

Women and the Law: Divorce in the Republican Period

CHINA ADOPTED IN 1929–31 a modern civil code based on the European continental model. How did this code work in practice? Almost nothing has been written on the subject. The assumption appears to be that the Republican civil code could not have had any real impact, in part because China lacked a civil law tradition and in part because the new code seemed so far removed from Chinese social reality.

But the Chinese soil was not as inhospitable for the foreign transplant as one might think. As other chapters in this volume show, the ground had been prepared by a tradition of codified civil law and of magisterial adjudication of civil disputes. With this tradition to build on, it was a relatively easy matter for legal reformers in the late Qing and early Republic to separate out the civil and the criminal in codified law and to establish a two-track system for civil and criminal affairs in the newly formed modern courts. In terms of content as well, the Republican civil code, though primarily of foreign origin, nevertheless included many features that were compatible with both the Qing code and Chinese social customs. Finally, the idea and practice of going to court to assert a right—be it the right to recover a debt, the right to inherit property, or the right to adopt a successor—was not at all foreign to the Chinese experience. There was thus an essential continuity in China's civil law tradition from the Qing to the Republic.

At the same time, however, there were also important discontinuities. The new code greatly expanded the scope of civil law in China, covering more areas in more detail than did the Qing code, with its predominantly penal and administrative emphasis.

As important, the new code also redefined the legal rights of individuals in such crucial matters as marriage, divorce, and inheritance. It was in these new areas that the tensions between the Republican civil code and social practice were most clearly revealed.

This chapter examines one of the most important of these discontinuities. In the Qing code, a wife's right to divorce her husband was severely restricted. With the promulgation of the Republican civil code, however, China came to have one of the most liberal divorce laws in the world. Modeled after the Swiss and German codes, it allowed for equal access to women on ten different grounds. It also allowed easy "no fault" mutual consent divorce, surpassing in that respect even its Swiss and German models as well as the codes of contemporary England, France, and the United States (Phillips 1988).

This chapter approaches the subject of women and divorce in Republican China on three levels: legal intent as embodied in the code; the gap between legal intent and social reality; and the interaction of the two in actual legal practice.

The Republican lawmakers explicitly upheld the principle of male-female equality, intending the civil code to be a major force in reshaping gender and family relations. The necessary first step, they believed, was to provide women with the means to liberate themselves from oppressive marriages. They thus made divorce, in principle at least, as readily available to women as it had been to men.

This legal ideal had to confront the backward social reality of Republican China. Women, after all, were heavily discriminated against in all walks of life; wife abuse was common; adultery was common among men; and keeping a concubine widely practiced among the wealthy and powerful.

Records of court cases show us the actual legal practice that emerged out of the tension between legal intent and social reality. Judges were obligated to uphold the law, but at the same time they could not help but be influenced by the prevailing social norms. They were agents of social change, as well as products of the Republican social context.

On balance, though the code's intent was not fully realized in actual application, neither was it completely compromised by social reality. Women of the Republican period did not quite gain the equality with men promised by the code, but they certainly found it far easier to obtain a divorce than women of the Qing.

This is not, of course, to suggest that divorce became common-

place in Republican China. The civil code had its greatest impact in the cities, where knowledge of the new law was more widespread and the new courts more easily accessible. But even there divorce, though on the increase, remained relatively rare.¹ In the countryside, the code had even less impact (P. Huang 1991). The legal reforms of the Republican period thus lacked the depth of the CCP's 1950 Marriage Law and the nationwide campaign to enforce it (Johnson 1983). Nevertheless, they served, at least in urban China, as an important bridge between the old and the new.

Divorce in the Qing and Republican Codes

In Qing law divorce was almost impossible for a woman to obtain. In the first place, she herself did not even have the right to bring a lawsuit against her husband or the senior members of his family, for the code prohibited people of inferior status from litigating against their legal superiors. A divorce action therefore had to be initiated by her natal family (Statute 337).

Furthermore, there was only a limited number of grounds on which her natal family could pursue a divorce on her behalf. If her husband had abandoned her for more than three years, for instance, they could apply to the magistrate for a certificate ending the marriage (Statute 116).² They could also report him if he beat her badly enough to cause permanent injury (at the minimum, a broken tooth or bone, impaired vision, or burns), but the divorce could only be granted if the husband agreed to it (Statute 315).

Divorce was also possible if the husband, his parents, or his grandparents committed certain criminal acts that Qing law considered to be violations of the marital bond (*yijue*). For example: the husband pawns, pledges, or sells his wife to another (Statute 102; 367); the husband, his parents, or grandparents permit or force the wife to commit adultery (Statute 367); the husband's parents or grandparents beat the wife without reason (*feili*), seriously injuring her (Statute 319). In these situations divorce was obligatory, and anyone failing to comply was subject to 80 blows of the heavy bamboo (Statute 116).

A husband in the Qing, in contrast, enjoyed a much broader range of grounds for divorce. The "seven conditions" (*qichu*) provided that he could divorce his wife for bearing him no son, for adultery, for being unfilial toward his parents, for loquacity, for theft, for jealousy, and for incurable disease. If none of the conditions existed,

however, a man who arbitrarily expelled his wife could be subject to 80 blows of the heavy bamboo. The seven conditions were in turn restricted by the "three limitations" (*san buqu*), which specified that a husband may not dismiss his wife for any of these reasons except adultery if she had observed the three-year mourning period for her parents-in-law, if he had been poor when they first married and subsequently became rich, and if she had no relatives to return to (Substatute 116-01). Outside of the seven conditions, a man could also "divorce" a wife who had run away by selling her into marriage to another man (Statute 116).

Divorce by mutual consent was also allowed. More specifically, the Qing code states that if the relationship between a husband and wife is not harmonious and they both wish to end their marriage, they would not be punished for doing so. A couple's mutual desire to part, the code explains, indicates that they have already become so emotionally estranged that it would be difficult to force them to stay together (No. 116).

With the legal reforms of the Republican period, women's access to divorce was greatly expanded. In the first place, a wife acquired the right to bring suit against her husband directly. Indeed, the new civil procedural laws explicitly required that the wife and the husband be the principals in any marital litigation. Parents could bring suit in their child's stead only if the daughter or son was a minor under the age of 20 *sui* (*Liufa quanshu* 1932: 428; Chiu 1966: 172-73).

As important, the new civil code radically revised the legal grounds for divorce, making them equally available to men and women. The ten grounds as listed in Article 1052 of the code³ are: bigamy; adultery; spousal ill-treatment of a degree that makes living together intolerable; the wife's ill-treatment of her husband's lineal ascendants and their ill-treatment of her to a degree that makes living together intolerable; ongoing malicious (*eyi*) desertion; the attempted murder of one spouse by the other; an incurable "loathsome" physical disease (*eji*); a serious and incurable mental illness; disappearance for over three years; and imprisonment of more than three years' duration or for the commission of an infamous crime (*bu mingyu zhi zui*).⁴

These new provisions served to curtail men's access to divorce. A husband lost the right to divorce his wife for barrenness, jealousy, loquacity, or theft. He also could not divorce her for being simply

unfilial toward his parents or for contracting an incurable disease that was not also life-threatening and communicable.

The Republican civil code and its liberal divorce provisions were several decades in the making. A first draft was drawn up in the last several years of the Qing in conjunction with the writing of a new criminal code. The latter was adopted in 1910, but the civil code generated too much opposition and was not put into effect. It was later redrafted in 1915 and again in 1925, but these versions also were fated to remain merely on paper (van der Valk 1939: 25-31, 42-44).

In the interim, those sections of the Qing code that dealt with civil matters remained in effect. This did not mean, however, that no change took place, for the Daliyuan,⁵ China's highest court in the early Republican period, was empowered to interpret and amend those laws so that they were not, as the court's president put it in 1920, "inconsistent with the spirit of the age" (F. T. Cheng 1923: i). The Daliyuan's interpretations and decisions thus formed an important body of transitional law. As will be examined in more detail later, by the time the family section of the civil code was put into effect in May 1931 the operative laws on divorce, with some exceptions, had already been significantly revised.

