

## CHAPTER ONE

## SISYPHUS GOES TO DIVORCE COURT

Not long after immersing myself in this project, I began to visualize Sisyphus going to divorce court. His fate is an apt metaphor for the protracted and sometimes futile uphill struggle of China's mostly female divorce plaintiffs, whose petitions will almost certainly fail at first – even in cases involving domestic violence, regardless of the severity of the allegations or the strength of the evidence.<sup>1</sup> Many plaintiffs give up on litigation, either resigning themselves to staying married to their abusers or pursuing divorce through civil government channels outside the court system. Of those who do return to court, most will eventually succeed, albeit sometimes only after multiple attempts and long delays.

My key tasks in this book are to trace the origins and chronicle the consequences of this highly institutionalized practice of denying first-time petitions (He 2009), which I call the “divorce twofer” because a court typically grants a divorce only after trying the same case twice. Obtaining a divorce after two (or more) attempts is no bargain for litigants, but, as we shall see later, denying divorce petitions has helped judges in a variety of ways. Courts and judges have enjoyed divorce litigation's “two for the price of one” quality, for which female plaintiffs have paid dearly. The divorce twofer's benefits to courts and judges have come at the expense of gender justice.

As I studied tens of thousands of courts' written divorce decisions, I was struck both by the high prevalence of domestic violence

<sup>1</sup> Throughout this book I use the term “domestic violence” instead of “intimate partner violence” because the scope of analysis is almost exclusively limited to married couples.

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allegations and by judges' tendency to ignore them. I was surprised by the ubiquity of judges' brazen and inscrutable disregard for plaintiffs' well-documented claims of domestic violence. I was mystified by how commonly judges denied divorce petitions on the grounds that mutual affection had not broken down and reconciliation remained possible despite admissible evidence of horrific spousal abuse. A remarkable feature of Chinese court rulings to deny divorce petitions is the overwhelming extent to which they are based on judges' arbitrary assessments of the strength of the marital foundation and speculative prognostications about litigants' reconciliation prospects. For this reason, the divorce twofer extends unabated to cases involving domestic violence.

I was equally amazed to find that judges' tendency to deny first-attempt divorce petitions had increased dramatically beginning in the mid-2000s. In some ways, the contemporary struggle is a throwback to the Mao era when divorce was notoriously difficult (Tsui 2001:105–06). To my dismay, I discovered that, among all divorce-seekers, women have been hugely disadvantaged not only in their prospects of obtaining a divorce on the first try but also in gaining child custody. Women have borne the brunt of this judicial clampdown on divorce. Their formidable difficulties thus harken even further back to China's imperial days (Baker 1979:45; Honig and Hershatter 1988:206).

These parallels to earlier periods, however, are strictly confined to courts. The Sisyphean character of divorce *litigation* stands in stark contrast to a relatively quick and simple *administrative* pathway to uncontested divorce in the Civil Affairs Administration, which accounts for the vast majority of China's divorces. Indeed, the liberalization in 2003 of this extrajudicial pathway helped triple China's crude divorce rate within 15 years. A prerequisite of divorcing outside of court, however, is mutual consent – and agreement on all terms. Most divorce cases brought to court, therefore, are contested. A considerable share of them have been filed by women making allegations of domestic violence.

Why have courts become averse, and increasingly so, to granting first-attempt divorce petitions? Why have judges remained so unmoved by domestic violence allegations? Why have women's divorce litigation outcomes been so much worse than men's? These are the questions I set out to answer in this book.

In my quest for answers, the first place I looked was China's family laws. Widely dubbed “breakdownism,” the ultimate legal standard

for divorce is the “breakdown of mutual affection.” Strictly according to the law, judges can grant divorce petitions only if their mediation efforts fail to reconcile the couple and they determine that “mutual affection has indeed broken down.” Breakdownism is analogous to no-fault divorce elsewhere in the world insofar as judges can apply it to grant a unilateral divorce petition on the grounds of irreconcilable differences. If mediation fails, a judge need only take a plaintiff’s claim of the breakdown of mutual affection at face value to grant a divorce. Chinese judges almost never apply the law this way, however. More often than not, they take a defendant’s unwillingness to divorce as proof that mutual affection has not broken down.

