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# ARTICLES

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## DOES CHINA HAVE ALIMONY?: A STUDY OF CHINA'S CURRENT POST-DIVORCE FINANCIAL RELIEF SYSTEM

Jason J. Lee\*

### ABSTRACT

Under China's current Marriage Law amended and enacted in 2001, its post-divorce financial relief system comprises three disparate component parts. The principal part and the one analogous to the American concept of "alimony" or "spousal support" is the "post-divorce financial assistance system," as authorized under Article 42. The other two parts, "economic compensation at divorce" and "divorce damage claims system," as authorized under Article 40 and Article 46, respectively, complement the principal part. After a brief historical overview of China's alimony legislations, this Article offers a doctrinal analysis of the two more straightforward components as embodied by Article 40 and Article 46. Then it delves into an in-depth textual criticism of Article 42, and its concomitant 1984 SPC's Judicial Opinions and Article 27 of the 2001 SPC's Judicial Interpretations, the three constituents of the entire corpus of China's "alimony laws." Through the lenses of California's divorce laws, focusing on the current judicial interpretations and practices, the author candidly critiques the Chinese *sui generis* body of "alimony laws." The author arrives at such significant findings: (1) The statutes and judicial interpretations are too vague to be of much practical guidance when judges decide issues such as the eligibility prerequisites for invoking the law and the criteria for rendering financial assistance; (2) The law is fraught with loopholes; (3) The law is obsolete and does not suit the current socioeconomic reality of China. The author observes that such vague, defective and obsolete laws leave too many key issues to the judges' vagaries. The author makes concrete recommendations and suggests specific remedies to close the loopholes and fill the gaps in the current post-divorce financial assistance system. The author advances the

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theory that the absence of an elaborate, systematic set of alimony laws and procedural rules is the direct result of the Party-state's overemphasis on mediation and a diehard feature of the rule of man, to the detriment of the rule of law. The author describes this trait as the corollary of the triumph of Confucianism over Legalism as manifested in contemporary China. The author marks out the stumbling blocks to reforming China's current alimony laws and cautions that the eventual reification of the proposed rules and legal remedies will hinge upon the outcome of the rivalry between the synthesists' views of rule of law and the thin theories of rule of law.

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## I. HISTORICAL OVERVIEW OF CHINA’S ALIMONY LAWS

“Brevity” and “vagueness” are the hallmarks of all alimony or quasi-alimony provisions found in the statutes enacted in modern China. In 1911, China’s last imperial dynasty met its end and a modern era dawned. The Manchu rulers had compiled a draft civil code, but before it was officially promulgated, the Manchu Dynasty (1644–1911) was overthrown. The Manchu Code devoted one sentence to the subject of alimony: “if the divorce results from the husband’s fault, the husband should render the wife such temporary compensation as appropriate to support her life.”<sup>1</sup> The Code does not quantify “temporariness;” nor does

1. The Draft Manchu Code provides in pertinent part: “The petition of dissolution of marriage shall be adjudicated under the preceding provision; but according to Article 1362, if the divorce results from the husband’s fault, the husband should render the wife such temporary compensation as appropriate to support her life.” Da Qing Minlü Caoan (大清民律草案) [Draft Qing Dynasty Civil Code] art. 1369.

it set the legal parameters for “compensation as appropriate to support” the wife’s life, leaving it all to the wide discretions of the judges, a diehard feature of the rule of man.

The Provisional Civil Code of the Republic of China pronounced in 1913 fared slightly better than its immediate predecessor in that it allotted more words to alimony. It stated that “[t]he purpose of alimony is to give the wife a means of sustenance,” which must be “reasonable, being based upon the husband’s financial and social condition.”<sup>2</sup> Again, it failed to particularize “a means of sustenance” and “reasonableness.” Part IV “Family Law,” Article 1057<sup>3</sup> of the 1930 Civil Code of the Republic of China conditioned receipt of “appropriate financial support” on nonfault of the recipient spouse who has been subjected to “hardships in life” by divorce but fell short of defining “fault” or “hardships in life.” The laconic drafters of the above civil codes as pertaining to alimony could have employed more words to make the alimony provision’s import more precise and its application more expedient. In law, less is just less.

Under China’s current Marriage Law of 2001, the post-divorce spousal support is embodied in Article 42,<sup>4</sup> which reads:

If, at the time of divorce, either party has difficulties in life, the other party shall render appropriate assistance from his or her personal property like house, etc. Specific arrangements shall be agreed upon by both parties. In case no agreement is agreed upon, the people’s court shall make a decision.

The origin of Article 42 can be traced back to Article 33<sup>5</sup> of the 1980 Marriage Law of the People’s Republic of China, which in turn can

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2. Robert T. Bryan, Jr., *The Divorce Law of China*, 4 CHINESE SOC. & POL. SCI. REV. 126, 129–32 (1919). Bryan notes:

This section provides that in case the husband is guilty of one of the causes of divorce the wife, if she is not guilty of a cause for divorce and is successful in her suit, may obtain alimony. The husband is not entitled to alimony under any circumstances. The purpose of alimony is to give the wife a means of sustenance. The alimony must be reasonable, being based upon the husband’s financial and social conditions. A concubine is never entitled to alimony, as there was no marriage and she is not therefore entitled to a divorce.

*Id.* at 131.

3. The provision states: “If divorce subjects a party, not at fault, to hardships in life, the other party, albeit not at fault either, should render [the needy party] appropriate financial support.” *Min Fa* (民法) [Civil Code] (promulgated Dec. 26, 1930, effective May 5, 1931), art. 1057, <http://tsn.taitung.gov.tw/changbin/map-2/station3/station3-12.htm> [<https://perma.cc/8ZKS-A5KE>].

4. *Zhonghua Renmin Gongheguo Hunyin Fa* (中华人民共和国婚姻法) [2001 Marriage Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 28, 2001, effective Apr. 28, 2001), art. 42, [LAWINFOCHINA.COM](http://www.lawinfochina.com/display.aspx?id=1793&lib=law), <http://www.lawinfochina.com/display.aspx?id=1793&lib=law> [<https://perma.cc/3MGG-SHSV>].

5. Article 33 of the 1980 law states: “At divorce, if one party is experiencing hardships in life, the other party should provide appropriate financial assistance. Specific arrangements shall be agreed upon by both parties. In case no agreement is reached, the people’s court shall make a decision.” *Zhongguo Renmin Gongheguo Hunyin Fa* (中华人民共和国婚姻法) [1980 Marriage Law of China] (promulgated by the Standing

be traced back to Article 25<sup>6</sup> of its 1950 Marriage Law. All three spousal support provisions were passed by the same legislative body, the National People's Congress (NPC), within the space of half a century. They deliver identical legislative messages in almost identical language, contain identical ambiguities, and result in identical difficulties of judicial application. A Chinese proverb best captures the legislative inadequacies inhering in these provisions: "Old medicine contained in new bottles." It is China's Marriage Law of 2001 that is the subject of study of this Article.

## II. CHINA'S CURRENT TRIPARTITE POST-DIVORCE FINANCIAL RELIEF SYSTEM

### A. *Brief Overview*

In 2001, China's NPC amended its Marriage Law. Under the "newly" enacted marriage, its post-divorce financial relief system comprises three disparate component parts. The principal part and the one analogous to the American concept of "alimony" or "spousal support" is the "post-divorce financial assistance system," as authorized under Article 42. The other two parts, "economic compensation at divorce" and "divorce damage claims system," as authorized under Article 40 and Article 46, respectively, complement the principal part.

### B. *Article 40 of the 2001 Marriage Law Governs the Economic Compensation Regime That Resembles California Family Code § 4320(a)(2),<sup>7</sup> § 4320(b),<sup>8</sup> and § 26419*

Article 40 of the 2001 Marriage Law complements Article 42 in economically compensating a party at divorce who has expended time,

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Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) art. 33, LAW-LIB.COM, [http://www.law-lib.com/law/law\\_view.asp?id=44312](http://www.law-lib.com/law/law_view.asp?id=44312) [<https://perma.cc/6SW3-WBPG>].

