiqued some of the abstract, ambiguous, and overly-broad laws and have argued that even though the law provides, in theory, for formal equality for women, some provisions of the law are still not operational. It is important that this growth be sustained and nurtured.

Most discussions by feminist advocates go to the heart of the problem. Advocates have argued that judicial decisions are based on a male standard and therefore often reflect male values and that a male

189. REPORT AND SUMMARY, supra note 7, at 17.
190. Id.
191. Professor Chen argues:

The basic intent of the law is benign, which is to take care of the rights and interests of women and children. But how is "care" defined? How is such care to be realized? What are the standards of such care? With regard to the difficulties experienced by one party, what constitutes difficulty? What amount of assistance is appropriate? None of this is covered in the law (even in principle), and thus, in situations where the divorcing parties cannot agree upon a settlement, they must rely on a judge to make the determination.

Chen Mingxia, supra note 50, at 22–23.
192. See Rong Weiyi & Song Meiya, supra note 169.
perspective of the world often colors the choices made by law enforcement officials. Drawing support from western theoretical studies, many scholars in China are beginning to analyze domestic violence within the framework of discrimination against women and to base marriage on the premise of equality. Also, scholars are urging the government to exercise due diligence in preventing violence against women. They point out that domestic violence is a violation of international conventions whether it occurs in public or in private and under international conventions, the government is obliged to take all appropriate measures such as legislative, political, administrative, and cultural steps in order to prevent human rights violations against women. Scholars have recommended that violence be defined as physical, psychological, sexual, or economic and that the state should be accountable for addressing inaction on the part of public officials. It is important that women’s rights scholars and advocates continue to critically examine what some advocates at the Centre call “imperfections” in the law.

4. Incorporate Lessons from Other Jurisdictions

Advocacy tools crafted in other countries have been used to certain advantage in China. Beijing University Centre advocates draw attention to certain theories, laws, and processes from other jurisdictions. They also cite domestic violence legislation in Taiwan, which directs attention to Matters to Which Courts Should Pay Attention in Dealing with Cases of Family Violence. They also recommend the adoption of mandatory restraining orders in order to guarantee the effectiveness of protection of domestic violence victims. Citing the United States and Britain, a Beijing University Centre report recommends the adoption of similar enforcement mechanisms to guarantee the safety of women in China. Some Chinese women’s rights advocates have adopted theories on “battered women’s syndrome” as part of a justified defense for women who kill their husbands in self-defense. These theories on battered women’s syndrome and “learned helplessness,” which evolved in the United States and Canada,

193. Id.
194. Huiming, supra note 186, at 28.
195. REPORT AND SUMMARY, supra note 7.
196. In the United States, 18 states have regulated that when law enforcement officers believe with a reason that someone violates the protection order, they should arrest him without a warrant. 23 states have prescribed that the arrest without warrant is required in such cases. Some states have regulated that the violation of the protection order constitutes a minor crime.

Id. at 28.
have been used with some success by some Chinese legal aid lawyers. 197

Women's rights advocates have also recommended the establishment of shelters for battered women and temporary housing for divorced women. This is important, advocates argue, in the light of the fact that although there exist Articles 13 and 14 of Several Opinions of the Supreme People's Court on Property Division in Hearing a Case on Divorce, which provide for dwelling houses for females, and Article 44 of the Law in Respect of Protection of Female Rights and Interests, these are only provisional arrangements and have no enforcement mechanisms. 198 It has also been proposed that given the difficulty of compensating a victim of domestic violence during the subsistence of marriage, it might be useful to consider the suspension of the regime of joint property and instead consider a separate property regime. 199 In doing so, the Centre for Research and Legal Services for Beijing University suggests that analogous laws in France, Germany, Switzerland, and Italy be considered. 200 In a country such as China with a bourgeoning interest in reforming gender discriminatory laws and institutions, it is helpful for legal scholars to look at legislation in other countries to learn what initiatives work. 201


198. REPORT AND SUMMARY, supra note 7, at 30.

199. Id.

200. C. civ. art. 220-1 (Fr.); §§ 1469–1470 BGB (F.R.G.); Art. 175 ZGB (Switz.); C.c. art. 193 (Italy); REPORT AND SUMMARY, supra note 7, at 27.

