

# **Empirical Research on Protecting Women's Property Right in Divorce Property Liquidating Proceeding in China**

**---Based on a Survey on Sampled Divorce Cases (2011-2013) Heard by a  
Local People's Court in Chongqing, China\***

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## **ABSTRACT**

For divorced women, the property divided to her at the time of divorce or after divorce is important for hereto start a new life, and it safeguards their basic human rights to life and development too. According to China's basic national policy of gender equality, it is meaningful to inspect whether or not China's current divorce property liquidation system and judicial practices realize substantial justice and gender equality. Thus, the authors carried out a survey in the people's court in suburb of Chongqing in January 2014. Base on the survey, the authors summarize the achievements made by this court regarding protecting the divorced wife's property. Generally speaking, this court distributed the community property based on "equality principle", and reduced the wife's liability for the couple's joint debts in divorce proceeding. However, The findings also reveal some shortcomings in following aspects: First, in making judgment on community property division, the principle of caring for wife is rarely applied; Second, in the sampled cases, the value of the community property that the wife allocated was usually less than the husband's, and cases that the wife giving her dowry and other personal properties to the husband or their child (or children) take a lion's share; Third, in determining the couple's joint debts, the judges applied different legal provisions or judicial interpretations; Fourth, some judges did not carry out a judicial review on the divorce agreement reached by the divorcing spouses; Fifth, some judges are lack of gender consciousness, etc. Thus, the authors put forward following suggestions: First, considerations of applying the caring-wife principle should be added; Second, the compensation system should be established, when personal properties lost value during marriage, the owner of these personal properties should be compensated; Third, in the Marriage Law, the family agency system should be perfected so that the court can easily determine the shares of

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the couple's joint debts; Fourth, family mediation counselors should be set up in the court; Fifth, judges should be urged to have more gender consciousness.

## I INTRODUCTION

In China, upon divorce the spouse's properties must be classified as either the community property<sup>1</sup> of the couple or as the personal property of one side<sup>2</sup>, while the community property should be assigned to the husband and the wife, and debts incurred during the marriage, usually the couple's joint debt, should be paid off out of their jointly possessed property in divorce proceedings. In china, the liquidation system of the couple's property upon divorce consists of dividing community property and paying off joint debts. For divorced women, the property divided to her after divorce is important for her to start a new life, and it safeguards their basic human rights of survival and development too. To explore whether China's current divorce property liquidation system and judicial practices realize substantial justice and gender equality, we carried out a survey in a people's court(hereinafter referred to as this court)<sup>3</sup> in a suburb of Chongqing in January 2014. Base on the survey, we summarize the achievements and the shortcomings in the trial and propose suggestions for improvement.

## II THE STATISTICS OF THE SAMPLED DIVORCE CASES

Regarding the surveyed court, there were 1064 cases where divorce is granted by mediation or judgment in 2011-2013. These divorce cases are our samples. 120 cases were randomly selected annually from this court. A total of 360 cases were sampled. Besides, the authors interviewed judges in this court. The authors investigated these samples with a view to understanding the judicial practice of divorce law and proposing relevant legislative proposals especially in drafting *Marriage Family Part* of the *Civil Codes of People's Republic of China*. After careful statistics work, we get the following information.

### (A) Personal information of the plaintiffs

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<sup>1</sup> In the 2001 Amendment of Marriage Law of People's Republic of China(PRC)(hereinafter referred to China's current Marriage Law), Article 17 stipulates: 'the following items of property acquired by husband and wife during the period in which they are under contract of marriage shall be jointly possessed: (1) pay and bonus; (2) earnings from production and operation; (3) earnings from intellectual property rights; (4) property obtained from inheritance of gift except as provided for in Article 18(3) of this Law; and(5) any other items of property which shall be in his or her separate possession.'

<sup>2</sup> In China's current Marriage Law, Article 18 provides: 'The following property shall be owned by either the husband or the wife:(1)the pre-marital property that is owned by one party; (2)the payment for medical treatment or living subsidies for the disabled arising from bodily injury on either party; (3)gift, bequests, and inheritances specifically given to only one spouse during the marriage according to the gift contact or will; (4) the articles of living specially used by either party; (5)other property that shall be used by either party.'

<sup>3</sup>The main industry in this county is agriculture. The GDP in this region in 2014 was nearly 10 billion RMB and it has a population of approximately0.52 million, with agricultural population of 0.46 million. Peasants' income per ca pita income was about 6,700 RMB and urban citizens' disposable income per capita income was more than 18,000 RMB.

We are going to observe plaintiff group from the perspective of gender, age, occupation<sup>4</sup> and duration of marriage.

Table 1-1 the Personal Information of Litigants

		Quantity	Percentage (%)	
Gender (360 cases)	Male	147	40.8	
	Female	213	59.2	
Age (360 cases)	20-30	81	22.5	
	31-40	174	48.3	
	41-50	93	25.8	
	51-60	7	1.9	
	61+	5	1.4	
Occupation (186 cases)	Female (186)	Peasant	177	95.2
		Civil servant and institution staff	7	3.8
		Enterprise staff	2	1.1
	Male (186)	Peasant	169	90.9
		Civil servant and institution staff	11	5.9
		Enterprise staff	6	3.2
Duration of Marriage (360 cases)	1-5 years	105	29.2	
	6-10 years	63	17.5	
	11-15 years	97	26.9	
	16-20 years	62	17.2	
	21 years +	33	9.2	

In the surveyed divorce cases, there were 213 cases in which the petitioner is a female (accounting for 59.2per cent); many of them fall into the group of 20-50 years old, and 48.3 per cent of the 360 petitioners (174 petitioners) is 31-40 years old. In 186 cases with occupation information out of 360 samples, female peasants account for 95.2per cent, while male peasants account for 90.9per cent. In terms of the marriage duration of the spouses, divorce mainly occurs during 1-20 years after marriage, especially in the first to fifth year (accounting for 29.2per cent) and the eleventh to fifteenth year (accounting for 26.9per cent).

## **(B) The division of property upon divorce**

Parties in the360 cases all adopted the community property system. It accords with the Chinese custom, especially for the peasantry.

### *(a) Basic information of the marital property system in these surveyed cases*

<sup>4</sup>At present, the occupation of litigants is not required in the divorce file in China. 186 out of 360 cases recorded litigants' occupations and we will investigate these cases according to gender.

