

## Anti-domestic Violence Endeavors by Chinese Courts and the Bangkok Rules

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The third survey on the social status of Chinese women (2012) showed that 24.7% of women had suffered from domestic violence, including abuse, beating, restrictions on personal freedom, economic controls, or forced sex at certain time of their marriage.<sup>2</sup> A news report published by *Guang Ming Daily* on November 24, 2011, indicated that the reality of abused women was “enduring violence in silence, leaving violence by breaking up their marriage, eliminating violence with violence and ending violence with their lives.”<sup>3</sup> Domestic violence is also one of the leading cause for Chinese women to commit violent crimes.<sup>4</sup> In 2006, among the 963 serious female offenders in Hebei Province, 219 of them (22.74%) committed crimes related to domestic violence.<sup>5</sup> As of April 2007, 171 women were serving time in Shaanxi Women’s Prison for violent crimes. Of these, 95.3% killed their spouse due to prolonged domestic violence.<sup>6</sup> In 2009, among women incarcerated in Liaoning Province for serious offenses, approximately 60% had suffered from domestic abuses prior to their arrests.<sup>7</sup> According to sources, more than a few of these women had sought help but were not responded.

China Institute of Applied Jurisprudence (CIAJ), affiliated to the Supreme People’s Court, noticed that if society and law treats domestic violence as violence, there would be effective interventions. And if intervention is effective, the number of women who have to fight back would decrease sharply. If judicial bodies realize that killing is the only way for some abused women to stay alive, the number of women sentenced to lighter or non-custodial sentences would increase. All this would in effect improve the treatment of this category of women offenders. For this reason, CIAJ started a dedicated pilot work on judicial intervention in domestic violence, after receiving approval from the Supreme People’s Court (SPC) in 2008. This article introduces this pilot work, cross-referencing relevant provisions in the Bangkok Rules and raise recommendations for accelerating the reform pace.

### A. Judicial Pilot Work on Marriage and Family Cases involving Domestic Violence

#### 1. Positive influence on judicial practices of the Guidebook on Marriage and Family Cases involving Domestic Violence<sup>8</sup>

After receiving approval from the SPC in May 2008, CIAJ released a Guidebook on Marriage and Family Law involving Domestic Violence (hereafter the Guidebook). Gender perspective is incorporated in the Guidebook and following

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<sup>2</sup> [http://news.china.com.cn/2012lianghui/2012-03/10/content\\_24861307.htm](http://news.china.com.cn/2012lianghui/2012-03/10/content_24861307.htm) (visited on Feb 7, 2014)

<sup>3</sup> “Shocking Frequency of Domestic Violence, Pressing Need for Anti-domestic Violence Law,” *Guang Ming Daily*, Nov 24, 2014.

<sup>4</sup> Mo Ruili and Yuan Zemin, “The Conflict in relationships from a Harmonious Perspective: Domestic Violence and Female Offenders,” *Women and Legal Research*, no. 4 (2007) p 45. Also see Xue Ninglan, Ning Meiya, *Oral Accounts by Abused Women*, (China Social Sciences Press, 2001).

<sup>5</sup> “Sentences for Murdering Abusive Husbands Different in Shanghai and in Baotou; Expert Calls for Same Standard,” *Xinhuanet*, Mar 29, 2006.

<sup>6</sup> *Xi’an Evening News*, Sept 29, 2008.

<sup>7</sup> Chen Liping, “Personal Safety Protection Orders Vigorously Intervenes in Domestic Violence,” *Legal Daily*, May 2, 2009.

<sup>8</sup> “The Guidebook” is a research Achievement from applied jurisprudence; it is not legally binding. For the full text, go to the official website of the Supreme People’s Court→ China Institute of Applied Jurisprudence → Gender Equality and Justice → “The Guidebook on Marriage and Family Cases involving Domestic Violence”

points are specified: 1) Domestic violence is not family dispute, but violence against women; 2) Since the key point to intervene in domestic violence is to protect the personal safety of the victim, a system of personal safety protection orders(i.e. civil protection order) is created, in accordance with legal principles; 3) Judges are requested to allocate fairly the burden of proof between the parties; 4) The abusive parent is not suitable to have child custody; 5) During mediation, power imbalance between the two parties must be taken in mind, in order to protect the rights and interests of the abused party; 6) Property settlement scheme should reflect the goal to justly compensate the woman for her contribution and input during marriage and be conducive to her survival and development after divorce.