201. See, e.g., Domestic Violence Act, No. 10 (1991) (Trin. & Tobago). This act, too, provides for protection orders or interim protection orders in instances where the respondent has engaged in conduct of an offensive or harassing nature in respect to a spouse of the respondent, a parent or a child or dependent of the spouse or of the respondent, to the extent that the spouse or the parent is fearful of injury, physical or mental, to herself or himself or to a child or dependent of the spouse or of the respondent. The Cayman Islands allows a police officer to arrest the respondent without warrant if there is reasonable cause for suspecting that the respondent is in breach of any such provision. Domestic Violence Act, No. 20 (1992) (Cayman Is.). In St. Lucia, the Act defines domestic violence as any act of violence whether physical or verbal abuse perpetrated by a member of a household upon a member of the same household which causes or is likely to cause physical, mental, or emotional injury or harm to the abused party or any other member of the household. Domestic Violence Act, No. 7 (1995) (St. Lucia). Interestingly, Mauritius has an Occupancy Order which allows a person who is a victim of domestic violence and who reasonably believes that the spouse will commit further acts of violence may apply to the Court for an occupation order granting the person the exclusive right to live in the residence belonging to the abuser. Further, a spouse who is the victim of an act of domestic violence and who reasonably believes that she will be subject to further violence may apply to the Court for a tenancy order so that the tenancy of the residence should vest on the victim of domestic violence. Protection from Domestic Violence Act (1997) (Mauritius). The South African Act on Domestic Violence makes special reference to the right to equality and to freedom and security of the person, and the international commitments and obligations of the state towards ending violence against women and children. The South African Act also
B. Bring China's Domestic Laws as They Relate to Women in Compliance with International Obligations

In China, international human rights law does not automatically form part of the national law of the ratifying state. International treaties in countries like China that follow the "monist" tradition are not self-executing. That is, they do not have the force of law without the passage of additional national legislation. These states incorporate treaties and norms into their domestic laws by specific "transformational" devices.

In countries where treaties are not self-executing, a route for directly incorporating international human rights norms into domestic law may be through the principle of *jus cogens*, a subset of customary laws that are so fundamental that they are non-derogable. The human rights values embodied in the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the

gives an expanded reading of domestic violence (physical abuse; sexual abuse; emotional, verbal, and psychological abuse; economic abuse; intimidation; harassment; stalking; or damage to property) and extends protection of the Act to persons who are in a "domestic relationship" with each other including those who are married to each other, whether it be marriage according to any law, custom, or religion; persons whether of the same or opposite sex who live or lived together in the nature of marriage, parents of a child, or persons who have or had parental responsibility for that child; whether family members related by consanguinity, affinity, or adoption or were in engagement, dating, or customary relationship, including an actual or perceived romantic, intimate, or sexual relationship of any duration or if they recently shared the same residence. Domestic Violence Act, No. 116 (1998) (S. Afr.).

In this context, it is interesting to look at steps taken by other countries to address the problem of family violence and learn from some of the challenges these initiatives have faced. In an attempt to address the problem of underreporting domestic violence, in the context of a hostile environment for women reporting incidents of domestic violence, several countries created special women's desks at police stations to address crimes against women. In Pakistan, too, even though attempts have been made to see that upon receiving a report of rape, assault, or domestic violence, the police should immediately register a First Information Report (FIR), contact a magistrate's office to request a medicolegal examination and then accompany the complainant to the medicolegal office for an examination, in practice, the situation is very different. In reality, Human Rights Watch reports that due to a lack of training with respect to the scope of the law, the police not only hesitate to tackle domestic violence cases as full-fledged crimes, but also frequently try to mediate between parties or delay formal complaints in order to coerce parties in to settling their differences. See Samya Burney, Human Rights Watch, Crime or Custom? Violence Against Women in Pakistan (1999). In Brazil, after a prolonged struggle by the women's rights movement, the government initiated women's police stations to deal exclusively with crimes of violence against women. Even though reports of violence against women increased immediately, institutional attitudes on criminalizing gender abuse remains unchanged. Dorothy Q. Thomas & Michele E. Beasley, Domestic Violence as a Human Rights Issue, 58 Alb. L. Rev. 1119, 1137-38 (1995).