Varieties of Divorce

Mutual Consent Divorce

For both women and men, the main avenue to divorce in the Republican period was the highly liberal provision for divorce by mutual consent (*xieyi lihun*). The procedure for effecting a mutual consent divorce was extremely simple. The couple need only draw up a divorce agreement, witnessed and signed by at least two other persons (Art. 1050). They did not have to file a petition with the court or register their divorce with the government. They also did not have to engage lawyers, for the witnesses to the document could be anyone, provided they were adults (over 20 *sui*) and of sound mind (Chiu 1966: 174).

To be on the safe side and to make sure that all the legalities had been followed, some divorcing couples preferred to use the services of lawyers. The following agreement for a mutual consent divorce was drawn up by lawyers associated with the Shanghai Lawyers' Office (*Shanghai lüshi shiwusuo*) on September 8, 1940:

Because incompatibility (*yijian buhe*) makes it impossible for us to grow old together as husband and wife, Lai Yiren and Fei Guiying, the parties to this contract for mutual consent divorce (hereafter referred to simply as party A and party B), do hereby mutually agree to end their marriage. Accordingly, they list the terms of the agreement below:

1. The marriage of the two parties shall be terminated from the date of the signing of this document. Henceforth, each may freely remarry without any interference from the other.
2. From the date of the signing of this document, neither party may demand any property from the other. Each party shall be responsible for the debts he or she incurred prior to the divorce, whether they were for family expenses or for personal use; the other party shall not be involved.
3. Our infant daughter, Lushan, now just four months old, shall go to party B [the wife] to raise, educate, and have guardianship over.⁶
4. Five copies of this contract have been drawn up. The parties shall each retain one copy. The others shall be handed over as proof to the Lawyers' Office for future reference.

The document was signed by the two principals and by two lawyers acting as witnesses (Shanghai 1940: 180-2-2793).

After divorcing, a couple, particularly if they lived in a big city, might then decide to announce the dissolution of their marriage in a newspaper. This was not only a quick and convenient way to inform their friends, relatives, and acquaintances of their changed relationship, but, more importantly, it served notice that each could no longer be held responsible for the other's actions, especially for any debts they might incur. Most commonly, announcements of this sort were short, matter-of-fact, and sparing of details about child custody and financial arrangements. The following is representative: "Because of incompatibility, it is impossible for us to grow old together as husband and wife. We have already mutually agreed to dissolve our marital relationship. Hereafter, each party can freely remarry as he/she wishes, and the other cannot interfere. In addition to drawing up a divorce document, we hereby are making this special announcement" (*Shenbao* May 26, 1935). Almost all such announcements gave incompatibility as the reason for the divorce.

A few rare individuals used the occasion of announcing their divorce to make a strong political statement. The following appeared in a February 1929 issue of the Shanghai newspaper *Shenbao*:

We both have suffered a loveless, unfree marriage for a long time. To express our revolutionary spirit in today's world, we should quickly liberate ourselves. It is only because there is no love or freedom that we do divorce.

There are absolutely no other reasons. Divorce is definitely not a shameful affair, and we do not divorce out of enmity. We will still be responsible for each other in times of need, but after the divorce, neither party shall interfere with the remarriage of the other.

The revolutionary spirit moved the husband, Wang Xuan, to relinquish the custody of their child to his wife, Liu Eying, as well as ownership of most of his property, "both the movables and immovables," to sell or to keep as she saw fit, including their house, two business establishments, some agricultural land, and all furniture, livestock, and lumber. Wang Xuan would keep for himself only enough to cover the expenses for his move back to his home county (*Shenbao* Feb. 2, 1929).

The available evidence suggests that mutual consent divorce comprised the overwhelming majority of divorces in Republican China. For instance, 70 percent of the reported 3,171 divorces in Shanghai from August 1928 to August 1934 were by mutual consent.⁷ By settling their dispute privately, the divorcing couple was spared not only court costs, but also the humiliation of airing one's private life before a judge and possibly, courtesy of the ubiquitous urban presses, before an avid reading public as well.

Court Divorce

Only after attempts to work out a mutual consent agreement failed did troubled couples take legal action and file for a divorce at court. The purpose of initiating a divorce suit was not necessarily to see the process through to its final stage of a judgment. Rather, it was as often as not an effort to make the other party more amenable to some sort of private resolution. Frequently just the filing of the plaint was enough to provoke the other into some kind of response. Indeed, in as many as 15 percent of the 118 divorce plaints filed with the Beijing District Court in 1942, the petitioner withdrew his/her case because the couple wanted to pursue outside mediation or because they had already reached a solution (Beijing 1942).

If the mere filing of a divorce plaint did not produce a resolution, then chances were that court mediation would. The Republican judicial system encouraged the resolution of civil disputes through mediation rather than adjudication. Procedurally, there were two routes to court mediation for people seeking a divorce. In the first, the petitioner specifically asked for such mediation in the plaint, sometimes then requesting that the case proceed to adjudication

should mediation fail. Upon the receipt of such a request, court clerks routed it directly to the mediation court for civil affairs (*min-shi tiaojie fating*), where a judge met with the couple and tried to help them work out their differences. If the parties could not reach an agreement, then the petitioner could decide to proceed to adjudication. But if they reached an agreement, then a court clerk drew up a statement to that effect (called a *hejie bilu*), which the judge and the couple then signed.

Second, even if the initiator of a divorce suit did not specifically ask for mediation, the judge nevertheless tried to settle the case before it reached adjudication. The Code of Civil Procedure provided specifically that judges may attempt to induce the litigants to come to a compromise at any stage of the proceedings (*Liufa quanshu* 1932: 403; *Sifa gongbao* 21, Apr. 23, 1935: 46). During his questioning, a judge hearing a divorce case typically urged the couple to try to reach an understanding. If they were able to do so, the case was then forwarded to the mediation court and an agreement was drawn up. If not, then the judge would write out his final decision.

Of the 1942 Beijing cases, 38 percent were settled through court mediation and 30 percent through adjudication. Most mediated cases resulted in divorce. Indeed, people whose suits were settled this way stood a much better chance of obtaining a divorce than people whose cases were adjudicated. Couples divorced in fully 78 percent of the mediated cases, compared with only 37 percent of the adjudicated ones (Table 7.1).

TABLE 7.1
*Breakdown of Divorce Cases in Shanghai,
1940-41, and Beijing, 1942*

	Shanghai 1940-41	Beijing 1942
Adjudicated cases	61	35
Divorce granted	41	13
Divorce denied	20	22
Court-mediated cases		45
Divorce		35
No divorce		10
Withdrawn cases ^a	4	38
TOTAL	65	118

SOURCES: Shanghai 1940-41; and Beijing 1942.

^aCases withdrawn either because the plaintiffs decided to pursue outside mediation or because they failed to file their complaints properly.

Women and the Court

Women brought suit for divorce much more frequently than did men. As Table 7.2 shows, women initiated 77 percent of divorce suits in Beijing in 1942 and 74 percent in Shanghai in 1940-41, a pattern also evident at other times and in other cities. The explanation has in part to do with a sympathetic civil code and in part with a court system that was relatively affordable and efficient.

While the divorce laws of the Qing had been weighted heavily in favor of the husband's interests, the grounds for judicial divorce in the Republican civil code reflected the realities of women's lives much more than men's. Because of the unequal power relations within a family, a wife was much more likely to suffer physical abuse from her husband and his parents than they were from her. Because of a wife's economic dependence on her husband, she was more likely than he to seek legal redress on the grounds of desertion. A man, by consorting with prostitutes, was much more likely than his wife to contract a venereal disease. And if the population of the country's prisons is any indication, men were much more likely to be convicted of a crime and sentenced to jail time.⁸ The only grounds for which some sort of parity existed were disappearance, adultery, and perhaps bigamy (Tables 7.3 and 7.4).