6. Article 25 of the 1950 law provides:

Following divorce, if one party is not remarried and is experiencing financial difficulties in life, the other party should assist the needy party in making a living. The specific form and duration of such assistance shall be mutually agreed upon between the parties. If such an agreement cannot be reached, the people's court shall make a decision.

Zhongguo Renmin Gongheguo Hunyin Fa (中华人民共和国婚姻法) [1950 Marriage Law of China] (promulgated May 1, 1950, effective May 1, 1950) art. 25, NAT'L PEOPLE'S CONG., [http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content\\_1882723.htm](http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882723.htm) [<https://perma.cc/X3CS-TK58>].

7. CAL. FAM. CODE § 4320 (West 2013) ("In ordering spousal support . . . , the court shall consider the following circumstances . . . [t]he extent to which the supported party's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.").

8. "In ordering spousal support under this part, the court shall consider the following circumstances . . . [t]he extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party. *Id.*

9. Section 2641 provides authority for reimbursement of educational expenses

effort and resources during marriage in rearing the child(ren) of the marriage, looking after the elderly, and assisting the other party in professional and career advancement. The benefited party is statutorily required to pay compensation to the assisting party for the domestic and household services rendered and received. It bears striking similarities to California Family Code § 4320(a)(2), § 4320(b) and § 2641. It is meant to return the compensated party to the status quo ante that she had enjoyed before marriage.

Article 40, however, is only legally operative where “both husband and wife agree to separately own the property they respectively obtain during the existence of their marriage and either of them has spent considerably more effort on supporting children, taking care of the old or assisting the other party in work, etc . . . .”<sup>10</sup>

The prerequisite for invoking Article 40 is that the parties have signed a written prenuptial agreement or postnuptial agreement defining the respective parties’ separate property rights and stipulating that there will be no community property or assets created by virtue of and in the course of the said marriage. Most contemporary Chinese couples, however, adopt a community property system when they get married. It is not customary in China that couples betrothed to each other sign a prenuptial agreement. While it is a generally accepted practice in America for couples in contemplation of marriage to directly bargain and expressly contract regarding their respective property rights during marriage, especially at the time of divorce and death, Chinese lovers usually shy away from directly discussing provisions to be made in case of divorce and death. Therefore, talking about a prenuptial agreement during courtship is for sure a deal breaker and love killer in the Chinese culture. After marriage, it is rare that Chinese newlyweds execute postnuptial property agreements because broaching the subject signifies the intention of untying the knot in the minds of most Chinese and signing the postnuptial agreement is tantamount to tolling the death knell for their marriage. For these reasons, the divorce economic compensation regime has very limited practical application in the real world.<sup>11</sup>

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that have benefited primarily one party to the marriage. CAL. FAM. CODE § 2641 (West 2004). Although the education, degree, or license or the resulting enhanced earning capacity is not “property” subject to division, community expenditures for them are properly subject to reimbursement.

10. Zhonghua Renmin Gongheguo Hunyin Fa (中华人民共和国婚姻法) [2001 Marriage Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 28, 2001, effective Apr. 28, 2001), art. 40, LAWINFOCHINA.COM, <http://www.lawinfochina.com/display.aspx?id=1793&lib=law> [<https://perma.cc/3MGG-SHSV>].

11. Wei Chen, Lei Shi, & Wenjun He, *Empirical Research on Judicial Practice of the Post-divorce Relief System—Targeted on Sampled Cases Handled in a Grassroots People’s Court in Chongqing in 2010–2012*, 2014 INT’L SURV. FAM. L. 51 (2014). These three researchers sampled a total of 360 cases handled in a trial court in Chongqing and interviewed the respective judges who decided these cases. They discovered that out of the 360 cases, a party petitioned for Article 42 compensation at divorce in only fifteen cases, accounting for only 4.2 percent. They sought for economic compensation

C. *Article 46 of the 2001 Marriage Law Confers Statutory Authority to Award Fault-Based Tort Damages to the Injured Spouse at Time of Divorce*

China's current divorce laws are still heavily fault-based even though the fault theory of divorce was repudiated in California almost half a century ago through the enactment of the Family Law Act in the 1970s.<sup>12</sup> Article 46 of the 2001 Marriage Law provides:

“In any of the following circumstances which has led to the divorce of husband and wife, the innocent party shall be entitled to claim damages: a. bigamy; b. cohabitation between a person who has a spouse but cohabitates with a third person; c. domestic violence; d. maltreating or deserting any family member.”<sup>13</sup>

A divorce damage claim, as the moniker suggests, is a fault-based claim arising out of the commission by a spouse of any of the above-enumerated criminal and/or tortious conducts. It provides distinctly separate statutory grounds to award damages to the innocent party whose spouse is bigamous, domestically violent, living together with another person or maltreating or deserting a family member and whose commission of the crime or the tort(s) directly and proximately caused the breakdown of the marriage. The commission of the criminal and/or tortious acts must have caused bodily and/or mental injury to the other spouse. The award of economic damages to the victim is meant to punish the criminal culprit/wrongdoer and to recompense the injured party for the damages she has suffered. The criminal/tort damage award is different from the pure economic compensation regime, discussed above, in that it is not recompense for performing domestic services or for rearing the child(ren) of the marriage, looking after the elderly, or assisting the other party in professional and career advancement. It is penal and retributive. It is different from the post-divorce financial assistance, to be analyzed in great detail *infra*, in that it is not need-based. It is almost like strict liability. If one party commits one of the specified crimes or torts, the abused party is

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on the statutory grounds of childrearing, caring for the elderly, and helping with the other spouse's work. Unfortunately, however, none of these fifteen petitioners came from families which had adopted a separate property system. Therefore, the court rejected their claims on jurisdictional grounds. But six out of the fifteen petitioners ended up receiving some compensation purely through mediation. One was to receive 500 RMB per month for two years. The rest walked away with one-lump payments ranging from 3,000 to 72,000 RMB. *Id.* at 62.

12. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 70 (11th ed. 2018). The Legislative Committee Report has this to say about this historic change:

The bulk of our divorce laws was established in 1872. The plaintiff or cross-complainant was required to submit evidence to establish that at least one of a number of grounds for divorce existed. The grounds were adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance and conviction of a felony. Incurable insanity was later added.

*Id.*

13. 2001 Marriage Law of China art. 46.



automatically entitled to an award of damages. American legal scholars maintain that the reintroduction of fault into the Chinese divorce laws is an attempt to “grapple with a high incidence of domestic violence and divorce followed by the feminization of poverty.”<sup>14</sup>

By contrast, under California divorce laws, except in the case of an attempted murder,<sup>15</sup> marital fault plays no part in considering spousal support. “In determining the need for, the amount of and the duration of spousal support under the Family Law Act, the court is to ignore marital fault and is to base its determination solely on the circumstances of the parties, including the duration of their marriage and the ability of the supported spouse to engage in gainful employment.”<sup>16</sup>

### III. THE POST-DIVORCE FINANCIAL ASSISTANCE REGIME, THE MOST SIGNIFICANT OF THE THREE REGIMES, IS ANALOGOUS BUT NOT EQUIVALENT TO THE AMERICAN CONCEPT OF “ALIMONY” OR “SPOUSAL SUPPORT”

The Chinese law of post-divorce financial assistance, a *sui generis* set of rules, is something of an analogue, albeit not even a close one, to the American system of “alimony” or “spousal support,” for the reasons to be expatriated upon in the following pages. Unlike divorce economic compensation regime which is available only for families that have adopted a separate property system, the law of post-divorce financial assistance has no such limitation and is available to families that operate on the bases of both community-property and separate-property arrangements. The law of post-divorce financial assistance is need-based. It differs from the rule of divorce damage claim, which is a fault-based tort claim system. These three forms of financial relief are not mutually exclusive. They operate conterminously. They are applied on distinctly different factual and legal grounds and may be available to the same claimant if circumstances so justify.