The law provides additional divorce standards. A judge is supposed to grant a plaintiff’s divorce petition if the defendant fails to show up and mediation cannot be carried out, or if the litigants satisfy a physical separation test. Most importantly, statutory wrongdoing – including domestic violence – automatically establishes the breakdown of mutual affection. Any one of a series of fault-based legal tests known collectively as “faultism” automatically satisfies the breakdownism standard and therefore provides sufficient grounds for an adjudicated divorce. Again, however, judges rarely apply the law this way.

On paper, Chinese family law adheres to global legal norms concerning women’s rights in general and protections against domestic violence in particular. Since the 1980s, the law has fully empowered judges to grant a divorce on the fault-based grounds of domestic violence. Although the term “domestic violence” debuted in Chinese law in 2001, earlier legal provisions extended protections – particularly to women and children – against “maltreatment” and “abuse,” and provided the right to divorce on this basis. Ambiguities in the law, however, have also provided a way out for judges disinclined to grant a divorce. Most judges tend to privilege breakdownism over faultism. Rather than affirming the breakdown of mutual affection on the basis of statutory wrongdoing, judges tend to do the opposite: they sideline plaintiffs’ fault-based claims and rule to preserve abusive marriages by determining that the litigants’ marital discord can be fixed and that mutual affection has therefore not completely broken down.

Denying divorce petitions solves a lot of problems for judges, who face pressures from many sources, perhaps the least of which is the law. Chinese judges are rewarded and punished according to how well they support the court system’s dual imperative to maximize judicial efficiency and minimize social unrest. Like Lipsky’s (2010) “street-level

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bureaucrats,” Chinese judges take advantage of their considerable discretion to bend and reinterpret formal rules. As street-level bureaucrats, they have developed unofficial “routines and simplifications” not only to complete their relentless work tasks but also to maximize their scores on measures their superiors use to evaluate their work performance (Lipsky 2010). In so doing they have produced informal *de facto* rules that deviate from official *de jure* rules.

The divorce twofer emerged as one of judges’ creative coping strategies. By helping overworked judges to close cases quickly and thus to clear their oppressive dockets, the divorce twofer is a docket-shrinking machine. Most of the divorce petitions that judges swiftly deny on the first attempt do not come back to court as second-attempt petitions. Moreover, the cases that do come back are less fraught and contentious – and are thus easier to dispose of and less likely to lead to “extreme incidents” of violence and unrest. Finally, marital preservation supports China’s political ideology of family harmony as a means of maintaining social stability.

Street-level bureaucrats also save time and effort by making snap judgments guided by prevailing stereotypes and biases (Lipsky 2010). Chinese judges sort litigants into cultural categories of credibility and deservingness in part according to patriarchal cultural beliefs. Because they deem women’s claims to be less credible than those of men, judges attach less weight to women’s allegations of domestic violence than to their alleged abusers’ denials. They use batterers’ apparent contrition as evidence of reconciliation potential and thus as grounds for denying victims’ divorce petitions. They support the rural patriarchal order by granting child custody – particularly of sons – to fathers. Judges also fear for their own personal safety lest they upset a defendant with a history of violence. To some degree, judicial decision-making occurs in the shadow of threats of violent retribution.

In recent years, the annual number of contested divorce petitions adjudicated by Chinese courts has exceeded half a million (Ministry of Civil Affairs of China, various years), at least one-quarter of which involve claims of violence and other forms of abuse (Chen and Duan 2012; Li 2015b). Such cases, usually filed by women, usually result in a court ruling to preserve the marriage (Ministry of Civil Affairs of China, various years; Xu 2007). My empirical analyses of the written court decisions of almost 150,000 divorce adjudications spanning eight years in two Chinese provinces, Henan and Zhejiang, show that courts’ long-standing practice of denying divorce requests on the first attempt

(He 2009) has intensified since the mid-2000s, and that China's judicial clampdown on divorce has disproportionately impacted women. They also show that when they do grant divorces, courts favor fathers over mothers with respect to child custody, in part because women who flee domestic violence often leave their children behind. Men who beat their wives are thus rewarded with child custody.

