# *Divorce Law Practices and the Origins, Myths, and Realities of Judicial "Mediation" in China*

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*Using archival records of 216 court cases, this article argues that divorce law practices lie at the core of the tradition of "Maoist justice" that remains profoundly influential in the present-day Chinese civil justice system. These practices were born of a distinctive set of historical circumstances: the need to steer a middle course between an early radical promise of divorce on demand and the reality of peasant opposition, and the merging of peasant practices with Communist Party methods and doctrines. They must be understood in terms not of an either/or binary—modernity and tradition, party and peasant—but rather of the interaction between them. They involve on-site investigations by judges and aggressive efforts at "mediation," as well as the formulation of* ganqing *(emotional relationship) as the basis for marriage and divorce. They have in fact been centrally important in shaping the civil justice system as a whole.*

***Keywords:*** *divorce law; peasants; "mediation"; Maoist justice*

Discussions of Chinese law can lapse easily into an either/or binary between Western modernism and Chinese tradition.[1] Neither point of view leaves much room for what might be termed "modern traditions"—that is, "traditions" forged in nearly two centuries of China's coping with its protracted contact with the West. In these times of collapses of Communist states and of "post-Communist" "transitions," there is even less room for considering revolutionary traditions. Yet

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there can be no question that Maoist tradition continues to powerfully shape Chinese justice today.

This article argues that divorce law practices made up the core of what might be termed "Maoist justice," which is the most distinctive part of contemporary Chinese civil law and indeed of the civil justice system as a whole.[2] They tell us about the origins, myths, and realities of judicial mediation in China. Divorce court mediations in China are very different from what we commonly associate with the English word "mediation," as well as from traditional Chinese mediation. They also differ markedly from how they are officially represented. In the end, they can only be understood as practices that evolved out of the special circumstances of the Chinese Revolution.

The article is based on a total of 336 civil cases that I have collected, of which 216 concern marriage and divorce. They come from two counties, which I call A (near Shanghai city) and B (in northeastern Hebei province). In gathering the cases, I attempted to draw a more or less random sample at regular intervals: for A county, 40 cases for each of the years 1953, 1965, 1977, 1988, and 1989, and for B county, 20 for each of those years, plus an additional 40 cases from 1995 to gain a glimpse at what happened in the 1990s, a decade in which divorce requirements relaxed. Two hundred of the 336 cases were gathered by photocopying the complete case files, including both the "main file" (*zhengjuan*), open to litigants, of written records of interviews with the litigants, their relatives, and neighbors and of court hearings and court-conducted meetings, and the closed "supplementary file" (*fujuan*), containing confidential materials such as records of interviews with the leaders of the litigants' work units and the internal "closing report of the case" (*jie'an baogao*) written by the head judge after reviewing all available materials. The remaining 136 cases were abstracted and outlined by hand at the archives. The article also draws on interviews with judges and lawmakers to supplement the information in the case records.

The first important departure of this study from past English-language scholarship is its use of a substantial number of archival records of actual cases, which the normal restrictions on relatively recent materials make difficult to access. The approach adopted here emphasizes actual legal practices rather than declared intentions of the law or representations of the legal system, whether official or popular. In

addition, instead of just narrating what was done, I attend also to what might be called "the logic of practice," including those principles evinced in practice even if not explicitly stated in the laws.[3] Marriage and divorce law in contemporary China, it will be seen, has come to operate by its own distinctive logic.

My approach and perspective are above all historical: I study contemporary justice not just synchronically but also diachronically, focusing on the process by which the civil justice system is formed and changed. Thus, my approach emphasizes both practice and the history of practice as an open-ended process that cannot be reduced to any simple construct such as tradition, modernity, or revolution.

This article, finally, brings together two areas of inquiry that have largely been treated separately in the past literature. We have, on the one hand, a substantial body of scholarship dealing with the nature of the post-1949 Chinese civil justice system, especially its great emphasis on mediation (Cohen, 1967; Lubman, 1967, 1999; Palmer, 1987, 1989; Clarke, 1991), and, on the other hand, works detailing marriage laws and their consequences (Meijer, 1971; Johnson, 1983; Palmer, 1996; Diamant, 2000). But little attention has been paid to the fundamental interconnections between the two. I propose to show how the former has been decisively shaped by the latter.

## *MAOIST JUSTICE*

Past scholarship is right to point to mediation as the central characteristic of contemporary Chinese justice. But the term "mediation" can give a very misleading impression of the real nature of Chinese courts.[4] I begin by outlining official representations and giving a quick chronological overview, then provide a detailed illustration of the workings of a Maoist court on divorce, and finally characterize and analyze the practices of Chinese court mediation.

### *THE CENTRALITY OF MEDIATION*

The primary official claim about judicial mediation in China is that it is the cornerstone of the formal civil justice system. It is pointed out that as late as 1989, on the eve of the major changes in the legal system

that occurred in the 1990s, 80% of all civil cases in the nation handled by the courts were mediated, and just 20% were adjudicated (Zhongguo falü nianjian, 1990: 993). Even in 2000, more than two decades after the shift away from Maoist-style civil justice had begun, official figures still show mediated cases roughly equal in number to adjudicated cases (Zhongguo falü nianjian, 2001: 1257; see also Lubman, 1999: 270-71). As Wang Hanbin, chair of the Law Committee of the National People's Congress, put it: "Using mediation to settle disputes among the people and civil lawsuits is a fine tradition in the judicial work of our country" (Shanghai shi lüshi xiehui, 1991: 56). It is touted as the distinguishing characteristic of Chinese civil justice, past and present.

The emphasis on mediation is readily evident in divorce cases involving unilateral (contested, or ex parte) petitions. For one thing, the Marriage Law of 1950 stipulated that mediation be attempted before a contested divorce petition could even be considered by the courts. According to Article 17, "Divorce shall be granted when husband and wife both desire it. In the event of either the husband or the wife insisting upon divorce, it may be granted only when mediation by the sub-district (*qu*) people's government and the sub-district judicial organ has failed to bring about a reconciliation." And this attempt usually followed an effort by the village or work unit at a more informal mediation process. Furthermore, "In dealing with a divorce case, the district or city people's court must, in the first instance, try to bring about a reconciliation between the parties. In case such mediation fails, the court shall render a verdict without delay" (Hubei caijing xueyuan, 1983: 17-18; Marriage Law, [1950] 1959).[5] In other words, even after extrajudicial mediation, the courts themselves must first try mediation before they can consider approving a contested divorce petition.

In cases in which there was "mutual consent," mediation to save the marriage did not come into play. The law, as we have seen, provided simply: "Divorce shall be granted when husband and wife both desire it." Although in some of the cases studied permission was denied even when both parties jointly petitioned for divorce,[6] in most cases it was granted. When such mutual consent was present, the court's role was limited mainly to working out the specific terms of the settlement. If the parties agreed on the specifics worked out by the court, the case

would be categorized as "mediated divorce" (*tiaojie lihun*); if they could not be brought to agreement, and the court had to resolve the dispute, the case would be categorized as "adjudicated divorce" (*panjue lihun*). That kind of mediation, which I plan to consider in a separate study, was very different from the "mediated reconciliations" (*tiaojie hehao*) that are the focus here.

### *CHRONOLOGICAL OVERVIEW*

The court mediation required in ex parte divorce cases could be imposed either loosely or very strictly. Its application was rather loose in the early 1950s during the movement to put an end to old-style "feudal" marriages: namely, bigamy or polygamy (*chonghun*), female slaves (*binü*), *tongyangxi* (i.e., the practice of bringing a young girl into the home to be raised as a prospective daughter-in-law),[7] marriages in which brides were purchased (*maimai hunyin*), and parentally imposed marriages (*baoban hunyin*). A petitioner could circumvent court-imposed mediation if he or she could convince the court that his or her marriage fell into one of those officially proscribed categories. By the close of the 1950s, however, since these specific forms of marriage were thought to have been largely done away with, divorce petitioners could no longer pursue that avenue (INT95-JP-1). In the 1960s and 1970s, the mediation requirement was so strictly applied that contested petitions were routinely denied in favor of vigorous efforts at "mediated reconciliations."

The requirement was relaxed somewhat under the 1980 Marriage Law, which guaranteed petitioners the right to choose to proceed immediately to the courts, without first going through mediation by the local government or the "sub-district" judicial agency: "When one party insists on divorce, the organizations concerned may try to effect a reconciliation, or the party may appeal directly to the people's court for divorce." But the court was still instructed to undertake mediation before granting divorce: "In dealing with a divorce case, the people's court should try to bring about a reconciliation between the parties. If the emotional relationship of the couple has truly ruptured (*ganqing que yi polie*), and when mediation has failed, then divorce should be granted" (Article 25) (Hubei caijing xueyuan, 1983: 41; Marriage Law, [1980] 1982).[8]

In the 1990s, the restrictions on divorce were further relaxed as a result of the "fourteen articles" issued by the Supreme People's Court on 21 November 1989; among other changes, they instructed the courts to grant divorce when a petitioner files for a second time, even if he or she had been the offending party in an extramarital affair (Article 8) (Zhonghua renmin gongheguo zuigao renmin fayuan, 1994: 1086 [hereafter cited as Zuigao renmin fayuan]). Thus did the Supreme Court order an end to the long-standing practice of always denying the suit of an adulterous party against a spouse's opposition. As two judges of A county explained, that practice had been thought of as a way of punishing the offending party (INT93-9). But the easing of divorce restrictions in the 1990s was followed by new amendments, passed by the Standing Committee of the National People's Congress on 28 April 2001, that again made requirements for ex parte divorce petitions more stringent.[9]

Reviewing the half century of divorce legislation and practices under the People's Republic of China (PRC), we might see the more stringent period, the 1960s and 1970s (and even the 1980s), as exemplifying what we can call in shorthand "Maoist justice," and the move away from those stringent requirements as characteristic of the more permissive or "liberal" reform period.[10] That indeed is how practicing judges in China conceptualize the differences (INT93-9). Our first task here, then, is to clarify the Maoist baseline of PRC divorce law practices.

## *PROCEDURES AND METHODS ILLUSTRATED*

The Maoist court, as has been seen, was expected to favor active mediation rather than outright adjudication in divorce cases. Yet this "mediation" was not, as the English term would suggest, a process in which two adversarial parties, free of coercion, voluntarily worked with a disinterested third party to try to arrive at an agreement. Instead, Maoist mediation employed distinctive methods and a variety of subtle and not-so-subtle pressures, as well as material inducements, in ways that would be astonishing in an American courtroom.

The Maoist procedures were pushed across the nation and standardized in the years after 1952, when a vigorous campaign was launched to put an end to Guomindang court practices, dubbed "

handling a case in isolation [from society]" (*guli ban'an*) and "handling a case by sitting in the courtroom" (*zuotang ban'an*) (INT93-8, 9). In Maoist court practices, the judges, after talking with the petitioner and the defendant individually, were expected to "investigate" (*diaocha*) the facts of the case themselves, not just to render decisions in the courtroom. Doing so usually entailed going to the residence and workplace of the petitioner and defendant and talking to their "leaders" (*lingdao*). For rural petitioners, these might include the Party branch secretary and brigade head; for urban petitioners, the factory head, school principal, Party secretary, and the like, at the relevant work units. The judges would also talk to "the masses" (*qunzhong*), such as relatives, neighbors, and co-workers. They would seek to ascertain the facts and background of the situation, focusing especially on the nature of the marital relationship and its main problems ("contradictions," *maodun*). Usually, they would also inquire into the character and general work and political "performance" (*biaoxian*) of the parties in question, factors taken into account in the court's posture toward the case. Then the court would call in the parties concerned, usually first individually, to seek common ground and concessions required for agreement. This process would include not just the couple but also the parents, other important relatives, and the local leaders. Finally, if and when the terms of a "reconciliation" (*hehao*)[11] had been more or less worked out, the judges would convene a formal "reconciliation meeting" (*hehao hui*), often involving the local leaders and relatives as well. As part of the "mediated reconciliation," both parties would either sign or endorse the verbatim record of the meeting or execute a more formal "mediation agreement" (*tiaojie xieyi*).

