

Gender Inequality in the Divorce System: Taking Property Division as the Starting Point

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Abstract. Both the legislature and the public gradually realized the significance of divorce autonomy, which is thought to be the progress of the law-based society and shows the increasing awareness of protecting women's rights. With the change from fault-based divorce to "no-fault" divorce, certain plight had been solved, providing people with more remedy approaches to get rid of painful marital relationships. However, statistics show that related provisions have not functioned well in the judicial practice. Regulatory research figured out that there existed a confusion of related issues in the divorce proceedings, which caused a new mode of inequality with modern features in the court. Which domestic violence is the one that needs the most attention as it involves a threat to life security. Therefore, verdicts of divorces involving domestic violence should be decisive, avoiding potential threat by the assaulter, and issues related to the divorce should be separately considered.

Keywords: Gender equality; law; divorce system.

1. Introduction

Marriage is one of the most special relationships in the society. From a sociological perspective, it is an economic alliance consisting of two opposite sex without a blood relationship. Traditionally, families mostly fell into the pattern called "breadwinning men and homemaking women". According to the sociologist, this kind of pattern is the most efficient way of social production. Such a historical pattern is a wise cooperation in marriage - one goes out for a living and the other supports the breadwinner by keeping the house in order. The generation of this has many reasons, including the patriarchal society, the gender inequality in the workforce, or simply because of the physical advantages of men and women. Yet regardless of the reasons, the term "alliance" shows an equal family status between men and women, and wives' contribution to the family income is as important as the husbands' as well.

However, substantive inequality between genders exists for long, either in traditional marriages or dual-earner marriages, either in ongoing marriages, or divorce proceedings. To improve the gender inequality and apply protection for vulnerable groups, governments have achieved certain success by revising the regulation of marriage and divorce. From revealing and punishing domestic violence to the establishment of marital rape as a crime, and to legalizing compensation for domestic labor in China, it is no doubt that the vulnerable group gain more judicial remedy approach than before. However, there is still a long way to realize the original intention of legislation in the judicial practice. In many cases, especially in cases filing for domestic abuse, both the rate of compensation decision and the determination of the domestic abuse is unexpectedly low. It seemed that "finality within the legal system was not finality in the real world", which is particularly true in the marriage dispute [1]. As marriage has been universally recognized as a private relationship, the risk of creating "individual injustice" by applying general legal norms is higher than any other legal relationship [1].

This article will focus on gender inequality in divorce proceedings, especially on affairs related to marital property division. First, it elaborates current deficiency of judicial practice in China. It begins with the difficulty in winning the court's decision of supporting the divorce indemnity. Taking domestic violence as the starting point, it is shown that the crimes and punishments are far from equal and the victims of the violence are under various coercion, prohibiting them from getting away from



the current situation. It then points out the courts' practice of confusing the marital property division with other factors, such as domestic violence compensation, children's custody, and the decision of divorce itself, etc., which aggravates the burden of the vulnerable group and puts them in a weak bargaining position. Second, this paper presents the big progress in legislation for ensuring the interest of the full-time homemakers, and makes a comparison with the similar regulation in the US. Third, it will propose suggestions for the problems mentioned above, rationalizing the judicial practice and raising the efficiency of divorce proceedings.

2. The Current Judicial Practice of Divorce Dispute (China as Example)

Private autonomy is one of the most important principles in civil law. Family law, as a special law in civil law, the necessity of complying with the private will is beyond dispute. The perception of marriage as a private relationship had been early characterized by The Supreme Court in the US, which justified the modern "no-fault" divorce system [2]. Similar cognition was established even earlier during the May 4th Movement, making the idea of the freedom of marriage a general and natural thing. The freedom of marriage includes the freedom of getting married and the freedom of getting divorced. While the public attaches great importance to the former because of the dross that matches are arranged by go-betweens according to the wishes of the parents in the feudal period, it took a long term for the freedom of breaking a marriage to be substantially accomplished. Compared with the freedom of getting married, the constraints to divorce are more of a gender inequality than the oppression of patriarchy.