#### A. *Doctrinal Analysis of Article 42*

The law is short, ambiguous, and painted with a broad brush. Without linguistic precision, it is hard to apply in judicial practice. It is susceptible of multiple interpretations and hence subject to inconsistent

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14. Charles Ogletree & Rangita de Silva de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 254 (2004).

15. In addition to any other remedy authorized by law, when a spouse is convicted of attempting to murder the other spouse, as punishable pursuant to subdivision (a) of Section 664 of the Penal Code, or of soliciting the murder of the other spouse, as punishable pursuant to subdivision (b) of Section 653f of the Penal Code, the injured spouse shall be entitled to a prohibition of any temporary or permanent award for spousal support or medical, life or other insurance benefits or payments from the injured spouse to the other spouse.

CAL. FAM. CODE § 4324 (West 2013).

16. *In re Marriage of Rosen*, 24 Cal. App. 3d 885, 892 (1972); *In re Marriage of Leib*, 80 Cal. App. 3d 629, 636 n.4 (1978).

and conflicting applications in terms of what constitutes “difficulties in life,” which is a prerequisite for invoking Article 42. The judicial interpretations<sup>17</sup> published by the SPC of China to construe the tenor of the statute, offer the following not-very-illuminating guidelines:<sup>18</sup>

At the time of divorce, if one party is indeed experiencing difficulties in life, according to Article 33 of the Marriage Law,<sup>19</sup> the other party should render [the needy party] appropriate financial assistance. If the needy party is still young and can work for a living but is experiencing temporary hardships, the other party can render him or her short-term or one-time financial assistance. When dealing with a marriage of many years, if one party is old, disabled, suffering from an illness or has lost his or her ability to work without means of sustenance, the other party should make proper arrangements in terms of housing and living support. During the period of receiving such financial assistance, if the recipient party is remarried, the assisting party may cease such assistance. After completing the financial assistance originally ordered or agreed upon between the parties, no further assistance shall be rendered even though requested by the recipient party.<sup>20</sup>

The above judicial interpretations serve to clarify the following issues. Financial assistance can be requested only at the time of divorce, not at any other time. This point is made clear by the qualifying phrase “at the time of divorce” that begins the judicial interpretations. It is short-term or one-time-based. Recipient spouse’s remarriage terminates the support. After the original judicially decreed or mutually agreed-upon assistance is completed, no more support is available under the law even though requested by the needy party. The concluding sentence also affirms the legislative intent that seeking and obtaining spousal support is a one-time deal, which is only available at the time of divorce, not available after divorce is finalized. Even though the above Judicial Opinion of the SPC was published in 1984 construing Article 33 of the 1980 Marriage Law, it is still followed by all the lower courts of China as binding

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17. Lei Shi, *Balancing Different Rights in Families: Did the Third Judicial Interpretation of Marriage Law of the PRC Achieve its Goals?*, 27 INT’L J.L. POL. & FAM.

381, 384 (2013) (“To some extent, judicial interpretations have the character of a source of law . . . courts, as the settlers of disputes, detect social change more directly and the procedures of judicial interpretations are much simpler than for legislation, so judicial interpretations can respond more quickly to social needs.”).

18. “Because the Marriage Law is very concise, many problems are left to the courts. Therefore, Judicial Interpretations are usually regarded as guiding the judges in the lower courts in resolving these problems. To some extent, they are as significant as the Marriage Law itself.” *Id.*

19. Referring to the Marriage Law of 1980.

20. Zuigao Renmin Fayuan Guanyu Guanche Zhixing Minshi Zhengce Falü Ruogan Wenti de Yijian (最高人民法院关于贯彻执行民事政策法律若干问题的意见 [Judicial Opinions of the Supreme People’s Court of China on the Resolution of Certain Issues Pertaining to the Application of Civil Laws and Policies] (promulgated by the Sup. People’s Ct., Aug. 30, 1984) art. 14, BAIDU.COM, <https://baike.baidu.com> [<https://perma.cc/3ZP7-36RJ>].

authority because the 1980 marriage law was not repealed but rather was revised and amended in 2001.<sup>21</sup>

But exactly what kind of difficulties does one have to experience at the time of divorce in order to qualify for financial assistance from the other party? The answer had to wait until December 24, 2001 when the Adjudicatory Committee of the SPC passed at its 120<sup>th</sup> meeting the “Judicial Interpretations Respecting Several Issues in the Application of the Marriage Law of the People’s Republic of China.”<sup>22</sup> Article 27 of the above said Judicial Interpretations provides the following guidance on point.

The phrase “difficulties in life a party experiences” referenced in Article 42 of the Marriage Law denotes the fact that *this party cannot lead a basic life in his or her locality* with her or his personal assets or with the portion of the property she or he gets following the division of community property. After divorce, one party *having no place to live* meets the requirement of “difficulties in life.” At divorce, when one party financially assists the other party using his or her personal assets such as a house, he or she can use either the right of possession or right of ownership at his or her disposal.<sup>23</sup> [Emphasis added]

Hence, the entire corpus of China’s post-divorce financial assistance law is comprised of Article 42 of the *2001 Marriage Law*, the 1984 SPC’s Judicial Opinions and Article 27 of the December 24, 2001 Judicial Interpretations issued by SPC.

Chinese alimony law has not reached the age of maturity, both literally and figuratively speaking. Compared with the copious space dedicated to alimony and the exhaustive treatment of alimony-related issues in the California Family Code, Article 42 and SPC’s Judicial Comments are pathetically meager, vague and obsolete to address the practical needs of Chinese divorcees.

### B. *Defects of China’s Post-Divorce Financial Assistance System*

The author sets out to examine China’s *2001 Marriage Law*, which is already 18 years old as of this writing. He cannot avoid examining its two precursors: *Marriage Law of 1950*, and the thirty-seven-year-old *Marriage Law of 1980*. This is because the 2001 law is a revision of the 1980 law, which in turn is a revision of the 1950 law. All three sets of laws,

21. The 1980 Marriage Law of China was adopted at the Third Session of the Fifth National People’s Congress on September 10, 1980 and was amended according to the “Decision on Amending the Marriage Law of the People’s Republic of China” on the 21<sup>st</sup> meeting of the Standing Committee of the Ninth National People’s Congress on April 28, 2001.

22. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释) [Judicial Interpretations Respecting Several Issues in the Application of the Marriage Law of the People’s Republic of China] (promulgated by the Sup. People’s Ct., Dec. 24, 2001), HUALV.COM, <http://66law.cn/tiaoli/1190.aspx> [<https://perma.cc/6HP5-KDF7>].

23. *Id.* art. 27.

being *in pari materia*, resemble each other so much that they are like triplets, rather than blood relatives separated by generations in age. In this Part, the author expounds some of the most salient defects inhering in China's alimony laws.

### 1. The First Eligibility Criterion is Flawed

By the fair import of the Judicial Interpretations, one must meet one of the two criteria in order to qualify for post-divorce financial assistance. The first is that one "cannot lead a basic life in his or her locality" and the second is that one "has no place to live." Such antiquated judicial guidelines ignore the already metamorphosed socioeconomic reality of China around the turn of the millennium when SPC issued them. SPC failed miserably to contemplate the much-improved living conditions of the Chinese when its GDP became the world's second largest in the 2010s.