The tragic 18-year saga of He Jie, a woman from Dingxi County in Gansu Province, offers a preview of almost every theme of this book about the struggle of Chinese divorce litigation.

#### CURTAIN-RAISER

He Jie's husband, Zhang Dong, began to beat her soon after they registered their marriage in 1986. His violent temper did not wane following the birth of their son. When their son was six months old, Zhang Dong's beating left He Jie collapsed on the floor with a ruptured eardrum and urinary and bowel incontinence. When she got up after Zhang Dong demanded that she return to work, he beat her again. He Jie's screams alerted the neighbors, who reported the situation to her parents, who in turn rushed her to the hospital. In 1987, as a consequence of this episode, He Jie filed her first divorce petition with the Dingxi County People's Court.<sup>2</sup> While awaiting her trial, she left her son behind and stayed with a relative in the provincial capital of Lanzhou, where she looked for work. Zhang Dong traveled to Lanzhou to express his remorse. He pledged never to repeat his offenses, and if he did, to agree to divorce and provide economic compensation. He also begged He Jie's parents to persuade her to give him another chance, which they did. In consideration of Zhang Dong's contrition, the court denied He Jie's divorce petition on the grounds that mutual affection had not completely broken down.

The very next day after the court's adjudicated denial, Zhang Dong brutally attacked He Jie. Later, in 1988, he dumped a basin of foot-washing water over her head and, wielding a cleaver, chased her out of their home. Not knowing where else to go, she returned to her parents' home. That same year, He Jie filed her second divorce petition. She also sought the assistance of the local branch of the All-Women's

<sup>2</sup> In 2003, Dingxi County was renamed Anding District after it was absorbed by the newly established prefecture-level city of Dingxi.

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Federation and the local People's Congress, both of which attempted to persuade her that countless couples experience the same thing, that physical fights are no big deal. Afterward, He Jie declared to Zhang Dong that she would move to Lanzhou and look for work while awaiting the court's ruling. After the court denied her second petition, Zhang Dong traveled to Lanzhou to retrieve her.

In 1993, the court denied He Jie's third divorce petition after yet another convincing display of remorse by Zhang Dong. In 1996, Zhang Dong chased He Jie again with a cleaver. This time, as she was trying to escape through the front door, he caught her by grabbing her hair. When he held the knife against her neck and moved it back and forth on her skin, she nearly lost three fingers when she tried to push the blade away. Her fingers remained attached by a small amount of sinew. Although she was bleeding profusely, he prevented her from going to the hospital. Only by pretending to use the bathroom was she able to escape to the hospital, where her fingers were reattached.

The fourth time she filed for divorce, He Jie was more determined than ever to succeed. She reasoned that if she used medical records as evidence of Zhang Dong's abuse, the court would be unable to use "mutual affection has not broken down" to deny her petition. Zhang Dong wrote a "pledge letter" admitting his mistakes, promising never to repeat them, and begging for one more chance. Under enormous pressure – from Zhang Dong's work unit, which wrote a formal statement and affixed its official red seal to vouch for his commitment to become a better person; from He Jie's older brother, who was moved by Zhang Dong's gestures; and from her precarious employment situation at her own work unit, which had started laying off employees – He Jie relented and withdrew her divorce petition.

A few years later she did indeed get laid off. After Zhang Dong was also let go by his work unit shortly afterward, he regularly got drunk and beat her. In 2002, Zhang Dong was arrested for hiring a prostitute. After He Jie bailed him out of jail, he beat her. After a few more years of abuse, He Jie resumed plans to file her fifth divorce petition. One day, in May 2005, when she returned home to discover Zhang Dong drinking with a friend, she ran to her mother's home, where she spent the night in order to avoid another beating. Several hours after He Jie returned home the following morning, Zhang Dong notified her mother that she had killed herself by drinking rat poison. He rushed her to the emergency room where she was pronounced dead. He Jie's

family, suspecting that Zhang Dong murdered her, requested a forensic investigation. Because Zhang Dong and his son refused to grant permission to examine He Jie's stomach contents, the forensic pathologist's tests were inconclusive. He Jie's body was cremated.<sup>3</sup>