Table 2-1 Basic Information of the Marital Property System in these Surveyed Cases

	Cases Involving Disposition of Community Property Only	Cases Involving Disposition of Both Community Property and Personal Property	Cases Involving Disposition of Personal Property Only	Total
Quantity	160	15	74	249
Percentage (%)	64.3	6.0	29.7	100

Of the 360 sampled divorce cases, there were 249 cases in which the court resolved the disputes of the community property or personal property either by mediation or judgment (except for the cases where property problems were dealt with separately, that is heard in another case because it involves a third party's interests). 160 out of the 249 cases only divided their community property; 15 cases involves the disposition of both community property and personal property; and other 74 cases only have personal property disputes. The authors regarded the former two groups (175 in total) as a category to analyze the judicial practice when hearing community property disputes (see table 2-1).

*(b) community property disputes*

Table 2-2 The Distribution of Community Property

	Husband Assigned More Share	Wife Assigned More Share	50-50 Split	Total Community Property Given to Child	Others	Total	Percentage (%)
Mediation	54	25	25	35	15	154	88
Judgment	7	3	11	0	0	21	12
Total	61	28	36	35	15	175	
Percentage (%)	34.8	16	20.6	20	8.6	100	

For community property disputes, 21 out of 175 were resolved by a judgment made by the court, accounting for 12 per cent; and 154 by mediation, accounting for 88 per cent. The property are divided as follows: in 34.8 per cent of the total (i.e. 61 cases), the husband was assigned more from the community property; in 16 per cent of the total (i.e. 28 cases), the wife got more share; the court in 20.6 per cent of the total (i.e. 36 cases) conformed to the fifty-fifty split; divorcing couples in 20 per cent of the total (i.e. 35 cases) gave all marital properties to their children; and in 8.6 per cent (i.e. 15 cases)<sup>5</sup>, the percentage of the property assigned is not indicated (see table 2-2).

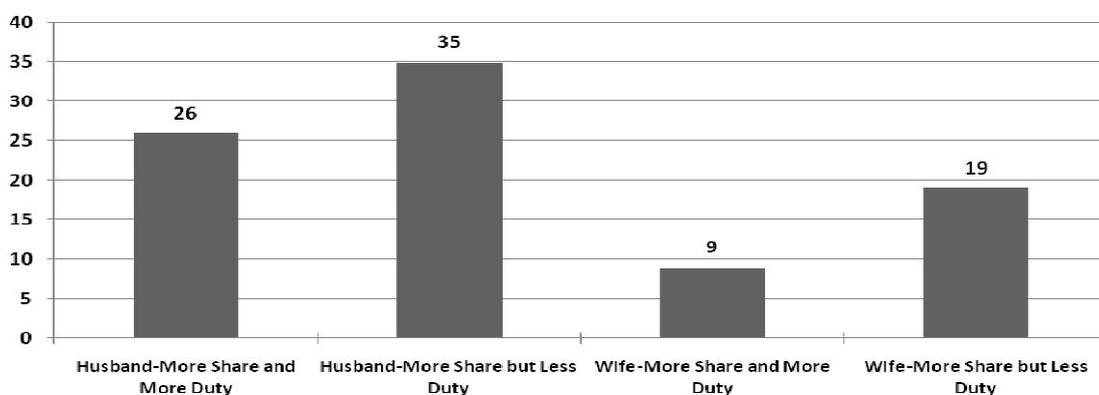
<sup>5</sup>The value of some property was unknown so its proportion in the community property couldn't be determined.

**(i) Analysis on the cases where one party gained more share**

Table 2-2-1 Analysis on Cases that the Spouse Was Assigned More Share of Property

	Husband Assigned More Share			Wife Assigned More Share		
	More Share and More Duty	More Share but Less Duty	Total	More Share and More Duty	More Share but Less Duty	Total
Mediation	25	29	54	9	16	25
Judgment	1	6	7	0	3	3
Total	26	35	61	9	19	28
Percentage (%)	42.6	57.4	100	32.1	67.9%	100

Figure2-2-1a Analysis on Cases Where One Party Was Assigned More Share of Property



For the cases involving one party assigned more property, the authors analyze mainly from two aspects<sup>6</sup>: one is the party getting more property undertook more duty, and the other is the party acquiring more property undertook less duty. To some extent, regarding the first respect, it reflects the balance between right and duty. However, as regards to a party getting a favorable share of property with less duty, this division indirectly indicates that he or she outweighs the other side when dividing properties. Our survey shows that there were 61 cases where husband gets more community property. Among them, 26 were involved in the situation that the husband undertakes more duty correspondingly, accounting for 42.6 per cent; while 35 out of 61 fall into the other situation, accounting for 57.4 per cent. Among 28 cases where wife acquires more community property, the wife in 9 cases (32.1 per cent) also takes on more duty; other 19 wives (67.9 per cent) assumed less duty (see table 2-2-1). Totally, cases where husband or wife gets more community property and undertakes more duty reach 35; 35 husbands got more community property but assumed less duty, which is nearly twice the amount of cases (19 in total) where the wife gets the same favorable treatment. Hence one can see that some wives are in a weak position when dividing property upon divorce.

<sup>6</sup>More community property means one party shall acquire more than half of the property; more duty means one party shall undertake more than half of the joint debts or support the minor child and their alimony, otherwise it will be called less duty.

**(ii) Analysis on the cases of the fifty-fifty split of the community property**

Table 2-2-2 Analysis on the Cases of the Fifty-Fifty Split of Community Property

	Equal Property Distribution and Equal Duty Performance(No Duty Included)	Equal Property Distribution with Wife's Share Given to Child	Equal Property Distribution with Husband's Share Given to Child	Others	Total
Meditation	9	10	2	4	25
Judgment	10	0	0	1	11
Total	19	10	2	5	36
Percentage (%)	52.8	27.8	5.5	13.9	100

Figure2-2-2a Analysis on the Cases of the Fifty-Fifty Split of Community Property



The authors mainly explore this group of cases from the prospective of equal distribution of obligation between two parties. Among 36 cases of the fifty-fifty split of community property, parties in 19 (i.e. 52.8 per cent) have equal property share and equal duty performance(no duty included)<sup>7</sup>; While, other cases have a new route to divide the property besides the fifty-fifty split of community property, i.e. one party gave his or her share of community property to their child(or children): in 10 cases, the wife was the donor, and the husband in other 2 cases take this role (see table 2-2-2 and figure2-2-2a). Taking a close look of the 10 cases where the wife willing to giving her divided properties to the child, 6 husbands among them are held responsible for the child support, and 2 were concerned with the wife both fostering the child and gifting her share of property to the child. Thus it is safe to say that in cases of equal sharing of community property, the wife generally undertakes the same duty (or no duty) as the husband. That said, the wife is more likely to give her share to the child(or children). Therefore, these wives actually didn't acquire any property upon divorce.