As discussed in Chapter 1 in this volume, the cost of civil litigation in the Republican period was not prohibitive. In the late 1930's and early 1940's, the basic court fee for civil cases that did not involve property was 4.50 yuan if the plaintiff was requesting court

TABLE 7.2
Initiators of Divorce Suits in Various Cities, 1929-42

Place	Date	No. of cases	Female-initiated		Male-initiated		Unclear	
			No.	Percent	No.	Percent	No.	Percent
Guangzhou	1929	47	42	89%	5	11%	—	—
Tianjin	July-Dec.							
	1929	28	24	86	4	14	—	—
Beijing	1930	62	41	66	16	26	5	8%
Shanghai	1940-41	65	48	74	17	26	—	—
Beijing	1942	118	91	77	27	23	—	—

SOURCES: Tan 1932: 57-62; Beijing 1942; and Shanghai 1940-41.

NOTE: The Beijing 1942 data cover all divorce suits brought before the Beijing District Court in that year—cases that were withdrawn, court-mediated, and adjudicated. The Shanghai 1940-41 cases consist of adjudicated cases only, both those that ended in divorce and those that did not. All other data concern only adjudicated cases that ended in divorce.

TABLE 7.3
Grounds for Divorce, Beijing, 1942

Grounds cited in plaint	Female-initiated				Male-initiated			
	No. of cases	Percent of cases	Divorce secured	Percent of adjudicated cases	No. of cases	Percent of cases	Divorce secured	Percent of adjudicated cases
Bigamy	5	6%	3		2	8%	2	
Adjudicated	1		0	0%	0		0	
Mediated	3		3		2		2	
Other ^a	1		—		0		—	
Adultery	7	8	4		6	24	2	
Adjudicated	1		1	100	3		2	67%
Mediated	3		3		1		1	
Other	3		—		2		—	
Spousal cruelty	62	70	21		2	8	1	
Adjudicated	18		3	17	0		0	
Mediated	24		18		1		1	
Other	20		—		1		—	
Familial cruelty	18	20	6		3	12	1	
Adjudicated	6		0	0	0		0	
Mediated	8		6		1		1	
Other	4		—		2		—	
Desertion	45	51	17		13	52	5	
Adjudicated	12		2	17	5		3	60
Mediated	19		15		3		2	
Other	14		—		5		—	
Murder attempt	5	6	1		1	4	0	
Adjudicated	2		0	0	0		0	
Mediated	1		1		0		0	
Other	2		—		1		—	
Physical illness	6	7	2		1	4	0	
Adjudicated	2		0	0	1		0	0
Mediated	2		2		0		0	
Other	2		—		0		—	
Mental illness	1	1	0		0	0	0	
Adjudicated	1		0	0	0		0	
Mediated	0		0		0		0	
Other	0		—		0		—	
Disappearance	5	6	1		3	12	2	
Adjudicated	1		1	100	3		2	67
Mediated	0		0		0		0	
Other	4		—		0		—	
Criminal conviction	9	10	3		1	4	1	
Adjudicated	2		0	0	0		0	
Mediated	6		3		1		1	
Other	1		—		0		—	

SOURCE: Beijing 1942.

NOTE: Since the grounds are not clear in three of the 91 female-initiated suits and two of the 27 male-initiated suits, the number of cases covered here is 88 and 25, respectively. Also, the totals in the "No. of cases" columns exceed 88 and 25 because plaintiffs often brought suit on a number of grounds. The "Percent of cases" columns represent the percentage based on 88 and 25, respectively. Thus, for example, women cited bigamy as a ground for divorce in five or 6 percent of the 88 cases. The "Percent of adjudicated cases" columns represent the percentage of adjudicated cases in each category that ended in a ruling for divorce.

^aCases that were withdrawn in favor of outside mediation or because of procedural problems. Since the court records do not consistently contain information about the subsequent fate of the couples in this category of cases, the corresponding spaces in the "divorce secured" columns have been left blank.

TABLE 7.4
Grounds for Judicial Divorces, Shanghai, 1940-41

Grounds cited in plaint	Female-initiated				Male-initiated			
	No. of cases		Divorce granted		No. of cases		Divorce granted	
			No. of cases	Percent of cases			No. of cases	Percent of cases
Bigamy	1	2%	1	100%	0	0	0	0
Adultery	5	11	1	20	2	12%	1	50%
Spousal cruelty	18	41	5	28	0	0	0	0
Familial cruelty	1	2	0	0	1	6	0	0
Desertion	17	39	12	71	7	41	6	86
Murder attempt	3	7	2	67	0	0	0	0
Physical illness	3	7	0	0	0	0	0	0
Mental illness	1	2	1	100	0	0	0	0
Disappearance	12	27	8	67	9	53	7	78
Criminal conviction	8	18	3	38	1	6	1	100

SOURCE: Shanghai 1940-41.

NOTE: Since the grounds are not clear in four of the female-initiated suits, the number of cases covered here is 44, rather than the 48 cases noted elsewhere. The number of male-initiated suits covered is 17. Also, the totals in the "No. of cases" columns exceed 44 and 17 because plaintiffs often brought suit on multiple grounds. The "Percent of cases" columns represent the percentage based on 44 and 17. Under "Divorce granted" the "No. of cases" and the "Percent of cases" represent the number and percentage of cases in each category that ended in a judicial ruling for divorce.

adjudication, but only 0.75 yuan if she or he was petitioning for a court mediation. Additional costs included 0.60 yuan for the plaint form; 0.10 yuan to the scribe for every one hundred characters; 0.75 yuan for the form informing the court of one's engagement of a lawyer; a fee for sending out a summons to the defendant and any witnesses, calculated on a graduated scale depending on the distance to be covered by the court personnel (0.15 yuan for each summons delivered within ten li, 0.23 yuan for ten to fifteen li, 0.30 yuan for fifteen to twenty li, and so on [1 li = 0.3 miles]); and finally a fee for a written copy of the mediated settlement or court judgment, calculated at 0.15 yuan for every hundred characters.

The cost for cases that went on to appeals was higher, but not excessively so. The basic court fee was 6.3 yuan for an appeal to a superior court (*gaodeng fayuan*) and 7.2 yuan for an appeal to the Supreme Court. All other fees remained the same (Niida, ed. 1952-58, I: 309-13; Beijing 1942: 108, 239, 1627). To help put this cost in perspective, a Beijing rickshaw puller at this time could earn two to three yuan a day, a Shanghai woman cotton mill worker 0.50-0.65 yuan a day, and a Hebei agricultural day laborer about

0.50 yuan a day (Beijing 1942: 4488; Honig 1986: 176; P. Huang 1985: 197).

The plaintiff had to pay all these costs, except the fee for a copy of the settlement or judgment, at the time of the submission of the plaint. If she or he subsequently withdrew the case, the fees would be refunded. If the case ended in a court-mediated settlement, they would be split between the plaintiff and the defendant. If the case ended in a favorable judgment for the plaintiff, they would be charged to the defendant.

To help keep expenses down, most divorcing couples did not hire lawyers. In the 1942 Beijing cases, for instance, only 19 percent (16 women and 15 men) of the plaintiffs and defendants in the 80 court-mediated or adjudicated cases were represented by legal counsel.⁹ For most litigants, therefore, the only expense was court fees.

Those fees, though not low, were not so high as to limit access to the well-to-do only. Indeed, in the 1942 Beijing cases the couples came mostly from the ranks of the working class and the unemployed. Forty-five percent of the husbands worked in lower class or blue-collar jobs as rickshaw pullers, factory workers, craftsmen, peasants, street vendors, and so on, and another 36 percent were unemployed at the time of the litigation. Only 19 percent had occupations that could be considered middle class or white-collar—merchant, clerk in store or bank, doctor, military officer, and student (Table 7.5). Only ten of the wives in the Beijing cases supplied information about jobs in their plaints. Five worked as servants, two as factory workers, one as a handicraft worker, one as an opera singer, and one identified herself as a peasant.¹⁰

If litigation costs did not discourage even these poorer women from taking their cases to court, they were high enough to discourage them from seeking alimony (*shanyangfei*) or other sorts of financial compensation along with the divorce.¹¹ Once a lawsuit involved property claims, the fees mounted up on a graduated scale—0.45 yuan for a claim of less than 10 yuan, 0.90 yuan for 10 to 25 yuan, 2.25 yuan for 25 to 50 yuan, and so on up to 105 yuan for a claim of 8,000–10,000 yuan, after which an extra 4.50 yuan would be charged for every additional 1,000 yuan of property involved (Niida, ed. 1952–58, I: 312–13). This cost proved to be prohibitive for most women, with the result that only 19 percent of the female plaintiffs in both the Beijing and the Shanghai cases requested alimony and/or other financial compensation in their plaints.