International Covenant on Economic, Social, and Cultural Rights are all elements of customary international law that are rapidly establishing themselves as *jus cogens*. For states that are not parties to the relevant human rights treaties, generally accepted standards of human rights are legally binding upon them according to customary international law.\(^{203}\)

In 1945, the U.N. Charter reaffirmed a "faith in fundamental human rights . . . in the equal rights of men and women."\(^{204}\) The Universal Declaration of Human Rights similarly promoted the dignity and worth of the human person in the equal rights of men and women.\(^{205}\) It specified sex as being among the impermissible grounds of differentiation and provided an equal protection clause. Despite the fact that the Universal Declaration does not in and of itself have legal effect on all states, it is morally persuasive and is considered part of customary international law. Provisions for equality of the sexes in the enjoyment of rights are provided for in both the International Covenant on Civil and Political Rights\(^{206}\) and the International Covenant on Economic, Social, and Cultural Rights.

The Political Covenant's Human Rights Committee has developed interpretations of its substantive articles by issuing general comments. Comment 4/13 interprets Article 3, which requires states to ensure for all individuals the rights recognized in the Political Covenant, as imposing a positive obligation on states to remedy sex discrimination. This positive obligation requires that states not only take measures to protect women, such as the enactment of laws, but also take measures of affirmative action designed to ensure the positive enjoyment of rights. It also imposes on states a duty to obtain information regarding the role of women in its jurisdiction in order to determine specifically what additional measures need to be taken.\(^{207}\) Thus, even in the absence of local legislation, or when there are gaps in the enacted legislation, women's rights advocates in China can argue that as a fundamental human right, substantive gender equality is a norm to which China is obliged to conform.

Another way in which to guarantee the enforcement of international

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\(^{203}\) China is a signatory to the Universal Declaration of Human Rights, the International Convention on Economic and Social Rights, and the International Convention on Civil and Political Rights. To date, China has ratified seventeen international conventions, among which are the Torture Convention and the Children's Rights Convention.


\(^{206}\) U.N. Covenants on Human Rights, Mar. 1967, 6 I.L.M. 360, 369. Article 3 states: "The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

women's rights norms is to hold the state accountable to the Convention on the Elimination of Discrimination against Women (CEDAW).\textsuperscript{208} The CEDAW, unlike the Declaration on the Elimination of Discrimination Against Women (DEVAW),\textsuperscript{209} creates binding obligations on the states that are parties to it. The Convention applies to both intentional discrimination and to acts that have a discriminatory effect, and it requires that States Parties exercise due diligence in implementing treaty provisions.

In Part I of the Convention (Articles 1-6), States Parties agree to take all appropriate measures to bring about the advancement of women. These take the form of legal, administrative, and other measures, which include temporary special measures of affirmative action, modification of social and cultural patterns of conduct, and suppression of traffic in women and exploitation of prostitution of women. In Part II (Articles 7-9), states undertake to protect women's rights in political and public life. In Part III (Articles 10-14), governments make various commitments to eliminate discrimination in education, employment, health, and in economic, social, and cultural life. In Part IV-VI, States Parties agree to afford women equality with men before the law in exercise of legal rights and in marriage and family law.

The CEDAW also declares that violence against women "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions," including the right to life, the right not to be subject to torture, the right to liberty and security of the person, and the right to equality before the law.\textsuperscript{210}

Even though there is no direct reference to domestic violence in the CEDAW, some guidance could be received from the Declaration on the Elimination of Violence Against Women (DEVAW), which defines violence against women as

any gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in the family, such as battering, sexual abuse of female children in the household, dowry-related

\textsuperscript{208} U.N. GAOR, 34th Sess., U.N. Doc A/34/180 (1981). China was also one of the first states to ratify the Convention on the Elimination of Discrimination Against Women (CEDAW) without any reservations. The CEDAW was adopted by the General Assembly in 1979 and came into operation in 1981 after ratification by the twentieth member nation.

209. In 1967, the United Nations Commission on the Status of Women drafted the Declaration on the Elimination of Discrimination Against Women. This Declaration stated in a single legal instrument the international standards that articulated the equal rights of women and men. As the Declaration was not a treaty, it had only moral and political force and did not create binding obligations for states.

210. Id. at para. 8.
violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.\textsuperscript{211}

The broad definition of domestic violence adopted by the DEVAW will also help China in expanding the scope of harms recognized as domestic violence and acts of violence against women. Currently, China’s definition of what constitutes domestic violence does not include sexual or psychological harm, threats of such action, coercion or deprivation of liberty, or marital rape. A broader understanding of domestic violence as set out in the DEVAW is essential if women who are victims of marital rape and other forms of violence are to seek legal redress for wrongs committed against them.