A detailed look at one example will illustrate how things were done. In B county, on 5 September 1977, a 25-year-old peasant woman of poor peasant family background, who had married four years earlier, filed a formal petition with the county court for divorce (B, 1977-16). She had written the petition herself, in grammar-school-level language and calligraphy.[12] As she tells it, she had married another peasant who lived with his widowed father. The father-in-law had been nice to her at first. Then, about half a year after she had married into the household, and while she was sick, he feigned taking care of her, claimed to know enough to be "half a doctor," touched and felt her (*mo*) in various places, and promised to buy her things if she would

just accommodate him. When she rejected his advances, he became nasty and ill-tempered toward her, found fault with her in everything, and once even beat her. As for her husband, she said, he sided with the father and became angry with her and beat her when she said anything against his father.

There had been numerous arguments and fights between her and her husband for the past three years. Their marital problems had been mediated in the village by the brigade and team cadres along with their relatives. On that occasion, when everyone was gathered, she had told them what her father-in-law had done. According to her complaint, he denied it at first, but after two days and evenings of discussions guided by the mediators, he eventually admitted his actions. Still, the mediators urged her to give him another chance, and one of them even went to see her mother to persuade her to help the young couple to reconcile. But things only got worse after that, and her father-in-law continued to find fault with her. Her husband was afraid of his father, and on one occasion when his father beat him in a dispute over some missing meat soup, he even took poison to kill himself and was hospitalized for two months. She had gone back to her natal family in April and had lived there for the past three months. She was now seeking a divorce.

In accordance with the usual procedures, she came to court in person two and a half weeks later, on 23 September, and reiterated these complaints orally in a meeting with one of the judges. The interview was recorded verbatim in a "written record of reception" (*jiedai bilu*), to which her thumbprint was affixed.

Two days later, on the 25th, the defendant husband too came to court for an interview to give his side of the story (also in accordance with the usual procedures). He confirmed some of the facts told by his wife—primarily, that his father had behaved inappropriately toward her. The father was in the wrong there, he said. He also confirmed that he was very much afraid of the old man and had indeed tried to commit suicide when his father beat him over the meat soup. But he pointed out that his wife had a weakness for nice clothes and was unhappy when his father refused to allow her to spend money on such luxuries. In addition, after he injured his lower back in the recent earthquake (the Tangshan quake) and became unable to work, their financial situation had deteriorated, increasing the tensions in their relationship.

According to him, she complained that he was useless and refused to get up in the morning to cook breakfast. He was opposed to divorce, however, and hoped that he and she could build a house for themselves entirely separate from his father's house. Then most of their problems would disappear, he said. All this, too, was recorded in a "written record of conversation" (*tanhua bilu*).

At this point, the judges entered the picture to begin their work toward reconciling the couple. On 15 October, just three weeks after the wife's in-person visit to the court, the chief judge (*shenpanyuan*) and a "people's assessor" (*renmin peishenyuan*) of the court "went down" to the couple's village to investigate the case.[13] They first interviewed the brigade Party branch secretary, who was rather critical of the wife. According to him, she was known by neighbors to be somewhat lazy; she also sometimes would secretly cook "a small pot" on the side for herself (rather than "a big pot" for the entire family, as was proper). She had complained crudely that her husband's "penis is not hard," and once even beat him with the help of her sister, but then later claimed that he was the one who had beaten them. As for the father-in-law, the secretary noted, he was rather stingy and talked dirty; it seemed quite possible that he might have behaved inappropriately toward his daughter-in-law. He, along with his own father, had indeed beaten the husband over something as trivial as meat soup that somehow went missing, and thereby caused him to take poison. But the root of the problem, the secretary said, was that the couple was in difficult financial straits and they didn't really know how to maintain a household. Otherwise, they had no great insurmountable contradictions in their relationship. This interview was recorded verbatim, in a "written record of interview" (*fangwen bilu*).

Next the judge and the assessor talked, on the same morning, with the local "chair of security and defense" (*zhi[an]bao[wei] zhuren*) and the deputy team leader of the husband's production team (who, as the lowest-level cadre, was closer to the family than the brigade secretary). They had been involved, they said, several times before in mediating between this couple. And, surprisingly, they reported that there was division of opinion within their own brigade Party branch. Their view of the situation was different from the Party secretary's: they were more critical of the father-in-law and less critical of the woman.

Even though her father-in-law denied having made improper sexual advances toward her, they knew that he had a history of such behavior: when he was working as a tailor, he would improperly touch the women who had gone to him to have clothes made, until in the end no one went to him any more. The wife's problem was that she was a bit lazy and didn't like to go to work; that was known among her co-workers. But on balance, they said, the relationship of the couple was actually not bad (*ganqing buhuai*).

The judge and the assessor, as was standard, also talked with "the masses"—in this case, a 29-year-old uncle of the husband who was living in the same compound. This uncle had been party to the division of the household between the father-in-law and the young couple. At that time, the wife had asked for the sewing machine, and it was agreed that though the father-in-law would be allowed to use it, the machine itself would be given to her. Outside of that, the uncle confirmed much of what the others had said about the father-in-law, as well as about the wife. Asked by the judge to analyze the root of the contradictions, the uncle replied that it was their financial situation. Even though they had divided up the household (*fenjia*) and separated from the old man, they were not really able to support themselves.

After interviewing the village's above-mentioned leaders and masses about the couple, the judge and the assessor met with the 49-year-old father-in-law of the petitioner. The judge, it is clear from the "written record of conversation," at this point already had drawn fairly firm conclusions about the father-in-law from the other investigative interviews. At the meeting, the father-in-law began by denying that he had molested the young woman. But the judge directly contradicted him, saying unequivocally that he and the juror had investigated and learned, not just from his daughter-in-law but also from "society" itself (*shehui*, an even broader and more elevated category than "the masses"), that his behavior toward his daughter-in-law "is improper" (*bu zhengpai*). Still, the father-in-law tried to deny he had done anything wrong, saying that he liked to joke around but had no sexual designs on his daughter-in-law. The judge, however, pronounced with finality that on this issue the father-in-law must henceforth pay close attention and do away with "bourgeois political thought." He added, somewhat threateningly, that such corrections would "work to your benefit in the future" (*jin hou dui ni you haochu*).

The judge then went on to lecture the father-in-law about his "rather severe problem of feudal thought and attitudes (*sixiang*)" when it comes to familial relations, declaring,

> There has been no place for Mao Zedong thought. . . . Your son dares not go against your wishes, and has no freedom at all. . . . Everything [you do] is completely of the old feudal ways, and is opposed to the new society's law. . . . You have direct responsibility in your daughter-in-law's clamoring for divorce (*nao lihun*). If this problem is not handled well, divorce might well be the result, and the one who suffers in the future will be you.

After this stern moral-ideological lecture, the judge continued: "You have now admitted in principle that you are responsible, but you have not yet arrived at a clear summation in concrete actions. You should consider things carefully, and talk about them this afternoon."

In the afternoon meeting, the father-in-law pointed out that when he had divided up the household with the young couple in the previous year, he had let them have more than 300 catties of grain, retaining just 40 for himself, and that he had paid for his son's hospital expenses (after having driven the young man to take poison). When the judge pressed him on what he was willing to contribute toward a new house for the young couple, he said that the maternal uncle was giving them a bench, and he himself had a tree ready to use and other "things," not specified. The judge concluded: "We will call all of you together. Would you be willing to acknowledge your mistakes and discuss things with them?"

On this same day, 15 October, another judge, the junior member of the team, went to the wife's village to investigate. He asked about the woman as a worker and a person, inquiring into her "political performance." The informant, whose identity is not noted in the very brief written record of interview (obviously, this judge was less thorough than the other), said that it was not bad and that all her family members were well liked, had no conflicts with others, and were good workers. Next the judge talked to the woman's father, in a conversation preserved in another written record of conversation. He repeated the same complaints as his daughter and said he was therefore in favor of the young couple's divorcing. Upon this testimony, this junior judge

asked, "If we can reeducate your in-laws, would you tell your daughter to go back?" And before the man had a chance to answer, the judge instructed him: "Urge her (*quanquan ta*) to do so." After the father replied, "I am just afraid they [the husband and his father] will not change," the judge responded, again rather officiously: "From your attitude and the way you think [*sixiang*, that all-encompassing Maoist term], it is evident you have no faith. Do you not want your daughter to have a happy life?" The father said, "What if they beat my daughter again after a few days?" The judge answered, "If they do not change after we educate them, then we'll resolve the divorce problem." He ended the interview with an order: "Work on her."

Four days later, on 19 October, the senior judge and the assessor went to the wife's village to talk with her. She continued to insist on a divorce, reiterating her complaints. After letting her have her say, the judge focused on the division of grain when the household was divided: as already noted, the young couple had been given most of it, and the father just 40 catties. He asked: "Do you think he behaved properly on this?" She agreed yes, on that matter. Then the judge went on: "You don't want to live with your father-in-law, he too does not want to live with you. What then is the problem?" She replied, "Well, after the division, we still ate together for several months." After this exchange, the judge took her to task for what he considered her failings: "The way you tell it, even when your father-in-law behaves well, he's still no good. We think you lack correct thinking, blaming others for everything, and do not have an objective, true-to-the-facts attitude (*shishi qiushi de sixiang*), and do not respect the old and love the young. This is a bad case of bourgeois thought." When she countered with her complaints, the judge kept on attempting to make her more conciliatory and applying moral-ideological pressure: "We have investigated. When your husband was in the hospital, your father-in-law paid for the expenses. Of course, after the household division, your father-in-law did not give you much financial help, but you should see that things are difficult for him too."

The judge summed up for the wife their view of the situation and their plan of action: "According to our investigation, your fights [with your husband] are not serious. Your financial difficulty is the main problem. As far as the 'government' (*zhengfu*) [the term by which judges referred to themselves before litigants] is concerned, we have

worked with the commune and the brigade, and intend to make appropriate arrangements. At the same time, we have done education work with your father-in-law. Now your father-in-law intends to provide some bricks and wood, and your maternal uncle some more wood, and the brigade the land, to enable you to build a house. We want from all different directions to get you two to reconcile. Henceforth you two should build up your spirit of supporting yourselves independently (*zili gengsheng*) and lead a happy life (*haohao guo rizi*). Go and think about this." Thus, the judge combined moral-ideological suasion with official pressure and material inducements (clearly arranged on the side with the brigade and commune leaders, even though these informal actions are not otherwise recorded in the official case record).

On the same day, this senior judge also met with the wife's father, in the presence of the village's deputy chair of security. As usual, he first allowed the other to speak. When the father grumbled in general terms, to the effect that his in-laws could not be trusted, that they said one thing and did another, the judge asked him to be concrete and specific. After he had aired a number of specific complaints and repeated his daughter's "request to the government to break up the marriage" (*yaoqiu zhengfu gei wo duankai*), the judge said, "Let us now go over the findings from our investigation. . . . The foundation of their marriage is quite good. The beginning of [your daughter's] demand for divorce was when the father-in-law misbehaved." He continued, "Through our criticism of the father-in-law, he has arrived at new understanding, agrees to give them bricks and wood for building their new home, and do all he can to help them financially. At the same time, the brigade has considered the problem of their livelihood, and will make appropriate arrangements."

Then, three days later, on 22 October, the senior and the junior judges and the assessor met at the wife's natal home with her and her mother, along with the local chair of security. This time the judges began by saying that they had criticized the father-in-law and the husband had begun building a new house. They then asked: "What do you say?" The wife, whose position had clearly been softened by the two-pronged attack of both material inducements and moral-ideological pressure, exerted not just by the two judges in the formally recorded sessions but also by the village leadership and her relatives, said, "If the 'government' [again, *zhengfu*] succeeds in reeducating them, then

we are most grateful." The judges continued to push her: "They have indicated that they are repentant and will change their ways (*huigai*). . . . We are here to urge you to go back. . . . If they do not change, then you can divorce later." They also asked, "Have you any other requests?" When the wife replied, "I can go back, but I want the sewing machine," the judges told her that the machine would go to her but the father-in-law should be allowed to use it. They explained: because of his lame leg, he needed the machine to enable him to earn an income, thereby reducing the young couple's burdens. The wife said she would like a guarantee in writing that the machine would go to her, and the judges agreed to her condition.