**(iii) Analysis on the rationale behind the judgment regarding property division**

Table 2-2-3 Analysis on the Rationale behind the Judgment Regarding Property Division

<sup>7</sup>Equal duty consists of equal payment of joint debts during marriage or equally bearing the duty of supporting minor child. No duty refers that the couple have the community property, while no child-support or joint debts.

	Caring for Wife	Caring for Wife, Child and No-fault Spouse	Equal Sharing	Caring for Child	Caring for No-fault Spouse	Benefit-Producing	Caring for Sick Husband	Others	Total
Quantity	1	1	11	2	1	2	1	2	21
Percentage (%)	Cases adopting the principle of caring for wife total 2 (i.e.9.5 per cent).		52.4	9.5	4.8	9.5	4.8	9.5	100

As mentioned above, there are 21 cases that this court gave an award to divide the community property. Our survey shows that 2 out of 21 cases (accounting for 9.5 per cent) adopted the principle of “caring for wife”<sup>8</sup>; 11 cases (accounting for 52.4 per cent) adopted the principle of “equal sharing” (see table 2-2-3). So when hearing property division disputes, this court mainly adopted “equal sharing” principle while the principle of “caring for wife” is applied much less.

*(c) The disposition of premarital personal property*

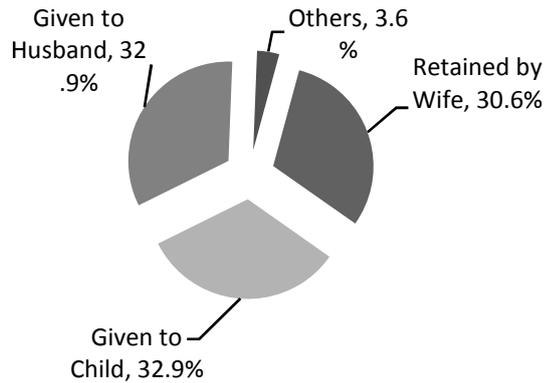
As the statistics shows, regarding premarital personal property, 85 out of 89 cases involve disposition of the wife’s properties such as dowry or other properties; 4 others are related to the disposition of husband’s premarital personal property, and the judicial decisions of these 4 cases indicate that the husband’s premarital property was still held by the husband.

Table 2-3-1 The Disposition of Wife’s Premarital Personal Property

	Retained by Wife	Given to Child	Given to Husband	Others	Total
Quantity	26	28	28	3	85
Percentage (%)	30.6	32.9	32.9	3.6	100

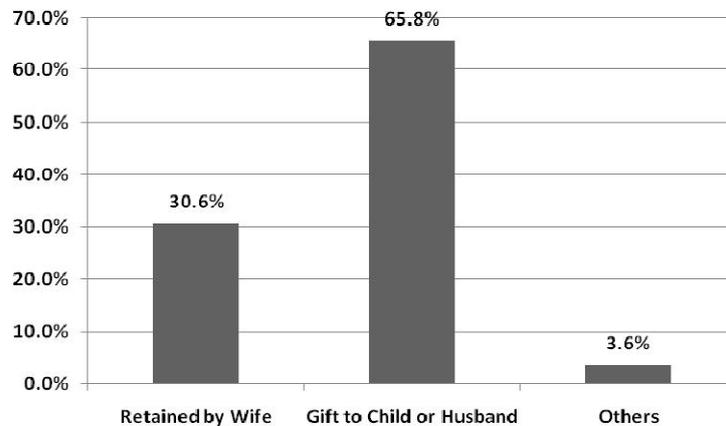
<sup>8</sup>In China’s current Marriage Law, Article 39 stipulates: ‘At the time of divorce, the disposition of common property owned by husband and wife is subject to agreement between the two parties. In cases where an agreement cannot be reached, the people’s court shall make a judgment considering the actual circumstance of the property based on the principle of caring for the rights and interests of the wife and the child or children.’

Figure2-3-1a The Disposition of Wife's Premarital Personal Property



Regarding wife's premarital personal property, 26 wives out of 85 (accounting for 30.6 per cent) kept their property in their own hand; 28 (accounting for 32.9 per cent) gave their personal properties to child (or children); 28 (accounting for 32.9 per cent) gave to their husbands (see table 2-3-1, figure2-3-1a). In total, there are 56 cases where the wife gives her premarital personal property to the child (or children) or the husband, accounting for 65.8 per cent, which was more than twice of the cases where the wife retained their premarital property (see figure2-3-2a).

Figure 2-3-2a Contrast on The Disposition of Wife's Dowry or Other Premarital Personal Property



**(C) Considerations to Determine the Responsibility for the Debts**

The survey shows that among the 360 sampled divorce cases, 87 involves determining the debt responsibility.

*(a) Determination of the nature of the debts*

Table3-1 Handling of Cases Involving Debts Responsibility Determination

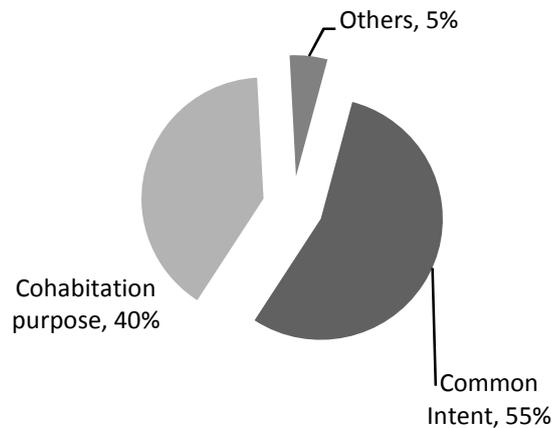
Item	Joint Debts	Partly Joint Debts	Non Joint Debts	Handled separately	Total
Mediation	55	1	3	3	62
Judgment	19	0	1	5	25
Total	74	1	4	8	87
Percentage(%)	85.1	1.1	4.6	9.2	100

In these 87 cases, disputed debts were held as non joint debts either by mediation or a judgment in 4 cases, accounting for 4.6 per cent; In 8 cases, this court asked the parties to file another petition for the debts, accounting for 9.2 per cent; In 74 cases, disputed debts were held as joint debts either by mediation or a judgment, accounting for 85.1 per cent; While in cases where mediation were applied, part of disputed debts were agreed as joint debts in 1 case, accounting for 1.1 per cent. We will take the latter two kinds of cases totaled 75 as the target of analysis of liquidation of joint debts (see table 3-1).

