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ARTICLES

Chinese Marital Law: Old Law in a New Matrix

BY

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I. INTRODUCTION

During the millenia prior to 1910, the Chinese marital laws remained relatively constant and were generally observed by the entire Chinese population. These are startling revelations, considering the physical vastness of the country, the cultural differences between sub-groups, the linguistic barriers separating one province from another, and the fact that the Chinese marital laws were set down in revered books,¹ dynastic histories,² and philosophical treatises³ more than 2,000 years ago.

After the fall of dynastic order in 1910, several efforts were made to modernize the ancient marital laws. On one hand, progressive leaders sought to reform the marital customs as part of the necessary and overdue upheaval of other social institutions. On the other hand, in 1928 and 1950, both Republican (Taiwanese) and Communist (mainland) governments strove to achieve marriage reform in order to assure greater national productivity. Although the 1910 and subsequent attempts to modernize the Chinese marital laws were motivated by different considerations, one social and the other economic, they actually share what had been, in fact, the

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1. See, e.g., the I-CHING, SHIH-JI, and the LI GI.

2. See, e.g., the CHIEN HAN SHU and the WU DAI SHIH.

3. See, e.g., the CONG TSE JIA YU, KUNG I TSE, and the SHI SHU.

fundamental premise of the ancient marital customs, that is, that the viability or growth of the State is dependent on stable family life.

The purpose of this paper is to discuss the importance of marital laws in Chinese history and to demonstrate that such laws are intended to promote family life and, in turn, to form the basis of a strong national order.

II. EARLY SOURCES OF CHINESE LAW: THE DOMINANCE OF LI

Two different characters in Chinese, *li* and *fa*, can be translated in terms of Western notions of law. Needham⁴ defines *fa* as positive law under which "obedience was an obligation and precisely specified sanctions followed transgression."⁵ *Li* should be viewed as the custom of society, or the moral order of an aggregation of people. Another way to conceptualize *li* and *fa* is to suggest that *li* is the code of honor of the rulers and *fa* is the order of the common man.⁶ Scholars have often attributed the concept of *li* to Confucius. However, Confucius claimed only to be a conduit for the order used by the sage of Yao and Shun.⁷ The Confucians used *li* to order the affairs of men by bringing to their consciousness the custom and ceremony essential to live in spiritual harmony.⁸ This order of proper human behavior was to be based first within the self, and then within the family unit, and finally at large. Thus, the state would govern by *li*. This doctrine was described in the *Da Xue*, which was written in approximately 200 B.C.:

The way to great learning rests in bright virtue, in the people attaining perfection through knowledge. With knowledge there can be stability, with stability there can be harmony. With harmony there can be peace. With peace there can be deliberateness. With deliberateness then one may attain bright virtue. Organic things have roots and branches, affairs of mind have beginnings and ends. To know what is first and last, places one on the path to understanding. The ancients desire bright virtue to be everywhere that they could rule their countries. Those who wish to govern

4. 2 J. NEEDHAM, *SCIENCE AND CIVILISATION IN CHINA* (1956) [hereinafter cited as NEEDHAM]. See also Wen Yen Tsoo, *The Chinese Family from Customary Law to Positive Law*, 17 HASTINGS L.J. 729 (1966) [hereinafter cited as Wen].

5. NEEDHAM, *supra* note 4, at 519.

6. *Id.* at 531.

7. Wen, *supra* note 4, at 731.

8. NEEDHAM, *supra* note 4, at 540.

must first set their families in order. To set one's family in order one must first study himself. Those who wish to study themselves must first be sincere in their intentions. Those who wish to be sincere in their intentions must first pursue knowledge. They must pursue the very source of learning. Once they have pursued the very essence of knowledge, then they have reached the goal of bright virtue. Once they know they have arrived, the learning can enter their consciousness. Once in their consciousness then the learning can rest in their mind. Once in their minds, then they may look to themselves with introspection. With introspection, then they can set their families in order. They can rule the country. When they can rule the country then peace will reign everywhere.⁹

The importance of introspection and a natural order containing the ordered family is fundamental to *li*, which permeates the marriage laws of dynastic China as well as both of the modern Chinas. The *Li Gi*, or Book of Rites, was one of the most durable volumes on marriage rights because its teachings governed intrafamily conduct.¹⁰

However, *li* has not been without competition as a system of regulating the marital affairs of the Chinese populus. *Fa*, the "positive law," developed its own following in early China. But *fa* did not enjoy quite the same popularity as *li*. Although *fa* gained a considerable following due to its promotion by the Legalist School, or *fa chia*, which rose to eminence for a brief period during the Warring States Period (403-222 B.C.), *fa* declined in popularity when it became known to the public that the *fa chia* practiced draconian measures. Under the twelve years of the Ch'in dynasty, 221-209 B.C., *fa* was a positive law implemented without regard for popular morality or tradition. Those who transgressed *fa* were severely punished. The most vocal of the *fa chia* was Han Fe Tze:

Severe penalties are what the people fear, having penalties are what the people hate. Accordingly, the sage promulgates what they fear in order to forbid the particular wickedness and to establish what they hate in order to prevent villainous acts. Thus the state is safe and no outrage can occur. From this I know that benevolence, righteousness, love and favor are not worth adopt-

9. See generally *Da Xue*.

10. M. VAN DER VALK, AN OUTLINE OF MODERN CHINESE FAMILY LAW 14 (1939) [hereinafter cited as VAN DER VALK, AN OUTLINE]. Van Der Valk's text is supported by numerous citations to the *Li Gi* as a source of the dynastic marital regulations.

ing, while severe and lasting punishment and healthy penalties maintain the state in order.¹¹

The fall of the Ch'in state has been attributed in particular to the harshness of *fa*.¹² Under the subsequent Han dynasty, *li* was adopted as the means of governing all but criminal matters. Traditional Chinese marital laws were strongly influenced by *li* Confucian thought. The relation between husband and wife was fundamental, for without marriage there could be no sons, no family, no harmony.¹³

The dynastic period marital law, permeated with *li*, was a feudalistic system based on keeping women subservient to men for economic reasons.¹⁴ The dynastic period regulations and injunctions against marriage forbade not only consanguinity, but also marriages between members of the extended family. The prohibitions were enforced with severe punishment reminiscent of the *fa* school.¹⁵ Confucius supported these strict prohibitions:

Women should have three obediences, and four virtues: Obedience to the father before marriage, and obedience to the husband after marriage and obedience to the son after the husband dies. They have to keep silence, make themselves beautiful to please their husbands, and be very capable with household tasks, such as embroidery. They have to be very moral. When they walk they are not allowed to look behind them, and when they talk, they are not allowed to open their mouths to show their teeth . . . [A] woman should follow a cock if she marries a cock, and follow a dog, if she marries a dog, and she should carry a pole to carry the load with her if she marries a pole.¹⁶

A. *The Effect of Kinship Regulations*

Perhaps the most striking aspect of the dynastic marital laws

11. NEEDHAM, *supra* note 4, at 207.

12. Wen, *supra* note 4, at 730.

13. *Id.* at 728. It is interesting to note the conclusion of the European sinologist Escarra that, in 1929, positive law continued to yield to *Li*. Several decisions by the Supreme Court of Beijing were not enforced at the local level because bureaucrats felt they were inconsistent with popular notions of *li*. NEEDHAM, *supra* note 4, at 539.

14. The histories note that *li*'s influence was only marginally decreased during the brief tenures of the Tang and Sung dynasties.

15. Yang Da Wen, *Lun Wa Guo Hun Y Wen He Zuo Yung*, in PIAO TA YEN JIU 36 (1963).

16. Brown, *Present-Day Law in the People's Republic of China*, 61 A.B.A.J. 474, 478 (1975) [hereinafter cited as Brown].

enforced by *li* was the powerful control of kinship, which effectively limited marriage opportunities. In contrast to western kinship bonds, the kinship relations which formed the basis of marital custom in China followed no mathematically perfect formula. The degree of kinship was not static; a different relationship could be reached depending on the point one started to plot his relation. Thus, China did not produce the symmetry that Occidentals take for granted when they define family relationship.¹⁷ The family laws and incestuous relations were based on *li* and the cult of the ancestors. Intrafamily relations were defined by the "mourning charts" which indicated the obligations of one family member to another at the time of the death of a family member. These relations ultimately determined who could marry whom. Much importance was placed upon descent through the male line.

The almost fluid relationships of kinship are subsumed within three special categories. The largest group is that of *Tsung Ch'in*. All male descendants of a common male ancestor within eight Roman degrees of relations are included with this group. The second group is that of *Wai Ch'in*, which is composed of relatives connected through the women, and, as if to defy definition, includes some paternal female relatives such as aunts (father's sisters) and their descendants. This group, like that of the *Tsung Ch'in*, is only as large as the relations of the eighth Roman degree. The third group is that of *Chi Ch'in*, which consists of relatives of the wife. This group was limited to the wife's lineal sanguine relatives not greater than the second Roman degree of relation. To these groups could be added surrogate and adopted relatives.