Even though the CEDAW does not directly deal with the question of violence against women, General Recommendation No. 19, adopted by the CEDAW in February of 1992, defines domestic violence as a violation of women’s fundamental human rights. Recommendation No. 19 makes clear that both public and private acts of domestic violence are covered by the relevant provisions of the CEDAW, as interpreted by “general human rights norms and specific human rights covenants.”\textsuperscript{212}


\textsuperscript{212} General Recommendation 19 recommends that:

- States take all legal and other measures which are necessary to provide effective protection of women against gender based violence, including, \textit{inter alia}:
  - \textit{effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including \textit{inter alia} violence and abuse in the family, sexual assault and sexual harassment in the workplace;}
  - \textit{preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women;}
  - \textit{protective measures, including refuges, counseling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.}

Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) [hereinafter CEDAW]. Specific recommendations on General Recommendation 19 state further that states should make laws against family violence and abuse, rape, sexual assault, and other gender-based violence; give adequate protection to all women; and respect their integrity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention. Specific recommendation 24(b). Further, it is recommended that states should establish support services for victims of family violence, rape, sexual assault, and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counseling. Specific recommendation 24(k). Measures that are necessary to overcome family violence should include: criminal penalties.
While the CEDAW's General Recommendation No. 19 is an authoritative jurisprudential interpretation of the provisions of the Women's Convention, the Recommendation is not binding on States Parties. The CEDAW itself does not hold states accountable for achieving certain results, but it does require that States Parties exercise due diligence in implementing treaty provisions.\textsuperscript{213} Also, the Due Diligence Clause in Article 4 of the DEVAW requires the state to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women.\textsuperscript{214}

Comments on Recommendation 19 also charge States Parties to create "appropriate protective and support services . . . for victims" and "gender-sensitive training of judicial and law enforcement officials and other public officials . . . for the effective implementation of the Convention."\textsuperscript{215} Further, States Parties are to "establish or support services for victims of family violence, rape, sex assault and other forms of gender-based violence, including . . . specially trained health workers, rehabilitation and

where necessary and civil remedies in case of domestic violence; and states should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive, and remedial measures that have been taken. Specific recommendation 24(i) & 24(s).

\textsuperscript{213} Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No.19, 11th Sess., U.N. Doc. CEDAW/C/Doc. A/47/38 (1992) [hereinafter General Recommendation 19]. It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments. \textit{See id. art. 2(e), 2(f) & 5.} For example, under Article 2(e), the Convention calls on states to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and may be responsible for providing compensation.

\textsuperscript{214} The due diligence doctrine was applied in the Inter-American Court's decision in Velasquez Rodriguez v. Honduras, Case 4, Inter-Am. C.H.R. 35, OAS/ser.L./V/III.19, doc. 13, app. VI (1988). In that case, the Inter-American Court held the Honduran government responsible in preventing the disappearances of people, whether or not the government was actually responsible for these disappearances. Many countries are using the \textit{Velasquez Rodriguez} standard to persuade courts to hold governments responsible for inaction in preventing domestic violence against women. In Raquel Martin de Mejia v. Peru, Peru was held responsible for failing to prosecute a rapist who may or may not have been a state actor. Case 10.970, Inter-Am. C.H.R. 157, OEA/ Ser.L./V/II.91 doc.7 rev. (1996), available at \url{http://www.cidh.oas.org/annualrep/95eng/Peru10970.htm}. The Inter-American Commission observed that the state is obligated to make effective judicial recourse available to victims of rights violations, and that recourse must be substantiated in accordance with the rules of due process. In the 2001 case of Maria de Penha Maia Fernandez, the Inter-American Commission stated that there was clear discrimination against women who are attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules. Case 12.051, Inter-Am. C.H.R., OEA/Ser.L./V/II.111, doc. 20 rev. at para. 47 (2001), available at, \url{http://www.cladem.com/english/regional/litigio_internacional/cas2i.asp}.

\textsuperscript{215} General Recommendation No.19, \textit{supra} note 213.
counseling."  Given the fact that these services are largely absent in China, it is important that the women's rights advocates use the CEDAW as an advocacy tool to draw attention to these needs and to the fact that these services are required under the CEDAW.

Article 2(e) requires States Parties to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. CEDAW further requires that these measures ensure the effectiveness of the protection. Further, Article 2(f) of the CEDAW requires States Parties to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women. Article 3 of the CEDAW requires States Parties to take measures, including legislation, in the political, social, economic, and cultural fields to guarantee equal rights for women.217

Article 5, which deals with sex roles and stereotyping, recommends that States Parties modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women. The section on accountability and implementation of these provisions recommends that in order to ensure the implementation of this provision, States Parties should take measures and steps to raise consciousness and inform law enforcement officials on the issue of violence against women, particularly within the home.