TABLE 7.5
*Occupations of Men Involved in
 Divorce Suits, Beijing, 1942*

Occupation	Number	Percent
Unemployed	23	36%
Lower class	29	45
Craftsman ^a	5	
Rickshaw puller	5	
Factory worker	4	
Peasant	3	
Peddler	3	
Food vendor	2	
Waiter	2	
Barber	1	
Servant	1	
Drummer	1	
Fortune teller	1	
Beggar	1	
Middle class	12	19
Merchant	7	
Clerk in bank or store	2	
Military officer	1	
Doctor	1	
Student	1	
TOTAL	64	100%

SOURCE: Beijing 1942.

NOTE: Only 64 of the 1942 Beijing case records contain information about the husband's occupation.

^aA craftsman here refers to a man identified in the records as being employed in traditional handicraft production (*shouyi* or *shougong*).

Aside from the relative affordability of initiating a simple divorce suit, litigation was no doubt also encouraged by the admirable speed with which the court system handled civil cases. In Beijing in 1942, a person bringing suit for divorce could reasonably expect a resolution within a matter of weeks. In the court-mediated cases, an average of only seventeen days went by between the filing of the plaint and the signing of the mediated agreement. (In 17 of the 45 mediated cases, the agreement was signed within ten days of the filing of the plaint.) The adjudicated cases took longer, but still averaged only 40 days from plaint to judgment.¹²

The progress of a case slowed somewhat as it entered appeals. Even so, the time between a Beijing District Court decision and a Hebei Superior Court decision averaged 69 days. Thus, for those di-

orce cases that reached that level, on average less than four months (113 days) lapsed between the filing of the plaint and the handing down of the superior court ruling. None of the 1942 Beijing cases was then appealed to the Supreme Court, but information from some Beijing divorce records of the 1930's suggests that it normally took another nine months for the case to be attended to at that level. Altogether, then, the entire process—from the filing of the plaint to the Supreme Court decision—took on average only about thirteen months.

The Major Grounds for Divorce

The letter of the code and the relative accessibility of the system would lead one to imagine very great changes. But in reality, change, though substantial, remained some distance from the legal ideal. In actual application, the courts remained quite strict, despite the code's liberal provisions. Though women of the Republican period had far greater access to divorce than did women of the Qing, they did not necessarily find it easy to obtain one.

Spousal Cruelty and Familial Cruelty

Spousal cruelty was the most commonly cited grounds for divorce. Nationwide from 1934 to 1939, 31 percent of the reported 3,206 judicial divorces were granted for this reason (Table 7.6). In large metropolises, the incidence was higher. In the Shanghai cases studied here, women cited spousal cruelty in 41 percent of their plaints, and in the Beijing cases 70 percent (Tables 7.3 and 7.4).

Qing law, as we have seen, had also permitted a wife to apply for a divorce because of her husband's physical abuse. But her injuries had to be severe and permanent, and her husband had also to agree to the divorce. A man, however, could divorce his wife if she just dealt him a single blow or slap without inflicting any injuries at all (Statute 315; 302).

The reformed code of the late Qing retained these statutes, but decisions by the Daliyuan in the 1910's and 1920's greatly changed their content. In the first place, the court ruled that when a wife sought a divorce on these grounds, the consent of the husband was no longer required before a judge could decide in her favor. In the second place, it ruled that the severity of the wounds was not to be

TABLE 7.6
Grounds for Judicial Divorces, 1934-39 (national statistics)

Grounds	Number of cases	Percent of total cases	Grounds	Number of cases	Percent of total cases
Bigamy	264	8%	Physical illness	90	3%
Adultery	409	13	Mental illness	53	2
Spousal cruelty	1,002	31	Disappearance	297	9
Familial cruelty	300	9	Criminal conviction	154	5
Desertion	596	19	TOTAL	3,206	100%
Murder attempt	41	1			

SOURCE: *Sifa tongji* n.d., 2: 108-12; 5: 47.

NOTE: The figures here do not represent all the judicial divorces granted in the years 1934-39, only those reported to the Judicial Yuan by district courts. They thus do not include the divorces given by county courts. Moreover, not all district courts forwarded this information annually; the number of courts reporting each year ranged from 44 to 130.

the only criterion for determining physical abuse. If the husband beat his wife so often that cohabitation became impossible, then divorce would be permitted, even if she suffered only slight injuries each time (Daliyuan 1918: 241-2739; Riasanovsky 1927: 147-48). This change in the definition of physical cruelty was advantageous to wives, but the law of the time was still heavily weighted in the husband's favor. A husband seeking divorce for this reason did not have to prove that his wife's ill-treatment resulted in serious bodily harm or that it was habitual. A light blow or slap from his wife still qualified as mistreatment so intolerable that divorce should be allowed (Riasanovsky 1927: 148).

The Republican civil code of 1929-31 equalized the definition of mistreatment, making it more difficult for men to gain divorce on these grounds, but otherwise affirmed the Daliyuan's guidelines for determining intolerable cruelty. Judges were to consider whether the cruelty was episodic or habitual and whether the injuries sustained were serious or slight. In a single incident, the injuries had to be serious: physical abuse that resulted in no wounds or only slight wounds, such as a slap in the face or a black eye, was not sufficient. But in the case of habitual abuse, the extent of injury was immaterial, and a divorce could be granted, however slight the wounds (*Zui-gao fayuan panli yaozhi* 1934, 1: 116; Chiu 1966: 176).

In application, the courts tended to be exacting in their defini-

tion of intolerable cruelty. The Shanghai women won a favorable judgment in only 28 percent of their suits and the Beijing women in only 17 percent (Tables 7.3 and 7.4).

Judges at the Shanghai and Beijing courts held the plaintiff to a very strict standard of proof, requiring her to supply witnesses to the beatings, hospital records detailing the extent of her injuries, police records if she had reported her husband, or court records if she had brought suit against him for assault and battery. Such evidence was necessary for every single instance of the alleged mistreatment.

But even providing such evidence did not guarantee success, for a judge still had considerable latitude in deciding whether the abuse made it impossible for the couple to continue their marriage. Generally women who could prove beyond doubt that they had been beaten severely just once did better than those who attempted to try to establish a pattern of habitual abuse that did not involve serious injuries. Thus, a Beijing woman got a divorce because her husband had injured her back seriously by beating her with a stool, an action for which he had also been convicted and fined (Beijing 1942: 5306). But another Beijing wife did not do as well against her husband of less than one year. She proved to the judge that her husband had beaten her three times since their marriage, for which he had been convicted and fined twice. The judge ruled against her, arguing that her injuries had only been slight and that three beatings in one year was not intolerable ill-treatment (Beijing 1942: 716).

In such divorce suits, a wife had to make sure that her own conduct was beyond reproach or, to use the language of the court records, that she was not deficient in the "way of a woman" (*fudao*). This the Supreme Court made clear in its handling in 1935 of an appeal by a young woman from Hunan. According to her testimony, her husband and father-in-law had bound her hands and feet with rope, keeping her shackled for several days. Her mother reported the incident to the police, and the two men were arrested and fined. In their defense the two maintained that they had treated her in such a way because they had suspected her of adultery. The Supreme Court, denying her appeal, reasoned that in this instance "if one party is dissolute in conduct, and the other party, in a sudden fit of rage, engages in excessive behavior [e.g., becomes physically abusive], that is clearly different from intolerable cruelty and cannot be used as a reason to request divorce" (*Sifa gongbao* 91, Jan. 1, 1936: 39-40).