2.1. The Overview of the Current Divorce System

The shift from fault-based divorce to "no-fault" divorce showed a great breakthrough and development upon the emancipation of the mind, which embodied people's demands for equality and liberty. The process of establishing this principle is full of dilemmas. The balance between the liberation of women and the maintaining social stability caused huge divisions in the legislature on this issue [3]. The "no-fault" divorce may cause serious problems in family harmony and lead to the detriment of the men's interest [3]. To break up the traditional marriage structure and cut off the patriarchal control, achieving the goal of women's personality independence and ideological emancipation, the legislature enacted the "no-fault" divorce system over the objections of those in a powerful and exploitative position.

However, it is worth mentioning that nowadays the freedom of divorce protected through fierce struggle in the old days is being closed again back to the cage. The appeals of divorce proceedings usually involve three issues: divorce judgment, child custody, and the division of the property (including the negotiations about the support payment and the upbringing payment) [2]. These issues need to be judged by separate factors and even held in bifurcation cases. However, the court tends to apply an all-at-once approach to divorce proceedings, which causes an unfair bargaining position [2]. Thus, the party in a weak position (usually women) failed to divorce successfully on their will, not only because of the harshness of winning in court legally, but also considering financial difficulties and the burden of social opinion, threats from the perpetrators, and the elder's disagreement, etc. Moreover, the physical and substantial discrepancy between genders must be taken into consideration, the ignorance of factual unequal social position and biological differences will transfer the formal equality into substantial inequality [4]. All these objective factors forced women back into the bitter marriage and made the the remedy system of divorce exist only in name, which is another way of depriving of divorce freedom.

2.2. The Confusion of Marital Property Division and Other Factors (Custody Granting, Fault Compensation, Alimony, etc.)

Such an all-at-once approach is based on the consideration of the efficiency and the cost of settling the dispute. But it does not mean that the confusion of marital property division and other factors has its justification. In fact, such settlement has several detriments upon gender equality, which lead to

the inefficient application of the remedy system of divorce and solidify the weak position of the women.

In China, there are two ways of divorce. A consensual divorce only needs to go through the formalities at the Civil Affairs Bureau, with a month's cooling-off period. If the divorce is unable to meet a consensual, concerned parties are required to file a lawsuit. This part will elaborate on the mistake of intertwining the related matters, particularly during the mediation process.

Statistics show that, in China's jurisprudence, the judge regards judicial mediation as a paramount goal to solve the dispute, which is undoubtedly an approach with high efficiency. However, due to the features of negotiation that judicial mediation contains, it is more like a trade than a reconciliation. Mediation has been seen as a signature production of China's civil justice for a long time [5]. Statistics showed that the amount of cases that ended by withdrawal or mediation kept at a high rate in last 2 decades, at about 50% to 60% [5]. The reason why mediation becomes the most favourable approach for the judge to handle legal disputes is complicated.

Firstly, the judges are no longer characterized as having a neutral role in the dispute during the mediation, they have their own stake and procedure [5]. Based on the provisions of the procedure law in China, litigant-mediation mediation is a necessary procedure. Also, the mediation rate are being regarded as a criterion to evaluate the performance of the courts and the judges [5]. In that case, the courts are inspired to make the mediation a success to boost their performance, and they do have the justifications that it costs the concerned parties less money and time. However, although mediation claims as respect for private autonomy and prohibition of coercion, the reality is that mediation is guided by the judges, rather than the litigants. With the goal of settling the cases as soon as possible, the judges give advice on which is the best solution to balance the appeals of the two parties, relying on their own decision-making capacities and standing from the perspective of an outsider [1]. While the growing caseloads lead the judges to a great burden on efficiency and accuracy, which makes them unable to investigate and obtain the details and even the truth for individual cases, it is impossible for the judges to figure out the urgent demands of the specific litigants and of course it is not the real self-autonomy the appellants originally pursuing.