China's economy has grown by leaps and bounds since it opened its doors in 1978. People's living standard has risen to a new plateau since the turn of the twenty-first century. Very few people would be so destitute after divorce that they cannot lead a basic life or has no place to live. In 1980, China's GDP was only \$191.15 billion USD and its citizens' annual per capita income was only about \$195.<sup>24</sup> In 2001 when China joined WTO and passed its current Marriage Law, its GDP increased seven times to \$1,339.4 billion USD and its citizens' annual per capita income rose nearly five and half times to \$1,053.11.<sup>25</sup> In July 2011, the World Bank Group ranked China as an upper-middle-income economy.<sup>26</sup> In 2017, China's GDP jumped up to \$12,237 billion USD, representing nearly 20 percent of the world economy while its citizens' annual per capita income grew more than 45 times.<sup>27</sup> The steep rise of people's living standard rendered the first criterion obsolete and of little practical applicability.

### 2. The Second Eligibility Criterion is Equally Flawed

The provision concerning financial assistance is devoid of any serious purpose of practical applicability because its alternative requirement, i.e., "no roof over one's head," is also hard to meet. China's economic growth resulted in widespread social wealth, making it very unlikely that

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24. *GDP (current US\$)*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN&view=chart> (last visited Nov. 8, 2018); *GNI per capita, Atlas method (current US\$)*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=CN&view=chart> (last visited Nov. 8, 2018).

25. *GDP (current US\$)*, WORLD BANK, *supra* note 24; *GNI per capita, Atlas method (current US\$)*, WORLD BANK, *supra* note 24.

26. *Changes in Country Classifications*, WORLD BANK: THE DATA BLOG (July 1, 2011), <https://blogs.worldbank.org/opendata/changes-country-classifications> [<https://perma.cc/74UX-D6JJ>] (The World Bank in 2011 defined an upper-middle-income economy as having an average annual per capita income of between \$3,976 and \$12,275 USD).

27. *GDP (current US\$)*, WORLD BANK, *supra* note 24; *GNI per capita, Atlas method (current US\$)*, WORLD BANK, *supra* note 24.

divorce would reduce a party to destitute homelessness. Even if a divorcee does not have enough money to purchase housing, she can rent a place to live. Moreover, her employer may provide her with a room at her work unit. In the countryside, it does not take much money to build some simple abode. Furthermore, Chinese culture and Chinese society still attach great importance to family values, family love, family ties and kinship. The divorcee may very well be welcome to go to live with her parents, her aunt, her uncle, her brother, her sister, or her cousin. In judicial practice, the second criterion has little applicability as well.

3. Using One's Housing to Assist the Needy Party is Impractical, Overly-Burdensome and Overly-Compensatory

Under Article 27 of the December 2001 Judicial Interpretations, "At divorce, when one party financially assists the other party using his personal assets such as a house, he or she can use either the right of possession or right of ownership at his or her disposal." This guideline foists upon the assisting spouse an undue obligation that conflicts with his constitutionally guaranteed absolute property right. Like Americans, to most Chinese, a house or a condo unit is the most valuable capital asset or capital investment. Particularly following the division of community property and reaffirmation of separate property rights in real property, as memorialized in a divorce decree, it would be unreasonable and unfair for the property owner spouse to either yield right of possession or the right of ownership to the needy party. Hence, the requirement to financially assist the needy party with one's real property, by the conveyance of either the right of possession or the right of ownership, runs contrary to the inviolability of one's private property rights sanctified and protected by China's Property Laws. Furthermore, most Chinese couples only own one house or one condo unit. If the owner spouse gives possession of the housing to the needy party, he would be without a roof above his head. If he rents one room out of his flat to the ex-spouse or permits her to continue to live in a room for free as suggested by Professor Guodong Xu,<sup>28</sup> they would be living under the same roof again, which defeats the purpose of their divorce. If he is required to convey ownership right to the needy party, it would constitute undue burden to the supporting ex-spouse and overcompensation to the supported, which is unfair and inequitable and defeats the purpose of the post-divorce financial assistance regime. For these reasons it is the most unpopular element of the entire post-divorce financial assistance regime because it has rarely been applied.<sup>29</sup> Essentially all post-divorce financial assistance was offered and accepted<sup>30</sup> in cash. Rarely is it in the form of realty.<sup>30</sup>

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28. XU GUODONG (徐国栋), LÜSE MINFA DIAN CAOAN (绿色民法典草案) [Green Civil Code Draft] 203 (2004). The author is a law professor at Xiamen University Law School, China.

29. Chen *et al.*, *supra* note 11.

30. *Id.*

#### 4. An Arithmetic Formula Needs to Be Developed to Calculate the Proper Amount of Post-Divorce Financial Assistance

Since it is impractical to offer financial assistance in the form of realty, cash payment is the most convenient way of rendering support. Instead of guessing the proper amount of post-divorce financial assistance or simply pulling a number out of the thin air, a scientific arithmetic formula should be developed. The formula should be modeled after *Dissomaster*, the software program that California family law judges and lawyers utilize in computing the amount of spousal support, taking into account parties' income, living expenses, mandatory retirement contributions, spousal support or child support obligations from prior marriages or relations, health insurance premiums, itemized deductions and/or hardship deductions. Furthermore, a general rule of thumb like Santa Clara County Court Rule 3.C can serve as a guideline for the judges. Under Rule 3.C, if a supported spouse is not receiving child support, she or he is entitled to 40 percent of the net income of the supporting party minus 50 percent of the net income of the supported spouse.<sup>31</sup> As an illustration, assuming that the husband's net monthly income is RMB 10,000 RMB and the wife's net monthly income is 5,000 RMB, all else being equal, the wife is entitled to a monthly financial support of 1,500 RMB.  $[(10,000 \times 40\%) - (5,000 \times \frac{1}{2}) = 4,000 - 2,500 = 1,500]$ . If the husband makes RMB10,000 and the wife makes zero income, then the wife is entitled to RMB4,000 in monthly post-divorce financial assistance.  $[(10,000 \times 40\%) - 0 = 4,000 - 0 = 4,000]$ .

#### 5. Scholarly Empirical Research Shows That Only 5 Percent of Divorcees Benefited From the Post-Divorce Financial Assistance Regime

Studies show that approximately 95 percent of the divorcees did not avail themselves of the statutory financial assistance regime. Most of those who benefited are the elderly, the disabled, the mentally or physically-ill, the unemployed, the retired, the homeless and the illiterate.<sup>32</sup>

A pioneering tripartite study was undertaken by Professor Yinlan Xia<sup>33</sup> right after the passage of the 2001 Marriage Law. She found that, from May 2001 to December 2002, out of a total 1,302 divorce cases filed and adjudicated in the No. 2 Intermediate People's Court of Beijing, only 95 cases, namely 7.3 percent, involved post-divorce financial assistance. Out of the 95 assisted/supported parties in the 95 cases, 86 were women, making up 90.8 percent while only seven were men. Professor Xia also

31. PRACTICE UNDER THE CALIFORNIA FAMILY CODE: DISSOLUTION, LEGAL SEPARATION, NULLITY 179 (M. Dee Samuels & Frederick A. Mandabach eds., 2008 ed.).

32. Wang Geya (王歌雅), *Lihun Jiuji Zhidu: Shijian yu Fansi* (离婚救济制度: 实践与反思) [Divorce Relief System: Practice and Reflection], FAXUE LUNTAN (法学论坛), Mar. 2011, at 30.