On the 27th, the main judge returned to the couple's village and met once more with the father-in-law, and then the husband, in the presence of the village's chair of security. The father-in-law confirmed that he would not try to control the young couple from then on. And, he said, his son had borrowed 40 yuan to build the new house, which he had paid off, in the interest of "unity" (*tuanjie*). The husband told the judge that the new house was already completed,[14] and his father had supported the construction. The husband himself had gone twice to his wife's natal home; she agreed to come back, and his mother-in-law did not say anything to the contrary. "What else?" the judge asked. His wife was worried that he might not get transferred to work on the brigade's seed farm (*zhongzichang*), a better and less onerous job, but he thought that once they were living apart from the same compound as his father, there would be fewer causes of fights.

The stage was set for the final resolution, which took place a week and a half later on 6 November at the couple's new house—just two months after the wife had filed the initial petition. Present were the two judges and the assessor, the husband and wife, the father-in-law, the brigade's Party branch secretary, the brigade head, and the chair of security. The judges opened the meeting by saying that the whole family was gathered that day for this "family reconciliation meeting" (*jiating hehao hui*). They announced that through work they had done in the two brigades, they had effected the reconciliation of husband and wife. First, turning to the father-in-law, they said, "You need to overcome your feudal thought, get rid of the old set of ideas, and let the two of them live their lives, not try to control everything. You should try to create good family relations." Then the Party branch

secretary and the brigade head in turn exhorted the three members of the family to do self-criticism (*ziwo piping*) and to make things right from then on. The father-in-law said what was expected of him: that he was grateful for "the concern shown by the leadership," that all the problems were the result of his old thoughts and of attitudes from the past, that he was determined to change, and that he would not make the same mistakes again. The wife-petitioner, for her part, said: "From here on, whoever is right should be the one listened to. I am talking straight. Please don't mind me in the future. We have borrowed a lot of money in building the house. The sewing machine must be given to me." And the father-in-law said, "I will take responsibility for the debts incurred in building the house, but I must be allowed to use the machine." The husband said simply: "I will listen to what the leadership says. In the future I will correct my weaknesses, and make the relations good." The judges then concluded the meeting: "Today you have all exchanged opinions. We think it is very good. We hope that from now on you will all unite (*tuanjie*) and [using the dominant political slogan of the time] 'grasp revolution and promote production' (*zhua geming, cu shengchan*)." The husband, wife, and father-in-law all signed and affixed their thumbprints to the transcript of the mediation meeting (*tiaojie bilu*); this took the place of the formal mediation agreement used in many of the other cases.[15]

To Americans accustomed to thinking in terms of very high court fees and hourly charges by attorneys, this procedure must seem incredible. First of all, the two Maoist judges did not sit at the courthouse but rather brought the court to the site of the dispute. In the course of their work on the case, they made a total of four separate and joint trips to the couple's village of domicile and two to the wife's natal village. Separately or jointly, they conducted five formally recorded investigative interviews to ascertain for themselves the roots of the couple's marital discord and the possibilities for reconciliation, before they felt ready for the final meeting of resolution. And this accounting leaves out their numerous informal discussions with the brigade and team leaders to work out the specific material inducements.

The mediation also involved a mixture of coercion from the court and voluntary compliance from the couple. The judges used moral-ideological suasion as well as material inducements, exerting their

**TABLE 1: Outcomes of Divorce Cases**

| *No Divorce (*buli*)* | *Divorce (*lihun*)* |
|---|---|
| By mediation *tiaojie hehao (tiaojie buli[hun])* | By adjudication *panjue buli(hun)* |
| By mediation *tiaojie lihun* | By adjudication *panjue lihun* |

own pressure and calling on that of the community and family to produce the results they sought from the couple and their relatives. They drew freely on the special ideological authority of the party-state and the powers of the local village leadership to effect a reconciliation.

### *OTHER CATEGORIES OF OUTCOMES*

Before a closer analysis of the characteristics and methods of the Maoist divorce court is undertaken, it would be useful to briefly place "mediated reconciliations" into the broader context of all divorce cases (schematized in Table 1). After this type of case, reported also as "mediated no divorce" (*tiaojie bu lihun*), the other main outcome on the side of no divorce was "adjudicated no divorce" (*panjue bu lihun*); on the side of divorce, the outcomes were "mediated divorce" (*tiaojie lihun*) and "adjudicated divorce" (*panjue lihun*). These are the main categories according to which statistics on divorce lawsuits are kept.[16]

#### *Adjudicated No Divorce*

Sometimes petitioners remained insistent despite strong pressures from the court, and the court would end up adjudicating outright against divorce. National statistics (discussed further below) suggest that such occurrences were relatively rare in comparison with mediated reconciliations. Simple adjudication for no divorce most commonly involved third-party affairs. In one case from B county in 1965 (B, 1965-11), for example, the petitioner was a 30-year-old man who had been born a peasant and had become a factory worker in nearby Tangshan. He was also a member of the Party. He had married ten years earlier, in 1956—by the order of his parents, he said. The marital relationship had never been good; his wife had not been nice to his parents. She caused his mother so much aggravation, he claimed, that

his mother's frustration and anger was partly responsible for her death. More recently, his wife had driven his father to leave the house. He therefore sought a divorce from this backward and ill-tempered woman. His letter of complaint was literate and had the tone of one good Party comrade writing to another. The wife, however, took a strong position against divorce. In her testimony, she said that their relationship after marriage had actually been very good (*ganqing henhao*), that she had been good to his parents, and that she suspected he was having an affair with someone in Tangshan.

The court set out to investigate, talking with the leaders at the man's factory and the woman's village, as well as with selected members of the masses (especially his relatives and neighbors), in accordance with the usual procedures. In the course of their investigations, they learned that she, not he, was telling the truth: in fact the couple had married of their own free will, and their relationship had been very good. Only recently, since 1964, had the husband begun to treat the wife badly, a change entirely due to his involvement in an extramarital affair with a widow. That affair was the true reason for his insistence on divorcing his wife. The court's conclusion: the husband was guilty of a severe case of "liking the new and tiring of the old" (*xixin yanjiu*). They therefore adjudicated outright against divorce.

As two A county judges explained to me, judges commonly believed that the offending party involved in an affair with a "third party" (*disanzhe*) should never be "rewarded" with permission to divorce. Although the petitioner was often insistent on divorce, seeking to leave one spouse to gain another, the adulterer was seen as the offender, the other spouse as victim. This was the standard posture of the courts of the time, not questioned and criticized until the Supreme Court issued its fourteen articles in 1989 (INT93-9). In the example above, the court adjudicated against divorce (*panjue buzhun lihun*) on the grounds that it was acting "to protect the interests of the woman and the children" (*wei baohu funü yu zinü liyi*).

### *Mediated Divorce*

The great majority of those cases that resulted in a divorce involved mutual consent. Generally the other party readily agreed to the

divorce, or at least did not object strongly. In such situations, usually the court simply helped to work out the terms of a mutually agreeable settlement. The case would then be categorized and counted as "mediated divorce" (*tiaojie lihun*). To give a simple example from A county in 1965 (A, 1965-14): the husband was a soldier who had been away from home for some years, and the wife had an affair. He sued for divorce, and initially she claimed to be opposed. Upon learning that her husband was adamant, she said that she was not really opposed, but did not want to go back to her natal home; instead, she wanted to stay at her in-laws until she found a new husband, and she wanted custody of their 8-year-old child. The court then mediated between the two sides, and got them to agree to the following terms: (1) the wife would be allowed to stay in her present home (a room at her in-laws' house) for another year; (2) she would have custody of the child, who would be supported by the father, during that time; and (3) the items in their room would be used by her until she left. Both parties agreed to the terms, and a formal "civil mediation agreement" (*minshi tiaojie shu*) was drawn up. The case was therefore recorded as a mediated divorce (see also B, 1988-12).

*Adjudicated Divorce*

In the other type of case ending in divorce, much rarer than mediated divorces, the court adjudicated for divorce. This usually happened when one party did not genuinely oppose the divorce but rather objected for what the court considered unacceptable reasons—usually to extract concessions or simply to spite the other, and not out of any genuine wish to reconcile. In one case from B county in 1965 (B, 1965-5), for example, the divorce petition had been filed at the end of 1964. The wife had gone back to her natal home the previous February and had not returned since. Her complaint was that her husband lied, was ill-tempered, and was dull-witted. By making inquiries among the leaders of the brigade and her neighbors and relatives, the court learned that she was a good worker and was well regarded in the village; it also learned that the main problem was her feeling that her husband was dull-witted. The brigade and commune leaders had tried to mediate several times, but to no avail. The husband said he opposed

the divorce, but not in the hope of effecting reconciliation; his desire instead was to have the 250 yuan given to her family before the marriage paid back and to be given all of their community properties.

The court's meetings with them to try to work out the specifics of a settlement to which both could agree were fruitless. Since the court considered the demand for full repayment of the betrothal gift-price and for possession of all community properties unreasonable, it proposed that the man settle for 30 yuan. He refused. The court therefore adjudicated for divorce, stipulating what it considered reasonable terms of settlement. The judgment was formally rendered, and the case was classified as an "adjudicated divorce" (*panjue lihun*).

### *THE NATIONAL PICTURE*

In many ways, 1989 was the final year when Maoist principles and methods predominated in divorce law practices. As already noted, in November of that year the Supreme People's Court issued what have come to be known as the fourteen articles, which made the conditions for divorce less stringent. The full implementation of those articles in 1990 and after would alter the divorce system substantially. But in 1989, the courts brought about no fewer than 125,000 mediated reconciliations and adjudicated outright against divorce in just 34,000 instances. Those numbers include almost all first-time ex parte divorce petitions. We should not be misled by the apparently high number of divorces that year: 377,000 mediated divorce cases and 88,000 adjudicated divorce cases (Zhongguo falü nianjian 1990, 1990: 993).[17] As the sample cases suggest, the great majority of divorces were effected by mutual consent; the courts mainly helped to work out the specifics of each settlement. Adjudication came into play when a couple wishing to divorce could not agree on a settlement acceptable to both. In addition, the courts granted a certain number of second-time divorce petitions, anticipating the changes to come in the 1990s. But they rejected almost all seriously contested divorce petitions, either by bringing about a mediated reconciliation or by simply adjudicating against divorce.

By contrast, in 2000, at the close of what might be considered the "liberal" decade in divorce (and before the move to amend the

marriage law in ways that tightened divorce requirements), the courts resorted less frequently to mediated reconciliations (just 89,000) despite the greater total number of petitions—1,300,000, compared to 747,000 in 1989. But the number of adjudications against divorce more than tripled, to 108,000 (Zhongguo falü nianjian 2001, 2001: 1257).[18] Maoist practices, in other words, were no longer predominant.

The reason for the increase in adjudicated denials of divorce was explained by two judges interviewed in A county. The Maoist model, as we have seen, called for the judges to go down to the village to investigate and then marshal community and familial as well as official pressure to effect reconciliation, in a very time-consuming process. In the first case described in detail above, the judges made six trips to the couple's two villages to investigate and mediate; such expenditures of time became increasingly unrealistic as caseloads mounted in the 1990s with the return of litigation over other civil matters such as property, debt, inheritance, and old-age support. In response, litigants in the 1990s were allowed to present the evidence at court, and the judges sitting in court adjudged the case on that basis. This method, dubbed "investigate by adjudging at court" (*tingshen diaocha*), had been equated in the 1950s campaigns with the Guomindang courts (INT93-9).

The changes that came in the 1990s should not be exaggerated, however. As is well known, the Party's gigantic propaganda apparatus often leads officials in the People's Republic of China to exaggerate the magnitude of change involved in each twist and turn of policy. My informant judges thus tended to frame as dramatic the shift from the Maoist style of justice requiring on-site investigations to the new practice of investigating by adjudging at court. Although such descriptions may give the impression that the treatment of divorce had changed completely and abruptly, from unilateral divorces being almost unheard-of to easily obtained, the national statistics tell a very different story. Much of the old resistance to unilateral divorce persisted, even in the "liberal" 1990s, and mediated reconciliations, though certainly reduced, still accounted for a large number of cases, with almost as many adjudicated denials in 2000 (89,000) as in 1989 (108,000). Furthermore, even these changes that to divorce-prone Americans suggest rather modest movement in the direction of

relaxing the laws limiting divorce provoked a counterreaction and a demand for more stringent regulation. In the twenty-first century, ex parte divorce remains difficult to obtain in China, and the Maoist legacy of mediating reconciliation remains an important feature of Chinese civil justice.