Secondly, such solutions are relatively fair in general civil relations, but marriage is such a special relationships that include ethic, emotion, and privacy, thus a determinate framework of mediation and the so-called best solution is not necessarily reasonable in individual cases [6]. The framework of the mediation always performs as supporting the custody for one party at the expense of forgoing the marital property or compensation they deserve, which is called an all-at-once approach [2]. Mostly, it provides exclusive profits for the parties with financial power at their spousal's expense. This is because, among the three matters in the divorce proceedings (dissolution, custody, and property division), property division is the only thing that matters to the more monied spouse. Thus, there formed a paradoxical situation that those who possess more right of speech on the negotiation table have less demand on the number of appeals. Then an unfair bargaining power exists and makes it impossible to win the appeal of both custody and financial security. Reasons that intertwined these three issues in divorce cause gender inequality are as follows: (1) The party who needs both the custody and the reasonable financial safeguard is the spouse in the traditional family pattern-homemakers without social income, while they at the same time are those invested more in the family, taking care of children and having a deep bond with them; (2) Even though the spouse with more financial resources had not to look after the children before, the courts have a large possibility to grant the custody, complying with the principle of the child's best interest-economic strength.

It seems that the all-at-once approach sounds like a win-win strategy, being accomplished by the concession of the two sides, facts are that all three matters are determined by the economic strength. The spouse possesses more financial resources not only has good command of the family's economic status and can easily search for the help of the solicitors, but also has the capital to go through the long legal proceedings. Which is to say, the all-at-once approach makes the determination of the less monied spouse can be easily determined by the will of the other [2]. Then two directions summarize

all the current situations: if the powerful spouse wants the custody, he can easily gain the granting because of the steady social income; if he does not sincerely want the custody, he tends to appeal for the custody as well, taking it as a bargaining chip to achieve their financial goals [2]. The more invested party cannot afford the risk of diminishing bond with children, so they have to make a concession on their financial interests. Results are that those who get the smaller share of the property undertake most of the upbringing responsibility, or part of them are unable to afford the expense and are forced to give up their file for divorce, which is a complete violation of the freedom of marriage.

Moreover, besides the potential coercion based on the bargaining power, applying such an approach to domestic violence may cause much more inequality and hazard. In China, legal grounds for divorce include bigamy, domestic abuse, gambling, addiction to drugs, and so on. Among these, direct physical and mental harms like domestic abuse have no room for mediation. Since the violation is strictly regulated in the general tort, so is the domestic abuse. The Civil Code in China confers spouses the right to dispose of certain matters mutually, such as the agent power of family affairs and the right to declaration of spousal's death. While the spouses obtain a lot of privilege and trust, their infringement acts are contrarily hard to confirm, punish, and prohibit by the courts. And plenty of the victims file the divorce at the risk of suffering more violence during the judicial process, which made it a huge cost to get away from such a life threat.

Involving domestic abuse and other issues in the mediation gives the assaulter an opportunity to put pressure on the victim, threatening them with custody, money, or even violation itself. On that occasion, mediation becomes a complete custody-for-forgiving threat, and forgiving always results in the next violation, as the domestic assaulter tends to be incorrigible and seldom recognize their crime [2]. The reason why domestic abuse happens is in order to confirm and display their supreme power in the marriage, so their apology and concession is just a false appearance to induce the weak party back into their control. Therefore, although the mediation seemed to successfully ease the family relationship and boost the courts' performance, all these may be at the expense of the victim's life for they have lost the help of the judicial remedy system. So, the advantages of the mediation cannot outweigh the detriment it brings in vicious affairs [7]. It is noticeable that not only the unbalanced verdict may cause an act on impulse, but also the moderate settlements have the possibility that putting someone's life at stake.