33. Yinlan Xia is a law professor at China University of Political Science and Law in Beijing.

surveyed 439 divorce cases filed and decided in Harbin<sup>34</sup> Intermediate People's Court during the same time and found that only 24 cases, i.e., 5.46 percent, involved post-divorce financial assistance. Out of the 24 assisted/supported parties in the 24 cases, 22 were women, while only two were men. Professor Xia's study culminated in her final review of 200 divorce cases decided during the same time period in the southern city of Xiamen, across the strait from Taiwan. She found that only five cases, 2.5 percent, involved post-financial assistance.<sup>35</sup>

Six years later in 2008, Professor Geya Wang<sup>36</sup> conducted a similar empirical study of 143 divorce cases from Beijing and 120 divorce cases from Harbin. Professor Wang found that the number of parties that sought and obtained post-divorce financial assistance was three in Beijing and six in Harbin.<sup>37</sup>

In 2014, three scholars published the results of a much more comprehensive empirical study of not only the post-divorce financial assistance regime, but also of the economic compensation at divorce and the divorce damage claims regimes.<sup>38</sup> The three researchers studied 120 divorce judgments from each of the three years between 2010 and 2012 for a total of 360 cases decided in Chongqing, located in the southwestern part of China. They discovered that out of the 360 cases, only 11 cases petitioned for post-divorce financial assistance on the statutory basis of Article 42, accounting for only 3.1 percent. Out of the 11 petitions, five were rejected by the court "based on no factual or judicial grounds."<sup>39</sup> Of the remaining six petitioners who were awarded financial assistance, only one received it via a court decree. She had requested 53,000 RMB (approx. \$8,000 USD) but the court reduced it to 6,000 RMB (equivalent to \$900 USD). The other five received financial assistance via mediated settlement, receiving 100,000, 48,000, 6,000, 5,000 and 1,000 RMB, respectively.<sup>40</sup> It is noteworthy that all received the post-divorce financial assistance in cash and that none of them received it by way of housing assistance.

## 6. The Protection of the Alimony Law is Skewed to Benefit Far More Women than Men

Most of the support applicants are women<sup>41</sup> probably because Chinese women have traditionally played the role of household managers, caretakers of children and the elderly, stay-home supporters of their

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34. Capital city of Heilongjiang Province in Northeast China.

35. XIA YINLAN (夏吟兰), LIHUN ZIYOU YU XIANZHI LUN 245 (离婚自由与限制论) [Divorce Freedom and Limitation] (2007).

36. Geya Wang is a law professor of Heilongjiang University Law School, China.

37. Wang, *supra* note 32, at 30.

38. Chen et al, *supra* note 11.

39. *Id.* at 61.

40. *Id.*

41. XIA, *supra* note 35, at 245. Approximately 90.8 percent of post-divorce financial assistance beneficiaries are women.

husbands' careers, rather than bread winners. Women also tend to be more disadvantaged financially by divorce due to limited marketable job skills.<sup>42</sup> Surveys show substantial differentials between women's income and men's income. One study indicated that in 1989 in China's cities and townships, the average income of women was 77.5 percent of that of men and that 10 years later in 1999, the average income of women dropped to 70.1 percent of that of men. Another study of the disparity between women's income and men's income in Shanghai found out that in 1989, the average income of women was 80 percent of that of men and that 10 years later in 1999, the average income of women fell to 73 percent of that of men. In 2007, a survey conducted by the Center for Women Studies of the Chinese Academy of Social Sciences revealed that the average income of women interviewed was only 63 percent of that of men.<sup>43</sup> What is worse, these indigent litigants who seek support often appear in *propria persona* and do not comprehend the substantive law; much less do they know how to navigate the labyrinth of the court rules and procedures.

The meager spousal support amount awarded divorcees has the effect of inhibiting women from untying the knot and from breaking free from the shackles of unhappy marriages and their unfortunate circumstances. Cynics may argue that this situation promotes stability of the family unit and promotes the state's policy of achieving a self-supporting society. Under Chairman Mao, women enjoyed equal social and political status as, if not higher than, men. "Women holding up half of the sky" was the slogan popular in Mao's days. Some women who grew up under the rule of Mao might feel simply too proud to "beg for" financial assistance from men, which is another contributing factor to the low percentage of divorcees seeking spousal support.

7. The Standard of "Inability to Lead a Basic Life" and "Nowhere to Live" Should be Superseded by the "Standard of Living Established During Marriage"

China's NPC should abrogate "the inability to afford basic subsistence" and "nowhere to live" criteria for invoking the post-divorce financial assistance law and supersede them with "the standard of living established during marriage," a benchmark generally employed by judges in California and in the United States. Instead of being the last resort a divorcee turns to before becoming a vagrant, the revised new spousal support statute should make sure that, in addition to providing the other party with the basic necessities of life such as food, clothing and shelter over her head, it should also ensure that she or he enjoys the same

42. Wang Geya (王歌雅), *Jingji Bangzhu Zhidu de Shehui Xingbie Fenxi* (经济帮助制度的社会性别分析) [Analysis About the Social Gender with Economic Assistance System], *FAXUE ZAZHI* (法学杂志), no. 7, 2010, at 69.

43. Xu Anqi (徐安琪), *Zhuanxixi Jiating Xingbie Juese Yishi de Bianqian* (转型期家庭性别角色意识的变迁) [Changes in Family Gender Role Awareness], in *NÜXING DE SHENG CUN ZHUANGKUANG HE SHEHUI XINTAI* (女性的生存状况和社会心态) [Women's Living Conditions and Social Mentality] 182, 205 (Meng Xianfan ed., 2010).



standard of living established during her marriage as provided for under California Family Code § 4330(a).<sup>44</sup> Even if the divorcee is able to survive on her own means, she is still entitled to spousal support.

In California and in many other states, multimillionaire divorcees are still awarded huge sums in spousal support. In the well-publicized divorce case of former Los Angeles Lakers basketball star Kobe Bryant, his wife Vanessa Bryant was going to be awarded an annual alimony of \$1 million, plus \$18.8 million in property settlement and \$365,000 in monthly child support if they had gone through with their divorce.<sup>45</sup> Another example to illustrate this point is the case of President Donald Trump when he divorced his second wife, Ivana Zelnicek Trump. When everything was said and done, Ivana Trump walked away with \$350,000 in annual alimony after Donald Trump paid her \$14 million in property settlement and promised to pay her \$350,000 per year for child support to continue her life style as a multimillionaire that she was accustomed to during her marriage with the real estate mogul.<sup>46</sup>

C. *Chinese Alimony Laws Should Be Revised to Close the Loopholes and Fill the Gaps*

1. Institute Financial Support Orders Pendente Lite, Including Award of Attorney's Fees and Costs

*The 2001 Marriage Law of China* and its two Judicial Interpretations are silent on the issue of whether the divorcing parties can apply for and have the court issue an order to obtain financial assistance during the pendency of divorce proceedings. This is in sharp contrast to the California law explicitly authorizing the court to issue support orders during the pendency of any proceeding for dissolution of marriage.<sup>47</sup> Actually, the applicant can obtain a support order pendente lite within a couple of months of filing the divorce petition. Its purpose, *inter alia*,

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44. In a judgment of dissolution of marriage or legal separation of the parties, the court may order a party to pay for the support of the other party an amount, for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage . . . .

CAL. FAM. CODE § 4330(a) (West 2013).

45. Andrew J. Botros, *Kobe Bryant May Have Been Facing \$1.36 Million in Monthly Spousal and Child Support Payments if Divorce Went Through*, LARRY BROWN SPORTS (Jan. 14, 2013), <http://larrybrownsports.com/everything-else/kobe-bryant-spousal-child-support-divorce> [<https://perma.cc/X7L8-2MPK>]; Michael Reicher, *Kobe Bryant Divorce: Wife Vanessa gets \$18.8 Million in Property*, L.A. TIMES (Jan. 21, 2012, 6:10 AM), <https://latimesblogs.latimes.com/lanow/2012/01/kobe-bryant-divorce-wife-vanessa-gets-188-million-in-property.html> [<https://perma.cc/2LZC-NSKC>].

46. Richard D. Hylton, *Trumps Settle: She Gets \$14 Million Plus*, N.Y. TIMES (Mar. 21, 1991), <https://www.nytimes.com/1991/03/21/nyregion/trumps-settle-she-gets-14-million-plus.html> [<https://perma.cc/2C82-884U>].