Owing to failures in the Chinese civil courts, divorce cases do lead to suicides and spawn criminal domestic violence cases, including homicides. In the grand scheme of divorce litigation, however, He Jie's tragedy is an extreme case in terms of both the number of times she filed for divorce and her ultimate fate. Other themes emerging from her case, however, are hardly aberrations from the utterly common experiences of abuse victims who file for divorce in court:

- In their divorce petitions, plaintiffs often present claims of domestic violence in gory, harrowing detail, and support them with legally admissible documentation.
- These plaintiffs commonly report their fruitless prior help-seeking efforts with the police, local government agencies, and the All-China Women's Federation.
- Plaintiffs often face pressure from all sides to withdraw their petitions.
- In order to justify their adjudicated denials of abuse victims' petitions for divorce, judges downplay and normalize domestic violence and underscore batterers' contrition. In so doing, judges reinforce the gaslighting efforts of husbands, parents, parents-in-law, other family members, police, and village leaders.
- Written court decisions are rife with judges' contorted efforts to establish mutual affection despite plaintiffs' claims and prima facie evidence of domestic violence. Judges commonly cite defendants' desire to stay together and remorse as proof that mutual affection has not broken down. Whereas pledge letters are supposed to be used as evidence of domestic violence, for purposes of establishing the *breakdown* of mutual affection, judges tend instead to use them as evidence of defendants' repentance, for purposes of establishing the *existence* of mutual affection.
- When plaintiffs return to court after an unsuccessful first attempt, they often report the intensification of domestic violence in the

<sup>3</sup> This account is a summary of details reported by Shi (2005). In another media report on the same case, the name He Jie (何洁) is reported as He Cailian (何彩莲; Chai and Zhu 2005).

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interim and their efforts to escape it by staying with family or participating in labor migration.

- In child custody determinations, judges privilege physical possession over domestic violence allegations. The judges in He Jie's case never had to determine child custody because they never granted any of her divorce petitions. Had they done so, they likely would have granted child custody to the defendant because He Jie, like so many abuse victims, left her son in the physical possession of her husband when she fled to safety.

I encountered other cases similar to He Jie's. In 2014, Henan Province's Zhongmu County People's Court denied the petition of a woman on her fourth attempt. According to the court decision, she and her husband moved in together in 2007. Like many rural couples, they had a traditional wedding ceremony but did not officially register their marriage. Because the husband came from a poor family without the means to support the dominant rural practice of patrilocality, they moved in with her parents. Only in 2009, a year after giving birth to a son, did they retroactively register their marriage. In 2011, their twins – one boy and one girl – were born. According to the plaintiff, the defendant regularly punched and kicked her when things were not to his liking. On one occasion, during a fight, he allegedly cut her parents with a knife when they tried to calm him down. When the plaintiff filed her first petition in 2011, village leaders intervened to persuade her to reconcile. In consideration of their son and given that she was pregnant, she agreed to give him another chance. Later in the same year, after no change whatsoever, the plaintiff filed a second petition, which the court denied. She withdrew her third petition in 2012, when her in-laws persuaded her to reconcile. Her fourth trial, like many divorce trials in China, was held with her husband in absentia. To support her claims, the plaintiff submitted as evidence a police report documenting an unspecified emergency incident. In its decision, the court wrote:

[O]wing to conflicts over family trifles, the plaintiff filed three previous divorce petitions that were resolved through mediated reconciliation. Moreover, their three children are young and need to be raised and cared for by both sides. In consideration of the physical and mental health of the children, the marriage still has reconciliation potential if both sides can forgive, compromise, and properly deal with marital conflict. The plaintiff's claim that mutual affection has

indeed broken down lacks sufficient evidence, and the court denies support of it. (Decision #1138764, March 8, 2014)<sup>4</sup>

Unless the defendant is AWOL, the first step of the Chinese divorce litigation process is judicial mediation for the purpose of marital reconciliation. In this case, village leaders and family members also intervened in the mediation process. They acted in concert with the court to gaslight the plaintiff by characterizing her claims of marital violence as “trifles.” Their efforts to persuade her to give her abusive husband another chance for the sake of the children and family unity succeeded when the plaintiff withdrew her first and third petitions. The court denied by adjudication her second and fourth petitions. This case illustrates not only the importance of mediation and petition withdrawals but also the unimportance of domestic violence allegations. The police report documented a visit in response to a call for help from the plaintiff, but even when they do explicitly describe the contents of police reports in their court decisions, judges tend to ignore, downplay, or negate their relevance.