Table3-1-1 Considerations to Determine the Debt Nature

	Common Intent	Cohabitation Purpose	Others	Total
Quantity	11	8	1	20
Percentage(%)	55	40	5	100

Figure3-1-1 Considerations to Determine the Debt Nature



For the cases closed by mediation, both parties are free to exercise their rights with their free wills, which reflect the parties' autonomy. Therefore, we will explore how the court determine the debt in those hotly debated cases.

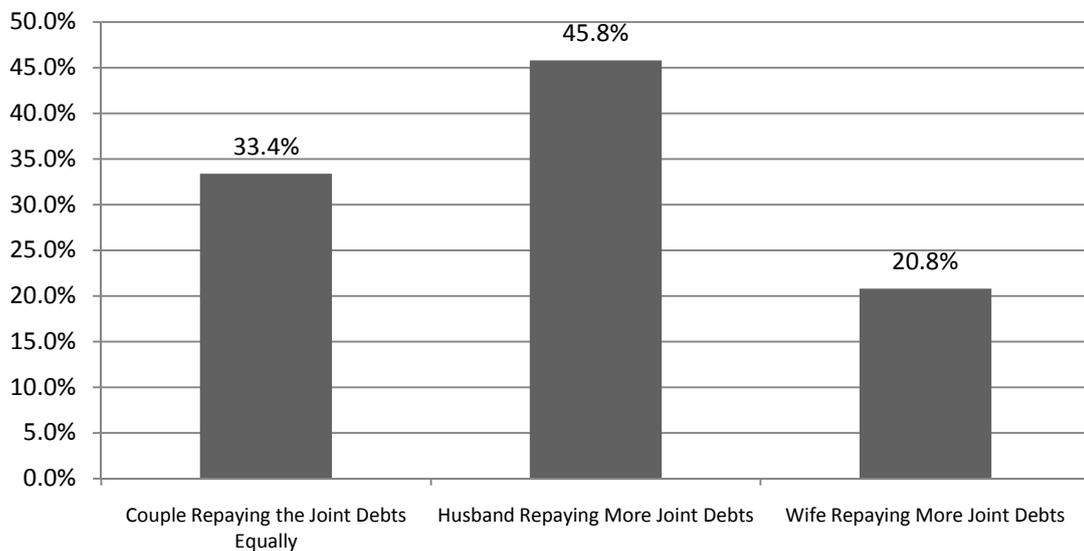
Among 75 cases involving determination of disputed debts, the court made the judgment regarding debts in 20 cases. In these 20 cases, this court determined the nature of the debts based on their common intent of borrowing in 11 cases (that is, whether the couple agreed to incur debts jointly or not), accounting for 55 per cent; while in 8 cases (accounting for 40 per cent) the standard of cohabitation purpose was applied (that is, whether the debts were used for the cohabitation or not) (see table 3-1-1, figure 3-1-1a). It should be noted that we did not list time factor since the debts in all cases were incurred during their marriages. It can be inferred that this court mainly adopted three tests in determining debts responsibility, namely, common intent, cohabitation purpose, and time.

(b) Determination of the debt responsibility

Table 3-2 Determination of the Debt Responsibility

Item	Equal Responsibility	More Responsibility for the Husband	More Responsibility for the Wife	Total
Mediation	2	8	4	14
Judgment	6	3	1	10
Total	8	11	5	24
Percentage (%)	33.4	45.8	20.8	100

Figure3-2 Determination of the Debt Responsibility



Among 75 cases involving determination of disputed debts, 24 only involves liquidation of the debts; the other 51 concerns not only liquidation of joint debts, but also division of community property. Since division of common property has been discussed above, we will focus on liquidation of joint debts here now.

In the aforesaid 24 cases, 11 husbands were judged to take more responsibility to pay off the joint debts (accounting for 45.8 per cent); while 5 wives (accounting for 20.8 per cent) were allocated more debt responsibility. The former is more than twice as many as the latter. In addition, in 8 cases (accounting for 33.4 per cent), both spouses were held to assume equal liability to the joint debts. (See table 3-2, figure 3-2a).

### III LESSONS OF PROTECTING WOMEN'S PROPERTY RIGHTS LEARNED FROM THE JUDICIAL PRACTICE IN LIQUIDATION OF PROPERTY UPON DIVORCE

#### (A) Adhering to the Principle of Gender Equality

Gender equality is one of China's basic state policies and one of the basic principles of China's current *Marriage Law*. According to the law, women equally enjoy

freedom of marriage and have equal rights and duties in a family as men, which can guarantee women's rights in a marriage or a family. At the time of divorce, the couple shall freely negotiate over community property division and jointly repay the debts incurred during the marriage.<sup>9</sup> Among the surveyed cases, this court adhered to the principle of gender equality when hearing these divorce property disputes, husband and wife were generally awarded equal rights and duties, for instance: (1) Taking property division, debt repayment and child support into consideration, the court divided the marital properties in away where the spouse acquiring more properties assumes more responsibilities, or where spouses sharing property equally shoulder the same duties. As mentioned above, among 175 surveyed cases involving division of community property, 26 husbands were awarded more property with more responsibility; 9 wives awarded more property were asked to assume more duty (see table 2-2-1 and figure 2-2-1a); spouses in 19 cases shared equal properties and duties(see table 2-2-2 and figure 2-2-2a). Altogether, these 54 cases, accounting for 30.9per cent, adopted the principle that the right shall conform to the duty no matter the person is husband or wife. (2) The principle of equal sharing of common property upon divorce is important, usually adopted by the people's court. When dividing common property, this principle was applied in half of the surveyed cases (52.4per cent)(see table 2-2-3). It is justified to say that this court generally applied the gender equality principle stipulated in the *Marriage Law* when hearing divorce property disputes, divided common properties equally, and allocated joint debts responsibility equally too. In this way, the equal legal status of husband and wife in a family is safeguarded and women's property rights are protected.

### **(B) Less Responsibility of Paying off Joint Debts for Women**

Our survey also shows that in the cases only involving the settlement of joint debt, cases where the husband assumed more duty account for 45.8 per cent; cases where the wife assumed more duty account for 20.8 per cent. The former is more than twice as many as the latter (see table 3-2, figure 3-2a). It is thus clear that the husband assumed relatively more liability, which reduced the wife's liability for the debts to some extent.

## **IV INADEQUACIES IN PROTECTING WOMEN'S RIGHTS IN LIQUIDATION OF PROPERTY UPON DIVORCE**

Although these achievements were made, our survey indicates that there are inadequacies in protecting women's property rights when the court hears divorce property disputes.