2.3. The Progress: Establishment of Housework Compensation in the Marital Property Division

China had gone through thousands of years of feudal society. As the discrimination on the housework value and the thought of traditional family patterns is deeply ingrained, it is necessary for China to establish the housework compensation system to change people's beliefs and improve gender equality for women in family relationships. Big progress had been made in the Chinese Civil Code, revising the provision of the housework compensation according to the reality. Since then, the scope of applying the compensation system has been expanded by canceling the limitation of the type of the marital property system. In China, a majority of people adopt community property, which is excluded by the original law. The promulgation of the Civil Code made it possible for women to strive for financial security and recognize the value of their contribution to the family.

Housework had long been regarded as valueless. It is no surprise that people held a serious stereotype talking down the contribution of full-time homemakers, whose labour seemed unpaid and had no market value. Some economists analyze that housework, as non-commodity, cannot be exchanged on the market and therefore is worthless. Then there exists a close loop logic: the expectation of the social gender for women is to afford the burden of housework, which is economically valueless but heavy; This impedes women from participating in paid work, generating their subordinate position in the workforce; Without income women have to economically rely on their husband, which also causes subordination in the family; The two subordination gradually solidified in the society and enhance the social gender's conservative expectation for women as homemakers [8]. It seems like an endless

loop that the only way to jump out of the circle is to undertake the double burden of the labour market and the housework, which results in a bigger inequality.

However, women who owned paid employment had experienced bigger self-sacrifice than those in traditional marriages, still undertaking a large proportionate of the housework [8]. Research shows that working women afford about 80% of housework including childcare, maintaining family relationships, cooking, and so on, while the husbands only need to do the easiest [8]. The amount of housework women are expected to do has nothing to do with their demanding time on waged labor and earnings, and sometimes women with higher incomes tend to do more housework to maintain the status and dignity of their husbands [9]. Inequality tends to be hidden under good marriages, thus problems erupt when the relationships break up [10]. More importantly, women's character as mothers, wives and employees at the same time, investing more in both the family and the workforce, will inevitably face a trade-off on between custody and money. The more invested parent may "find themselves in the weakest bargaining position of all", which is a reality in most divorce disputes [2].

To eliminate the inequality between the contribution and the acquirement, legislation established the housework compensation system. Some scholars argued that family law is a private one, private autonomy should be highly respected, and the government's intervention should be cautious; others advocated that this new compensation is an overcompensation, which may cause an unfair to the opposite gender, aggravating the conflict [11]. However, the housework compensation has sufficient legitimacy.

Marriage acts as a corporation, which is a combination of achieving better life standards and working together to resist social risks. Both the husband and the wife have the reliance interests that they are the community of the interest, and any of whom gains the profits will benefit the other [8]. In that case, wives are willing to make a concession and self-sacrifice to better support their husband's work and the family relationship at the cost of their career pursuit. This concession is based on the community and is made for the purpose of profit. Once the community breaks up, such reliance interest is reasonable to receive the compensation, as same as the protection for the reliance interest in the contractual relationship. Moreover, housework has its social value. Upbringing children and caring for the elderly contribute a lot to the family stability and social burden, which lay a solid foundation for the development of the social economy and family finance [8]. The rights and obligations in the family should be equal, while the spouse who is responsible for the housework has no rights or profit. Therefore, applying corrective justice instead of formal justice is the true justice in the marriage.

3. Proposal for Improving Gender Equality in the Divorce Proceeding

As mentioned above, the confusion in the divorce dispute prevents the courts from deciding on the legal facts and reasons, which causes inequality. It is recognized that issues like money and custody should be independent of each other [2]. Bifurcations become a useful method to directly separate the decision of divorce from hearing the appeals for the money and custody. Some may argue that bifurcations will lead to a huge surge in caseloads. They are concerned that further caseloads will slow down the courts' efficiency and make the divorce proceedings much more lengthy, wasting judicial resources and increasing the divorce cost. This part will propose a proper bifurcation to avoid potential infringement and inequality and improve the efficiency of the judicial decisions. Also, having discussed the deficiency of mediation in vicious divorce cases, the necessity of encouraging the courts to pronounce divorce in the first instance to decrease further harm is beyond dispute.