There were no specific rules to determine if the surrogates should be included within *Tsung Ch'in*, *Wai Ch'in*, or *Chi Ch'in*.¹⁸ To ascertain the degree of relationship under the Roman system one starts from oneself, and counts one's relative distance through each generation to the common ancestor, then to the relative in question. The total number of generations in reaching the common ancestor is the number of degrees in relationship.¹⁹

In the case of collateral relatives, *Chi Ch'in* and *Wai Ch'in*, the degree of relationship is arrived at through a canon law system.

17. Van Der Valk, *Conservatism in Modern Chinese Family Law*, in 4 *STUDIA ET DOCUMENTA AD VIRA ORIENTAS ANTIQUI PERTINENTIA* 5 (1956) [hereinafter cited as Van Der Valk, *Conservatism*].

18. *Id.* at 6. See also VAN DER VALK, *AN OUTLINE*, *supra* note 10, at 17.

19. VAN DER VALK, *AN OUTLINE*, *supra* note 10, at 180-81.

This differs from Roman law when there is an unequal number of generations between the relatives seeking to determine their degree of relationship. Under such circumstances, the relationship is fixed on the side of most generations.²⁰ Depending on which side the relation existed, the marriage would be prohibited or allowed.²¹

The mourning chart system made the finding of eligible brides a difficult matter. Any marriage within the eighth Roman degree would result in punishment of the spouses. It has been said that if persons belonging to the same *Tsung Ch'in* attempted to marry, they would be subject to 100 strokes, while those within the fifth degree of mourning would receive eighty strokes and exile. The eighth Roman degree of relationship in a Western society would forbid persons with a common great-great-great-grandfather from marrying.²²

The punishment for persons connected through the female line was extended to those not connected by degrees of mourning. Daughters of father's aunts or those of mother's uncles or aunts to the fifth Roman degree, the mother's cousin on her side, a sister of a mother's aunt, a sister of her father, and first paternal cousin and second cousin to the sixth Roman degree—as well as their spouses—were subject to 100 strokes and three years of exile.²³ An exception was made in the case of *Piao* (cousins); their punishment was only eighty strokes.²⁴

Marriage to a matrilineal aunt of the fifth rank of mourning was considered incest and punishable by the strangling death of both spouses.²⁵ If the spouse was a niece, a child of the sister within five degrees, then both parties were punished as if they had committed incest: "The female is exiled for 3 years and 100 strokes, and the male is exiled a distance of 2,000 [Chinese] miles to a military camp in a foul area."²⁶

Marriage between a member of the patriarchy and the widow of one of the patriarchy was punished by death and confiscation of the wedding presents.²⁷

20. *Id.* at 180.

21. See mourning tables in P. HOANG, *LE MARIAGE CHINOIS AU POINT DE VUE LEGAL* (1898) [hereinafter cited as HOANG].

22. VAN DER VALK, *Conservatism*, *supra* note 17, at 6.

23. *Id.*

24. *Id.* at 7.

25. HOANG, *supra* note 21, at 51.

26. *Id.*

27. *Id.* at 55.

There were no rules to govern the age of consent. According to the *Tung dian* of the T'ang dynasty, "In the oldest antiquity a man married at the age of fifty and a woman at the age of thirty, in middle antiquity a man at the age of thirty and a woman at that of twenty. Our old law, however, did not contain any explicit provisions as to the marriageable age."²⁸

During the dynastic period, marriage was felt to be far too important an event to be left to the caprices of love or the wish of the principals. Marriages arranged by the heads of families were intended to serve the spirits of the ancestors as well as to create family heirs.²⁹ In the event that the grandparents were not living, then the principals to the marriage contract would be the next relation.³⁰ It was common that the family head or acting family head would arrange marriage contracts between pre-pubescent family members.

Dynastic divorce regulations of the *Li Gi* were sex biased, and helped to ensure female submissiveness:

Whoever puts away his wife, except for any of the seven ordinary reasons, or for breach of the marital relations, be liable to 80 blows. The seven ordinary reasons which justify a divorce are barrenness, wanton conduct, neglect of husband's parents, talkativeness, theft, envy, and inveterate infirmity. On the other hand, there are three reasons which nullify the foregoing — if the wife has kept the three years mourning for either of husband's parents, if the family having been once poor are now rich, or if the woman has not her old home to go to³¹

Section 116 of the last dynastic code continues: "If a woman having been deserted by her husband, absconds and gets married to another man before the expiry of 3 years, without first obtaining the sanction of the local magistrate, she shall be liable to 100 blows. The above rules shall also apply to the case of concubines — the penalty in each case being reduced by 2 degrees"³²

B. Rules Relating to Divorce

The grounds for divorce remained principally unaltered until

28. VAN DER VALK, AN OUTLINE, *supra* note 10, at 168.

29. Wen, *supra* note 4, at 740.

30. G. JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 34 (1970) [hereinafter cited as JAMIESON].

31. *Id.* at 41.