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<sup>9</sup> See Article 39 and 41 of China's current *Marriage Law*: At the time of divorce, community property shall be disposed by both parties through consultation. If it fails, the people's court will give a judgment in accordance with specific condition of property and with the principle preferential for the rights and interests of wife and child. At the time of divorce, debts incurred jointly by the husband and wife during their married life shall be paid off jointly by them. *Specific Opinions of the Supreme People's Court on Issues Concerning the Trial of People's Court on the Distribution of Property upon Divorce in 1993* (hereinafter referred to as *Opinions on the Distribution of Property upon Divorce 1993*) points out that during the disposition of community property in divorce cases, the people's court shall resolve it reasonably in accordance with *the Marriage Law, the Law on the Protection of Wife's Rights and Interests*, and relevant legal provisions, and with the principle of gender equality, to safeguard the legal rights and interests of wife and child, take care of the no-fault party, respect the will of the parties, and benefit the production and people's life. In addition, Article 8 of the Opinion provides that "community property shall be divided equally in principle."

## **(A) The Principle of Caring for Wife Randomly Applied in Division of Community Property**

Article 39 in the current *Marriage Law* provides that the people's court shall adopt the principle of caring for the rights and interests of child and wife when dividing common property. *Opinions on the Distribution of Property upon Divorce 1993* stipulates that the people's court shall protect wife's legitimate rights and interests when hearing divorce cases involving property disputes. However, our survey shows that the principle of caring for wife is rarely applied in dividing common property and the wife finally acquired less property in judicial practice. Take the following data as examples: (1) Of the cases concerning dividing community property, the principle of caring for wife is applied in less than 10 percent (9.5%) (see table 2-2-3). (2) 35 husbands were awarded more property but did not be required to assume more duty to pay off debts, while only 19 wives indeed were awarded more property with less debt responsibility. The former is about twice the latter (see table 2-2-1, figure 2-2-2a). It is obvious that the husband were awarded more property than the wife in some cases. (3) Spouses in 35 cases agreed to donate their common property to the child (or children) (see table 2-2), and in other 10 cases the wife acquired half of the common property donated her share to the child (or children) (see table 2-2-2, figure 2-2-2a). These cases, 45 in total, accounted for 25.7 per cent among the 175 cases. Although the donation embodies the care for minor children, it will lead to a result that the wife actually does not get any property upon divorce, which may cause trouble for her post-divorce life.

Regarding the reasons why this court rarely adopted the principle of caring for wife in judicial practice, the authors hold that, although China's current judicial interpretation stipulates that common property shall be equally divided upon divorce in accordance with the principle of gender equality,<sup>10</sup> the judicial guidance on applying the principle of caring for wife is still imperfect.<sup>11</sup> There is no clear stipulation on considerations of applying the principle of caring for wife when dividing common property upon divorce. Without a clear guidance, the court faces difficulties when hearing divorce property cases even if it would like to apply this caring for wife principle. Obviously, this principle cannot guide mediation either. In addition, some judges without gender consciousness did not fully recognize the legislative value of the principle.

Prioritizing women's rights when dividing property at the time of divorce reflects fairness upon divorce. It also embodies the target of social law in modern society, that is, protecting the weak. Therefore, the caring-for-wife principle should be regarded as the basic principle for the people's court to divide common property or carry out mediation of property division at the time of divorce. Considerations of applying this principle should be explicitly stipulated, and training on gender consciousness for judges shall be conducted if possible. The specific reasons are as followings: First, the wife is usually weak when divorcing, thus her rights should be prioritized when

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<sup>10</sup> See Article 8 of *Opinions on the Distribution of Property upon Divorce* in 1993.

<sup>11</sup> Article 13 of *Opinions on the Distribution of Property upon Divorce* in 1993 provides that "marital house not suitable for distribution shall be assigned to one party according to the housing condition of both sides and the principle preferential for the child-rearing party or no-fault party. The party who acquires the house shall give the other party half of the equivalent value of the house as the compensation. If both parties occur the same condition, then the court shall be wife-friendly." However, this provision is just guidance on applying the wife-friendly principle to the marital house distribution, yet not other kinds of distribution. Therefore, comprehensive considerations on applying the principle to the distribution of community property shall be established in judicial interpretation.

dividing common property. *The third nationwide survey on the status of Chinese women in 2011* shows that a great disparity of labor income still exists between men and women, albeit the improvement in the aspects of women's average schooling years and social security situation. On account of a Chinese traditional view of 'domestic wife and social husband', women usually do more housework than men in families, which causes more hardship for them to balance work and family.<sup>12</sup> As a result, women are still in a weak position both in society and family. Therefore, women's rights and interests shall be prioritized when dividing community property. Second, women's rights should be given more protection based on compensation for their domestic work. In accordance with division of labor in domestic and social surroundings, the value of housework mainly or wholly created by one spouse will be transformed into social income acquired by the other spouse at present and in the future. Consequently, the fifty-fifty split of community property only deals with the present value transformed from the value of current housework. The expected interests in the future are neglected, which is unfair. Therefore, the spouse who undertakes the main housework shall be given appropriate compensation by awarding more community property upon divorce.

### **(B) Many Wives Waiving Personal Properties such as Dowry**

Article 18 in China's current *Marriage Law* stipulates that a spouse has the sole ownership of his or her premarital property. Therefore the wife has the sole ownership of her dowry and other personal properties. But in the surveyed cases closed by this court, many wives waived their dowry or other personal properties. As mentioned above, in 85 cases involving wife's dowry or other premarital properties, more than 65.8 per cent of the wives gave up their dowries or other premarital properties (see table 2-3-1, figure 2-3-1a, 2-3-2a). The interview with judges gave a possible explanation: the dowries mainly are daily necessities, including furniture and household appliances etc., which either have a huge loss of value on account of using jointly by the couple, or is inconvenient to take away. Thus, the wife usually donates these personal properties to the husband or the child. It can be inferred that without compensation system for personal properties due to natural loss, protecting women's property rights faces more difficulties.

Article 16 of *Opinions on the distribution of Property in Divorce* 1993 provided that where one spouse claims for compensation for the premarital personal property with community property based on that his or her personal property is naturally damaged, consumed or lost after marriage, the people's court shall not uphold the claim. This article seems to be neutral without gender discrimination. But in the prevalent Chinese marriage custom, this article would generate an adverse effect on women. In China, women usually prepares life necessities as the dowry, like furniture and household appliances etc. before marriage, which will have a quick loss during marriage, while the husband usually will buy a house which is a good form of wealth preservation or has an increasing value after several years. Thus the provision is obviously unfavorable for women. In fact, this article does not discriminate women when it was enacted since Article 6 of the same judicial interpretation provides that one spouse's personal properties can be transformed into community properties after joint used or managed for a fixed periods.<sup>13</sup> In this way, one party suffering more

<sup>12</sup> See research group of the third survey on Chinese women's social status, 'Report on the survey data of Chinese Women's Social Status, Iss3', (2001)6Women's Studies Forum 7-14.