Article 16 also requires states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family. Further, these rights should extend during marriage and its dissolution.218

The reporting obligations under the CEDAW also enable Chinese women's rights advocates to play the role of watchdog for state compliance with CEDAW. Article 18 requires each State Party to submit a report to the Committee within one year of entry into the CEDAW and every four years thereafter. The report should illustrate the legislative, judicial, administrative, and other measures the State Party has taken to give effect to the provisions of the CEDAW.219 In the Guide to Reporting Under the

216. Id.

217. States shall take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. CEDAW, supra note 212.

218. Id.

219. UNITED NATIONS, ASSESSING THE STATUS OF WOMEN: A GUIDE TO REPORTING UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST
The Recently Revised Marriage Law of China

Convention, one of the required questions that a member state has to ask itself under Article 1 of the Convention is whether "... the legal definition of discrimination [is] sufficiently broad or interpreted broadly enough to be compatible with that contained in the Convention." Further, states are required to ask themselves whether the definition covers practices which although not intending to discriminate, are discriminatory in effect and not reasonable or justifiable. State Party reporting is a very important tool to keep State Parties accountable under the CEDAW.

State Party reporting is not the only enforcement mechanism under CEDAW. The convention has an Optional Protocol which provides for a right of complaint—something that was suggested in the Vienna Declaration and Programme of Action adopted in 1993. It entered into force on July 22, 2001, after the requisite number of ratifications had been deposited. Under the Optional Protocol, individual women and groups of women, under the jurisdiction of a State Party, can submit complaints to the Committee alleging violations of the Convention provided that the State Party in question has ratified the Protocol. A person other than the victim can also submit a complaint on her behalf. Complaints under the Optional Protocol are to be sent to the Division for the Advancement of Women. At its twenty-sixth session in January/February 2002, the Committee finalized guidelines for the submission of communications that had been drafted by the Working Group on the Optional Protocol.

Individual women or groups of women can submit claims of violations of rights under CEDAW to a committee of twenty-three independent experts. Another novel enforcement procedure under the Optional Protocol is the provision which allows the CEDAW Committee to conduct an inquiry into allegations of grave and systematic violations of the CEDAW by a State Party. When the Committee receives information of such alleged violations, it can invite the State Party concerned to cooperate in the examination of the information and to submit relevant observations to the Committee. China has not yet signed the Optional Protocol. However, advocates in China can play a proactive role in ensuring state compliance with CEDAW by submitting information in the form of "shadow" or Alternative Country Reports, presenting their own views on the rights of women. CEDAW members increasingly use such reports as

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WOMEN (updated by the Division for the Advancement of Women, Department of Economic and Social Affairs, 2000) [hereinafter GUIDE TO REPORTING].

220 Id.

221. Id.


224. GUIDE TO REPORTING, supra note 219, at 7.
one source of authoritative information when considering the state report.225

Judges around the world are using international human rights norms as interpretive guides to clarify domestic law, to expand the interpretation of domestic law to fill lacuna in the local law and as persuasive authority to augment the domestic cause of action.

Judicial colloquia on the domestic application of international human rights norms have helped facilitate the process of judges talking to one another from around the world and developing principles of application of international norms in domestic jurisdictions. The first judicial colloquium, held in February 1988 at Bangalore, adopted a set of standards come to be known as the Bangalore Principles.226 The Bangalore Principles and its progeny recognize the centrality of human rights standards and develop methodologies by which national courts can incorporate international human rights jurisprudence to enrich domestic protection of individual rights and freedoms.227

Apart from implementing and revising legislation, it may also be possible to enforce the provisions of the CEDAW through national courts in China. Examples of such litigation include the decision of the highest court in Botswana in *Unity Dow v. Attorney General of Botswana*,228 which decided that the general equal protection clause of Botswana's constitution prevented the awarding of citizenship in a patrilineal manner and held that the "comity of nations speaks clearly against discrimination against women."229 The highest court in Tanzania held that tribal law limiting women's property rights violated the state's international legal obligations.

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225. WOMEN, LAW & DEV. INT'L & HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, WOMEN'S HUMAN RIGHTS STEP BY STEP: A PRACTICAL GUIDE TO USING INTERNATIONAL HUMAN RIGHTS LAW AND MECHANISMS TO DEFEND WOMEN'S HUMAN RIGHTS 38 (1997).