47. "During the pendency of any proceeding for dissolution of marriage or for legal separation of the parties . . . the court may order . . . (a) either spouse to pay any amount that is necessary for the support of the other spouse . . . ." CAL. FAM. CODE § 3600 (West 2004).

is to assist a spouse to live in substantially the same manner to which he or she had become accustomed.<sup>48</sup> It is also to provide the less financially able spouse with the financial means to properly litigate that spouse's side of the controversy.<sup>49</sup> The new proposed law would provide support solely based on the respective parties' current income.<sup>50</sup> Attorney fees and court costs ought to be awarded to the financially less-able party for her to have equal access to legal representation, to level the playing field, and to enable him or her to maintain or defend the proceeding during its pendency. The proposed provision respecting award of attorney's fees and court costs could be modeled after California Family Code sections 2030(a)(1) & (2).<sup>51</sup>

The award of temporary financial support and attorney's fees & costs to the party who is at a financial disadvantage will help balance the otherwise unequal economic powers. It will tip the balance in favor of justice and equity by affording the recipient spouse some economic leverage. It will make her stand on her feet, and equally equip her to fight for her rights to child custody, visitation, child support, division of community property, and pursue her rights to economic compensation and divorce damages.

## 2. The Proposed New Law Should Require the Supporting Spouse to Make Provisions for the Supported Spouse in Case of the Death of Either Party

Another glaring loophole is the conspicuous absence of a provision in China's alimony law specifying what happens to the support obligation in case of the death of one of the parties. Article 27 of the "Judicial Interpretations" of Article 42 of the 2001 Marriage Law explains that

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48. *In re Marriage of Winter*, 7 Cal. App. 4th 1926, 1932 (1992).

49. *In re Estate of Fawcett*, 232 Cal. App. 2d 770, 784 (1965); *Heller v. Heller*, 88 Cal. App. 2d 603, 606 (1948).

50. *Marriage of Winter*, 7 Cal. App. 4th at 1933.

51. (1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a government entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for the attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

(2) When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward. CAL. FAM. CODE § 2030 (West 2004).

remarriage of the supported spouse terminates the support but is silent as to what legal effect death of the obligor party has on the support obligation. This huge void in the law creates ambiguity and perplexity to judges, but at the same time confers on them unfettered power to do whatever they want. This is certainly another instance of the rule of man at work. It results in unequal and inconsistent application of the alimony laws. It may breed abuses and injustices.

Generally speaking, the obligation to pay spousal support is a personal responsibility. Death of one of the parties extinguishes the personal responsibility under contract law. Under California Family Law, death of one of the parties terminates the obligation of support unless otherwise agreed by the parties in writing.<sup>52</sup> However, even without a written agreement, the court may order the supporting spouse to maintain life insurance naming the supported party as beneficiary, purchase an annuity for the supported spouse, or establish a trust to provide for the support of the supported spouse, so that the death of the supporting spouse will not leave the supported party in the lurch.<sup>53</sup>

Moreover, a proposed provision should provide for the supported spouse in the event of the death of the supporting spouse because, unlike their American counterparts, the supported spouses in China are comprised mostly of the elderly, the disabled, the mentally or physically-ill, the unemployed, the retired, the homeless and the illiterate,<sup>54</sup> 90.8 percent of which are women.<sup>55</sup> The new provision that fills the void should require the supporting spouse to take one or a combination of the following affirmative actions: (i) purchase a life insurance policy on the life of the supporting spouse; (ii) purchase an annuity contract; (iii) establish a trust; and naming the supported spouse as beneficiary in each of the three scenarios. Failing the above, the court may require that the estate of the supporting spouse be responsible for the remainder of the support obligation.

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52. "Except as otherwise agreed by the parties in writing, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party." CAL. FAM. CODE § 4337 (West 2013).

53. [W]here it is just and reasonable in view of the circumstances of the parties, the court, in determining the needs of a supported spouse, may include an amount sufficient to purchase an annuity for the supported spouse or to maintain life insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support, or may require the spouse required to make the payment of support to establish a trust to provide for the support of the supported spouse, so that the supported spouse will not be left without means of support in the event that the spousal support is terminated by the death of the party required to make the payment of support.

CAL. FAM. CODE § 4060 (West 2013).

54. See Wang, *supra* note 32.

55. See Xia, *supra* note 35.

### 3. The Ability to Pay Support Should be Part of the Alimony Law

Another gaping hole in China's current post-divorce financial assistance law is the omission of the ability to pay support, which creates so much ambiguity. It is another gap that the lower court judges are called upon to fill given their unfettered discretionary power. The current financial assistance law and the judicial interpretations insist on the other party rendering the needy party appropriate financial assistance without considering the relevant issue of whether the other party has the ability to render the required financial assistance or not. The ability to pay support is not only a relevant factor but also a threshold issue to decide before the court can issue a financial support order. In determining the amount of spousal support, a California court is instructed to consider many factors enumerated in the Family Code from (a) through (n), including (c) the ability of the supporting party to pay spousal support; (d) needs of each party based on the standard of living established during marriage; (e) the obligations and assets of each party; (f) duration of marriage; (g) ability of supported party to engage in gainful employment; (h) parties' age and health, etc.<sup>56</sup>

In an early case, the California Supreme Court held that a trial court's refusal to consider evidence of lack of ability to pay support constituted prejudicial error requiring reversal of the support order.<sup>57</sup> On the other hand, when a husband quit his higher-paying job after separation and took up a lower-paying job just to avoid paying spousal support, the court awarded the wife support on the basis of his earning capacity. The court imputed to him a higher income commensurate with his earning ability rather than using his actual lower earnings in calculating the amount of support.<sup>58</sup> California Family Code § 4320(a) and (c) instruct the court to take into account the spouses' respective earning capacities in determining spousal support.<sup>59</sup> California Supreme Court defined "earning capacity" to mean the level of income that a spouse is reasonably capable of earning on the basis of his or her age, health, education, marketable skills, employment history, and the availability of the necessary

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56. CAL. FAM. CODE § 4320 (West 2013).

57. *Arnold v. Arnold*, 215 Cal. 613, 614–15 (1932).

58. *Meagher v. Meagher*, 190 Cal. App. 2d 62, 63–65 (1961).

59. [T]he extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all the following:

(1) the marketable skills of the supported party; the job market for those skills; the time and expenses required for training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

CAL. FAM. CODE § 4320 (West 2013).

employment opportunities.<sup>60</sup> Courts, however, historically base support on actual income. But when the supporting spouse, in bad faith, purposely tries to shirk his or her obligation of support by quitting or refusing to seek or accept gainful employment, intentionally not applying himself to business, or willfully reducing his income to an artificial level, courts will calculate the support amount on the basis of earning capacity instead of actual income.<sup>61</sup>

California Family Code section 4320 with its enumerated factors to be considered for purposes of determining spousal support, and the above cited California case law provide suitable paradigms for formulating a provision concerning the ability to pay financial assistance to fill the void in China's post-divorce financial assistance law.

#### 4. The Court Should Retain Jurisdiction to Modify, Extend or Terminate Post-Divorce Financial Assistance Based on Material Change of Circumstances

Article 14 of the 1984 SPC's Judicial Opinions unambiguously limits the availability of financial assistance to the time of divorce and permanently and inalterably cuts it off after the completion of the "original judicially decreed or mutually agreed-upon financial assistance."<sup>62</sup> The law is not only rigid and inflexible but also unsympathetic and inhuman. People's fortunes and circumstances change with the passage of time. Therefore, this author suggests that a revamped Chinese alimony law would mandate that in a marriage of ten years or more the court shall retain indefinitely both personal jurisdiction and subject matter jurisdiction for the divorce case to award new support, modify or terminate existing support upon showing of material changes of circumstances. This would bring the Chinese post-divorce financial assistance law on a par with its California counterpart.<sup>63</sup> Of course the parties can waive their respective right to receive post-divorce financial assistance from each other permanently and request that the court terminate jurisdiction to award financial assistance in the future if they act in an intelligent and well-informed manner. The parties can also choose to relinquish financial assistance for the time being and pray for the court to reserve jurisdiction to award financial support in the future in case one's financial situation

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60. *In re Marriage of Simpson*, 4 Cal. 4th 225, 234 (1992).