32. *Id.* at 41-42.

the 1930's. Women could only seek divorce by mutual consent. Jamieson³³ comments:

The wife has no rights of divorce against her husband. Marital infidelity on his part, within or without the household, is not a matter of which the law takes cognizance. Harsh treatment even to the extent of beating or wounding gives her no right of appeal to the law for protection or separation, much less is it a ground for divorce. The only case in which a wife can get a divorce or what is tantamount to it, the right to re-marry, is when she has been deserted by her husband The re-marriage must be carried out with all the formalities of sponsors and go-betweens, which implies that it must have the consent of the seniors of her husband's family, if any, or failing them, of her mother's family. If carried out clandestinely it will be void.³⁴

The divorcee was deemed a stranger to her husband's family. She forfeited all her possessions, including her children and her right to be related to her children. Further, the wife was bound to observe the marital prohibitions as if she were still a member of her husband's family: she could not marry any *Tsung Ch'in*, *Wai Ch'in*, or *Chi Ch'in*. The divorced woman had no social status. Before 1910 (and probably after), her alternatives were limited to being sold as a concubine or returned in disgrace to her family. Neither prospect was particularly attractive.

The remarriage of widows under the old codes was socially stressful. Custom and social pressure discouraged remarriage and mandated a chaste life in the service of the aging parents. Like the divorcee, the widow, when remarried, left behind all her possessions and her children, except for "daughters of tender age."³⁵

III. CHINESE MARITAL LAWS: 1910 - 1949

In 1928 and 1950, the Republican and Communist governments targeted the old marital regulations for massive reform. The old system was considered incompatible with increased productivity. Political success for both governments depended on abandoning the old feudal ways and creating a politically aware population of men and women.

In 1928 the Republican government under Chiang Kai-shek

33. JAMIESON, *supra* note 30.

34. *Id.* at 54.

35. *Id.* at 55.

set out to revise the marital codes. The legislature (*Yuan*) undertook its reform of family law by comparatively analyzing the existing Chinese laws with the prevailing Western civil law systems. The resultant Nationalist Civil Code of 1930 (1930 Code) modified some features of the dynastic marital laws, but failed to correct a number of the existing injustices.

Under the 1930 Code, notions of family succession were reformed. Parents and grandparents could become heirs, and sons and daughters were put on the same footing in the disposition of the parents' property.³⁶ Moreover, men and women were emancipated from the traditional practice of families contracting marriages on behalf of and without the consent of the participants. The choice of marriage was left by code to the contracting parties. The only restriction was one of age.³⁷ The requirements of a formal ceremony were also deleted under the 1930 Code.³⁸ It was no longer necessary for the woman to be carried aloft in a red sedan chair through her village or town to the home of her husband.

The draftsmen of the 1930 Code were faced with the thorny question of kinship and marital prohibitions. The solution took several years of debate. Roscoe Pound served as an advisor in this codification effort. The task he shared with the Republican government was to develop a code of ethical precepts as to the relationship of individuals to the family and to the state.³⁹ The final form was the first Nanking Draft: "Lineal relatives (of a person) by blood are his relatives by blood from whom he is descended or those that are descended from him. Collateral relatives (of a person) by blood are his non-lineal relatives that are descended from the same common ancestor as the person himself . . ." ⁴⁰ The method for determining the blood relationship is determined by computing the number of generations upwards or downwards from himself, one generation constituting one degree. For example, "[a]s between the person and his collateral relative, the degree of relationship is determined by the total number of generations computing upwards from himself to the common lineal ancestor . . . and then downwards to the relative by blood with whom the degree of

36. Wen, *supra* note 4, at 756.

37. *Id.*

38. Mc Aleavy, *Some Aspects of Marriage and Divorce in Communist China*, in *FAMILY LAW IN ASIA AND AFRICA* 73, 82 (1967) [hereinafter cited as McAleavy].