226. The Bangalore Principles include, inter alia, the following principles:
It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from constitutions, legislation or common law. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.


228. Court of Appeal of Botswana, Civil Appeal No. 4/91 (unreported 1992).

under the CEDAW’s antidiscrimination provisions. In *Vishaka v. State of Rajasthan*, a petition was brought before the Indian Supreme Court in 1997 by a group of women’s rights advocates and NGO workers challenging the gang rape of a social worker in a village in Rajasthan. The petitioners argued that the constitutional provisions on the right to life and gender equality must be interpreted according to the CEDAW to which India was a party. The petitioners’ argument that the CEDAW “must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee” was accepted by the Supreme Court, which held that that the definition of sexual harassment in the CEDAW was binding on the nation and that relevant constitutional provisions should be interpreted in accordance with the CEDAW. The Supreme Court’s decision went on to set out detailed guidelines defining both quid pro quo and hostile environment harassment as sex discrimination. The Court also outlined preventive mechanisms and complaint committees to be set up both in the public and private sector. Further, internal complaint mechanisms were to be set up and headed by a woman, and at least half of the committee members were to be women. In *Apparel Export Promotion Council v. A.K. Chopra*, the Supreme Court of India once again used the CEDAW to support the view that states have an obligation to prevent all forms of discrimination against women and to introduce measures to protect the rights of women. In this case, where a female typist alleged that she was sexually harassed by her superior, the Indian Supreme Court also referred to Article 7 of the International Covenant on Economic, Social, and Cultural Rights (ICESR) as persuasive authority to hold that a woman’s right to fair working conditions meant that the work environment should be free of sexual harassment.

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230. *Id.*
231. *Id.* 6 S.C.C. 241.
232. The Supreme Court of India has held that some fundamental rights in the constitution may be enforceable against private parties as well as the state. People’s Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473, 1483–86. The court also argued that where the state enacts legislation to protect fundamental rights in a private law relationship, it then has the obligation to ensure that the legislation is enforced. A private law victim who suffers a violation of this legislation can bring a constitutional action against the state to ensure that there is general compliance with this obligation. Compare *Mehta v. Union of India*, A.I.R. 1987 S.C. 965, with *Rural Litigation and Entitlement Kendra Dehradun v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652, where private citizens successfully sued their respective governments to impose stricter environmental standards on ecologically hazardous industries.
233. *Id.* 6 S.C.C. 241, 249.
234. *Id.* at 247.
235. *Id.* at 254.
237. Article 7 of the International Covenant on Economic, Social, and Cultural Rights
One of the chief values of CEDAW is that it encourages women's groups to think in global terms. By using international standards to measure policy, women's groups can help advance the concept of universal human rights. Using CEDAW as an advocacy tool or in litigation could be useful in efforts to help support the idea that these universal norms are not abstract ideas but concrete rights that must be vindicated. In a seminal case, the Hong Kong judiciary cited CEDAW as a guide to interpreting the Hong Kong Sex Discrimination Ordinance. This is in keeping with the fact that the sex discrimination bill was drafted in order to comply with CEDAW. The court's first reliance upon CEDAW was in a case concerning gender discrimination in primary schooling. In 1998, the Equal Opportunities Commission began receiving complaints from female students who alleged that they had been rejected from elite secondary schools while boys with lower scores had been admitted. The Equal Opportunities Commission in conducting investigations found that although female students completing primary schools performed better than male students on the relevant assessments, the Education Department had for years been secretly scaling the results on the basis of gender and applying gender quotas to the elite schools. The Equal Opportunities Commission relied on CEDAW and other international jurisprudence when challenging this discriminatory practice, and the court held that the Sex Discrimination Ordinance should be interpreted, when possible so as to carry out Hong Kong's obligations under CEDAW. In striking down the Education Department's argument that boys develop later than girls, the Court also relied upon Article 10 of CEDAW which provides that State Parties have an obligation to eliminate stereotyped concepts of men and women.