61. *Philbin v. Philbin*, 19 Cal. App. 3d 115, 121 (1971); *see also In re Marriage of Meegan*, 11 Cal. App. 4th 156, 163 (1992).

62. *Zuigao Renmin Fayuan Guanyu Guanche Zhixing Minshi Zhengce Falü Ruogan Wenti de Yijian*, *supra* note 20, art. 14.

63. (a) Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely in a proceeding for dissolution of marriage or for legal separation of the parties where the marriage is of long duration.

(b) For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration . . . .

CAL. FAM. CODE. § 4336 (West 2013).

materially changes such as losing one's job, becoming ill or disabled. Material change of circumstances shall also include getting a higher-paying job, one's company going public and winning the lottery, which will be grounds for reducing, increasing, extending or terminating previously ordered financial assistance. The recommended revision to the Chinese post-divorce financial assistance law should also include the prerogative of the parties to enter into a written agreement at the time of divorce that cancels the legal effects of death, remarriage and cohabitation, extends the support obligation beyond death, remarriage and cohabitation,<sup>64</sup> and provides for the nonmodifiability and/or irrevocability of an agreement for spousal support.<sup>65</sup> This is probably wishful thinking. It is simply too rosy a picture being painted of the current Chinese legislators.<sup>66</sup>

#### 5. Strengthen Enforcement Mechanisms to Compel Compliance With Judicial Decree or Marital Settlement Agreement Re Post-Divorce Financial Assistance

The enforcement of post-divorce financial assistance as judicially ordered or mutually agreed upon between the parties is vaguely and briefly mentioned in Article 48 of the 2001 Marriage Law, lumped together with enforcement of other rights of property division, property inheritance and child visitation. Article 48 states: "In case any person refuses to execute the judgment or decision on the payment of expenses for upbringing, supporting or maintenance, the partitioning or inheritance of property or visiting the children, the execution may be enforced by the people's court in accordance with the law. Relevant persons and entities shall be responsible for giving assistance to the enforcement."

This lackluster enforcement provision is symptomatically vague, imprecise and indefinite and devoid of any concrete rules and procedures necessary to compel performance of the support obligation. It is suggested that Chinese post-divorce financial assistance law be rewritten to include the following devices as remedies to the obligee spouse.

##### *a. Earnings Assignment Order*

When the parties execute an agreement regarding the amount and specific method of post-divorce financial assistance with the supervision

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64. See California Family Code § 4323(a)(1), which provides:

Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a nonmarital partner. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support . . . .

CAL. FAM. CODE § 4323(a)(1) (West 2013).

65. "An agreement for spousal support may not be modified or revoked to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination." CAL. FAM. CODE § 3591(c) (West 2004).

66. See discussion, *infra*, of stumbling blocks to reforming China's alimony law.

of the judge as a mediator or when the court issues a financial assistance decree as part of a divorce judgment, the court should issue a concomitant earnings assignment order, which shall be served on the obligor spouse's employer, mandating the said employer to make monthly or semimonthly deductions of that portion of the obligor spouse's salary or wages to be paid over directly to the obligee spouse's bank account, as ongoing payment of the post-divorce financial assistance until the support obligation is fulfilled.<sup>67</sup>

*b. Order to Attach a Security Lien on Paying Spouse's Separate Property*

In cases where the obligor spouse is a self-employed entrepreneur, professional or sole proprietor owner and operator of a business and the enforcement of an earnings assignment order is impractical, the court may order the obligor spouse to give reasonable security for payment of the post-divorce financial assistance by allowing the court to impress a lien on the supporting spouse's separate property, including community property awarded to him, to secure payment of the financial support until such time as the support obligation is discharged *in toto*.<sup>68</sup>

*c. Imposing Monetary Penalties on Delinquent Support Payments, Issuance of Writ of Execution, Levying Obligor's Bank Account, Non-Issuance and Non-Renewal of Professional Licenses*

If and when the obligor spouse becomes delinquent in the support payments, the obligee spouse ought to be authorized under the statute to file and serve a notice of delinquency stating the amount of arrears under oath and request that the court impose a monetary penalty at 10 percent interest rate to accrue on the arrearages. The obligee spouse should be able to obtain a judgment for the unpaid amounts plus the interest accruals and enforce the said judgment via court's issuance of a writ of execution, which is to be turned over to the law enforcement division of the county or district, who shall serve as the levying officer to levy on the obligor spouse's bank account. The new law should authorize non-issuance, non-renewal, suspension or revocation of drivers' licenses and professional licenses for real estate brokers and agents, insurance brokers

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67. California legislature instructs courts to include an earnings assignment order in any support orders.

(a) When the court orders a party to pay an amount for support or orders a modification of the amount of support to be paid, the court shall include in its order an earnings assignment order for support that orders the employer of the obligor to pay to the obligee that portion of the obligor's earnings due or to become due in the future as will be sufficient to pay an amount to cover both of the following: (1) The amount ordered by the court for support. (2) An amount which shall be ordered by the court to be paid toward the liquidation of any arrearage.

CAL. FAM. CODE § 5230 (West 2013).

68. "The court may order the supporting party to give reasonable security for payment of spousal support." CAL. FAM. CODE § 4339 (West 2013).

and agents, lawyers, doctors, CPAs, financial analysts, etc. if they are delinquent on their post-divorce financial assistance payments. Under the new law, courts should be empowered to hold the delinquent obligor spouses in contempt of court order and sentence them to jail time if their disobedience of the court order is willful and otherwise unjustified and inexcusable.

#### IV. STUMBLING BLOCKS TO REFORMING CHINA'S POST-DIVORCE FINANCIAL ASSISTANCE SYSTEM

One must not overlook the enormity and complexity of the mission of reforming China's alimony laws, each proposed provision being *res nova*. One of the reasons for the government's inertia and stasis to respond to the demands of the fast-changing times is the disparate shifting policies that SPC's different presidents adopt during their successive reigns.<sup>69</sup> These inconsistent policies' focus changes from experimentation with the adversarial trial system, to mediation, and to social harmony and stability over the individuals' legal rights.<sup>70</sup> As a matter of fact, the current overarching goal of the State is to promote social stability and social harmony, not the passage and application of an elaborate set of particularized rules of law. Judges are under pressure to mediate cases rather than try them because mediation is less formal, less adversarial and less confrontational. This corollary might be ascribed to the triumph of Confucianism over Legalism, and the concomitant ascendancy of the rule of man to the expense of the rule of law, as manifested in contemporary China. The success of the mission to reform China's alimony laws requires far more than the technical lawyering and drafting talents. It hinges on overcoming resistance emanating from Confucianism and the Party-state's overemphasis on mediation. To contextualize the current conundrum of mediation vis-à-vis adjudication, it is necessary to reexamine the historical dichotomy between Confucianism and Legalism and the resultant struggle of rule of man against rule of law.

##### A. *The Conflict Between Confucianism and Legalism and the Resultant Rule of Man Competing Against Rule of Law*

The clash between Confucianism and Legalism led to the struggle of rule of man against rule of law, with the former dominating for more than two thousand years of Chinese political, philosophical and legal history. In imperial China, law was the embodiment of ethical norms of Confucianism.<sup>71</sup> Protecting the economic rights of one individual against another individual was only the ancillary function of law.<sup>72</sup> Confucian belief dictated that government by law should always be kept

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69. KWAI HANG NG & XIN HE, *Chinese Courts as Embedded Institutions*, in *EMBEDDED COURTS: JUDICIAL DECISION MAKING IN CHINA* 1, 3 (2017).

70. *Id.*

71. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 5 (1967).

