

# The Swiss Marital Property in Chinese Context

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## I. Introduction

In the forthcoming decade or so the drafters of the Civil Code of China might ask themselves a question like this when they look back the development of Chinese family law: what if the “real” Swiss marital property law be introduced to Chinese lawyers and scholars earlier, say, two or three decades? What would the Chinese marital property law now look like; what would happen to the hundreds of thousands of divorced couples and their claims regarding his, her, or their property?

In the summer of 1999, when the family law experts submitted their first proposal of the new marriage law, the Law of Switzerland in the far western Europe was important but indifferent in a dual sense. It’s important in that the blue picture of the new law was mainly based of its Swiss counterpart, at least in the academic level; on the other hand, it’s indifferent because what make up the Swiss marital property law are only a Chinese translation of the Swiss civil Code (ZGB), translated by a linguist without legal background; and some pieces of outdated literatures in complicated Chinese, focusing on reframing the provisions of the code, accompanied by some historical development and legislation procedures.

That’s apparently even not the “law in book”. In contrast to the accuracy and completeness of the German Civil Code (BGB), The Swiss Civil Code is famous for its flexibility and its trust on courts, which leaves many questions open for case laws and scholarly discussions. That’s the original initiative of my research. I plans to explore first how the “real” Swiss marital property law looks like and why it looks like so. Then I will be back to the Chinese context and depict what the Swiss law in China looked like in the past, and based on its real picture, how its Chinese Counterpart should look like in the future.

In this short article some of these questions will be answered in a quite simplified manner;<sup>1</sup> references and footnotes are omitted due to reasons of publication. First, a specific example regarding “the increased value” or “appreciation” (Mehrwert) will be given, which seems to raise problems almost everywhere, including China and Switzerland (II). Then all the other relevant provisions or concepts which have been misunderstood or neglected will be listed, together with its original correspondents in the Swiss law (II). In the end are some general observations (IV).

## II. Example: Appreciation Problems

The current legal state regarding property appreciation is, that only the active appreciation fall into the category of marital property, while the negative appreciation

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<sup>1</sup> For the details of my research please see “Calculation in ‘Fortress Besieged’: A Revisit of the Swiss Marital Property Law” (unpublished article) and the related parts about Swiss Law in my dissertation.

(natural appreciation) stays with the separate property (§ 5, Judicial Interpretation III). Although the law itself does not so explicitly provides, it's believed to be well settled.

This idea did not originate from Switzerland, but from America, partly because of the English popularity and lack of German or French amongst scholars and legislators. But there are some corresponding words (Appreciation) in the Chinese version of ZGB (§§ 206, 209) and several papers did talk about these two clauses. One explanation for the obvious neglect might be that the Swiss law is only legal texts in Chinese, instead of workable and practical problem-solving guide. Some mistranslations and repetitions in scholar works are also misleading, for instance, § 209 ZGB are believed to deal with issues between spouses; indeed, it's only related to issues inside one spouse, namely the relationship of two different Assets (Eigentgut & Errungenschaft<sup>2</sup>) owned by the spouse and could be owned by each spouse.

What was also be neglected is the exact meaning of the "Appreciation" (Mehrwert) in §§ 206, 209. It's only confined to "Konjunktureller Wert", the exact equivalent of negative appreciation. If the drafters of Interpretation III had known this, they would be astonished about how the rule in § 206 ZGB look like as, but more general than § 10 of Interpretation III, which deals with division of marital home and therefore the most crucial part of this Interpretation.

The missed but invaluable points following the neglect include:

(1) The potential role of the active appreciation or its corresponding "active" contribution. According to the prevailing opinion in China, in case of active appreciation the property would become marital property to the extent of active appreciation, one half of which the non-owned spouse is entitled to. The result would not change if the property itself has also experienced negative appreciation due to inflation or market changes; the latter belongs exclusively to the owning spouse. Oppositely § 206 allows the contributing non-owned spouse to enjoy part of the negative appreciation, by reasoning that the active appreciation is also an investment in some sense and the spouse should not be treated the same as a third party such as a creditor. The latter is more just and fair than the former, which is based on the idea of community and shared by both Chinese and Swiss law.

(2) The treatment of mortgage in the context of marital home or other real estate bought during marriage with credit.

Let's see a model case: Husband (H) bought a house before marriage valued 100,000 (dollars). 30,000 dollars was paid from H's savings earned before and the rest 70,000 was paid through a mortgage. The mortgage was paid down during the marriage with the salaries of the wife (W), including principal (40,000) and interests (20,000). At the time of dissolution the amount of the unpaid mortgage is 30,000 (principal) with the undue interests (15,000). The value of the house increases to

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<sup>2</sup> The direct and accurate translation for Eigentgut and Errungenschaft should be respectively: individual property and acquired property. But for sake of understanding and comparison, this article translated them to marital property and separate property, respectively.