In the Beijing and Shanghai cases, the judges also looked closely at a wife's behavior to assess the husband's guilt. In 1940 a Shanghai wife brought suit against her husband for having beaten her so severely that she required hospitalization. She reported the incident to the police and to the procurator's office. He was found guilty of assault and fined. At the divorce hearing, the husband explained to the judge that on the night of the beating he had just gotten off his shift as a bus driver, only to arrive home to find his wife and some friends playing mahjong. Worried that he would not be able to sleep through the noise and that his job performance would suffer as a result, he ordered his wife to stop the game and send her friends home. She refused, and "the conflict," as he called it, ensued. The judge denied her the divorce, reasoning that it was her disobedience that had provoked his attack in the first place (Shanghai 1940: 180-1-48).

In other instances as well the woman's behavior became the central issue of the case. One Shanghai husband, for instance, had beaten his wife for attiring herself in a manner (gold earrings, watch, and a patterned *qipao*, presumably given to her by her own parents) inappropriate for her station as a factory worker's wife (Shanghai 1941: 180-1-62). A Beijing husband had beaten his wife when she returned yet again to visit her natal family without his permission (Beijing 1942: 1294). In both cases, the judges deemed the wife's behavior to have been improper and the husband's understandable.

A Supreme Court decision of 1933 took the liberal position that cruelty included mental (*jingshenshang*) cruelty (Chiu 1966: 181). As applied by the Shanghai and Beijing courts, however, the notion of mental cruelty was largely restricted to cases of a husband forcing a wife to become a prostitute. In those cases, it was up to the woman to prove that she had not been willing. Generally she stood a better chance in her suit if she had done everything in her power to resist. The Shanghai court, for example, awarded a divorce in 1940 to a woman who had managed to run away immediately from the brothel to which her husband had pawned her for 250 yuan (Shanghai 1940: 180-1-48). And the Beijing court awarded a divorce to a woman who had attempted suicide by swallowing opium rather than to submit to her husband's plans to prostitute her (Beijing 1942: 7401-2087).

Women's suits against their husbands on the grounds of cruelty often included complaints against their parents-in-law as well (18

out of the 62 Beijing abuse cases initiated by women). Qing law considered a wife's ill-treatment at the hands of her husband's parents or grandparents to be a breaking of the bond. But for divorce to be in order, the physical abuse had to be without provocation and it had to result in injuries even more serious than the legal minimum required in the case of physical ill-treatment by a husband (Statute 319). A wife, on the other hand, could be divorced if she was not filial toward her parents-in-law. That condition covered about everything a wife could conceivably do, but the Qing code also spelled out in other statutes that she was to be beheaded if she struck her husband's parents or grandparents and strangled if she scolded them (Statute 319; Substatute 329-01).

In the Republican code, the fourth provision of Article 1052 allowed divorce when "the wife has so ill-treated the direct lineal ascendants [parents and grandparents] of the husband or has been so ill-treated by them that life in common becomes intolerable." This is the only provision for divorce that cannot be found in the Swiss and German codes that had served as its models. By including this as a ground for divorce, the lawmakers were recognizing the simple fact that for most couples in China, a life in common meant a life with the husband's parents and that troubles between a wife and her in-laws could be just as disruptive of a marriage as troubles between a wife and her husband. Nationwide from 1934 to 1939, familial cruelty served as the grounds in 9 percent of the divorces (Table 7.6).

In the Beijing cases this provision was cited principally by wives against their parents-in-law. Most singled out their mothers-in-law as being especially abusive. The following passage comes from a plaint submitted to the Beijing District Court in 1942 by the 22-year-old wife of a peasant:

Throughout my life, fate has brought me many hardships. My parents died long ago, one after the other, and I was raised by my stepmother. . . . When I turned thirteen years old, my uncle, Zhao Zicheng, arranged for my betrothal to Zhang Tingzhong, the eldest son of Zhang Wenli of Majiaying Village. When I married at age seventeen, my husband and I at first got along extremely well without any misunderstandings at all. . . . But my mother-in-law is perverse, unreasonable, and very vicious. Other people have nicknamed her Mother Tiger. When I entered her household, she was quite dissatisfied and frequently gave me haughty looks of disdain. Then she began to make oblique accusations and looked for opportunities to find fault with me. Most frightful of all was that she did not let her son share a room with

me. When we occasionally met in private, she would spy on us and then become even more abusive than before.

Finally, she continues, her mother-in-law's behavior turned her husband against her. They beat her often, deprived her of food, and forced her to work without rest. In early May 1942 they drove her out, whereupon she came to Beijing to live with her stepmother and to work as a servant in a Japanese household. In the end she got a divorce through court mediation (Beijing 1942: 1627).

Generally speaking, judges regarded anything short of actual physical abuse to be insufficient grounds. Thus, a Shanghai judge dismissed outright the suit of a wife who claimed extreme emotional torment by her husband's stepmother (Shanghai 1941: 180-162). Women charging physical mistreatment did not do much better. Judges held them to the same strict standard of proof as in cases of spousal cruelty, requiring them to provide witnesses or documentation for every instance of abuse. Even then, it was up to the judge to decide whether the abuse made a life in common intolerable. In practice, women found it just as difficult to gain a divorce on the grounds of in-law cruelty as on spousal cruelty.

Desertion and Disappearance

Desertion provisions of Qing law did little for women. In fact, they were targeted mainly against the woman rather than for her.¹³ If a wife ran away from her husband (*beifu zaitao*), she was to be punished with 100 blows of the heavy bamboo and he was permitted, if he so chose, to divorce her by selling her in marriage to another man. If she ran away and remarried, she was subject to strangulation after the assizes (Statute 116). If her husband abandoned her, she could do nothing in the first three years. If she left his home prematurely, without first getting the magistrate's permission, she was to be beaten 80 times with the heavy bamboo. If she left prematurely and remarried, the punishment increased to 100 blows (Statute 116). The only condition under which she could seek a dissolution of the marriage was if he had been absent more than three years (Substatute 116-02).¹⁴ Even then, she could not represent herself but had to be represented by her natal family against her marital family.

In the Republican period, she could represent herself. Marital litigation was now between the woman and the man as individuals

and not as families. A wife had the same rights and obligations as her husband. She was no longer subject to corporal punishment nor to sale by her husband in marriage to another. Moreover, the Daliyuan broadened the definition of desertion to allow for divorce in less than three years if the wife could prove malicious intent (Daliyuan 1915: 241-1610). In this change, the Daliyuan anticipated the civil code to come.

The expanded definition of desertion held out the promise of redress to women who had been abandoned by their husbands. Shanghai women cited it in 39 percent of their complaints and Beijing women in 51 percent, making it the second most common grounds for divorce (Tables 7.3 and 7.4).

Women charging desertion often made their case solely on the grounds of financial support. In their complaints they complained of husbands who held no regular jobs, of husbands who owned no property, of husbands who squandered their meager earnings on drugs, gambling, and frequent visits to brothels, and, worse yet, of husbands who had stolen and sold off their dowries to fund their low-life ways. Some expressed great resentment that their husbands' failure to support the family had forced them to seek outside employment as servants, waitresses, or factory workers. One 28-year-old Beijing woman explained: "I am just a weak woman who has never taken a step outside the family gate. How could I possibly be able to work?" (Beijing 1942: 6627). Another explained that because she came from a good family, she could not bear to do as her husband demanded and work at such a base job as being a servant (Beijing 1942: 7528). Most were now seeking temporary refuge with their natal families, but explained that their parents were too poor to support them for long. They thus had no choice but to sue for a divorce in order to safeguard their livelihood, the implication being that they then would be free to find a more financially solvent mate.