### *THE CHARACTERISTICS OF MAOIST DIVORCE LAW PRACTICES*

Ideologically and conceptually, the Maoist practice of mediated reconciliation is distinguished by its presumption that the party-state should intervene in the "(emotional) relationship" (*ganqing*) of couples. Superficially, this presumption calls to mind old notions of "totalitarianism"—the control by the party-state of matters that in Western societies these days are normally considered to be in the "private sphere," outside of public or government purview, though historically very much the concern of religious authorities (notably the Roman Catholic Church). It resonates with familiar Maoist formulations, most especially the idea of "nonantagonistic contradictions among the people"—the notion that once the "antagonistic contradictions" of class enemies are removed or set aside, the resulting society will live in socialist harmony (Mao, [1957] 1971; Han, 1982; see also Yang and Fang, 1987). The Party was to take an active role in promoting such harmonious relations, including those between couples.

Some of the distinctively Maoist ways in which the party-state has intervened in marital relationships may not be so apparent. We have seen in the cases discussed above the subtle and not-so-subtle uses of Party power. Coercion and high-handed pressure were ever-present but never used alone. There was a great deal of emphasis on moral-ideological "criticism" and "education." Part of the key to this kind of control was to "elevate" (*tigao*) small details of daily life into larger political principles, especially during the years surrounding the Cultural Revolution: hence relatives and neighbors were labeled "the masses" or even "society"; patriarchal attitudes and behavior, "feudal"; laziness and a desire for nice-looking clothes, "bourgeois"; work and lifestyle, "performance" subject to political evaluation by the Party; and so on. In addition, moral suasion and ideological education were accompanied by genuine material inducements, such as the new

house for the troubled couple discussed above (as well as a new job for the husband).

Less obvious still, perhaps, are the subtle ways in which the representatives of this system exercised their power. The judges routinely presented themselves, or at least allowed themselves to be perceived as, "the government," acting not just as officials of the court but rather in unison with the entire apparatus of the party-state's authority; hence local cadres were always made a part of any effort at mediation. And the emphasis on involving relatives and neighbors in the process also broadened the sources of the pressures brought to bear on each couple to the larger community and society.

Moreover, the use of political power was carefully cloaked so as to not appear arbitrary. Thus, the questioning of selected members of the masses was called "visits" or "interviews" (*fangwen*); "conversations" (*tanhua*) were held with the principals involved in a case. The senior judge in the case discussed above, unlike the junior member of the team, always encouraged the litigants to air their grievances and issues first, before stating his own position. And that view was presented as not merely an opinion but the objective truth, gleaned from a thoroughgoing investigation. The latter was itself a distinctive hallmark of Maoist governance and exercise of power, as exemplified by Mao himself—for example, his classic "Report on an Investigation of the Peasant Movement in Hunan" and his investigation of Xingguo county and Caixi and Changgang townships, "Preface to Rural Surveys" (Mao, [1927] 1971, [1941a] 1971). "Investigation and research" (*diaocha yanjiu*), far from being undertakings limited to academics, became integral to the language in which judges (and cadres) used and exercised power, and indeed to the Maoist "mass line" style of leadership and governance (discussed below). Mao's saying "If you have not investigated, you have no right to speak" (*meiyou diaocha jiu meiyou fayan quan*) (Mao, [1941b] 1971: 206) became one of the dicta most often repeated by judges, cadres, and officials throughout the Maoist era. Conversely, once such investigation and research had been done according to the accepted methods (interviewing trusted Party leaders and the masses), the investigator's opinion carried much more weight. Thus, a judge can refer to his findings as having the authority of society and the government.

The entire language associated with marriage and divorce itself conveys the posture taken by the Party and the pressures exerted on those seeking divorce. The word for "reconciliation" is *he* (either "to harmonize" or "to unite") plus *hao* (good). And reconciliation is lent political significance by its (political) equation with "uniting (with others)" (*tuanjie*), as we saw above. There can be no mistaking the positive value associated with it. Divorce, in contrast, is the consequence of the "rupture" or "breakdown" (*polie*) of a relationship. And "third parties" who "disrupt" a marriage (*fanghai hunyin*) are offenders, as is the adulterous party; the other is the victim, even if not explicitly so labeled in the Marriage Law. Most of all, mediation is represented as highly desirable, a special attribute of China and Chinese tradition and something that local courts were to strive to maximize.

There was also a distinctive set of rituals associated with the process. As part of the "mass line" of Maoist governance, the judges would invariably "go down" to the village themselves to investigate, never just sit in court and summon witnesses—a style of behavior specifically targeted for criticism under Maoist justice. And the appropriate style for interviews and conversations, we have seen, was not to talk down to the litigants, or their relatives and neighbors, but to elicit their voluntary participation and an honest airing of their views. Perhaps most effective and important, the mediation effort would conclude not just with signed and fingerprinted mediation agreements but also with a mediation meeting, in which each concerned party was expected to announce before a community public gathering of both the leaders and the masses his or her plans for how to improve things in the future. Such practices gave concrete meaning to the subtle uses of official and social pressures on the couple to reconcile.

In its intent, method, language, and style, Maoist mediation clearly must not be simply equated with "traditional" mediation. I have shown elsewhere that court mediation in imperial China was mostly nonexistent; magistrates had neither the time nor the inclination to operate in the manner of Maoist judges (Huang, 1996). To be sure, extrajudicial mediation, such as might be undertaken by community or kin leaders in the village, had echoes in Maoist justice: for example, the use of moralistic language, the ceremony involving the public (i.e., other community members), and so on. But old-style community or

kin mediation was predicated above all on voluntary compromise, brought about by a third-party intermediary—someone well respected in the community, to be sure, but usually lacking any official connections (Huang, 1996: chap. 3). There was no resort to official coercion, nor anything like the imposition of Party policy.

The Maoist Party itself distinguished its mediation practices from the work of old-style mediators, whom it termed mere "peacemakers" (*heshilao*), interested only in working out compromises and lacking a clear-cut position (determined by ideology or policy) as to what was right and wrong. That kind of approach it dubbed unprincipled "mixing of watery mud" (*he xini*) (Han and Chang, 1981-1984: 3.426-27, 669). The Maoist court's attitude toward divorce was unequivocal disapproval, at least until mediation had proved impossible. Nor was the process voluntary in the same way that traditional village mediation had been. The petitioner for divorce might withdraw or give up, but he or she was not at liberty to seek the services of another individual or agency. The petitioner could obtain the desired divorce only by overcoming the local court's posture against divorce, by going through its required procedures of investigation and mediation, and by being subjected to its exercises of power in the distinctively Maoist manner of the Chinese Communist Party. To equate Maoist justice with traditional village mediation, in short, would obfuscate both.

Nor should Maoist mediated reconciliations be confused with conventional American notions of mediation. The so-called mediated reconciliation might in fact be described more accurately as coercive marriage counseling undertaken by the party-state through its court system, with no equivalent either in Chinese tradition or in the modern West. Maoist China was unique in its attempts to intervene within a troubled couple's relationship, particularly in actively seeking to improve their emotional connection. This unprecedented enterprise can be best understood by looking at the historical circumstances that led to its rise.

## *HISTORICAL ORIGINS*

The Maoist system was shaped above all by two historical processes. The first was the evolution of legal practices from the Party's

attempt to steer a middle course between its early radical promise on divorce and the realities of strong peasant opposition. The second was the evolution of styles of work in the countryside, where the modern judicial apparatus that had developed in the Republican period under the Guomindang government was absent.

### *RADICAL PROMISE AND RURAL REALITIES*

The radical promise on divorce dates back to the 1931 Jiangxi Soviet's Marriage Regulations of the Chinese Soviet Republic (Zhonghua suwei'ai gongheguo hunyin tiaoli). It was a period of considerable change in attitudes toward marriage. Even the ruling Guomindang Party had promised gender equality in its 1930 Civil Code and had instituted relatively liberal standards for divorce (Huang, 2001: chap. 10). The principle of gender equality, at least in the abstract, was not open to question in the progressive climate of the time (and the Guomindang was not behind the Communist Party in laying claim to the mantle of progressivism). Perhaps more immediate and relevant was Article 18 of the 1926 USSR Code of Laws on Marriage and Divorce, the Family and Guardianship, which stipulated that a "marriage may be dissolved either by the mutual consent of both parties to it or upon the ex parte application of either of them" (The Soviet Law on Marriage, [1926] 1932: 13; see also Meijer, 1971: 51).

The Chinese Soviet Republic in Jiangxi followed suit in its regulations; Article 9 declared, "Freedom of divorce is established. Whenever both the man and the woman agree to divorce, the divorce shall have immediate effect. When one party, either the man or the woman, is determined to claim a divorce, it shall have immediate effect" (qtd. in Meijer, 1971: 281; for the Chinese text, see Hubei caijing xueyuan, 1983: 1-4). That was a far more radical posture than could then be found in any Western countries, where no-fault divorce would begin to take hold only from the 1960s on (Phillips, 1988: 561-72). On its face, this radical provision would allow millions of unhappily married Chinese women, and men, to obtain divorce on demand, regardless of the wishes of their spouse.

The first retreat from this position came almost immediately and for a very practical reason: the Party wished to protect the claims of the Red Army's peasant soldiers to their wives. Thus, the formal (8

April) 1934 Marriage Law of the Chinese Soviet Republic, though repeating the radical provision of the early regulations (now in Article 10), added in the article immediately following: "Wives of soldiers of the Red Army when claiming a divorce must obtain the consent of their husbands" (Meijer, 1971: 283). The need for such an amendment had in fact already been fully spelled out in a 1931 document titled "Plan of Work among the Women," drawn up by the Special Committee for Northern Jiangxi of the Central Committee of the CCP: "We must refrain from imposing limitations on the freedom of marriage, since this would be contrary to Bolshevist principles, but we must also resolutely oppose the idea of absolute freedom of marriage, because it creates chaotic conditions in society and *antagonizes the peasants and the Red Army*" (qtd. in Meijer, 1971: 39; emphasis mine). To threaten the interests of the peasant soldiers would be to endanger the very basis of the Party's power, as Kay Johnson has pointed out (Johnson, 1983: 59-60).

For the peasants, the considerations at work here are obvious. Marriage in the countryside was a very costly event—affordable only once in a lifetime, given the expectations of customary expenditure and the income levels of most peasants. Allowing a dissatisfied woman to divorce her husband at will would strike not only the enlisted men but also their families as ruinous. To get a sense of the economic implications from the parents' point of view, imagine an American couple divorcing because of a marital spat—after the parents had purchased a home for the newlyweds. Such economic concerns were far more important than the injured feelings of the husband.

Moreover, some women joined the men in opposing unilateral divorce. Within the revolutionary movement itself, it was not uncommon for male Communist Party members to seek divorces from their (peasant) wives, disdained for their ostensible political "backwardness," in order to marry other (urban) women comrades—something that Ding Ling alluded to in her famous 1942 essay criticizing male chauvinism within the Party on the occasion of International Women's Day (8 March) (Ding, 1942). That issue would remain contentious even into the 1980s (as discussed below).

Small wonder, then, that backpedaling from support for unilateral divorce was soon rampant. Nowhere were these concessions to popular displeasure more apparent than in the Communist base areas

during the subsequent Sino-Japanese War. All dropped the Jiangxi Soviet's formulation, adopting instead provisions similar to those in the Guomindang Civil Code that lay out the conditions under which divorce can be granted, including bigamy, adultery, cruelty or ill-treatment, desertion, impotence, and incurable disease. (At the same time, the border regions began to formulate laws based on a couple's emotional relationship, a new conceptual approach to marriage and divorce that would in the postrevolutionary years become dominant.) None repeated the Jiangxi Soviet stipulation that divorce be granted at the demand of either party.[19]

Specific provisions and elaborations to protect the interests of soldiers flourished in base areas as well as in post-1949 PRC legislation on divorce. Both the 1943 Jin-Cha-Ji and 1942 Jin-Ji-Lu-Yu Regulations provided that a petition for divorce from a soldier in the War of Resistance might be brought only when the soldier's whereabouts had been unknown for more than four years (Han and Chang, 1981-1984: 4.828, 840). The central Shaan-Gan-Ning base area did not treat the question of divorce from soldiers in its 1939 Regulations, but its 1944 Revised Regulations required the passage of "at least five years" of "no information from the husband" (Han and Chang, 1981-1984: 4.810). The early 1950s, as we will see below, saw even stronger protections for soldiers.

