

Protection of Women's Rights and Interests in Matrimonial Justice: A Comparative Study of Divorce Cases Involving Domestic Violence in the Qing Dynasty and Contemporary Times as an Example

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Abstract: Based on the comparative study of the Qing legal texts represented by the Qing Laws, the criminal archives, and the contemporary laws and regulations represented by the Civil Code of the People's Republic of China, this paper presents the results of a comparative study of 72 cases from the first month of the third year of Emperor Chongde's reign in the Qing Dynasty (A.D. 1638) to December of the fourth year of Emperor Chongde's reign in Shengjing (the original archives of the Criminal Ministry of Shengjing), 1,361 "women's" cases from the records of Baxian County during the Tongzhi period (A.D. 1862–1875), and 2,648 marriage and family inheritance cases from the civil and commercial cases heard in the courts of P County in 2020–2021, totaling 4,081 cases, from which typical cases of domestic violence were extracted to conduct empirical analyses and to explore the changes in women's rights and interests in judicial practice across different periods, which may provide a good basis for the development of women's rights and interests over time. This will explore the changes in women's rights and interests in different periods of judicial practice and may provide experience for the prevention and control of contemporary "domestic violence," especially "marital violence."

Keywords: Qing Dynasty; Conjugal relations; Legal analysis; Women's rights and interests; Divorce cases involving domestic violence

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1. Introduction

The phenomenon of wife abuse was very common in ancient Chinese family marriages. Contemporary scholars believe that "marital violence" in families in today's society is a continuation of history. The strict hierarchical order and gender discrimination in traditional culture, such as the "father's duty to the son" ^[1] and "the husband's duty to the wife," are the ideological roots of the continuation of modern "marital violence."

However, the description of marital violence in ancient times is often too systematized and static in many treatises, which is usually summarized by the phrase "the husband is superior to the wife," and it focuses on the analysis based on scattered legal provisions, which seldom involves the examination of the original judicial archives and the analysis of

large-scale data. The research system has been fully developed, but it is limited to the exploration of ancient society and lacks expansion into contemporary judicial practice.

The Qing Dynasty, as the peak of feudal kingship in China and the last dynasty of the imperial period, was not only an important period of social, economic, cultural, and life transition but also a key point of change in the concept of marriage and the marriage system. Zhu Zi's theory became the orthodox doctrine followed by the ruling class, and the concept of "the husband is the wife's program" and "the husband's superiority over the wife" reached its peak in the Qing Dynasty, where the wife's family status and legal status were particularly low. At the same time, with the eastward spread of Western ideas such as the concept of "marriage freedom," intellectuals who received new-style education gradually began to make active attempts at reforming the marriage customs^[2]. The collision of these two social trends made family marriage relationships in the Qing Dynasty show the dual characteristics of being old-fashioned yet new.

Therefore, through the methods of legal empirical analysis research, historical bibliographic research, comparative research, and social gender analysis, and combining with the author's 13-day field investigation experience in the People's Court of P County, W City, Z Province, this paper will, on the basis of comparative research on the legal texts of the Qing Dynasty represented by the Qing Laws and Regulations, the files of the Criminal Division, and contemporary laws and regulations represented by the Civil Code of the People's Republic of China, use the "Shengjing Criminal Department"^[3]. The 72 cases from the first month of the third year of Emperor Taizong Chongde's reign (1638 AD) to the December of the fourth year of Chongde's reign (1639 AD) in the Original Records of the Qing Dynasty, the 1,361 women's cases during the Tongzhi reign (1862–1875 AD) in the Records of Baxian County and the 2,648 civil and commercial cases in the 2020–2021 court hearings in P County. A total of 4,081 civil and commercial cases, including 2,648 matrimonial and family inheritance cases, are taken as data samples, from which typical cases involving domestic violence are extracted for empirical analysis to explore the changes of women's rights and interests in judicial practice in different periods, which may provide experience for the prevention and control of contemporary "domestic violence," especially "marital violence."

Figure 1 shows an example of a Qing Dynasty family photo.



Figure 1. Qing Dynasty family photo

2. "Xu Yang's case" and "Xu's domestic violence case"

The author would like to analyze the "Xu Yang's Case" in the Baxian Archives in comparison with the "Xu's Domestic Violence Case" heard in 2021 by the P County Court, in order to explore the different coping mechanisms and corresponding laws and regulations for women who suffered from domestic violence in the Qing Dynasty and in contemporary times. Both are cases in which women chose to sue after enduring marital violence to no avail. After the

husband was found to have “abused his wife,” both the Qing governor and the contemporary judge ruled that “the husband and wife should be reconciled” and “the request for divorce should be rejected,” warning the husband not to abuse his wife in the future. This hardly solves any substantive problems for the wife, who is suing for the breakdown of her relationship with her husband.