In Aldridge v. Booth, the Federal Court of Australia held that sexual harassment of women was a form of sex discrimination within the meaning of CEDAW and that sexual harassment in the workplace violated the State's obligations under the CEDAW provisions guaranteeing equality in

recognizes among things, the right of everyone to the just and favorable conditions of work, including the right of women to conditions of work not inferior to those enjoyed by men. The Indian Supreme Court went on to observe that,

These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Court [sic] are under an obligation to see that the message of the international instruments is not allowed to be drowned. . . . The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.


the workplace.\textsuperscript{239}

In Japan, a group of women sued four companies of Sumimoto Cement and the Government of Japan claiming wage discrimination. They claimed that separate employment tracks disadvantaged women as lower level tracks were primarily occupied by women. The women argued that this violated the guarantee of equality under the CEDAW. The court ordered the company to pay the plaintiffs back wages.

In \textit{Muojekwu v. Ejikeme}, the Nigerian Court of Appeal invoked international law in determining the legitimacy of a custom which subordinated women.\textsuperscript{240} The court emphasized that Nigeria had ratified the CEDAW and therefore Nigeria must live up to its international obligations. The court stated that Article 2 of the CEDAW which prohibits discrimination against women in all of its forms and agree to policy of eliminating discrimination against women, applied to the woman in question.

In \textit{R. v. Ewanchuk}, the Canadian Supreme Court applied international law to issues of violence against women.\textsuperscript{241} The Court relied on international law to emphasize that Canadian authorities have an obligation to prevent violence against women and suggested that avenues must be fashioned to make real international law domestically even when legislatures have not explicitly made international law part of the domestic law.

In courts around the world, judges have invoked international law as creative strategies to vindicate women's rights. Reliance on international law also reveals a concern for the rule of law and universal human rights values and a desire for a cross fertilization of ideas. Most of all national courts cite foreign sources not as binding authority but as persuasive authority to broaden the interpretation of binding domestic law. In the past few years courts have increasingly transcended national boundaries to embrace a more universal commitment to human rights. International colloquia and training on the application of international human rights norms in national courts has spurred this judicial reliance on and receptivity to international human rights. Invocation of international norms in judicial decision-making has the potential to transform the women's international human rights movement. Examination of leading cases across jurisdictions reveals interesting insights into how international human rights norms can support domestic human rights claims and provide a forum for the enforcement of international instruments.

Apart from domestic compliance with international norms, regional
and international tribunals have determined the adequacy of state compliance to their international human rights commitments. In *Airey v. Ireland*, the European Court of Human Rights determined that states must provide free legal assistance in civil cases when this proves necessary to effectively access justice.\(^{242}\) Mrs. Airey could not effectively represent herself in her divorce proceedings, because the procedure to bring the action before the Supreme Court was far too complex. The Court also paid attention to the emotional status of the applicant during proceedings before the relevant court. In *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, the Human Rights Committee recommended that Mauritius adjust the provisions of the statutes which treated foreign spouses of Mauritian citizens differently based on sex.\(^{243}\) Similarly, in *S.W.M. Broeks v. The Netherlands*, the Human Rights Committee decided that a statute which differentiated payments of unemployed benefits on the basis of sex was unreasonable.\(^{244}\) Even though the Human Rights Committee would have no jurisdiction over China, international lawmaking can have persuasive authority over the formulation of non-discriminatory legislation and the dismantling of discriminatory clauses.

CEDAW can also be used as a tool of advocacy in policy making. In 1991, in Columbia, women’s groups united all of their different platforms around a call to put CEDAW principles into the Constitution during the constitutional reform process. In Argentina too, women’s rights advocates used the opportunity of the constitutional reform process in 1994 to give CEDAW an explicit constitutional rank in Article 75 of the Constitution along with several other international treaties to which Argentina is signatory to. In Sao Paulo, Brazil, because of the organized advocacy of women’s groups, the state government passed a local version of CEDAW called Paulista CEDAW, proving that sometimes local advocacy proves successful when it is difficult to make change at the national level.


\(^{244}\) S.W.M. Broeks v. The Netherlands, Communications No. 172/1984, U.N. GAOR, 42nd Sess., Supp.No.40, at 139, U.N. Doc. A/42/40 (1987). The European Court of Human Rights, which enforces the provisions of the European Convention on Human Rights is one of the active tribunals in the development of international human rights norms. In *X & Y v. the Netherlands*, the European Court held that the Netherlands was responsible for the human rights violations that were committed by private individuals. A lacuna in the Netherlands law precluded the state from prosecuting the son-in-law of a nursing home director for the sexual assault of a sixteen-year-old mentally-handicapped resident of the home. The European Court held that the Dutch Criminal Code failed to provide the victim with practical, effective protection from this assault and therefore the Netherlands had violated the European Convention. In this case, the State was held accountable to a private act of violence due to its failure to act.
V. Conclusion

As evident from an examination of the CEDAW, China as a State Party to the Convention is obligated to draft enabling legislation, which will help in counteracting all forms of discrimination against women. Although China has been active in adopting legislation, which prima facie adopts the values advanced in the CEDAW, these laws have an unintended discriminatory impact on women. This disparate impact is mainly due to the vague generalities in the law and the lack of implementation and enforcement mechanisms in the law.