But in retreating from divorce on demand, the Party did not go back completely on its avowed goal of eliminating what it termed "feudal" marriages. In the early 1950s, the Party especially targeted bigamy or polygamy, slave girls, tongyangxi, and marriage by purchase and by parental imposition. Many divorces were in fact granted, or marriages nullified, on the grounds that the unions fell into one of those categories, as the sample cases from 1953 clearly illustrate. Thus, in a B county case involving a tongyangxi, the court found: "The feudal marriage system is both irrational and immoral. . . . For this kind of marital relationship to continue would only add to the emotional suffering of both parties." The court therefore adjudicated for divorce (B, 1953-19). Another case involved a couple who had married at a very early age by parental imposition; the court ruled, "Both parties were still young. . . . They could never form a mutually affectionate, respectful, and harmonious family" (B, 1953-7). In a similar case, the court granted divorce because "the marriage had been imposed by the

parents while the couple were still young, resulting therefore in the rupture of the relationship (*ganqing polie*) after marriage" (B, 1953-15). Data from Songjiang and Fengxian counties (discussed in the final section) show relatively large numbers of divorce cases each year through the early 1960s; indeed, these levels would not be reached again until the 1980s.

It is clear that obtaining a divorce was easier in the early years of the People's Republic than it later became. The mediation requirement of the Marriage Law, eventually imposed so strictly, was at first not stringently enforced. The movement against feudal marriages in fact created a generally liberal climate for divorce; even petitioners whose marriages did not clearly fall into the targeted categories could sometimes divorce. This liberal trend would end only after the old feudal marriages were thought to have been largely stamped out. Thus, in one case studied a party cadre petitioned for and obtained a divorce on the grounds that his relationship with his wife had ruptured because she is filled with "backward feudal thought" (*fengjian luohou sixiang*) (B, 1953-1; see also B, 1953-5). Another cadre won a divorce because his wife was "just a housewife, is illiterate, and cannot work." The court granted the petition because "the two parties have different social occupations, and their *ganqing* has gradually ruptured (*zhujian polie*)" (B, 1953-7). And a woman cadre successfully petitioned for a divorce on the same grounds: her husband's thoughts and attitudes were backward, and he even objected to her going to meetings (B, 1953-20). Another woman managed to obtain permission to divorce despite the objection of her soldier husband, after she had gone through several failed attempts at mediation. The court explained its judgment as intended "to spare the two parties emotional suffering in the future, to promote production and avoid tragic consequences" (B, 1953-4).

But her case was an exception. Explanations and directives issued by the Supreme Court during these years show it repeatedly taking the position that when it came to soldiers, divorce was to be denied even if the wives had been tongyangxi (less consideration still was given to wives who had been purchased or married against their will by their parents). It invariably cited Article 19: "The consent of a member of the revolutionary army on active service who maintains correspondence with his or her family must first be obtained before his or her

spouse can apply for divorce," a requirement that applied even to those seeking to break off engagements, otherwise not considered binding (Zuigao renmin fayuan, 1994: 1099). As the court explained in response to a query from its northwest branch, the need for the soldier's consent, even in tongyangxi arrangements, was based on the principle of "the greatest benefit for the greatest majority of the people" (Zuigao renmin fayuan, 1994: 1090), as foundational a notion as the idea of allowing freedom of marriage and divorce.[20]

Yet this process of retreat must be viewed in conjunction with the parallel process of the Party's campaign against feudal marriages. There can be no question that the marriage law campaigns of 1950-1953 attacked such marriages vigorously and that divorce practices were greatly liberalized during those years. The best evidence can be found in the scale and intensity of conflicts stemming from rural resistance to the campaigns. According to the Chinese Ministry of Justice itself, as Kay Johnson has pointed out, in each of those years some 70,000 to 80,000 Chinese women and men (mostly women) "committed suicide or were killed because of the lack of freedom in marriage" (Johnson, 1983: 132; Guanche hunyinfa yundong de zhongyao wenjian, 1953: 23-24).

To view the 1950 Marriage Law only in terms of its retreat from the radical promise of divorce on demand would be to overlook its important consequences. Indeed, as we have seen, those consequences were quite revolutionary in the context of Chinese rural society. The law's impact could be expected to be greater in the countryside, where the targeted old-style marriages were more prevalent, than in the modernized cities. But at the same time, to convey an accurate picture of what actually happened, proper emphasis must be put on the Party's backpedaling from the Jiangxi provisions to protect the interests of soldiers and peasants. The two processes—a Party-led campaign against the most objectionable varieties of old-style marriages and a retreat from the promise of divorce on demand—need to be seen together.[21]

By requiring mediation before contested divorces, the Party steered its difficult course between the two competing principles. Divorces by mutual consent, it is clear, raised no concerns, since neither of the parties objected. Obviously, neither denying nor approving all contested divorces was an option: the first meant going back on the Party's

commitments to freedom of marriage and divorce, and the second was certain to be strongly opposed by rural society. In this context, mediation was an effective compromise. It could be loosely applied when the Party wished to emphasize its attack on old-style marriages, as in the 1950s, and strictly applied when the Party wished to take a more conservative stance on divorce, as in the 1960s and after. Most important, the procedure helped to minimize conflict by providing an institutional avenue through which the opposing voice could be heard and through which the Party could try its best to work out, case by case, resolutions on which the two sides could at least nominally agree. In this way, the Party tried to remain true to its goal of ending feudal marriages while at the same time minimizing peasant opposition. That, it seems to me, is the true origin and meaning of mediation in legislation about and the practice of divorce.

### *RURAL TRADITIONS MERGED WITH COMMUNIST PRACTICES*

Although the analysis above explains the widespread resort to mediation in divorce, it does not address the specific methods, style, and form that those practices took. To understand the latter, we must turn to peasant traditions of mediation, and how those were and were not changed by the Maoist Party. The practices need to be understood, in other words, neither as merely traditional nor as merely Communist, but rather as the product of a complex interaction.

The initial historical context is of the rural base areas. Driven underground and out of the cities by the White Terror after 12 April 1927, the Party had to rebuild from the ground up after the collapse of the "First United Front." One consequence was its almost complete severance from the modern court system instituted by 1926 in perhaps one-quarter of all of China's county seats by the Republican government. Over the following six years, the new Guomindang national government would extend the modern system to nearly half of China's counties (Huang, 2001: 2, 40-47). The Communist-controlled hinterland fell largely outside these modern and semimodern cities; thus, the Communist governments of the Jiangxi Soviet, and later of the border regions, had few models for modern courts and judicial personnel. The Communists were in any case as strongly opposed in principle to the Guomindang system as to the old Qing system. Those base

areas, therefore, had to construct their legal apparatus almost completely from scratch.

Over time, a system evolved that drew on both traditional village and new Communist practices. From the former came the emphasis on mediation, predicated on compromise, with its distinctive methods of calling on respected local individuals to persuade disputants to resolve their differences in mutually acceptable ways. Such methods included talking with both sides to listen sympathetically to their grievances, using moral suasion to try to make each see the point of view of the other, bringing in neighbors and relatives when possible to aid in making compromises, and holding public ceremonies such as a meal or gathering to announce and give weight to a settlement.

All these were incorporated into the practices of the Communist Party. In fact, even today cadre mediators often fall back on the Confucian "golden mean" as they attempt to persuade disputing parties: "How would you feel if this were done to you?" (i.e., "what you would not have done to yourself, do not unto others") (INT93-12; Huang, 1996: chap. 3). Although the traditional meal to mark success has been replaced by the mediation meeting, there is still an emphasis on each side publicly stating its concessions (albeit now in the form of Maoist "self-criticisms").

At the same time, distinctively Communist practices shaped the process. Hence the ultimate guide to right and wrong was Party principles and policies, not Confucian or traditional popular morality (as discussed further below). Also influencing the procedure were the distinctive Maoist mass line instructions on how urban intellectuals were to behave toward villagers: to listen to them and talk to them as equals; to resort to persuasion, not arbitrary dictates; and to learn to live with and like the peasants, in the "three sames"—living the same, eating the same, and working the same (*tongzhu*, *tongchi*, *tonglao*) (Mao, [1943] 1971).

Those instructions were actually an outgrowth of a new theory of knowledge: it entailed learning first from practice, then proceeding to abstract theoretical knowledge, and finally returning once more to practice in order to test the validity of that knowledge (Mao, [1937a] 1971, [1937b] 1971). It was also linked to a method of study, which relied on systematic investigation through interviews with "the masses" (Mao, [1941a] 1971, [1941b] 1971). Together these elements

formed what is arguably a distinctive revolutionary, and modern, epistemology (Huang, 2005).[22]

That epistemological posture in turn gave rise to a set of dos and don'ts for Party members. Excessive reliance on theory to the neglect of concrete circumstances was criticized with a host of terms, such as "dogmatism" (*jiaotiao zhuyi*), "subjectivism" (*zhuguan zhuyi*), "party eight-leggedism" (*dang bagu*), "commandism" (*mingling zhuyi*), "giving orders blindly" (*xia zhihui*), and even "mountaintoppism" (*shantou zhuyi*). Single-minded preoccupation with facts to the neglect of theory, by contrast, is subject mainly to one criticism: "empiricism" (*jingyan zhuyi*). The Maoist prioritizing of practice over theory is of course best expressed by its mass line, which included emphasizing to cadres the need to obtain voluntary compliance and agreement from the populace (see also Mao, [1942] 1971). The new epistemology was thus accompanied by a theory of governance.

This blending of village traditions of mediation with Maoist party practices resulted in the unique mediated reconciliation of Maoist justice. Its distinctive methods and styles evolved from the interaction of the Party and the village in the base areas. In other words, the truth about divorce law practices, especially those involved in mediated reconciliations, is told in those processes of change, and not in any simple dichotomous binary such as tradition/modernity, the village/the Party, the peasant/the modern state.

From this interaction emerged what was called the "Ma Xiwu model." Ma Xiwu (1898-1962) was a superior court judge of the Shaan-Gan-Ning base area whose style of work Mao singled out for praise in 1943. In time, the "Ma Xiwu way of adjudging cases" (*Ma Xiwu shenpan fangshi*) came to be a kind of shorthand reference to all that Maoist justice stood for, not just in marital but in all civil disputes. Judges were to go down to the actual site of the dispute (*xianchang*) and investigate (*diaocha*) the real facts of the case. In so doing, they were to rely especially on the masses, who were thought to have "the clearest eyes" ([*qunzhong*] *yanjing zuiliang*). Once in command of the facts of the situation, the judges would work to dispel the "contradiction." And mediation accepted by both parties was thought to be the best way to resolve conflict and prevent its recurrence. The entire process was summed up in a three-clause formula: "rely on the masses"

(*yikao qunzhong*), "investigate and do research" (*diaocha yanjiu*), and "mainly use mediation" (*tiaojie weizhu*)—the procedures, style, and rituals illustrated in the detailed case examined above. That Ma Xiwu style of justice, as we have seen, was aggressively propagated nationwide by the Party in 1952 and after to replace what it considered unacceptable Guomindang practices. In 1954, Ma himself became the vice president of the Supreme People's Court (INT93-B-3; INT93-8, 9; see also Yang and Fang, 1987: 131-45).

### *CONCEPTUAL BASIS*

The Maoist divorce law practices outlined above were closely tied to the notion that the couple's ganqing, or emotional relationship, was *the* crucial basis for marriage and divorce. When divorce was denied, the grounds were that the ganqing was still good enough to repair; when it was granted, the grounds were that no such repair was possible. Even though that formulation did not appear in law until 1980, it was widely employed in practice from the 1940s onward. It served to provide at once the justification and conceptual spaces for those practices. Indeed, Maoist practices of mediated reconciliation can be understood only in light of the conceptual underpinnings that evolved with them.