3.1. Bifurcations in the Divorce Dispute

Many courts prefer to settle all the issues at once for some reasons, but deciding separately has been a success in some cases [2]. Actually, bifurcations have been applied in many countries. In Australia, the legislature only regulates the time limit to appeal for the property division and the divorce is just a legal process to finish the marriage relationships. States in America also promote the bifurcation of

the divorce issue through settling the custody and money in mediation [2]. Although there are still incomplete problems, bifurcation seems to be a tool to avoid the current situation of the unequal bargaining position in the divorce.

Bifurcation in divorce has many choices, among which, the most important is to bifurcate the decision of divorce and the other two issues. Because freedom of divorce is one of the constitutional rights, the decision of divorce cannot be affected by any other objective factors and force the concerned parties to change their mind. This is even more significant in the legal grounds of divorce, the concession forced by objective factors such as living hardship in the future or the possibility of leaving their children always results in worse beats after back into the family. For the rest two issues, bifurcation is not a necessity in consideration of saving the judicial resources. However, custody and money should be decided in separate criteria. The fundamental principle of settlement will be the priority of the child's best interests [2]. By only considering the child's best interest, the courts can make an independent decision and prevent using children as bargaining tools. The best interest of children comes from the ability to take care of them, the closeness with children, or the living environment, not necessarily linked to the economic capacity. Thus it is practical to hear and decide the custody and the visitation at first, then settle the property, payment, and compensation according to the custody [2]. In this way, certain inequalities and large gaps in negotiation positions can be prevented to a large extent.

3.2. The Necessity of Pronouncing Divorce in the First Instance

Statistics show that a large proportion of divorces based on domestic abuse did not receive certain support from the courts in China [12]. The rate of pronouncing divorce in the first instance is surprisingly low, at 30% [12]. This is because domestic abuse is difficult to identify and prove. The taunt abuse, mental repression, and the boundary of a fight are hard to define. Such recognition completely relies on discretion, while the courts tend to apply high criteria to declare violation because of their intention to maintain the family stability and decrease the rate of divorce [13].

Additionally, the courts have a sense of legal paternalism that decides and analyzes the pros and cons of the divorce for the litigants [12]. However, "only the wearers know where the shoes pain", nobody else knows better than the battered woman herself about which life she wants and what advantages she would rather not have [1]. Not only such a decision violates people's private autonomy, but also puts the victims of domestic abuse in danger. Since domestic violence is hard to find, the provisions of habeas corpus exist only in name. The weaker party hard to obtain protection from the government, which put them in danger of being revenged during the judicial proceedings. Therefore, for these divorces based on legal grounds, particularly those involving violation and threat, the demands for potential public policy purposes should not outweigh the interest and security of the individuals. The judges have the obligation to pronounce the divorce in the first instance decidedly.

4. Conclusion

Divorce mainly consists of three issues, which always be intertwined together in the court. This leads to a serious unequal bargaining position between the husband and the wife. Traditional family patterns made the wives passively become the weaker party, who tend to have insignificant negotiating power but demand both custody and money. Their access to custody granting is actually closely linked with money, including income, upbringing payment, and property division. As the less monied side, the determination of their appeals completely depends on their spouse, which is a serious unequal settlement. This situation becomes even more severe in cases of divorce because of domestic abuse.

This article elaborates on the generation process of inequality and the current judicial practice in China. Both the deficiency of the current institution of mediation and the big progress made by the government show that China has already noticed the potential unfairness and revised its provisions to fit the current national conditions, but there are still problems. Proposals are provided in the article separately for the problems mentioned above. First-instance pronouncements constantly kept at a low

rate in China. This is simply because of the aim of decreasing the divorce rate and the belief in recovering family relationships, which brings huge costs and misery to the victims of the marriage. Thus it is suggested that a decidedly verdict should be made at least in marriages where violence and actions are included for divorce. There are researches advised to apply bifurcation to solve the problems in divorce proceedings, and this article proposed this solution in detail and provided a proper sequence of the bifurcation. By deciding the custody at first, certain equality will be protected.

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