But failure to provide support alone was not considered sufficient grounds for divorce. The Supreme Court in the early 1930's ruled that malicious desertion had to include both physical and financial desertion. A husband or a wife who simply refused to live with the other was not guilty of malicious desertion, nor was a husband or a wife who simply refused to provide the other and their dependents with necessary living expenses. For malicious desertion to be present, the guilty spouse had to have left the couple's conjugal resi-

dence and to have ceased to provide financial support if it had been his/her responsibility to do so (Chiu 1966: 177, 183-84).

In actual cases, the judges made clear that a husband's simple failure to provide financially for his wife and other dependents did not, by itself, constitute willful desertion (for example, Beijing 1942: 1294). One Beijing judge told a 32-year-old woman that she herself was strong and could help her husband earn a living (Beijing 1942: 7543-7280). Nor was physical abandonment alone sufficient. As long as the husband continued to provide support, a wife's chances of winning a divorce for desertion were slim. One wife lost her suit in Shanghai in 1940 because her husband was able to convince the judge that he had sent her 30 yuan each month since leaving home (Shanghai 1940: 180-1-48). For women to prove desertion, then, they had to show that their husbands had, with harmful intent, abandoned them both physically and financially.

They also had to prove that the desertion was ongoing. If the defendant appeared in court and contested the divorce, then the plaintiff's chances of winning evaporated. It made no difference whether the defendant had in fact maliciously abandoned the plaintiff nor for how long. The important point was that the desertion was not ongoing. If, on the other hand, the whereabouts of the defendant were not known or if he/she failed to respond to a court summons, then the judges took that as evidence of continuing desertion.

With respect to disappearance, Republican law adhered to the three-year rule of the Qing code. Plaintiffs who wanted a divorce on these grounds had to demonstrate that the defendant had truly disappeared without a trace and that the disappearance had lasted for more than three years. They had to prove that there had been no communication with the defendant during that time and that a concerted effort had been made to discover the defendant's whereabouts. Six percent of the suits brought by Beijing women and 27 percent of those brought by Shanghai women charged disappearance (Tables 7.3 and 7.4).¹⁵

In court, plaintiffs brought forth witnesses who could verify that the spouse had not been seen or heard from for three years or more, copies of letters that they had written to others in an attempt to find out about the fate of the spouse, and copies of missing person announcements that they had placed in newspapers.

Plaintiffs charging disappearance generally found it easier to

win their cases than those charging desertion. The majority of the women won their cases—for instance, two-thirds in Shanghai (Table 7.4).

Adultery

In Qing law, the burden of conjugal fidelity lay entirely with the woman. An adulterous wife, along with her paramour, was to be punished with 90 blows of the heavy bamboo (Statute 366). If her paramour happened to be a married man, what he was being punished for was not a violation of his own marriage bond, but rather another man's. Similarly, if a married man had a relationship with an unmarried woman, he would be punished (80 blows with the heavy bamboo) not for committing adultery against his wife, but for abetting the other woman in her crime of fornication. This one-sided notion of conjugal fidelity extended to the Qing divorce laws as well. A woman had no right to divorce a husband for infidelity, but so strong was the husband's right that adultery was the only one of the seven conditions to which the three limitations did not apply. Criminal and civil jurisprudence in the 1910's and 1920's followed that of the Qing, making adultery a crime for a wife, but not for a husband, and a grounds for divorce for a husband, but not for a wife (Riasanovsky 1927: 147; *PCC* 1923: 90).

It was only with the adoption of the civil code in 1931 that women finally acquired the right to divorce an adulterous husband. Criminal law soon followed suit in its revised code of 1935, which made adultery an offense for both spouses, punishable with up to one year of imprisonment. (A criminal conviction, though, was not a prerequisite for bringing a civil suit for divorce on the grounds of adultery.)

Despite the liberal changes, powerful economic considerations worked against women taking full advantage of the new provision. A divorce, after all, would deprive a wife of her main source of support. It is no coincidence that the Shanghai and Beijing women seldom cited adultery as their sole complaint, but usually listed it along with spousal cruelty and/or desertion. So long as a husband did not abuse her physically and continued to provide for her economically, a wife was likely to turn a blind eye to his adultery.

Some legal deterrents as well restricted access to divorce for adultery. Article 1053 of the civil code specified that a spouse lost

the right to sue for divorce in the following circumstances: if the spouse consented to the adultery before it happened or pardoned it after it happened, or if more than six months had passed between the spouse's first knowledge of it and the initiation of legal proceedings, or finally, if more than two years had passed since its occurrence.

In practice, the time restrictions especially often frustrated a wife's or husband's attempt to divorce an adulterous spouse. Among the Shanghai cases, two plaintiffs (one woman and one man) lost their suits because the love letters they had supplied as evidence of their respective spouses' affairs were dated more than two years earlier (Shanghai 1940: 180-1-48). Another Shanghai plaintiff lost her suit because she had failed to file for divorce within six months of finding out about her husband's ongoing affair (Shanghai 1941: 180-1-62).

The women who won their adultery suits were those who met the deadlines and presented incontrovertible proof. A Beijing wife won because her husband had been living openly with his mistress. He had also been criminally convicted of adultery (Beijing 1942: 704). A Shanghai wife succeeded because her husband's paramour confessed to the affair and obligingly supplied the court with their love letters (Shanghai 1940: 180-1-48).

On balance, though the practice of the law fell well short of the ideals for gender equality reflected in the civil code, Republican women did gain greatly expanded access to divorce on the grounds of adultery. Nationwide, adultery was the third most common grounds, accounting for 13 percent of the reported divorces from 1934 to 1939 (Table 7.6). Among the Shanghai and Beijing women, it was the fifth most common grounds, with Shanghai women citing it in 11 percent of their complaints and Beijing women in 8 percent (Tables 7.3 and 7.4).

Code and Practice: The Issue of Concubines

Nowhere was the gap between legal intent and social reality more apparent than with concubines. The lawmakers faced an impossible dilemma. How were they to protect a social group that they wanted to declare illegal? They wished, on the one hand, to espouse the ideals of monogamy and male-female equality. This meant in principle outlawing concubinage. On the other hand, they wished to

give legal protection to the substantial number of concubines. In the end, the Legislative Yuan sidestepped the issue altogether. Nowhere in the code did they mention concubines. They left the problem of reconciling legal ideal with social reality to the Supreme Court and the Judicial Yuan (van der Valk 1939: 171, 193).

Concubines and Divorce

For decisions in actual cases, the Supreme Court and Judicial Yuan made clear that concubinage, not being marriage, could not be governed by the laws on divorce. But how then was the dissolution of the relationship between a concubine and her "husband" to be regulated? The answer to that depended upon how the law defined the relationship. If it was not a marriage, then what was it?

Qing law regarded concubinage, at least in matters of divorce, as a semilegitimate marriage. A concubine had some of the same rights to divorce as a wife, but not the same protection against arbitrary expulsion. A concubine, like a wife, could appeal for divorce if her husband beat her to the point of serious and permanent injuries, if her husband's parents or grandparents beat her without provocation to the point of serious and permanent injuries, if her husband or his relatives pawned or rented her, or if they forced or permitted her to commit adultery (Tai 1978: 94). Unlike a wife, however, she was not protected by the seven conditions and three limitations and could be expelled from the husband's household for any reason.

In the early Republican period, the Daliyuan attempted both to distinguish concubines more clearly from wives and to protect them from arbitrary expulsion. Concubinage, the court decided, was a contractual relationship between the "family head" (*jiazhang*) and a woman. Since it was not a marriage, the laws of divorce were not to apply. Instead, the plaintiff in a suit had to demonstrate that just cause (*zhengdang liyou*) existed to cancel the contract. This requirement applied as much to a family head as it did a concubine, thus giving her some legal defense against arbitrary expulsion (Daliyuan 1917: 241-662; Jingshi 1919: 239-5468, 1922: 239-8362).

This legal invention notwithstanding, in actual practice courts used the body of divorce laws to determine just cause. Hence, in a case in 1916, for example, the Capital Superior Court found, on the basis of the divorce laws, that forcing a concubine to become a prostitute was an acceptable grounds for severance of the relationship. It also found that excessive sexual demands were not legitimate

grounds, again on the basis of the divorce laws (Jingshi 1916: 239-3000). In 1922, the same court upheld the decision of a lower court that had, in accordance with the divorce laws, granted a concubine an end to her relationship on the grounds of intolerable mistreatment (Jingshi 1922: 239-8433).