Afterward, nine basic-level courts across the country agreed to join the pilot effort and the Guidebook was used in handling marriage and family cases, which attained good legal and social effects. Between 2009 and 2011, the number of pilot courts gradually increased to 73, domestic violence were recognized in divorce cases, at a rate over 29% in some pilot courts: an increase from below 8% since 2001,<sup>9</sup> and over 130 personal safety protection orders were issued in total.<sup>10</sup> The effectiveness of the orders was above 98%, the highest rate among all civil orders in mainland China. While effectively stopping the violence, the orders also provided a chance for those women, who want to stay in marriage if violence stopped, to withdraw their divorce suit. More importantly, due to increased gender awareness among judges, the abusive party can no longer obtain child custody.

2. The main content in the Guidebook and achievements of the pilot project were absorbed by legislation and judicial policies.

(1) Legislation

Pilot courts' issuance of personal safety protection orders to curb domestic violence has pushed forward some local and national legislation. In 2010 and in 2012, the mechanism of personal safety protection orders was legislated both in the Zuhai and Shenzhen Special Economic Zone in Guangdong Province.<sup>11</sup> On April 12, 2011, the Social Law Office of the Legal Working Committee of the Standing Committee of National People's Congress (NPC) entrusted CIAJ to hold a "Legislative Workshop on the Personal Safety Protection Order Mechanism" in which the representative of the Office listened to work reports delivered by pilot courts across the country. On June 20, 2011, the same representative made an address in the opening ceremony of the International Seminar on Anti-Domestic Violence Legislation, jointly organized by the All-China Women's Federation (ACWF) and the United Nations Population Fund. In the address, he stated that "CIAJ put theory into practice and launched pilot work against domestic violence. It has achieved gratifying results. The NPC has been paying close attention to the aforementioned judicial pilot work and its development. Currently, the Anti-domestic Violence Law as a preparatory legislation work was included in the

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<sup>9</sup> 2001 was the year when domestic first became a legal basis for divorce.

<sup>10</sup> As of the end of 2013, there was no way of measuring how many personal safety protection orders were issued across the country, but we do know that one court that issued the most has issued 88 orders.

<sup>11</sup> Women's Rights Protection Act of Zhuhai (2010), Gender Equality Bill of the Shenzhen Special Economic Zone (2011).

NPC Standing Committee's 2011 Work Plan. This symbolizes that China national legislative organs has begun its research on the issue of domestic violence. Propelled by the ACWF, the Anti-domestic Violence Law became part of the work plan of the NPC Standing Committee in 2012.

In June 2011, CIAJ submitted to the Civil Procedure Law Amendment Group in SPC "Recommendation on Inclusion of Personal Safety Protection Orders in the Civil Procedure Law Amendment". It was then submitted to the NPC Legal Working Committee as part of the SPC opinions on the Civil Procedure Law amendments. In 2012, the Civil Procedure Law of People's Republic of China (amended) has a new provision regarding a behavioral preservation system,<sup>12</sup> which became the first specific legal procedural basis for the issuance of "personal safety protection orders."<sup>13</sup>

(2) Judicial policies

From 2009 to 2013, the ideas of the Guidebook, a non-legally binding handbook, the mechanism of personal safety protection orders and the fair allocation of burden of proof, were transformed into legally binding normative documents by six provincial high courts, 11 municipal intermediate courts, and one municipal politico-legal committee.<sup>14</sup> They direct the trials of marriage and family cases in the aforementioned cities and provinces.

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<sup>12</sup> Article 100 of the Civil Procedure Law of the People's Republic of China states: If it becomes impossible or difficult to enforce a judgment or damages may occur due to acts of one of the parties or for other reasons, the people's court may, at the request of the other party, order property preservation, order the party to do or not to do certain things. In the absence of such request, the people's court may, when necessary, also order property preservation measures. When a people's court has decided to adopt property preservation, it may instruct the applicant to provide a guarantee; if the applicant fails to do so, application shall be rejected. After receiving application, if urgent, the people's court must decide whether to grant an order within 48 hours concerning property preservation; if granted, the order goes into enforcement immediately.

<sup>13</sup> "Property preservation measures should be applied under the following circumstances: ... in disputes such as those involving domestic violence, sometimes there is a need to immediately stop the behavior of one party that may cause harm to the other ..." see Xi Xiaoming, *Civil Procedure Law of People's Republic of China: Understanding and Applying Amended Provisions* (People's Court Press, 2012) p. 221.