<sup>13</sup> See Article 6 of the *Opinions on the Distribution of Property in divorce*: the premarital personal properties of

personal property losses could be compensated from the joint property since some of the joint property is transformed from the other party's premarital personal properties. However, Article 19 of the *Interpretation No.1 of the Supreme People's Court on the Application of the Marriage Law of PRC* in 2001 (hereinafter referred to as the 1<sup>st</sup> *Judicial Interpretation of Marriage Law*) abolishes this transformation rule, and stipulates that each spouse's personal properties, whether before or after marriage, shall not be transformed to the community property for the common usage or management of this property for a fixed period. In other words, the original compensatory article has been abolished, which lead to the drawbacks when applying Article 16 of this judicial interpretation in practice.

### **(C) Differences in Determination of Joint Debts**

Whether the living debts incurred only by the wife should be determined as the joint debts upon divorce is relevant to protecting divorced wife's property rights. As mentioned above, in the 20 cases where this court determined whether the disputed debts are joint debts or not, the common intent test was applied in 55 per cent of these cases; the cases where cohabitation purpose test was applied accounted for 40.0 per cent (see table 3-1-1, figure 3-1-1a).

Different tests will produce different results. Take the following two cases heard by this court as examples. Case A: in Duan (husband) V Zhang (wife), a divorce case closed in 2012 in this court, the defendant (wife) claimed that 6,000 RMB borrowed from Mr. Liu should be held as a joint debts which Duan disagreed. The court determined that after they fought and Duan ran out of home and worked as a migrant worker in another city, Zhang had to raise two children alone with lots of difficulties. These debts for raising children and daily life thus could be presumed as joint debts since no contrary evidences. Therefore, the petitioner and the defendant shall bear the liability of the debt jointly and each one shall pay off 3,000 RMB. Case B: in Cheng (wife) V Dong (husband), a divorce case concluded in 2012 in this court, the court confirmed that the defendant (husband) had a relationship with a third party, stayed out and refused to contact with the petitioner (wife) and their children and that a divorce was granted based on an irretrievable breakdown of this marriage based on the above-mentioned fact. However, for the debt (10,000 RMB) borrowed by the petitioner (wife) for her medical expenses in a hospital which the husband argued that he has no idea of this debt, the court judged that the petitioner herself should be liable for this debt. It is clear that different tests were adopted in these two cases when the husband left home and the wife borrowed some money. In case A, the cohabitation purpose test was adopted, so the debt owed by the wife for raising the children was determined as a joint debt. While in case B, the common intent test was used. For the medical expenses debts incurred by the wife whom the husband denied, the court determined that the wife has all of responsibility for the debts.

At present, *the Marriage Law* and its judicial interpretations establish three tests on how to determine the nature of a debt, and different tests will lead to different judgments: (1) A time test. Article 24 of *the Interpretation No.2 issued by the Supreme People's Court on the Application of the Marriage Law* in 2003 (hereinafter referred to

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one spouse can be regarded as couple's community properties after a-certain-number-of-year joint usage, operation and management after marriage, specifically, house and other means of production with greater value - 8 years and valuable means of life - 4 years.

as the 2<sup>nd</sup> *Judicial Interpretation of the Marriage Law*) stipulates that “Under the claim of the creditor, the debts owed by the husband or the wife during the duration of marriage shall be determined as joint debts.” According to this article, the debts incurred during the marriage should be held as joint debts. (2) The cohabitation purpose test. Article 41 of the *Marriage Law* stipulates that at the time of divorce, debts incurred jointly by the husband and the wife during their married life shall be paid off jointly by them. Article 23 of the 2<sup>nd</sup> *Judicial Interpretation of the Marriage Law* provides that where a creditor files a claim for the personal debt of a party before marriage against his (her) spouse, the claim shall not be supported unless the creditor is able to prove that the debt is used for their joint family living after marriage. Therefore, any cohabitation living debts incurred only by one spouses whether before the marriage or during the marriage shall be presumed as joint debts. (3) The common intent test. This test comes from Article 17 of the *Opinions on the Distribution of Property in Divorce*<sup>14</sup> which provides that the debt without the agreement of both parties or the permission of the other party shall not be determined as joint debt. On the contrary, though the debt owed by the husband or wife during the marriage is not used for cohabitation, if agreed by the other party, it can be determined as a joint debt. In judicial practice, some judges apply this test and determine whether a debt is a joint debt based on the consent of spouses. If one side denies, such a debt should be regarded as a personal debt. Case B is an example. The different tests to determine joint debts obviously influence protection of the property rights of divorce parties.

#### **(D) Lack of Substantial Review on the Divorce Agreement Reached in Judicial Mediation**

The litigation divorce proceedings in China<sup>15</sup> emphasize the principle of prioritizing mediation to deal with community property division. In another word, the judicial practice encourages spouses resolve property disputes by mutual negotiation and agreement if possible. When the parties reach reconciliation agreement of their own accord during judicial mediation, the people’s court will respect their autonomy and confirm this agreement accordingly. But judges should examine the content of the reconciliation agreement with a view to protecting the rights and interests of women and children. Under the traditional marriage custom in China’s rural areas, rural women are weaker than men in terms of the economic status because of such factors as education, job market, gender discrimination, etc. Judges should be aware of rural women’s weak status and consider it as a factor in dividing community property so as to provide economic protection for their lives after divorce. However, as mentioned above, lots of wives were assigned little property actually in the surveyed cases. The survey also shows that agreements reached during judicial mediation are usually

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<sup>14</sup>See Article 17 of the *Opinions on the Distribution of Property in Divorce* stipulated that, The following debts shall not be determined as the joint debts ,and shall be paid off by husband’s or wife’s personal property: (1) the debts that the spouses render the agreement to repay with the personal property , except for the agreement in the purpose of evading debt; (2) the debts incurred by husband or wife without the consent of the other party to support relatives and friends to whom there is no duty of support; (3) the debts incurred by one party without the consent of the other party and used to engage in business activities, the income of which is not used for joint life; (4) other debts borne by husband or wife.