The LPWRI is one example of a law that cannot be enforced. The law was promulgated to implement China's obligations as a party to the CEDAW. It has been argued that it is more a norm-creating document than a law with teeth. The revised marriage laws, too, as pointed out in this article, might be difficult to implement due to the lack of certain operational provisions.²⁴⁵ It is important to keep in mind that, under Article 4 of the CEDAW, States Parties are required to ask themselves "what enforcement mechanisms have been established and how do they operate?"

Also, under Article 5 of CEDAW, States Parties are recommended to consider in their reports whether there are places for women to go when faced with violence within the family and whether there are special law enforcement units to deal with domestic violence. However, as explained previously, without the active support of the state government, shelters for victims of domestic violence have not met with much success in China.²⁴⁶

Several countries around the world tried in the 1990s to bring their legislative framework in compliance with CEDAW provisions.²⁴⁷ These good faith efforts have, however, been hamstrung by a lack of corresponding enforcement mechanisms. In short, even though the framework is in the process of being changed, the implementation of these laws and guidelines remains a problem.²⁴⁸

The concerns expressed and the recommendations made by the CEDAW Committee based on China's last country report can also guide women's rights groups and advocates to address these issues.²⁴⁹ The

²⁴⁵. Hecht, supra note 11.
²⁴⁶. Chen Min, supra note 158, at 33.
²⁴⁷. Unfortunately, the United States, despite much effort by women's groups, has not ratified the Women's Convention. However, its provisions may be binding on the United States to the extent that they embody customary norms of international law. The domestic legal effect of customary international law remains a matter of substantial debate in the United States.
²⁴⁸. WOMEN'S RIGHTS WATCH YEAR REPORT 1999, at 7 (The Women and Media Collective, 1999).
²⁴⁹. The Committee considered the combined third and fourth periodic reports of China (CEDAW/C/CHN/3-4 and Corr. 1 and Add. 1 and 2) at its 419th to 421st
Committee noted that provisions that are gender-neutral on their face may affect women negatively because their circumstances and problems are different from those of men. Some of the Committee's concerns dealt with the government's approach to the implementation of the CEDAW, which focuses more on the "protection" of women rather than on their "empowerment." The Committee also raised concerns that neither the LPWRI nor other laws define discrimination against women and urged the adoption of legislation that explicitly addresses direct and indirect discrimination. Among other things, the Committee recommended that the government enhance the available means of redress for grievances and adopt effective legal remedies, as well as allocate resources to monitor the enforcement of women's rights. The Committee also recommended the adoption of a special law on domestic violence that provides for shelters and training of law, health care, and law enforcement officials. These recommendations can be used by women's rights advocates to urge the Chinese government to address these concerns.

It is important for China to give concrete expression to the guarantees of gender equality contained in international instruments. China has come to play an increasingly important role in adopting the framework of international women's rights. Much has been done in China in terms of achieving equality for women on paper, but much still remains to be done to fully realize the potential of those rights. Unmasking the gendered notions of law and practice and laying bare the biases underlying these laws and practices is the first step in feminist methodology. The lack of an understanding or awareness of the ways in which gender stereotypes or assumptions can affect women can perpetuate practices that have the systemic effect of imposing burdens or disadvantages on women.

meetings, on 1 and 2 February 1999 (see CEDAW/C/SR.419-421). Addendum 2 to the third and fourth periodic reports covered the implementation of the Convention by the Government of the Hong Kong Special Administrative Region, over which the Government of China resumed the exercise of sovereignty on 1 July 1997.


250. Id.
251. Id.
252. Id.
253. Advocates can also submit information in the form of "shadow" or Alternative Country Reports, presenting their own views on the human rights of women in their country. The CEDAW Committee members increasingly use such reports as one source of authoritative information when considering the state report. Division for the Advancement of Women, Country Reports, available at http://www.un.org/womenwatch/daw/cedaw/reports.htm (outlining the procedures for this process) (last visited Apr. 8, 2004).