<sup>14</sup> Provincial/Municipality High People's Court Documents: Ningxia Hui Autonomous Region: Guiding Opinions on Strengthening Judicial Protection of Women Suffering from Domestic Violence (2013); Chongqing: Procedural Regulations on Personal Safety Protection Orders in Marriage and Family Cases involving Domestic Violence(2010); Shanxi: Implementation Rules on Personal Safety Protection Orders in Domestic Violence Cases (2010); Jiangsu: Guiding Opinions on Issues in Handling Marriage and Family Cases involving Domestic Violence in Accordance with the Law (2010); Guangdong: Application Guidelines for Personal Safety Protections Orders (2010); Hunan: Guiding Opinions on Strengthening the Judicial Protection of Women Victims of Domestic Violence (2009); Intermediate People's Court Documents: Shenzhen: Implementation Measures for Personal Safety Protection in Family Disputes and Application Guidelines for Personal Safety Protections Orders (2013); Qingdao: Opinions on 'Injunctions' in Marriage and Family Cases involving Domestic Violence (2012); Lianyungang: Guiding Opinions on 'Personal Safety Protection Orders' in Marriage and Family Cases involving Domestic Violence (2012); Tongling: Provisional Regulations for the Launch of 'Personal Safety Protection Orders (2012); Ma'anshan: Provisional Regulations for the Personal Safety Protection Orders (2011); Fuyang: Provisional Regulations for the Launch of 'Personal Safety Protection Orders (2011); Wuhu: Provisional Regulations for the Launch of Personal Safety Protection Orders(2011); Suzhou: Provisional Regulations for the Launch of 'Personal Safety Protection Orders (2011); Hefei: Provisional Regulations for the Launch of Personal Safety Protection Orders (2010), Changsha: Guiding Opinions on Trial Work for Further Prevention and Control of Domestic Violence(2010);

## B. Pilot work on criminal cases involving domestic violence

In March 2012, building on the achievements from marriage and family law area and with SPC approval, CIAJ extended its anti-domestic violence pilot work to the criminal law area, which mainly includes:

- (1) Defining domestic violence. [CIAJ] referred to the definition of domestic violence in the Guidebook and included more offences other than domestic violence related crimes such as abuse, intentional assault, murder, and interference in marriage freedom. The pilot scheme not only brought into view illegal detention, kidnapping, rape (between husbands and wives, fathers and daughters, and lovers), but also called attention to the fact that domestic violence may be an underlying cause of women's involvement in rape, robbery, fraud, embezzlement, bribery, kidnapping, theft, drug trafficking, and the trafficking of women and children.
- (2) Drawing from international practice, [CIAJ] explored the possibility of having expert witness (opinion) to appear in the court. Realizing that expert witnesses could testify with regard to domestic violence and its effects on the victim, explain the interaction patterns, the emotional, economic, and psychological interdependence between the two parties, and other general characteristics, which can assist the collegiate court in making fairer and more just decisions, we made the expert witness mechanism an important part of the pilot scheme.
- (3) Sentencing. Combining leniency with severity is the basic criminal policy in main-land China. It allows the court to use discretion to give a lighter sentence to a defendant who "committed murder due to the escalation of civil conflict such as marriage, family and neighborhood disputes."<sup>15</sup> Nevertheless, it did not regulate specifically the types of domestic violence that triggers criminal acts. Therefore, all defendants would benefit from this policy no matter whether they committed crimes because of controlling violence or because of defensive violence. In order to change this situation, the pilot scheme requests pilot courts to identify and distinguish the two different type of violence in trials. In instances where death is the result of defensive violence, courts are advised, to the extent possible, to sentence the defendant to three to 10 years' imprisonment, in accord with the provisions in Article 232(2) of the Criminal Law. If the circumstances are obviously minor, suspension of sentence is advised.
- (4) Specialized training. The success in the aforementioned pilot work on marriage and family cases involving domestic violence showed that

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Municipal Politico-Legal Committee Documents: Changsha: Opinions on Further Promoting the work on Prevention and Control of Domestic Violence" (2010).