Tongue Years, Bucks County Records 8232, December 9, Tongue Years 12

Plaintiff: Ms. Xu Yang (wife).

Defendant: Xu Tingzan (husband).

Content: Xu Yang married Xu Tingzan as a child bride. When she grew up, her husband showed bad qualities—“not devoting oneself to proper duties”^[4], smoking opium for a long time, squandering the family’s wealth, and even forcing Xu Yang to prostitute herself again and again. Mr. and Mrs. Xu Yang left Quxian for Chongqing, where they stayed at the home of Xu Yang’s relatives. Although they agreed to give Xu Tingzan five taels of silver to do business, the money was spent by Xu Tingzan, who once again forced Xu Yang to prostitute herself. For refusing this demand, Xu Yang was beaten and scolded. She could not stand it any longer, so she cut off her hair and went to the court to file a complaint^[1].

At the same time, during the couple’s marriage, although the husband has always been “not doing his job,” and even addicted to gambling and drug abuse, and regularly commits domestic violence against the wife, the wife did not sue the husband in the first instance, but chose to put up with it until the husband’s behavior exceeded the limits of her tolerance, and only then proceeded to “prosecute,” and other more violent ways of resistance. Xu Yang endured her husband’s long-term opium addiction and repeated coercion into prostitution, yet still chose not to press charges. Despite her husband’s continued moral failings and frequent, unwarranted verbal abuse directed at her character, Xu tolerated the situation for four years before finally deciding to prosecute.

In the Qing Dynasty, after determining that Xu Tingzan had “abused his wife,” the county magistrate only made a judgment that “the husband and wife should be reconciled,” and verbally warned the husband not to abuse his wife in the future. The contemporary judge in Xu’s first lawsuit also rejected her claim. However, since she and her husband, Chen, frequently argued over his lifestyle issues, failed to fulfill their marital obligations, and clearly experienced a breakdown in their relationship with no possibility of reconciliation, the judge granted the divorce in the second proceedings. The author believes that the above changes in the outcome of the judgment is a good illustration of the protection of women’s rights and interests in judicial practice at different times, as well as the advancement and duality of the contemporary legal system.

Cases similar to “Xu Yang’s Case” were numerous in history. Yuan Ji, the sister of Yuan Mei, was bound by the feudal ethical ideology and was unwilling to withdraw from her marriage, believing that a woman could only remain faithful to her husband, stating: “If my husband is sick, I will take care of him; if he dies, I will keep him.”^[2] In the family’s strong order, she refused to her husband “sell off,” chose to sue her husband, but unfortunately, even after a peaceful divorce, she still died a miserable death. “Shengjing criminal original file” records, Liu Tongzi, a woman at that time, was beaten by her husband Liu Shideng, who broke her arm and knocked out her teeth, then forced her to return to her parents’ home. After reaching the end of her patience, she chose to report the case to the authorities. These cases reflect the helplessness of women in the face of marital violence in the Qing Dynasty.

3. Two extreme choices in the face of domestic violence

Special attention should be paid to the fact that in the Qing Dynasty and contemporary society, when women encountered disputes in family life, there were two extreme choices: “divorce” and “suicide,” which was essentially a question of women’s right to choose in different periods.

In the middle and late Qing Dynasty, due to various limitations of the legal system and social and cultural concepts, fewer women had the right to choose to divorce, and divorce cases basically took place in the upper class; the social and legal status of women at the bottom of the social and legal status was extremely low.

By comparing the Qing and Tang laws, it becomes evident that in cases of husbands beating their wives, the Qing

law modified the provisions of the Tang law: the penalty of “assault and injury resulting in a reduction to the second class of mortals” was reduced to “injuries not involving fractures are not subject to discussion; if fractures occur, the penalty is reduced to the second class of mortals, and prosecution requires the wife’s own report.” In the case of a wife who killed or injured her husband through negligence, the penalty was increased from “a reduction of the penalty by two grades in respect of a murder committed for the purpose of killing” in the Tang Law to “decapitation” in the Qing Law.