400,000. How much could W from H claim with regard to the house?

The predominant opinion at the moment in China (according to § 10 of Interpretation III) will take the unpaid mortgage as H's personal debt, and then distribute the corresponding appreciation of it only to H. So the result would be: (1) W would be refunded one half of the principal and interests paid from her salaries (marital property), i.e.  $(40,000+20,000)*0.5=30,000$ , which constitutes a contribution at the same time; (2) W is also entitled to share part of the negative appreciation according to her contribution, i.e.  $(400-100)*(40+20)/(100+20+15)*0.5=66,700$ . The total sum of W's claim against her husband H is 96,700.

However, the same case would be slightly different dealt with under Swiss Law (§ 206 ZGB), namely, the unpaid mortgage would be seen as the debt of the marital property in the economic sense<sup>3</sup>, rather than of H, because the interests were paid with marital property, and in this way it resumes the obligation related to the mortgage and helps to maintain the property. Therefore, the corresponding appreciation should also be distributed between the couple as marital property, instead of staying with H alone. So the result under Swiss Law would be: (1) W is entitled to refund one half of the paid principal and its corresponding part of appreciation, i.e.  $400,000*(40,000/100,000)*0.5=80,000$ ; (2) W is also entitled to half of the appreciation of the mortgage (less the unpaid principal), i.e.  $(400,000*30,000/100,000-30,000)*0.5=45,000$ . So the total sum of W's claim against H would be 125,000.

There is no doubt that this result is more fair and just than that in current prevailing opinion in China, as the role of the interests are properly understood, not to mention the fact that the marital house constitutes normally the main or even the whole marital assets that are distributable, and that other compensation institutions such as alimony, damage compensation are in fact very weak or rarely employed. It's also interesting to note that the Florida court in a case law background also reached just the same result in 2009 as in Switzerland, after decades of ambiguity in dealing with negative appreciation.

### III. Other Missed or Misunderstood Issues

Other important issues in Swiss marital property law which were missed or misunderstood in Chinese context include at least as follows:

(1) The concept "income" (Erträge) of separate property (Eigentum) in § 197 II 5 ZGB does not bear a broad meaning and thus does not include "appreciation". The literature erred in this regard by using it as an argument for a uniform rule for income and appreciation as a whole.

(2) As a matter of fact, the "income" equals to the concept "fruits", which has been not yet noticed. The income or fruits contains mainly two types: natural fruits

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<sup>3</sup> More accurately, the debt would be taken as W's marital property (Errungenschaft), but the economic effect is always the same.

(natürliche Früchte), like milk, grass or fruit; and legal fruits (zivile Früchte), like rents, dividends. This is probably helpful to the interpretation of § 5, Judicial Interpretation in practice.

(3) The definition of “Marital Property” (Errungenschaft) in § 197 I ZGB contributes partly to the idea that only onerously (non-gratuitously) gained property belong to marital property, while gratuitously gained property fall into separate property. From this idea a theory named “Mutual Efforts” was fairly well developed and rooted in the mind of many scholars. But the definition, as all the Swiss literature recognize, is not accurate. It’s indeed partly too broad, and partly too narrow. For instance, the income from both separate property and marital property might be gratuitously received, namely, against no labor or any other efforts alike. But they both fall into marital property. For another instance, the goods financed with money from marital property would principally fall into marital property, but when it’s exclusively for personal use of the husband or wife, then it would belong to the separate property of this couple (§ 198 I ZGB).

(4) Some important issues have been discussed or even recommended academically, but not yet realized in the legislation or (judicial) Interpretation level. These contain: (a) ordinary compensation for debts paid with non-obligated property (§ 209 I ZGB); (b) compensation for extraordinary contribution, applicable to all types of marital property models (§ 165 ZGB); (c) additions (Hinzurechnung, § 208 ZGB); (d) restriction upon disposal of certain assets (§ 178 ZGB); (e) right of residence in marital home (§ 219 ZGB); (f) restriction upon marital agreement (§§ 182, 199 ZGB).

#### **IV. Conclusions**

In contrast with the substantive flourishing of German legal science in China, the Swiss German legal tradition stays only seemingly somewhere in the legal world of China. Although some writers were and are still inclined to cite some paragraphs of the Swiss Civil Code or the Swiss Law of Obligation, the Swiss law has rarely existed in its original face in the Chinese context. The influence and non-influence of Swiss marital property law upon Chinese marital law scholars, legislators and the related laws is an extraordinary example. Probably the Swiss legal science would never reach its peak of success in China as it did in Turkey, or as its German counterpart has done in China. But on the side of Chinese lawyers, where the Swiss law was chosen as a candidate in solving legal problems or a potential model in legislation, it should be taken seriously.