<sup>15</sup> The Supreme People's Court "Opinions on Implementing the Criminal Policy of Combining Leniency with Severity (No.9 [2010]) Article 22: Lenient punishment may be used for offenses triggered by the escalation of civil conflicts such as marriage, family, or neighborhood disputes; offenses caused due to labor disputes and mismanagements where the criminal motive is not malicious; or sudden offenses caused by the victim's negligence or outrage or involving defensive elements. The Supreme People's Court's "Summary of Discussion Panels on Nationwide Courts Maintaining Stability in Rural Areas and Criminal Prosecutions (No. 217 [1999]) Part 2, Article 1, Paragraph 1, regarding cases of intentional homicide and intentional injury: The decision to impose the death penalty in cases of intentional homicide, should not only take into account whether it results in the death of the victim but also shall consider comprehensively all circumstances of the case. When handling intentional murder cases triggered by escalated civil conflicts such as marriage, family, or neighborhood disputes, the application of the death penalty must be extremely cautious and shall be distinguishable from other intentional homicide cases that seriously endanger public safety in society.

specialized training is the most effective way to update judicial ideas and improve judicial skills. It also served as the foundation of the effectiveness of anti-domestic violence pilot work. In May and October 2013, a total of 43 criminal judges attended interactive anti-domestic violence training on judicial skills. The outcome was encouraging. For example, after the trainings, one criminal judge from an intermediate court said: “The top priority now is to separate domestic violence from domestic conflicts, which is a neutral, yet somewhat affectionate, sociological concept. We have to put domestic violence together with other criminal concepts like rape and murder.” Bringing this concept back home, this judge spent half a year studying 65 criminal cases involving domestic violence between 2008 and 2012 collected from 12 basic-level courts in the jurisdiction of his court. He then indicated existing problems and suggested improvements.<sup>16</sup>

C. In comparison with Bangkok Rules

Although the pilot judicial intervention in domestic violence has achieved some success, there is still a rather large discrepancy if compared with the relevant provisions of the Bangkok Rules. The following table compares the pilot development in Chinese courts to the Bangkok Rules in five areas, namely, definition, evidence rules, sentencing, training, law and policy.

Bangkok Rules	Development in pilot courts in mainland China	
	Achieved	Lacking
Definition: “‘Violence against women’ meant any act of gender-based violence resulting in, or likely to result in, physical, sexual or psychological harm or suffering to women, including arbitrary deprivation of liberty, whether occurring in public or in private life” (Article 9)	Some courts are able to treat equally and seriously any violence against women in both public and private lives.	Need future Anti-Domestic Violence Law to help with a unified understanding and practice.
Evidence rules” Consideration of the specific implications that violence against women has for women’s contact with the criminal justice system (Article 9):	Drawing on international experiences, the pilot scheme is exploring the possibility of setting up expert witnesses mechanism to determine whether domestic violence occurred and whether the experience of violence has an impact on the female defendant.	Still at Pilot stage
Sentencing: When sentencing female offenders, the court has to consider their care-taking responsibilities and general	Lack of unified sentencing has long been an outstanding problem in mainland China. Some courts that realize that domestic violence has specific implications for abused women and may even be the main reason for	Uneven development in different places, under further exploration

<sup>16</sup> Ren Guoquan, Xia Ningnan, “Problems and Countermeasures in Trying Criminal Cases involving Domestic Violence,” *People’s Court Daily*, Jan 22, 2014.

<p>background. The court possesses the power to consider mitigating factors such as no previous criminal history and the severity of the criminal act (Article 61)</p>	<p>her to violate the criminal law are able to consider this in sentencing and give lenient or reduced punishment to female defendants with no criminal record and with defensive violence. A number of these women are sentenced to non-custodial punishments. Nevertheless, due to lack of gender awareness, there are still some courts that make relatively inadequate efforts in sentencing.</p>	
<p>Training: Providing law enforcement and judicial staff with training and skills related to gender equality and women's rights</p>	<p>Since 2008, the CIAJ has provided interactive trainings for more than 600 judges from pilot and non-pilot courts as well as for police and procurators in some pilot court jurisdictions to enhance the skills in dealing with cases involving domestic violence. These trainings have attained good results.</p>	<p>This training is only a support for the anti-domestic violence pilot work launched by the CIAJ. It has yet to be included in the regular curriculum of judge's college at all levels.</p>
<p>Law and policy: Urging member states "to review and, where appropriate, revise, amend, or abolish all laws, regulations, policies, practices and customs discriminating against women or having a discriminatory impact on women" (Article 9)</p>	<p>Some courts have issued guiding opinions with some gender perspectives in marriage and family as well as criminal laws.<sup>17</sup> Some guiding opinions fully conform to the requirements in the Bangkok Rules. For example, Article 8 of the Guiding Opinions on Criminal Cases involving Domestic Violence by Wenzhou Intermediate People's Court (Guiding Opinions of the Wenzhou Intermediate Court) states: Where a perpetrator of domestic violence assault, bind, abuse, and forcibly restrict the personal liberty of a victim in a prolonged period, he shall be liable to severe punishment. Where a victim of prolonged domestic violence without effective help commits responsive violence in order to escape from the perpetrator or to protect family members, the court must sufficiently consider the continuous nature of domestic violence, the power imbalance between the two parties and whether the action constitutes self-defense or defense exceeding the limits. Where the responsive violence constitutes a crime but the defendant shows sincere remorse or is forgiven by the deceased and his/her family members, especially those women who have minor children in need of care, the court can</p>	<p>Yet to be raised to the level of national criminal justice policy.</p>