More obviously, in the legal systems of previous generations, the husband had no right to kill his wife under any circumstances, nor did he have the right to kill the adulterous wife or the adulterer’s concubine or to beat the guilty wife or concubine to death. This was developed in the Qing Dynasty’s laws, where, in cases of adultery, the husband could kill the adulterer and the adulteress at once without any distinction; that is, the Qing Dynasty’s laws deprived the husband of the right to the life of his wife under certain circumstances. Qing law along the evolution of the Ming law, compared to the Tang law, “about ceremonies and customs and cultures,” a class of non-direct violation of the monarchy and other aspects of the crime is often “light of its light”^[5], according to this to push, the punishment of crimes involving the husband and wife should be mitigated. Through the above comparison, it can be found that the punishment of husband’s crime against wife was reduced, while the punishment of wife’s crime against husband was aggravated, the reason is that with the infiltration of Zhu Zi’s theory, the husband’s right in the Qing Dynasty was expanded to the extreme^[6].

Therefore, if the husband did not consent, the option of a woman initiating divorce proceedings was extremely unlikely in the Qing dynasty. Because of the constraints of her environment, a woman’s choices in the course of a family dispute were greatly reduced, and it can be concluded from the Qing litigation records that most were forced to choose the extreme option of “suicide.”

In contemporary society, women have the right to divorce, and society is becoming more tolerant of divorce. The 2021 China Marriage Report shows that the number of registered divorces in China climbed from 580,000 pairs to 3.73 million pairs from 1987 to 2020. The crude divorce rate climbed from 0.5 per 1,000 to 3.4 per 1,000 from 1987 to 2019. Nearly 6 million cases of first-instance divorce disputes were concluded from 2015 to 2018^[7]. Economic independence has enabled women to gradually get rid of the shackles of marriage and have more confidence to bear the unfavorable consequences of divorce; the penetration of Western feminist ideology has contributed to the enhancement of women’s sense of autonomy, and more women have chosen to end their unfortunate marriages and actively seek their own happiness.

According to the Judicial Big Data report, in 2017, courts across the country concluded more than 1.4 million cases. The number of divorce disputes increased, with emotional discord (77.5%) and domestic violence (14.9%) as the main reasons. The plaintiffs in 73.40% of the cases were women, and 2–7 years after marriage was the high incidence of marital breakdown. The percentage of cases in which only one of the spouses wishes to divorce is 91.09%^[8].

This shows that women have more choices in family disputes and, in comparison, have a greater degree of autonomy and enjoy a higher degree of legal protection. Thus, the choice between “suicide” and “divorce” is also closely linked to the actual historical changes.

4. Conclusion

In the author’s opinion, whether it is during the Qing Dynasty when the ideas of “Three Principles and Five Virtues” and “Three Obediences and Four Virtues”^[9] were prevalent, or in the contemporary progressive society where women’s rights awareness is actively developing, the legal practice lacks a gender perspective. In particular, there is a lack of holistic norms in the legal system against domestic violence, and most of the relevant provisions are only in principle and not very operational.

Apart from the laws and regulations themselves, the most important reason these women chose to endure for a long time was that they were bound by the core Confucian ethical concepts of patriarchal power and the husband’s right. In exploring this issue, we should base ourselves on the original historical soil and social background, rather than simply criticizing them using modern feminist thinking, and we should take the initiative to think about the reasons for their choices and the deeper logic behind them.

Simone de Beauvoir confessed in *The Second Sex*, “On ne naît pas femme, on le devient”^[10]. Patriarchal society shapes the nature of individual women and absorbs their separate personalities. Men “become men” by assimilating into the group of men, and women gradually become “women” in the social context of the “silence” prescribed by the group.

To quote Spivak in “Can subaltern speak?”, we can homogenize women, the poor, people of color, sexual minorities, etc. in the first world in some sense into one issue for discussion.

The social machine shapes the identities of different groups, while individuals are unconsciously assimilated by this cultural hegemony in their search for so-called “identity” and “belonging.” As a result, those who are discriminated against are easily confined to a socially constructed identity system that is built by and for the benefit of those who are in a position of power. Even when some of those discriminated against choose to struggle and resist, they are equally unable to completely disassociate themselves from the landscape of social discrimination.

At the same time, because of their marginalization, the “common people” are unable to represent themselves and have a voice^[11]. As constructed subjects, their free will is obscured by authority and intellectuals, and those who hold the power of discourse conceal, exploit and even represent them through tangible or intangible means of violence, as some anthropological women’s studies have emphasized, which suggests that women’s status is not always inferior, but may be distorted by ethnographies biased in favour of men.

Therefore, we need to look at the Qing Dynasty and contemporary “divorce cases involving domestic violence” with a dialectical perspective, and explore the protection of women’s rights and interests in judicial practice in different periods. This paper is extremely limited in the selection of cases, but we can see some commonalities in these typical cases, and by looking at the “other,” we can better understand the “self,” and perhaps provide experience for the prevention of contemporary “domestic violence,” to give a voice to the disadvantaged groups in a privileged society.

Disclosure statement

The author declares no conflict of interest.

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