Ganqing had not been a part of the original 1931 Jiangxi Soviet Marriage Regulations. Those, as noted above, were basically a copy of the Soviet Union's 1926 code, granting either partner in a marriage the right to ex parte divorce. That provision is rooted in the notion of marriage as a union entered into freely by two equal parties, which the will of either should be sufficient to dissolve. By the War of Resistance period, as we have seen, the border regions had already abandoned that original formulation in favor of something closely resembling the Guomindang's Civil Code of 1929-1930, which in turn was modeled on the German Civil Code of 1900. That code framed marriage as a civil contract, and divorce as a response to breaches of that contract in what might be termed "matrimonial offenses": adultery, willful desertion, ill-treatment, and the like. Its treatment of marriage was itself based in the Western tradition of secular marriage law, which had moved away from the Roman Catholic Church's doctrine

of marriage's sanctity and indissolubility (Phillips, 1988). The Chinese Communist Party, perhaps unwittingly, thus became to some extent heir to that tradition.

But even as the Party of the base areas echoed the Guomindang approach, it was at the same time developing a formulation based on ganqing, which was not in Guomindang law. Because, on this understanding, the couple's emotional relationship was the most basic element of marriage, divorce should occur only if that foundation had never existed or had been undermined, resulting in a "fundamental incompatibility in the relationship" (*ganqing genben buhe*) of the couple. Similarly, in contemporary Soviet law, divorce was viewed as justified if the marital relationship was such as to make continuance of the marriage impossible, and hence divorce necessary (Sverdlov, 1956: 37ff). This approach to divorce also had some affinity with the no-fault doctrine that was to become dominant in the West in the 1960s and 1970s, whereby "marriage breakdown" (a breakdown blamed on neither party) was made a sufficient criterion for divorce, replacing the "matrimonial offenses" found in earlier legislation (Phillips, 1988: 561-72).

At the same time, the notion of ganqing was distinctive. It emerged from the wish to replace both the Qing and the Guomindang conceptions of marriage. In the former, marriage was the acquisition of a wife by the husband's family: the husband alone was granted the right to divorce. More accurately, he had the right to "terminate" (*xiu*) his wife's marital relationship to him because of her failures, enumerated by the law as seven conditions: barrenness, wanton conduct, neglect of the husband's parents, loquacity, theft, jealousy, and chronic illness (Huang, 2001: 164). (In practice, of course, there were social-cultural constraints against divorcing one's wife, legal theory notwithstanding.) Fundamental to the Communist Revolution's vision of a new social order was a new conception of marriage, based on love and the partners' free choice rather than parental will. Such a notion led naturally to the emphasis on ganqing as the sine qua non of a marriage.

At the same time, the Party rejected (after a brief flirtation with it) the Guomindang's "capitalist" or "bourgeois" formulation of marriage as a kind of civil contract, a private matter outside the purview of the state, to be dissolved when that contract is breached. As the authoritative *Comprehensive Explanations* of China's laws puts it: "In our

country, marriage is not a kind of civil contract, but rather a husband-wife relationship that is affirmed by law, including both property relations and human relations" (Zhonghua renmin gongheguo falü shiyi daquan, 1992: 510). It also rejected recent Western formulations of no-fault divorce, whose justifications for ending a marriage—the breakdown of the marital relationship because of "irreconcilable differences," or because the parties no longer "love" one another—became in the Party's view mere rationalizations for cavalier bourgeois attitudes toward marriage and divorce. For the Communist party-state, the ganqing formulation was to emphasize freedom of marriage and divorce as well as long-term commitment to marriage.

To be sure, the 1950 Marriage Law of the People's Republic made no reference to ganqing, although the concept had been present in embryonic form in almost all of the wartime marriage legislation in the border regions. It also omitted any list of the kinds of offenses that would warrant divorce, as had been included in earlier laws. Instead, the 1950 Marriage Law focused almost entirely on procedures, an emphasis consistent with the Soviet Code of Laws on Marriage, the Family, and Guardianship (promulgated 1926; amended 1936, 1944, and 1945) (Sverdlov, 1956). It was also consistent with the Party's wish then to stress practical considerations over principles.

Nevertheless, a host of contemporary evidence makes clear that almost all jurists and judges of the time had ganqing in mind as they applied and interpreted marriage law. Thus, the Ministry of Justice of the North China People's Government in 1949, as it in effect summed up the experiences of the base area governments, explicitly called a "fundamental incompatibility" in the couple's "(emotional) relationship" (*ganqing genben buhe*) the crucial criterion for deciding whether to grant divorce (Han and Chang, 1981-1984: 4.875). And the Supreme People's Court, in multiple explanations and directives issued in the early 1950s, referred repeatedly to the principle as determinative in interpreting and applying divorce law (see, e.g., Zuigao renmin fayuan, 1994: 1056, 1064). Perhaps most conclusively, the sample of divorce cases from 1953 shows that divorce petitions, as well as court decisions, were already routinely couched in those terms. The belief that ganqing was the proper foundation of marriage justified divorce when marriages involved bigamy, slave girls, tongyangxi, purchased wives, and parental imposition, as seen above.

It was only after the movement against feudal marriages was concluded that requirements for divorce tightened and the mediation requirement came to be applied very strictly. In time, a fairly standard set of procedures and categories developed in connection with the ganqing formulation, already illustrated in the sample cases summarized earlier. The judges involved would always seek to ascertain first the foundation and the history of the couple's relationship, grading it "very good" (*henhao*), "good" (*hao*), "not bad" (*bucuo*), "average" (*yiban*), or "poor" (*buhao*). Thus, a couple who had been forced into marriage by their parents, against their own will, would be viewed as having a poor foundation. And if during the course of their married life they had fought frequently, their history would be seen as poor. These assessments would help the court to decide whether the relationship had truly ruptured (*ganqing polie*)—that is, whether divorce would be justified. On the other hand, a finding that the relationship's foundation and history were good would justify the court's insistence on a mediated reconciliation or its outright denial of divorce.

It remained for the 1980 Marriage Law to formally incorporate the idea of ganqing as something distinctively Chinese and deeply rooted in practical experience. As Wu Xinyu—deputy chair of the Legal System Committee of the Standing Committee of the National People's Congress, the formal body for writing laws in the People's Republic—explained at the time: "In our draft of the new law, we have added [to the 1950 Marriage Law] the expression 'if the (emotional) relationship has truly ruptured' to [the original sentence that reads] 'and mediation has failed, then divorce should be granted.'" Given the climate of reform, the revision was intended in part to be liberalizing. Wu cautioned, "While we oppose the kind of bourgeois thought that adopts a cavalier attitude toward marital relations and 'liking the new and tiring of the old,' we must not use law to forcibly maintain relationships that have already ruptured. That would only cause those involved to suffer, even for the contradictions to sharpen, and result possibly in homicides." He himself believed that "in the past, our courts in dealing with divorce cases had tended to be too strict" (Hubei caijing xueyuan, 1983: 46).

Wu's position finds ready justification in the plentitude of examples of hopeless Chinese marriages dragging on and on because of a court system overly intent on effecting mediated reconciliations, a

state of affairs made familiar to English-language readers by Ha Jin's prize-winning novel *Waiting* (1999). Indeed, improving the emotional relationships of couples is often beyond the power of any court, no matter how intrusive, whether it be congenial or overbearing, well-intentioned or rigidly following policy.

Yet Wu was expressing here just one side of the story. The Women's Federation chose to emphasize the other:

> In recent years, there has been an increase in "liking the new and tiring of the old" behavior, in perfunctory marriages and hasty divorces. Some people, once they have been promoted as cadres, or have moved to the city, or have gained admission to university, discard their old spouses . . ., using "rupture in the relationship" as their excuse. . . . They view proper morality as feudal dregs and worship the capitalist class's "freedom of marriage." We must undertake criticism and education of these people. . . . In real life, divorce often brings hardship to the women and the children. Under the new law we must seriously implement its stipulations about protecting the interests of women and children. [Hubei caijing xueyuan, 1983: 65-66]

That concern echoes the note sounded by Ding Ling some 40 years earlier.

In any event, reliance on the idea of ganqing allowed the courts both to loosen divorce requirements for those couples whose relationship offered no hope for reconciliation and to tighten them for spouses who sought divorce out of momentary anger or a wish to replace an old mate with a new. Since any judgment of the quality of a couple's emotional relationship is inexact, the courts could make ad hoc determinations that best suited the circumstances of specific cases and the policy emphases of the moment. In other words, the formulation allowed practical concerns to take precedence over theoretical dictates. As Wu Xinyu put it: "This stipulation at once maintains the principle of freedom of marriage and also gives the courts considerable latitude, and is well suited to the real conditions of our country" (Hubei caijing xueyuan, 1983: 46).

The result is a conceptual framework that was, on the one hand, revolutionary in its origins, in some ways even anticipating today's no-fault divorce practices in the West, but that, on the other hand, grew out of and was enmeshed in practices dictated by the exigencies of the

time. It served to justify, first, both the drive to put an end to targeted feudal forms of marriage and the efforts to minimize opposition among peasants and, in the later reform context, both the tendency to liberalize divorce requirements and the wish to conserve marriages. That twin-edged concept and its flexible application, perhaps, is the true "logic of practice" of the court's distinctively Maoist mediated reconciliations. It might also be seen as a major feature of what we can call the "revolutionary modernity" that went into the making of contemporary China.

As a diagnosis born of different and sometimes conflicting purposes and needs, "rupture of relationship" is of necessity elusive and vague. It thus is predictable that the question of exactly what qualifies as a ruptured relationship would become the center of all debates over marriage and divorce legislation in the decades after 1980. Future changes in marriage and divorce law will continue to revolve around that question, a focus that also seems to me part of the distinctive logic of the history of divorce law practices in the People's Republic.

## *DIVORCE LAW PRACTICES AND CIVIL JUSTICE AS A WHOLE*

We are left with a final question: What can this analysis of divorce law practices tell us about contemporary Chinese civil justice as a whole? For an answer, we need to look first at the general profile of civil litigation in the People's Republic.

It perhaps comes as no surprise that divorce cases have generally accounted for the overwhelming majority of all civil cases in China. Table 2, with data from the Songjiang county court for the years 1950 to 1990, shows that divorce cases, which constituted about two-fifths of all civil cases in the early 1950s, soon overwhelmed those in all other categories once collectivization and "socialist construction" had largely eliminated land- and debt-related disputes. At the height of the Maoist period, divorce cases made up 90% to 100% of all cases. Only in the reformist 1980s have the numbers of civil actions in other categories risen again to create a profile resembling that of the early 1950s. Even so, divorces accounted for two-thirds of all cases as late as 1990 (when, nationwide, their proportion in all civil cases had declined to about two-fifths; see Zhongguo falü nianjian 1990, 1990: 993).