In the 1930's the law took a stronger position toward providing legal protection for the concubine. The Supreme Court and the Judicial Yuan began by explicitly disavowing the contractual interpretation of concubinage that the Daliyuan had worked out (*Sifayuan jieshi huibian* 1932, 3: 172). In its place they substituted the idea of the concubine as a member of the "family head's" family, with many of the rights and responsibilities that such membership entailed (*Sifayuan jieshi huibian* 1932, 3: 139). The Republican civil code defined "family" (*jia*) as all those relatives and nonrelatives who "live together in one household with the object of sharing a life in common permanently" (Arts. 1122 and 1123). By this definition a concubine would thus be a member of the household.

The conferral on concubines of the status of family member meant that they enjoyed the same rights with respect to voluntary separation and forced expulsion as other family members—to wit, Article 1127, which held that "a member of a house who has attained majority, or, though a minor, has been married, may demand to be separated from the house"; and Article 1128, which held that the head of a house may expel a member only if he has a good reason for doing so.

The laws made it much easier for a concubine to sever her relationship with the family head, but no less difficult for the family head to sever his relationship with her. A Supreme Court decision of 1932 made this clear:

When a concubine no longer wishes to be a concubine, she is permitted to leave freely. This is based on the principle of male-female equality. It is to enable women who have been placed in an unequal position to free themselves of the restriction of having to continue as concubines. But if a family head wishes to sever his relationship with a concubine, he still must have just cause before it will be permitted (*L'Année Judiciaire Chinoise* 1934, 5: 147).

This is a striking revision of the Daliyuan's stance that both parties had to demonstrate just cause.

Case records suggest that the new principles were indeed honored in practice. In 1934, for example, a Beijing concubine, Yan Jing-

lin, brought suit against Li Zhi to dissolve their relationship of twelve years. Li Zhi filed a countersuit, denying her allegations, accusing her of plotting to run away with another man, and requesting that the court order her to continue to live with him. A judge of the Beijing District Court ruled for her and against him, noting that a concubine did not have to satisfy any particular grounds to end her relationship with a family head. Her desire to do so was alone sufficient. A disappointed Li Zhi appealed that decision to the Hebei Superior Court and then to the Supreme Court, both of which affirmed the lower court's ruling (Beijing 1934-35: 65-5-431-434).

A family head, though, had to demonstrate just cause for ending his relationship with a concubine. In practice, "just reason" amounted to one of the ten legal grounds for divorce. Thus, in 1942, for instance, an employee of the Hebei provincial government tried to expel his concubine by charging her with desertion and adultery, both acceptable grounds. But he failed to substantiate the charges, and the Beijing District Court denied his suit (Beijing 1942: 1244).

The Supreme Court and the Judicial Yuan also ruled that the laws regarding a wife's maintenance after a divorce could be applied to concubines. A concubine, just like a wife, was fully entitled to alimony if she was likely to suffer economic hardship after the severing of her relationship with the family head. As with a wife, the only condition was that she herself not be at fault (Chiu 1966: 189-90; *Sifa gongbao* 81, Oct. 10, 1935: 28-30).

The heart of the approach of the Judicial Yuan and the Supreme Court to concubines was to give them new legal rights. In doing so, they constructed a body of law that was the complete opposite of Qing law. In the Qing a "husband" could unilaterally and arbitrarily end the relationship, but in the later Republican period the concubine could. And, conversely, whereas in the Qing a concubine could secure a divorce only in certain circumstances, in the later Republican period it was the family head who had to demonstrate just cause.

Wives and Concubines

Ironically, the effort to safeguard the interests of a concubine limited the protection that the Supreme Court and Judicial Yuan could offer a wife. The concubine's newfound status as a member of the family head's household meant not only that he could not expel her without just cause, but also that the wife could not expel her at all,

no matter what. If a wife found a concubine's presence intolerable, she could do nothing to remove her from the household. Short of moving out herself, the wife's only recourse was to sue her husband for divorce or legal separation (*bieju*).

The Supreme Court in 1933 held that the husband's taking of a concubine constituted adultery and thus was a sound reason for divorce. Subsequently the Court further ruled that sexual intercourse between a husband and a concubine need not actually have occurred before a wife could charge adultery. It was only necessary that he be in the act of negotiating for a concubine (Chiu 1966: 179–80). This gave disgruntled wives their main legal recourse against a husband who took or wanted to take a concubine.

This limited prerogative was further restricted by several important qualifications. A wife had to demonstrate that she had not expressly or tacitly condoned her husband's action. She also could not bring suit if he had acquired the concubine more than two years earlier or if he had acquired her before the implementation of the family section of the civil code in May 1931.¹⁶

Women who were unable to use the adultery provision for these reasons did have the option of bringing suit against their husbands for judicial separation. Article 1001 of the civil code provided that a married couple bore a mutual obligation to live together, unless there was legitimate reason for them not to do so. The Judicial Yuan ruled in 1932 that a husband's keeping of a concubine justified a wife's refusal to cohabit. It did not matter when the husband had acquired the concubine or whether the wife had ever condoned it (*Sifayuan jieshi huibian* 1932, 3: 172). Thus, in 1934 the Beijing District Court awarded a judicial separation to a wife whose husband had brought two concubines into their home a decade earlier (Beijing 1934: 2960).

From the wife's perspective, these legal solutions were far from ideal. She could not attack her husband's relationship with a concubine directly, but only indirectly by the threat of her own divorce or separation from the husband. Even so, those were alternatives unavailable under the Qing.

The story of divorce in Republican China, then, was above all the story of the interaction of legal intent and social reality. The highly liberal code promised women easy access to divorce. But legal practice remained some distance from that promise. In court,

women came up against a number of barriers: societal notions about a woman's place, strict evidentiary requirements, restrictive time limitations, and the like. Nevertheless, legal intent was clearly an active agent for social change. Divorce became a real option for wives and concubines in the major cities during the Republican period, and they turned to the courts in numbers unimaginable in the Qing.

hired to protect against aborigine or bandit attacks. They evolved into organizations that obtained the rights to settle land in frontier areas.

6. Huang: Law and Magisterial Adjudication

1. See the discussion in Chapter 1.
2. See Chapter 1, note 3.
3. All references to the Qing code below will be to the compilation by Xue Yunsheng 1970 [1905], punctuated and edited by Huang Tsing-chia. The first number refers to the relevant statute as numbered by Huang. If a substitute, the subnumber is given after the statute number.
4. The Baxian cases kept at the Sichuan Provincial Archives are cataloged by category number, catalog number, then juan number. All citations below will follow this format. The date, by year, lunar month, and day, refers to the date on the original plaint, if available. If not, then to the first documented date.
The final bracketed letter and number are my own file references, by county: "l" for land, "d" for debt, "m" for marriage, and "i" for inheritance, followed by the case number.
5. All citations below from the Baodi archives will follow this format: the juan number, followed by year, and date of the first plaint in lunar month and day, if available; otherwise, the first documented date.
6. All citations from the Dan-Xin archive below will be by cataloger Dai Yanhui's numbers, followed by the lunar date of the first plaint.
7. Statute 93: for forcibly encroaching on another's property of one mu or less, 50 lashes, to increase by one grade for every five mu of land. From Kangxi times on, stipulated punishments were routinely adjusted downward by a factor of 0.4 (see Xue Yunsheng's annotation to Statute 1).
8. Matthew Sommer is writing a dissertation at UCLA on "Sex, Law, and Society in Qing China," drawing mainly on the Baxian archive.
9. David Wakefield's dissertation (1992) at UCLA is a full-length study of household division in the Qing and the Republic.