Most divorce cases in Henan and Zhejiang involve couples from rural locales. A couple from Henan’s Huojia County held their marriage ceremony in 2011 and registered their marriage a year later. In her third divorce petition, filed in 2015, the plaintiff claimed she and the defendant had been separated since 2012 owing to his regular habit of late-night drinking, their incompatible personalities, and their lack of communication. In 2013, during their separation, when the defendant visited her at her workplace (a KTV club), the discussion became heated and he allegedly beat her, causing her eardrum to bleed. She filed for divorce the following month but ultimately withdrew her petition. In 2014, she withdrew her second divorce petition. In 2015, the plaintiff supported her third petition for divorce by submitting the diagnostic result of an ear endoscopy performed at the Huojia County

<sup>4</sup> Case ID (2013)牟民初字第3050号. All translations in this book are mine. Using its case ID in a search query on both the “China Judgements Online” website of China’s Supreme People’s Court (<https://wenshu.court.gov.cn>) and an alternative online repository, OpenLaw (<https://openlaw.cn/>), this particular decision was still accessible at the time I wrote this book, and is archived at <https://perma.cc/24RL-FUMW>. The Henan and Zhejiang provincial high court websites from which all the court decisions I analyze in this book were originally bulk downloaded (“scraped”) took their collections offline in 2018 and 2019, respectively. Chapter 4 contains more methodological details about my sources of court decisions. I include Perma.cc links because there is no way of knowing how long court decisions will remain available on any Chinese website.

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Red Cross Hospital showing an external injury to her left ear and bleeding from – but no obvious perforation of – her left eardrum. The court refused to affirm the evidence because “the medical documentation proves only that an injury occurred but not that the defendant caused it.” With the defendant in absentia, the court denied the plaintiff’s divorce petition on the grounds that her claims of physical separation and violence lacked sufficient proof (Decision #1386750, April 2, 2015).<sup>5</sup>

As a pretext for excluding admissible evidence of domestic violence, courts commonly hold that it fails to link the defendant to the plaintiff’s injury. The previous two examples also illustrate the prevalence of in absentia divorce trials. A defendant’s failure to participate in trial proceedings in no way diminishes a court’s legal authority to grant a plaintiff’s divorce petition. Nonetheless, courts can be reluctant to grant a divorce when the defendant is absent.

In her fourth divorce trial at the Xinchang County People’s Court in Zhejiang Province, a plaintiff lamented her three unsuccessful prior attempts. She supported her claim of marital strife with a copy of a pledge letter, which she said proved that her husband beat her. In his defense, the defendant stated, “It’s true that the plaintiff’s previous three attempts to divorce were unsuccessful, but it’s not true that I beat her. I believe mutual affection has not broken down and do not consent to divorce.” He challenged the plaintiff’s use of his pledge letter by saying, “I think I wrote it just to reconcile with the plaintiff.” To justify its decision to deny the plaintiff’s fourth petition, the court wrote:

In this case the plaintiff and defendant have some conflict in their life together. The plaintiff filed three previous petitions in this court, but never provided evidence that marital affection has indeed broken down. ... Plaintiff and defendant are lacking communication and contact, but the court believes they have reconciliation potential if they can treasure marital affection, attend to family interests, communicate more, interact more, and forgive and compromise. (Decision #4861687, November 11, 2016)<sup>6</sup>

Defendants in most cases deny allegations of violence made against them. Even when they admit, on the record, to beating their wives,

<sup>5</sup> Case ID (2015)获民初字第252号, archived at <https://perma.cc/Z9EV-EVS8>.

<sup>6</sup> Case ID (2016)浙0624民初3381号, archived at <https://perma.cc/M3L5-DRF9>.