**TABLE 2: Civil Cases in Songjiang County by Category, and Divorce Cases as a Percentage of All Civil Cases, 1950-1990**

| *Year* | *Land*[a] | *Debt* | *Divorce* | *Other Marr.* | *Inher.* | *Old Age Supp.* | *Child Supp.* | *House* | *Comp.* | *Other* | *Total* | *Divorce as % of Total* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1950 | 33 | 135 | 150 | 138 | 9 | 0 | 0 | 32 | 19 | 111 | 627 | 23.9 |
| 1951 | 6 | 64 | 145 | 101 | 5 | 0 | 0 | 12 | 6 | 35 | 374 | 38.8 |
| 1952 | 16 | 55 | 211 | 66 | 2 | 0 | 0 | 12 | 1 | 41 | 404 | 52.2 |
| 1953 | 30 | 94 | 287 | 121 | 21 | 0 | 0 | 21 | 0 | 51 | 625 | 45.9 |
| 1954 | 4 | 12 | 232 | 5 | 2 | 0 | 2 | 3 | 0 | 12 | 272 | 85.3 |
| 1955 | 0 | 3 | 113 | 12 | 0 | 0 | 0 | 1 | 0 | 5 | 134 | 84.3 |
| 1956 | 0 | 19 | 257 | 5 | 2 | 0 | 5 | 2 | 3 | 38 | 331 | 77.6 |
| 1957 | 2 | 21 | 169 | 23 | 1 | 0 | 0 | 19 | 5 | 22 | 262 | 64.5 |
| 1958 | 3 | 19 | 172 | 16 | 1 | 0 | 0 | 13 | 1 | 12 | 237 | 72.6 |
| 1959 | 0 | 7 | 203 | 0 | 0 | 0 | 0 | 1 | 0 | 11 | 222 | 91.4 |
| 1960 | 0 | 0 | 179 | 2 | 0 | 0 | 0 | 1 | 0 | 1 | 183 | 97.8 |
| 1961 | 0 | 0 | 251 | 5 | 1 | 0 | 0 | 5 | 0 | 0 | 262 | 95.8 |
| 1962 | 1 | 2 | 317 | 11 | 2 | 0 | 0 | 10 | 0 | 0 | 343 | 92.4 |
| 1963 | 1 | 2 | 267 | 35 | 1 | 0 | 0 | 15 | 0 | 3 | 324 | 82.4 |
| 1964 | 0 | 0 | 182 | 21 | 3 | 0 | 1 | 4 | 2 | 0 | 213 | 85.4 |
| 1965 | 0 | 2 | 191 | 4 | 1 | 0 | 1 | 5 | 0 | 0 | 204 | 93.6 |
| 1966 | 1 | 0 | 76 | 1 | 0 | 0 | 1 | 3 | 1 | 0 | 83 | 91.6 |
| 1967-1969 | ..... | ..... | ..... | ..... | ..... | not available | ..... | ..... | ..... | ..... | ..... | ..... |
| 1970 | 0 | 0 | 20 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 20 | 100.0 |
| 1971 | 0 | 0 | 29 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 29 | 100.0 |
| 1972 | 0 | 0 | 22 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 22 | 100.0 |
| 1973 | 0 | 0 | 18 | 0 | 0 | 0 | 1 | 7 | 4 | 1 | 31 | 58.1 |
| 1974 | 0 | 0 | 36 | 0 | 1 | 0 | 4 | 16 | 17 | 38 | 112 | 32.1 |
| 1975 | 0 | 0 | 24 | 0 | 0 | 0 | 2 | 3 | 3 | 0 | 32 | 75.0 |

*(continued)*

**Table 2 (continued)**

| *Year* | *Land*[a] | *Debt* | *Divorce* | *Other Marr.* | *Inher.* | *Old Age Supp.* | *Child Supp.* | *House* | *Comp.* | *Other* | *Total* | *Divorce as % of Total* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1976 | 0 | 0 | 41 | 0 | 1 | 0 | 2 | 0 | 0 | 0 | 44 | 93.2 |
| 1977 | 0 | 0 | 33 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 35 | 94.3 |
| 1978 | 0 | 0 | 61 | 0 | 0 | 1 | 0 | 6 | 1 | 0 | 69 | 88.4 |
| 1979 | 0 | 0 | 65 | 0 | 2 | 1 | 0 | 9 | 4 | 1 | 82 | 79.3 |
| 1980 | 0 | 1 | 103 | 0 | 13 | 3 | 1 | 17 | 6 | 6 | 150 | 68.7 |
| 1981 | 0 | 1 | 182 | 0 | 12 | 19 | 1 | 33 | 9 | 18 | 275 | 66.2 |
| 1982 | 0 | 3 | 199 | 0 | 12 | 29 | 8 | 29 | 25 | 20 | 325 | 61.2 |
| 1983 | 1 | 5 | 207 | 0 | 15 | 27 | 14 | 36 | 19 | 48 | 372 | 55.6 |
| 1984 | 0 | 8 | 246 | 0 | 13 | 43 | 13 | 39 | 30 | 20 | 412 | 59.7 |
| 1985 | 0 | 6 | 180 | 0 | 6 | 25 | 10 | 31 | 24 | 36 | 318 | 56.6 |
| 1986 | 2 | 18 | 230 | 14 | 28 | 8 | 9 | 45 | 40 | 8 | 402 | 57.2 |
| 1987 | 0 | 37 | 329 | 9 | 9 | 26 | 15 | 38 | 48 | 3 | 514 | 64.0 |
| 1988 | 1 | 66 | 453 | 14 | 9 | 33 | 35 | 25 | 67 | 12 | 715 | 63.4 |
| 1989 | 3 | 123 | 557 | 6 | 4 | 28 | 33 | 22 | 70 | 11 | 857 | 65.0 |
| 1990 | 0 | 112 | 623 | 19 | 1 | 38 | 34 | 32 | 76 | 9 | 944 | 66.0 |
| Total | 104 | 815 | 7,060 | 628 | 177 | 281 | 192 | 548 | 482 | 573 | 10,860 | |
| % | 1.0 | 7.5 | 65.0 | 5.8 | 1.6 | 2.6 | 1.8 | 5.0 | 4.4 | 5.3 | 100.0 | |

Source: Data furnished by the Songjiang county court.
Note: The data for a given year reflect cases received by the court, not cases concluded.
marr. = marriage; inher. = inheritance; supp. = support; comp. = compensation.
a. Cases in the 1980s concern use of "residential plots" (*zhaijidi*).

Much the same picture appears in neighboring Fengxian county, another county court for which we have detailed data. (Even though divorce cases are not distinguished from other marriage cases, the data are very roughly comparable with those from Songjiang, since divorce accounted for the preponderance of all marriage cases from the mid-1950s on.) As shown in Table 3, marriage cases made up about three-quarters of all cases in the early 1950s, but only about two-fifths of all cases in the reformist 1980s. Otherwise, the pattern very much resembles that in Songjiang, with marriage cases far exceeding all others at the height of the Maoist period. In fact, it would not be an exaggeration to say that Maoist civil justice was mainly its divorce law.

As we have seen, a central claim of Maoist justice is that mediation makes up the cornerstone of the entire system. In Songjiang county, for the same years as the cases sampled (1953, 1965, 1977, 1988, 1989), only 16% of all civil cases were reported as adjudicated; most of the rest were mediated (69%).[23] In Fengxian county, from 1977 to 1985, a total of 2,109 civil cases were reported as mediated and 215 adjudicated, for a ratio of nearly 10 to 1 (Fengxian xian fayuan zhi, 1986: 97). In other words, if Maoist justice was, above all, divorce justice, then divorce justice was, above all, mediation justice.

This is not to say that all mediation can be equated with the mediated reconciliations of divorce law practice. A substantial proportion of mediated divorce cases, as noted above, ended in divorce, not reconciliation, but they involved a different kind of "mediation." Again, these by and large were divorces by mutual consent, and the court's role was only to help work out the terms of a settlement—getting each side to make whatever concessions were needed. In that respect, it was quite similar to traditional mediation.[24] Mediated reconciliations, in contrast, required aggressive intervention: the court resorted not just to moral suasion but material inducements and pressures from the family, the community, and the larger society as well as from the judiciary.

In fact, judicial mediation in contemporary Chinese civil justice spans a range of court actions, from the merely pro forma to the aggressively adjudicative and interventionist, all placed into the same broad (and misleading) category. At one end, "mediation" really means no more than the lack of active opposition from either litigant

**TABLE 3: Civil Cases in Fengxian County by Category, and Marriage Cases as a Percentage of All Civil Cases, 1950-1985**

| *Year* | *Land*[a] | *Debt* | *Marr.* | *Inher.* | *Old Age Supp.* | *Child Supp.* | *House* | *Comp.* | *Other* | *Total* | *Marriage as % of Total* |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1950 | 11 | 49 | 439 | 0 | 7 | 10 | 4 | 1 | 15 | 536 | 81.9 |
| 1951 | 7 | 34 | 298 | 6 | 0 | 0 | 3 | 1 | 16 | 365 | 81.6 |
| 1952 | 10 | 43 | 846 | 23 | 4 | 7 | 2 | 0 | 16 | 951 | 89.0 |
| 1953 | 56 | 83 | 532 | 11 | 0 | 0 | 11 | 0 | 37 | 730 | 72.9 |
| 1954 | 48 | 51 | 458 | 17 | 0 | 6 | 11 | 0 | 56 | 647 | 70.8 |
| 1955 | 2 | 15 | 371 | 1 | 0 | 5 | 4 | 0 | 51 | 449 | 82.6 |
| 1956 | 0 | 8 | 358 | 0 | 0 | 3 | 1 | 0 | 0 | 370 | 96.8 |
| 1957 | 0 | 6 | 381 | 2 | 3 | 6 | 1 | 2 | 0 | 401 | 95.0 |
| 1958 | 0 | 12 | 326 | 4 | 0 | 4 | 0 | 8 | 84 | 438 | 74.4 |
| 1959 | 0 | 3 | 472 | 0 | 0 | 3 | 3 | 2 | 2 | 485 | 97.3 |
| 1960 | 0 | 0 | 385 | 1 | 1 | 1 | 2 | 0 | 0 | 390 | 98.7 |
| 1961 | 0 | 0 | 558 | 2 | 0 | 2 | 3 | 1 | 0 | 566 | 98.6 |
| 1962 | 0 | 1 | 385 | 1 | 0 | 3 | 19 | 2 | 1 | 412 | 93.4 |
| 1963 | 0 | 3 | 296 | 7 | 0 | 8 | 30 | 5 | 10 | 359 | 82.5 |
| 1964 | 0 | 9 | 241 | 13 | 4 | 9 | 30 | 1 | 2 | 309 | 78.0 |
| 1965 | 0 | 5 | 194 | 4 | 5 | 7 | 0 | 2 | 5 | 222 | 87.4 |
| 1966-1976 | ..... | ..... | ..... | ..... | not available | ..... | ..... | ..... | ..... | ..... | ..... |
| 1977 | 0 | 0 | 51 | 2 | 4 | 2 | 14 | 5 | 15 | 93 | 54.8 |
| 1978 | 0 | 0 | 56 | 0 | 6 | 2 | 30 | 6 | 22 | 122 | 45.9 |
| 1979 | 0 | 0 | 96 | 3 | 8 | 0 | 47 | 22 | 38 | 214 | 44.9 |
| 1980 | 0 | 0 | 72 | 3 | 7 | 0 | 36 | 28 | 22 | 168 | 42.9 |
| 1981 | 0 | 0 | 137 | 16 | 17 | 7 | 73 | 37 | 30 | 317 | 43.2 |
| 1982 | 0 | 0 | 179 | 8 | 38 | 14 | 62 | 92 | 64 | 457 | 39.2 |
| 1983 | 9 | 19 | 181 | 8 | 43 | 10 | 54 | 82 | 64 | 470 | 38.5 |

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1984 | 8 | 5 | 227 | 12 | 39 | 11 | 26 | 50 | 42 | 420 | 54.0 |
| 1985 | 7 | 8 | 173 | 9 | 49 | 16 | 14 | 61 | 75 | 412 | 42.0 |
| Total | 158 | 354 | 7,712 | 153 | 235 | 136 | 480 | 408 | 667 | 10,303 | |
| % | 1.5 | 3.4 | 74.9 | 1.5 | 2.3 | 1.3 | 4.7 | 4.0 | 6.5 | 100.0 | |

Source: Fengxian xian fayuan zhi, 1986: 94-95.
Note: The data for a given year reflect cases concluded by the court, not cases received.
marr. = marriage; inher. = inheritance; supp. = support; comp. = compensation.
a. Cases in the 1980s concern use of "residential plots" (*zhaijidi*).

to the outcome of a case. Such cases differ little from those in imperial times when litigants were formally required to file a "willing acceptance" (*ju ganjie*) of the court's judgment. The contemporary twist is to represent the outcome as "mediated." At the other end, the court actively inserts itself not just into divorces but also into nondivorce civil cases (to be analyzed in a separate study). This latter type of court mediation is strictly a product of the Chinese revolutionary process.