72. *Id.* at 4.



secondary to government by moral precept and example.<sup>73</sup> Confucius himself is attributed with saying “[l]ead the people by regulations, keep them in order by punishments, and they will flee from you and lose all self-respect.”<sup>74</sup> Therefore, dispute resolution in China relied heavily on extralegal bodies, channels, and procedures, rather than the formal judicial system.<sup>75</sup>

The following passage from *Huai-nan-tzu*<sup>76</sup> metaphorically and vividly describes the relationship, in Confucianist views, between rule of man by benevolent and righteous examples and rule of law.

A good government is one that takes benevolence (*jen*) and social rightness (*yi*) as its basic roots, and laws (*fa*) and regulations (*tu*) as its lesser twigs . . . . He who gives priority to the roots, but only secondary place to the twigs, is termed a Superior Man (*chun-tzu*), whereas he who lets his concern for the twigs result in damage to the roots is termed a petty man (*hsiao jen*) . . . . To ignore cultivation of the roots while devoting effort to the twigs is to neglect the trunk while giving water to the branches. Law, moreover, has its birth in the upholding of benevolence and social rightness, so that to lay great weight on law while discarding social rightness is to value one’s cap and shoes while forgetting one’s head and feet.<sup>77</sup>

By contrast, the thrust of the Legalists’ arguments is that law is the basis of stable government because it provides precision in measuring individual conduct. *Li* (rituals) cannot do this because they are unwritten and subject to subjective interpretation.<sup>78</sup> The legalists argue that the *li* of the ancients were no longer congruent with modern conditions and should be superseded by a system of law. They argue that law should be responsive to the shifting needs of its times in order to retain its vitality. They further argue that harsh laws result in reduction of government and a society free from conflict and oppression.<sup>79</sup> Han Fei Tzu, the chief framer and proponent of Legalism, offers the following dicta that are aptly instructive for our present purpose of revamping China’s outdated alimony laws:

For governing the people there is no permanent principle save that it is the laws (*fa*) and nothing else that determine the government. Let the laws roll with the times and there will be good government. Let the government accord with the age and there will be great achievement . . . . But let times shift without any alteration in the laws and there will be disorder . . . . This is why, in the sage’s governing of men, the laws shift with the times . . . .<sup>80</sup>

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73. *Id.* at 18.

74. *Id.* at 21–22.

75. *Id.* at 6.

76. It is also spelled Huainanzi according to modern-day Pinyin spelling.

77. HUIAI NAN-TZU (淮南子), 20:21b-22, *quoted in* BODDE & MORRIS, *supra* note 71, at 23.

78. BODDE & MORRIS, *supra* note 71, at 23.

79. *Id.* at 24.

80. HAN FEI TZU, *COMPLETE WORKS* (W.K. Liao trans. Probsthain 1939), *quoted*

If the Chinese legislators are still looking for inspiration and guidance as to how to reform China's alimony laws, look no further. The ancient sages already laid down the course of action: "Let the laws roll with the times" and "let the government accord with the age." China's current post-divorce financial relief laws date back to 2001 and fell behind the times. Reform is overdue.

### B. *The Synthesists' Views Versus the Thin Theories of Rule of Law*

Consequent to the triumph of Confucianism over Legalism is the predominance of the rule of man over the rule of law throughout the dynastic periods. Following China's reform and opening up in 1978, legal scholars vehemently debated the merits of rule of law versus rule of man.<sup>81</sup> Those who adopt the rule of the golden mean are the synthesists who believe that law by itself is not sufficient to govern and that every social system is an amalgamation of laws and human beings who are necessary to the creation, interpretation, and implementation of laws. Rather, the law must be supplemented by morality, education, and CCP leadership.<sup>82</sup> In his 2002 book, Professor Peerenboom gave a precis of the essential constitutive elements of the thin theory of rule of law as follows: procedural rules for lawmaking, transparency of laws that must be made public and readily accessible, general applicability of laws, clearness of laws, laws being prospective rather than retroactive, laws being consistent on the whole, fair application of the laws, enforcement of the laws, and laws' reasonable acceptance to a majority of the populace.<sup>83</sup>

The dynamics in reforming China's post-divorce financial relief laws would be shaped by a convergence of the synthesists' views and the thin theories of rule of law. In light of China's longstanding political distrust of law and the scholarly opinion that China is retreating from political and legal reform and that China has turned against law,<sup>84</sup> it would take many more years or generations to firmly anchor the rule of law in the collective consciousness of the politicians, the lawmakers, the jurists, and the populace who stand to be the stakeholders in and beneficiaries from such reform.

## CONCLUSION

Does China have alimony laws? The answer is both yes and no. Yes, because China has a regime not dissimilar to the American concept of "alimony," albeit crude and vague in form and substance. No, because

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in BODDE & MORRIS, *supra* note 71, at 25.

81. RANDALL PEERENBOOM, *Post-Mao Reforms: Competing Conceptions of Rule of Law*, in CHINA'S LONG MARCH TOWARD THE RULE OF LAW 55, 56 (2002).

82. *Id.*

83. *Id.* at 65.

84. See e.g., CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018); Carl Minzner, *Legal Reform in the Xi Jinping Era*, 20 ASIA POL., July 2015, at 4, 4; Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

China's post-divorce financial relief laws, outdated and obsolete, are a far cry from its California counterparts and exceedingly inadequate to meet the current needs of litigants. They were enacted when China's annual per capita income was only \$195 USD and now that figure has jumped to more than \$8,826.99 USD. The law's investiture of the lower court judges with the overly-broad discretionary powers, owing to the innumerable loopholes and gaps in the law, naturally impedes its uniform and equal application across the board. These loopholes leave open the back door for abuses and grafting, which is the inevitable byproduct of the rule of man, as opposed to the rule of law. If the gaps in the law and obstacles to its implementation are not addressed, the law will remain largely symbolic.<sup>85</sup> Therefore, a major overhaul is overdue for the law to keep pace and to comport with the current socioeconomic reality.

However, reforming China's post-divorce financial relief laws is a daunting mission for historical and contemporary reasons. With Confucianist rule of man dominating the collective consciousness, each SPC president has favored different policies and approaches.<sup>86</sup> An adversarial trial system was introduced in the 1990s aiming at prosecuting the individuals' rights to the fullest extent possible under the law, which would require an elaborate set of particularized rules of law, both substantive and procedural. Then, "the pendulum swung to the other end as mediation was prioritized in the 2000s."<sup>87</sup> Between 2008 and 2013, when Wang Shengjun was the SPC's president, the policy reverted to traditionalism, favoring social harmony and stability over individual rights.<sup>88</sup> Amidst the maelstrom of forces influencing the judicial policies has been the predominant principle of "resolving the case and resting the matter to promote social harmony."<sup>89</sup> To achieve that end, non-adversarial mediation and settlement of disputes are preferred and encouraged to put an end to all disputes, preferably in one sitting, once and for all. Judges are mediators and facilitators of settlement. The slogan becomes: "Mediation first and then combine mediation with adjudication."<sup>90</sup>

Under this Utopian scheme of mediating and settling disputes once and for all, it might be a little anachronistic to propose that Chinese courts retain jurisdiction to modify post-divorce financial assistance based on material change of circumstances as suggested above. Such a Utopian approach, however, is bound to lead to dystopian miscarriages of justice.

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85. Ogletree et al., *supra* note 14.

86. NG & HE, *supra* note 69, at 3.

87. *Id.*

88. *Id.*

89. Yi Zhongfa (易忠法), *Lun "Anjie Shiliao" (论 "案结事了")* [Discussing "Deciding the Case and Solving the Problem"], 2 FAZHI YU SHEHUI (法制与社会) 194 (2008).

90. Wu Huiqing (吴会清) & Chen Rensheng (陈仁盛), *Zhuoli Huajie Shehui Maodun Qieshi Tuijin "Anjie Shiliao" (着力化解社会矛盾切实推进 "案结事了")* [Strive to Resolve Social Contradictions and Earnestly Implement "Resolving the Case and Resting the Matter"], SHIDAI ZHUREN (时代主人), Feb. 2012, at 26, 27.