<sup>15</sup>See CHEN Wei & SHI Lei, ‘Divorce Procedure in China’, John Eekelaar & Rob George ed., *Routeledge Handbook of Family Law and Policy*, Routeledge, p.111.

disadvantageous to women because they generally would like to give up their share of community property in order to win a battle of custody. For example, in one divorce case closed by this court in 2011, both parties reached an agreement on property division and child support as follows: The wife was given custody of a 15-year-old daughter and would bear the responsibility of raising the child by her own. The community property, the marital house, was awarded to the husband. Again, a divorce case in 2012, both parties reached a divorce agreement in judicial mediation: The marital house and family appliances were all awarded to the husband; the wife was given custody of a 14-year-old daughter and assume all responsibility of child-raising. According to the personal information recorded in these two cases, both women were peasants. The agreements of giving up her share of community property and fostering child alone probably cause economic difficulties after divorce for single mother families so that their rights to life and development are hard to realized.

The interviews with the judges in this court indicate that there is an old custom that the children should stay at father's home in this area, so the wife was willing to give-up property in exchange for the children's direct custody. However, some judges adopt a policy of laissez-faire toward this undesirable divorce agreement based on this obsolete custom. They fail to examine the agreement according to the law and correct it if anything illegal. In addition, they gave another reason. Due to the heavy caseload for a judge in a grass-root court, they don't have lots of time and energy on mediation in each case. It is already difficult to help angry parties calm down and reach a divorce agreement. They generally would not carry out substantive examination of these mediation agreements, result of their hard work.

In recent years, divorce cases and other civil cases rise rapidly in this court, and usually a judge hears several cases or carries out several mediations a day. Family disputes, concerning personal relationship mixed with emotions, ethics and morals, is totally different from other civil cases. The aim to settle family disputes is not just to balance different interests, but also to consider the long-time relationship of parties, which sometimes is the continuing martial relationship, or both parties' continuous cooperation in child raising after divorce. In this sense, settlement of a family dispute needs comprehensive mechanisms such as marriage consultation, family treatment and law education. It costs time and energy. The conflict between the heavy caseload and the high demanding of hearing family disputes made lots of judges have to end mediation in limited time. For those agreements reached by both parties against the rights and interests of the wife and the children, some judges did not carry out substantive review and correct them accordingly.<sup>16</sup> Therefore, it is necessary to improve the current mediation system in divorce litigation.<sup>17</sup>

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<sup>16</sup> Another survey showed that in judicial practice there was a lack of public supervision and appropriate intervention during the trial of child custody disputes in the investigated court. See Chen Wei, Zhang Qing-lin. *The Juridical Practice of Child-rearing Questions in Divorce Proceedings and Its Improvement Proposals - Based on the survey concluded divorce cases (2011 — 2013) of a grass-root People's court*, (2015)1Hebei Law Journal13-33.

<sup>17</sup> For example, in the forum, some judges pointed out that in the disposition of divorce disputes, cases withdrawn by the petitioners voluntarily through mediation accounted for a large proportion. For instance, for divorce cases tried by the court from 2011 to 2013, 441 out of 1816 were withdrawn by the petitioners through court's mediation, accounting for nearly 25%. On the one hand, it shows that the effect is significant. On the other hand, it shows that some divorce cases are not much controversial and can be diverged through diversified disputes resolving mechanism. Hence, the judges can put their energy into the judgment of more controversial and complicated divorce cases. In this way, the trial effect and social effect in divorce cases can be improve.

### **(E) Some Judges Lacking Gender Consciousness**

As mentioned above, the authors found the following problems in surveyed cases: Some judges failed to examine the content of the divorce agreement reached by both parties; the principle of caring for wife was rarely applied in the judgments of dividing community property; the property rights of divorced wife were poorly protected in some cases. The underlying reason for these problems is that some judges lack gender consciousness and consciousness of protecting the weak.

## **V THE ENLIGHTENMENT OF THE EMPIRICAL RESEARCHON THE PROTECTION OF WOMEN'S PROERTY RIGHTS IN DIVORCE PROPERTY DISPUTES**

The State Council of China issued the *Program of China's Women Development (2011-2020)* in 2011. It requires 'protecting the property rights and interests of women in the marriage and family relationship. In hearing divorce cases, women should be fairly compensated considering their contribution in caring family members during the marriage, their post-divorce lives and development and raising-child tasks.' The survey finds that this court has made achievements in protecting women's property rights, but there is some space to improve, too. We suggest taking the following measures to improve the current legislation as well as the judicial practice.

### **(A) Stipulating Factors that the Court must Consider When Applying the Principle of Caring for the Wife in Divorce Property Disputes**

Regarding the problem that some judges rarely use the principle of caring for wife during divorce property disputes, the authors suggest that the lawmakers should explicitly stipulate the considerations of applying the principle of caring for the wife in divorce property disputes learning from the judicial experience of the England and Wales<sup>18</sup>. These factors include: (1) The marriage life. The longer the marriage lasts, the more housework and caring responsibilities the wife takes, the more compensation she is entitled to. (2) The health of the wife. If the wife is old and weak after a long marriage at the time of divorce, the wife should get more properties from the common property pool. (3) Contribution to the community property. Where the wife contributes a lot to the family even in the form of housework should be compensated and acquire more properties appropriately from the common property. (4) The child-rearing tasks. If the wife is awarded the child custody and this caring responsibility might make her decrease money-earning capacity such as their child is too young to work out of home or their minor child is disabled, the wife is justified to acquire more properties. (5) Other factors.

### **(B) Establishing Compensation System for the Natural Losses of Premarital Personal Properties during marriage**

As mentioned earlier, there is no compensation system for the natural losses of premarital properties due to marriage life, the authors suggest learning from French compensation system stipulated in Article 1433 of *French Civil Code* which provides that as long as the community property benefits from one spouse's personal property, the owner of the personal property shall be compensated with the community

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<sup>18</sup> Shi Lei, *Research on the Modern Divorce System in England and Wales*, Beijing: Qunzhong Press, pp. 209-215.

property.<sup>19</sup> Such a compensation between community and personal property is reciprocal, equivalent, and can balance the interests among couple's retained property, personal property and community property, which supports fair protection of both sides' rights and interests in a marriage. So the authors recommend establishing such system in China's *Marriage Law*: Where one party's personal property suffers an apparent decrease of the value due to marriage life, the spouse shall have the rights to claim a compensation with community property or the other spouse's personal property for such a loss.