<sup>17</sup> See note 12

	<p>give significantly lenient or reduced punishment or exempt defendants from punishment in light of the circumstances of their crimes.</p> <p>Another example is Article 19 of the Guiding Opinion on Strengthening the Judicial Protection of Women Victims of Domestic Violence by Hunan Provincial High People’s Court (Hunan High Court Guiding Opinion): Where a woman who suffers from prolonged domestic violence murders or injures the perpetrator of violence in order to escape from the perpetrator or to protect family members and it constitutes a crime, the court should sufficiently consider the motive and cause of the crime, the relative lack of maliciousness, and the relatively little harm to society. Where the defendant shows sincere remorse or is forgiven by the deceased and his/her family members, especially those women who have minor children in need of care, the court can give lenient or reduced punishment or exempt them from punishment in accordance with the law. Article 20 states: In terms of sentence reduction or parole for woman inmates who had fought against domestic violence, if she follows prison regulations while serving her sentence, accepts education and reform, shows remorse, and has minor children in need of care, in consideration of the generally low threat that she poses, she can be granted larger sentence reductions and sentence reductions at more frequent intervals in accordance with the law. For this category of women offenders, based on their crimes and repentance, and confirming that they will not harm the society again, parole can be applied more liberally in accordance with the law.</p>	
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D. Recommendation for accelerating the pace of improvements

1) Legislative suggestions

To prevent and eliminate crimes by women, we have to effectively prevent and stop domestic violence against women. Following this logic, we have to switch post-crime punishments against abused women who were forced to become perpetrators because of violence against them at home to pre-incident protections. In addition, we have to switch post-crime punishment against abusers to the correction of their mind and behaviors. Therefore, the government should launch Anti-domestic Violence Law as soon as possible to provide means to the aforementioned demands.

Anti-domestic Violence Law should at least include the following content. First, stating clearly the purpose of the legislation. The aim to legislate Anti-domestic Violence Law is to protect victims, not to protect marital and family relationships. This would avoid in practice sacrificing the protection of the personal rights of the victim to the protection of marital and family relationships. Second, defining domestic violence. Domestic violence is not domestic disputes, but behavior inflicted by one party in relationships in order to control the other party, through infringing his/her basic human rights. Third, in terms of personal safety protection, application, standards of evidence review, enforcement agency, etc. should be regulated in order to facilitate different governmental departments to cooperate with one another in carrying out their respective duties, so that the orders could exert greatest deterrence. Fourth, formulating evidence rules which observe the characteristics and patterns of domestic violence. This measure can effectively reduce the current overloaded burden of proof born by domestic violence victims. Fifth, building effective social assistance measures to help victims and correction measures to help perpetrators.

2) Suggestion for judicial policies

- a) The current judicial pilot work against domestic violence should continue to be paid attention and measures should gradually be taken to reach a common understanding and practices across the country in protecting women's rights in the home and hence reduce the number of women, who are victims in disguise, to violate the Criminal Law.
- b) The SPC, drawing from the experience and practices of the international community and on the basis of the experience of local pilot courts, should formulate an expert witness mechanism and sentencing standards for criminal cases involving domestic violence, thus ensure proportional punishments for female defendants.<sup>18</sup>
- c) Bringing gender awareness and skills related to domestic violence trial into training courses for judges. Trainings can help judges renew concepts and understand the characteristics and patterns of domestic violence. The SPC should integrate interactive trainings into in-service training courses for judges at all levels as soon as possible in order to improve the skills and quality of.

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<sup>18</sup> For example, both the Guiding Opinion of the Wenzhou Intermediate Court and the Ningxia Hui Autonomous Region High People's Court Guiding Opinion on Strengthening Judicial Protection of Women Victims of Domestic Violence use evidence of the defendants' past history of perpetrating violence as aggravating factors to deliver more severe punishment, and both the Guiding Opinion of the Wenzhou Intermediate Court and the Guiding Opinion of the Hunan High People's Court use the defendants' histories of victimization as mitigating factors to give lenient punishment. Moreover, some pilot courts are also investigating the possibility of introducing the practice of expert witness into criminal cases involving domestic violence.