As we try to grasp the real nature of judicial mediation in contemporary China, and to sort out myths from realities, the Maoist mediated reconciliations in divorce law practices may be the most distinctive and revealing. They cannot be understood merely in terms of traditional mediation, which centered mainly in the community and was compromise based. (Judicial mediation, we should recall, was very rare.) Nor can they be understood in terms of Western mediation, clearly separated as it is from the court's adjudication and coercion. The Maoist mediation deployed in the mediated reconciliations of couples, by contrast, was born of a distinctive history of divorce law practices that merged elements of both the traditional and the modern, the peasant and the Communist. It involved a cluster of practices and concepts that included the use of moral suasion, material inducements, and coercive pressures by the party-state and its courts against ex parte divorce in order to minimize active opposition; an organizing concept that held a couple's emotional relationship, ganqing, to be the crucial basis for marriage and divorce; and its logic in practice of terminating old-style unacceptable marriages without good ganqing, while striving to the utmost to conserve new-style marriages based on good ganqing. Those make up the core of Maoist divorce law practices, and hence also of Maoist civil justice as a whole. They remain the most distinctive aspect of the contemporary Chinese justice system.

*CHARACTER LIST*

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## NOTES

1. The recourse to binarism is perhaps best exemplified by the debate in China between those calling for wholesale Westernization and those preferring to look to "indigenous resources." For an example of the modernist position, see Zhang, 2001. The "postmodernist-nativist" position is best represented by Liang (1996) and Su Li [Zhu Suli] (1996). For a discussion of what might be termed the "angst" of China's legal history studies and lawmaking, see Tian, 1996.

2. Contemporary Chinese law sometimes separates out "family law" from "civil law"; this narrow conception of civil law is shown, for example, in the 1986 General Principles of Civil Law. On the other hand, civil courts in practice routinely handle marriage, divorce, and other family law cases, and it is this sense of civil law—employed also in Republican Guomindang law, based on the 1900 German Civil Code—that I use here. "Civil justice," in my usage, covers both codified law and legal practice, as well as the justice system generally, both formal (courts) and informal (community mediation)—that is, both judicial and extrajudicial.

3. Readers familiar with the writings of Pierre Bourdieu will recognize the source of the terms "practice" and "logic of practice" as they are used here. Bourdieu meant these concepts to provide a way beyond the old binaries of objectivism and subjectivism, structuralism and voluntarism, but he failed to apply his own ideas to his study of the Kabylia peasants of Algeria (Bourdieu, 1977: 114-58), which is mainly structural and synchronic, and did not consider practice as process over time. My own preference, no doubt partly due to my bias as a historian, is for the study of practice as historical process.

4. Clarke (1991) and Lubman (1999: chaps. 8, 9) point out the complexities of "mediation."

5. The texts of the marriage laws are of course widely published. I rely here on the convenient compilation of source materials done by the Hubei caijing xueyuan, using the translation produced by the semiofficial Foreign Languages Press in Beijing. Alterations to these translations are made when necessary, and are so noted.

6. For example, in a case from A county in 1977 involving a Party member (A, 1977-20), the "organization" (*zuzhi*; i.e., the Party) took the position that the couple should set a good example for others and not divorce; that ended the matter.

7. Neither of the two commonly used English terms for *tongyangxi*—"child bride" and "adopted daughter-in-law"—is quite accurate, as I have pointed out elsewhere (Huang, 2001: 160n). "Child bride" suggests that the girl was married very young, which was generally not the case. "Adopted daughter-in-law" is also misleading, for no formal process of adoption took place. I therefore use the original Chinese term throughout.

8. The Chinese term *ganqing* has no exact English equivalent. In the semiofficial Foreign Languages Press version, this stipulation is translated "In cases of complete alienation of mutual affection," which is close. But ganqing allows for gradations—"very good" (*ganqing henhao*), "poor" (*buhao*), "ruptured" (*polie*), and so on—while "mutual affection" does not. Here and later in the article, I will render ganqing as "emotional relationship," or simply "relationship," which seems to me to come closest to capturing the meaning of the Chinese term.

9. The amendments on divorce focused on the question of how to determine whether a couple's relationship had truly reached a point of rupture (*ganqing que yi polie*). They are quite conservative; for example, one situation that warrants the judgment that such rupture has occurred is "separation for two years" ("Guanyu xiugai 'Zhonghua renmin gongheguo hunyinfa' de jueding," passed by the Standing Committee of the Ninth National People's Congress, 28 April 2001; Chinese text available on the Web at http://www.people.com.cn, accessed August 2004). The new regulations governing (marriage and) divorce registration ("Hunyin dengji tiaoli"),

enacted by the State Council on 1 October 2003, took the liberalizing step of removing the requirement for certification from the village or work unit, but only for uncontested divorces of mutually consenting parties.

10. Of course, these terms do not apply to the height of the Cultural Revolution—in A county, the years 1968 to 1974 (INT93-9)—when the courts largely ceased to function.

11. Two different characters are routinely used in the expression: *he* meaning "harmonize, reconcile," and *he* meaning "unite, put together," plus *hao* (good).

12. The cases collected also contain examples of complaints written by a court scribe or judge rather than by the complainant (e.g., B, 1965-2).

13. Except for the simplest civil cases handled by a single judge, the "collegial bench" (*heyiting*) for a civil case comprised three members; they might include one or two lay judges or *renmin peishenyuan* (people's assessors), along with one or two professional judges (*shenpanyuan*).

14. Houses in North China villages at this time were still relatively simple; they were typically built, with the help of other villagers, in just a few days (Huang, 1985: 220).

15. Not all efforts at mediation ended by so completely satisfying the Maoist court's wishes. Sometimes the petitioner insisted on divorce despite the court's uses of ideological and moral suasion, official pressures, and material inducements. In that event, judges would sometimes resort to still more high-handed methods. Consider the following example, drawn from A county in 1989 (A, 1989-14). A local schoolteacher filed for divorce on the grounds that his wife frequently criticized and berated (*ma*) him as well as his parents, that she was no longer interested in having sex with him, and that their relationship (*ganqing*) had completely ruptured (*polie*). She, however, made clear that she was opposed to divorce. The judges investigated at both their work units. They determined that the couple's relationship had been quite good and that their main problem had to do with their sex life. Her lack of interest stemmed from the pains she had suffered following a difficult cesarean section—a problem that they thought could be overcome. The judges therefore used moral suasion, lecturing the petitioner that as a teacher, he should set a good example for others. They also tried to apply political pressure through the Party organization, to which the man had applied for membership. And they offered the couple a material inducement: the principal of the school would arrange a position for her there, so the two of them would have more time with one another. But the husband remained adamant. The judges then informed him, "You do not have sufficient reason to seek divorce. If you insist, the court will adjudicate against divorce. We hope you will consider things carefully." Faced with that declaration, the petitioner gave in at the second mediation meeting convened by the court, presumably because he knew that nothing he did would make any difference in the court's decision. He withdrew his divorce petition (*chesu*). Judges interviewed in A county, however, say such a tactic is something of a last resort. The judges generally preferred to couch their statements in terms of what the law said, leaving no doubt as to how the court would adjudicate but stopping just short of the kind of bald threat used in this case (INT93-B-4).

16. Cases sometimes moved from one category to another during the process of litigation. Strong initial opposition to divorce could give way to agreement to divorce. In parallel to this shift, earnest efforts by the court to mediate could give way to acknowledgment that reconciliation was not feasible. In a 1977 case from B county, for example, both of these processes were evident (B, 1977-11).

17. In most of the remaining cases (about 122,000), the petitioner withdrew his or her petition (*chesu*) or the case was discontinued (*zhongzhi*) for another reason—for example, successful extrajudicial mediation. All numbers in this discussion have been rounded to the nearest thousand.

18. The 2000 figures do not separate out divorce petitions from "other marriage and family" cases, as did the 1989 statistics. The number of total divorce petitions here is arrived at by assuming the ratio of divorce to nondivorce marriage cases was the same in 2000 as it had been in 1989: roughly 6 to 1.

19. See the 1939 Marriage Regulations of the Shaanxi-Gansu-Ningxia (Shaan-Gan-Ning) Border Area, the 1943 Regulations of the Shanxi, Chahaer, and Hebei (Jin-Cha-Ji) Border Area, and the 1942 Regulations of the Shanxi, Hebei, Shandong, and Henan (Jin-Ji-Lu-Yü) Border Area, in Meijer, 1971: 285-87, 288-94 (appendices 3, 4, 6); for the original Chinese texts, see Han and Chang, 1981-1984, 4.804-7, 826-29, 838-41; compare the Guomindang provisions discussed in Huang, 2001: chap. 10.

20. The actions of the legal system at that time had already been foreshadowed in the border regions. As we have seen, the original 1939 Shaan-Gan-Ning Regulations had not addressed divorce from soldiers, and it had also specifically banned tongyangxi, purchase of wives, and parentally imposed marriages; the 1944 Revised Regulations, however, added the stipulation about soldiers' consent and deleted the ban on tongyangxi, marriages by purchase, and parentally imposed marriages, retaining only the ban on bigamy (Han and Chang, 1981-1984: 4.804-7, 808-11). It is thus clear that soldiers were already exempted from divorce on those grounds in the previous decade.

21. In other words, Neil Diamant (2000) is right to emphasize the impact of the 1950 Marriage Law, especially on the countryside, while Kay Ann Johnson (1983) also tells an important story in emphasizing the Party's retreat from its Jiangxi Soviet position. But Diamant's argument that the Marriage Law had a greater impact on the countryside than the cities, contrary to what he believes modernization theory might predict, is overly elaborate. He somehow overlooks the commonsense explanation that the old-style marriages targeted by the new law were much more common in the countryside than in the cities.

22. Li Fangchun (forthcoming) makes stimulating suggestions about a distinctive "revolutionary modernity." Under that rubric could be included this new epistemology, which is distinctive from both Confucian epistemology and Western Enlightenment epistemology. It also includes a new view of history from the ground up.

23. Another 16% of the civil cases were withdrawn (*chesu*), discontinued (*zhongzhi*), or otherwise terminated (data provided by the Songjiang county court).

24. Even in mediated divorces, the court could intervene quite forcefully to bring about a settlement considered fair by legal standards. In one case cited above, the court thought unreasonable the husband's demand for what amounted to a full refund of marriage expenses and for all community properties. When it could not get him to agree, it adjudicated. The difference between the PRC court and a contemporary American divorce court, which is guided by a set of general principles and rules of thumb in deciding the terms of a divorce settlement, is the premium placed by the former system on bringing both parties to (at least ostensibly) voluntarily accept the court's decision.

## *INTERVIEWS*

I conducted nine interviews with Songjiang county court judges, the Huayang township judicial official (Sifa zhuli), Huayang town and village mediators, and village leaders and litigants between 6 and 10 September 1993, from 9 to 12 in the morning and 2 to 5 in the

afternoon; six interviews with Jiang Ping, one of the main architects of the 1986 General Principles of Civil Law (Minfa tongze), and the main architect of the Law of Administrative Procedure (Xingzheng susongfa), between 30 January and 8 February 1995; one interview each with Xiao Xun, former deputy chair of the Civil Law Section of the Committee for Legal Work (Falü gongzuoweiyuanhui) of the Standing Committee of the National People's Congress about the Drafting of the General Principles of Civil Law, on 15 March 1999, and Wu Changzhen, one of the drafters of the amendments (passed 28 April 2001) to the 1980 Marriage Law, on 16 March 1999. References to the interviews begin "INT," followed by the year of the interview and its number (in consecutive order for each year), preceded by a hyphen (e.g., INT93-2). The interviews in 1995 and 1999 are further identified by the initials of the interviewee (e.g., JP for Jiang Ping: INT95-JP-1). There are two citations from interviews conducted by Kathryn Bernhardt with judges and judicial personnel in Songjiang in 1993. Those are cited as INT93, followed by B and the number of the interview: e.g., INT93-B-3.

*CASE RECORDS*

The A county case files are cited by the abbreviation A, year, and my own case number, from 1 to 20 for each of the years 1953, 1965, 1977, 1988, and 1989, for the first batch of case records I obtained, and 01 to 020 for each year for the second batch I obtained (e.g., A, 1953-20; A, 1965-015). The A court itself numbers its case records by year and in numerical order by date of the case's closing. For reasons of confidentiality, I have avoided using the court's own identification numbers and the names of the litigants.

The B county cases are cited by the abbreviation B, year, and my own case number, from 1 to 20 for each of the years 1953, 1965, 1977, 1988, and 1989, and 1 to 40 for 1995.

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