### **(C) Establishing the Family Agency System as a Helpful Tool to Determine Joint Debts**

In the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Private Lending Cases* issued on September 1, 2015, Article 19 provides that the people's court shall strictly examine the cases involving private lending disputes. The examining targets include the reason, time and place when incurring the debt, the source of money, the way of delivery, the money flow, and the relationship between creditor and debtor and their economic conditions. Thus the judge can identify whether there is a fraud civil litigation. On the basis of the provision, when hearing joint debts in divorce proceedings, the court should examine the following three aspects: First, the time. Generally, joint debts are established during the marriage. This is a basic rule. Second, the cohabitation purpose that is whether the debts are incurred for their cohabitation and raising their biological children. Whether the other's debt incurred before or after marriage, as long as the debt was for the couple's living and raising their biological children, it should be presumed to be the joint debt. This is requirement of marriage ethics and accords with the legislative intent of statutory marital property system in China, and is the fundamental rule to determine joint debts. Third, the common intent, that is whether the couple agreed to bear the debt jointly. If the debt incurred by husband or wife was the couple's common intent, the court would respect their willingness and confirm that it is their joint debt. This rule embodies the principle of the autonomy in the civil law and stresses that even if the debt is neither incurred during marriage, nor for the cohabitation purpose, it will be determined as a joint debt as long as the couples agree.

The necessity of couples to incur a debt for their cohabitation in reality is the reason to confirm that it is a joint debt. Therefore, it is crucial to define what debts for the cohabitation cover. We suggest establishing the family agency system in China in which the scope of the daily lives for a couple and family agency power should be stipulated. Accordingly, the liability for the debt will be clarified, and the burden of proof will be reasonably assigned. We commend learning from Article 220 of French Civil Code<sup>20</sup>, in accordance with the Chinese custom, the daily lives should be defined as those necessary matters of maintaining the daily life of families and

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<sup>19</sup>See *French Civil Code*, translated by Luo Jiezhen(Peking University Press, 2010) 368.

<sup>20</sup>Article 220 of French Civil Code provided: "No matter husband or wife has the right to separately conclude a contract which aims at maintaining family's daily life and supporting the education of children. Thus, any debt of a spouse concluded as a result of this shall be jointly and severally liable by the other party. Nevertheless, the joint effect depends on the condition of family life, whether the activity is helpful, and whether the third party of the contract is in goodwill or ill will. If the expenditure is obviously excessive; the joint effect will be invalid. This does not apply to the loan or payment by installment which will not cause joint obligation if it is not mutually agreed, but belongs to the microloan necessary for family's daily life." See *French Civil Code*, translated by Luo Jiezhen(Peking University Press, 2010) 68-69.

educating children. The transaction act concerning the real estate or other property with big values, debts for investing and financing activities, and other businesses out of the appropriate living expenses are not daily lives matters where family agency applies.

For those debts incurred in daily lives matters, these debts owed by one party should be determined as joint debts. Both parties bear joint and several liability to these debts and they should be paid off with community property. On the contrary, the debts out of this scope should be determined as personal debts. Only the debtor himself or herself has the liability for these debts, except that both agreed to bear it.

Besides, the court shall consider the following factors when determining the liability for joint debts: the division of common property and child custody; the economic status and debts-paying ability of both parties (giving preferential treatment for the weak side); the cause of debt(the party benefiting more from joint debts should assume a larger liability for the joint debts).

#### **(D) Establishing Family Mediation Counselors in the People's Court**

As for the difficulties in divorce mediation in the People's Court, We suggest learning from Australian family court system and establishing family counselor in mediation on family matters. According to the provision in Australian Family Law in 1975(amended in 2008), judges in family courts or federal courts have the duty to be the family counselors. Court officers and staff or psychologists and community workers specializing in child and family affairs will be the family counselors to provide consultation and mediation services in litigation. In the divorce proceeding, once reconciliation is possible, the court has the power to suspend lawsuit immediately and command litigants participate in mediation. Any party who refuses mediation without reasonable grounds or violates agreement will be punished to bear lawsuit fees and fines.<sup>21</sup> Such a system makes the mediation a professional conduct carried out by professionals. So the authors suggest that the court should appoint professional institutions or mediators specialized in family mediation as family counselors to provide consultation services in divorce cases. Once a divorce agreement reached by both parties with the help of family counselors, judges need to carry out substantive examination in accordance with law on the basis of respecting their autonomy so as to promote substantive fairness of mediation agreement and protect the rights of the vulnerable.

#### **(E) Strengthening the Regular Training of Legislators and Judicial Personnel on Gender Consciousness**

In 1995, the 4th World Conference on Women culminated in the adoption of the *Beijing Declaration and Platform for Action*, and set forth a global strategy of "channeling gender consciousness into the mainstream of decision-making".<sup>22</sup>As a

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<sup>21</sup> See Australia Family Law in 1975, Chapter 3 'family consultant', Chapter 4A 'the management of court'. Australian Family Law (amended in 2008), translated by Chen Wei etc, (Beijing: Public Press, 2009)61-72,92-99.

<sup>22</sup>In 1985, 'Nairobi strategy' was passed on the 3rd World Conference on Women, in which the conception of 'social gender mainstreaming' was proposed firstly. In 1995, the Beijing Declaration and Platform for Action adopted on the 4th World Conference on Women gave the comprehensive and mature expression of the concept

signatory of this U.N. document, China has made a clear promise to incorporate gender consciousness into its national policies management. *The Program of China's Women Development (2011-2020)* issued by the State Council in 2011 requires strengthening training on gender consciousness. "Incorporate the theory of gender into regular training courses for the legislative, the executive and the judicial departments, and improve their gender consciousness." The author's suggest that the experience of one court in Chongqing provides a good example regarding training on gender consciousness for judges. Judges in this court enhanced their gender equality concept and improved their knowledge and ability of hearing cases concerning domestic violence through training courses like "The Gender Equality and Domestic Violence" and "The International Project for Judges on Anti-domestic Violence" organized by the Research Center on Foreign Family Law and Theory of Women in the Southwest University of Political Science and Law.<sup>23</sup> We put forward suggestions that courts at all level should earnestly implement relevant documents issued by the government and take steps to incorporate the gender theory into regular training of judges. Thus, judges' gender consciousness can be improved and the legitimate property rights of the wife in liquidation of divorce property can be better protected.

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of social gender mainstreaming, and identified the global strategy of the social gender mainstreaming. In 1997, the United Nations economic and social council made the consistency definition of social gender mainstreaming; its content is as follows: the so-called social gender mainstreaming refers to assess all planned action in all fields and every level, including legislation, policy, and plan, for the different meaning of both men and women. As a strategy method, it makes the attention and the experience of both the male and the female to become a part to design, implement, supervise and evaluate all policy options in political, economic and social area, so that both men and women gain the benefit equally, and no inequality exists. The ultimate goal of the mainstream is the realization of equality between men and women.

<sup>23</sup>See Chen Wei, and Duan Wei-wei, 'Empirical research of the court's role of combating domestic violence-take grass-root people's court of Chongqing City one district hearing domestic violence cases as example', (2012)8 HeBei Law Journal 28-38.

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