7. Bernhardt: Divorce in the Republican Period

The following short forms and abbreviations are used in the citations:

Beijing	Beijing difang fayuan (the Beijing District Court), 140 divorce case records mostly from 1942, kept at the Beijing Municipal Archives. [Cases cited as Beijing, date of case: catalog number.]
Daliyuan	Daliyuan, some 40 divorce case records from 1915 to 1918, kept at the Second Historical Archives in Nanjing. [Cases cited as Daliyuan, date of case: catalog number.]
Jingshi	Jingshi gaodeng shenpanting (the Capital [Jingshi] Superior Court, located in Beijing), 130 divorce case records from 1912

to 1925, kept at the Second Historical Archives in Nanjing. [Cases cited as Jingshi, date of case: catalog number.]

PCC *The Provisional Criminal Code of the Republic of China*

Shanghai Shanghai diyi tequ difang fayuan (Shanghai First Special District Court, originally the International Mixed Court, which reverted to Chinese control in 1927), 65 divorce case records from 1940 and 1941, kept at the Shanghai Municipal Archives. [Cases cited as Shanghai, date of case: catalog number.]

1. In Shanghai, for instance, the acknowledged divorce capital of the country, the annual crude divorce rate (number of divorces per unit of population) stood at .24–.31 divorces per 1,000 people in the late 1920's and early 1930's (Tan 1932: 50–56; Shen Dengjie and Chen Wenjie 1935: 310–14). The Shanghai data, compiled by the Shanghai Social Bureau (*Shanghai shehuiju*), are the most reliable statistics on divorce in Republican China. No national figures exist, and data on other cities are sketchy at best. For divorce rates in Western countries in the first half of the twentieth century, see Phillips 1988.

2. All references to the Qing code are to the edition by Xue Yunsheng 1970 [1905]. The number refers to the number of the statute or substatute.

3. All references to the Republican civil code are to *The Civil Code of the Republic of China* 1930.

4. The phrase “infamous crime” meant a crime the penalty for which included a curtailment of civic rights (*gongquan*)—for example, in the 1935 criminal code, the right to be a public official, the right to obtain public employment, and the four rights of election, recall, initiative, and referendum. A criminal lost these rights if he/she had committed an intentional offense that carried a prison term of six months or more. By specifying a minimum of at least three years' imprisonment or the commission of an infamous crime, the lawmakers were purposely ruling out crimes such as accidental injury or death that did not cast as great a dishonor on the other spouse (van der Valk 1939: 119; *Liufa quanshu* 1932: 295–96; Escarra 1936: 304–5).

5. The Daliyuan was established in Beijing in 1905 as part of the reorganization of the judiciary in the late Qing. It took its name from the Dalisi (the Court of Revision), one of the “Three High Courts” (*Sanfasi*) of the Qing, the other two being the Board of Punishments and the Censorate. The Daliyuan was replaced by the Supreme Court (*Zuigao fayuan*) in late 1927. The Supreme Court moved from Beijing to Nanjing in 1929.

6. In Republican law, the husband had presumptive custody of the children in both mutual consent and judicial divorce. But a couple could work out a different private arrangement, as this couple did. Moreover, the court could, in the interests of the child, appoint another guardian, either the mother or some other relative (Arts. 1051 and 1055). This was rare, however.

In the 1942 Beijing and 1940–41 Shanghai cases under study here, the

most a mother could expect from a judge was temporary custody of a young child until it was weaned. In only one case did a wife receive outright and permanent custody of her children and that was because her husband, an inveterate criminal and drug user, was again in prison serving a sentence for theft (Shanghai 1940: 180-1-48). It was in its provisions about child custody that the Republican civil code demonstrated some of its strongest support for the patrilineal family. The issue of child custody will be dealt with at greater length in my forthcoming larger study, *Women and the Law in Imperial and Republican China: Marriage, Divorce, and Property Rights*.

7. Tan 1932: 50–56; and Shen Dengjie and Chen Wenjie 1935: 310–14. Because of gaps in the Shanghai Social Bureau's statistics, the figure of 3,171 divorces does not include divorces from February, March, and April, 1932, or those from the year 1933.

8. As of the last day of 1931, for example, the country's prisons held 54,784 men, but only 1,199 women (*Shenbao nianjian* 1935: 280).

9. Evidence of the hiring of lawyers comes from the court mediation records (*hejie bilu*) and the court judgments (*panjue*). The remaining 38 cases from the 1942 Beijing records were either withdrawn by the plaintiff to pursue outside mediation or dismissed by the court because of procedural irregularities. It therefore cannot be known whether the people in these cases had also engaged lawyers.

10. The Shanghai divorce case records of 1940–41 do not contain the original plaints, where information on the occupations of the litigants is usually listed. But thirteen of the judgments do mention the husband's occupation. Ten of the thirteen men were variously factory workers, streetcar drivers, unemployed, or in jail for drugs or theft. The other three were a factory owner, a relatively well paid (100 yuan per month) office worker in a printing company, and an office worker in an insurance company (Shanghai 1940: 180-1-48, 1941: 180-1-62).

11. Alimony and compensation for damages in the event of a divorce are covered in Articles 1056 and 1057 of the civil code. Article 1057 specifies that the spouse not at fault for the divorce is entitled to maintenance from the other spouse if the divorce would cause financial difficulties. Article 1056 allows the innocent party to claim compensation for any financial, physical, or emotional damage she/he might have suffered at the hands of the guilty party. The financial aspects of divorce will be investigated in my book-length study.

12. The Beijing District Court was not unusually quick in its handling of such cases. According to the Judicial Yuan's national figures for 1936, 44 percent of the reported 5,725 marital cases (divorce included) heard by district courts were concluded within one month and 86 percent within three months (*Sifa tongji* n.d., 2: 116).

13. For a discussion of Qing legal cases involving runaway wives, see P. Huang 1991: 43–46.

14. The three-year rule here derives from the three years of mourning that a wife was to observe for a deceased husband (Xiao 1614: 3: 26a–b).

15. The disparity between the Shanghai and Beijing figures here arose from the fact that roughly three years earlier, in 1937, the Japanese army had attacked Shanghai, causing much death and disruption of people's lives. Most of the Shanghai plaintiffs seeking divorce on the grounds of disappearance made reference to the chaos of that time in their petitions. The lower percentage in the Beijing cases was much more representative, in line with the 9 percent figure of the nationwide cases from 1934 to 1939 (Table 7.6). Aside from this, the Japanese occupation of Shanghai and Beijing in the early 1940's had no discernible effect on the reasons people sought divorce. It also did not interfere with the normal workings of the legal system.

16. In 1940 the Supreme Court exempted wives in these circumstances from the normal requirement that a suit for divorce on the grounds of adultery be brought within six months of the discovery of the affair (Chiu 1966: 180).

8. Conner: Legal Profession in the Republic

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To conform to the citation style used in this volume, most statutes in this chapter are cited by source only, and the standard, full legal citations are not provided. The following short forms and abbreviations are used in the citations:

1912 Regulations (or the "Provisional Regulations")	"Lüshi zhanxing zhangcheng."
1927 Regulations (or the "Regulations")	"Lüshi zhangcheng."
Lawyers Law	"Lüshi fa."
Model Bar Regulations	"Lüshi gonghui biao zhun huize."
<i>NCH</i>	<i>North China Herald.</i>
<i>Shanghai Register</i>	<i>Shanghai lüshi gonghui huiyuan lu.</i>
Shanghai Regulations (or "Shanghai bar regulations")	"Shanghai lüshi gonghui zhangxing huize."
<i>Sifa ligui</i>	<i>Cengding guomin zhengfu sifa ligui.</i>
<i>ZFGB</i>	<i>Zhengfu gongbao.</i>

1. For example, van der Sprenkel 1962: 1; Bodde and Morris 1973: 4, 113, 180; Bell and Woodhead, eds. 1913: 661. This view is apparently taken on both sides of the Taiwan straits (see Zhan 1973: 292–93; Chen Haisheng 1989: 3). Writing in the 1930's, Chang Yu-chuan argued that lawyers in the "broad or strict sense of the term" existed before the Republican period, but

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