39. See Pound, *The Chinese Civil Code in Action*, 29 *Tul. L. Rev.* 277 (1955).

40. VAN DER VALK, *AN OUTLINE*, *supra* note 10, at 62.

relationship is to be determined"⁴¹ Relatives by marriage are the spouse of his relatives by blood, the relatives by blood of his spouse and the person who is married by blood of the spouse.⁴² The line and degree of relationship between relatives by marriage is determined in the following manner:

As regards the spouse of a relative, by the line and the degree of relationship of a person who is married to said spouse; as regards the relative by blood of a spouse, by the line and degree of relationship between such relative by blood and said spouse; as regards the person to whom a relative by blood of a spouse is married, by the line and the degree of relationship between such person and said spouse⁴³

Moving toward the political ideal of equality, the 1930 Code allowed marriages between persons of the same mourning group. "One cannot marry a collateral relative by blood, either of the same or another rank, unless beyond the eighth degree, with the exception of *Piao* (cousins) One cannot marry a collateral relative by marriage, of a different rank, unless he is beyond the fifth degree."⁴⁴ The new code also fixed the minimum age for marriage at eighteen for males and sixteen for females.⁴⁵

The Nationalist Civil Code of 1933 (1933 Code) continued the thrust of the 1930 Code in overturning thousands of years of marital regulations. However, the 1933 Code provisions were difficult to enforce, because, by 1932, the area controlled by the Republican government in the countryside beyond the Yangtze River Valley was minimal.⁴⁶ Other political forces, both domestic and foreign, had asserted their authority over much of the rest of China. The Republican government was faced with the monumental problem of enforcing its positive laws within the areas it did control. Toward this end, a supreme court was established. This highest court handed down a number of decisions which invalidated long established marital custom,⁴⁷ but the rulings of the court were not uniformly observed.

Despite the reforms achieved by the 1930 and 1933 Civil

41. *Id.* at 63.

42. *Id.*

43. *Id.*

44. *Id.* at 80-81.

45. *Id.* at 79.

46. VAN DER VALK, *Conservatism*, *supra* note 17, at 14.

47. Wen, *supra* note 4, at 747-48.

Codes, a great section of the population continued to observe ancient custom. Concubines were still kept. Marriages were still arranged.⁴⁸ The Nationalist government was not prepared to take the kind of political action required for local enforcement. In 1949, the Nationalist government relocated in Taiwan, creating the seat of the Republic of China.

IV. THE TAIWAN MODEL

Taiwan, geographically smaller than mainland China, was a perfect place for the Republican government to assert its reformist will over the people. The island was of manageable size and it contained a relatively small native Chinese population of agrarian peasants, docile after years of Japanese occupation. Additionally, with the movement of the *Guo Min Dang* army into Taiwan came a receptive, educated people from middle and upper class backgrounds who were ready to accept new laws.

The new Taiwanese constitution and civil code continue to stress the importance of a strong, harmonious family life in maintaining a viable economic and political order. However, what is viewed as "sound marital relations" is no longer suffocating male chauvinism, but instead, a co-equal, productive role for the female spouse.

Moreover, the Republican government has implemented familial, as well as judicial, means of enforcing the new marital politics. For example, according to Article 1123 of the 1931 Taiwanese Civil Code (1931 Code), every family is to have a head, who may be recommended by its members. If no such recommendations are made, the oldest man or woman of the family is to be the head.⁴⁹ This enables the government to assert its authority upon the family head and, thereby, upon the family. However, it is interesting to note that the family head, while unable to *legally command* a marriage, retains by popular support an important role in influencing marriage. Go-betweens continue to act in an advisory capacity, balancing the interest of the parents and the interest of the contracting parties.

The government also employs judicial and familial means of assuring women of a right to divorce, which is intended to promote

48. *Id.* at 746-48, 759. See also Mc Aleavy, *supra* note 38, at 75.

49. Chen, *The Foster Daughter-in-Law System in Formosa*, 6 AM. J. COMP. L. 302, 302 n.1 (1957).

national productivity. For example, Article 1050 of the 1931 Code allows divorce by mutual consent without action by the court, if both parties sign a witnessed statement. In the event that the motion for dissolution is unilateral, the parties must appear before the court and plead special grounds. Many women are reluctant to either contest a divorce, thus bringing it before a court, or to initiate dissolution proceedings. McAleavy⁵⁰ attributes this to the ancient prejudice against public view.⁵¹ Custom inhibits many from seeking relief within the courts, but more progressive thinkers avail themselves of the courts and are granted divorces.

In 1973, the *Yuan* enacted a new body of rules to govern the settlement of family affairs cases. Family courts were established in Taipei, Taichung and Kaohsiung. These new family courts are specialized divisions of the district courts in which they sit. Their jurisdiction is exclusively in family matters. The broad jurisdiction of the family court includes matters which concern property, succession, and guardianship.⁵² The family courts stress conciliation and dialogue as a means of resolving family disputes.⁵³ The judges are selected according to their experience, compassion, and ability. Marriage appears to be one of the qualifications to sit on the family law court.

Within the new family court system, all hearings are informal and private. It is contemplated that the parties will reconcile their differences without the intervention of the court. Prior to the formal conciliation procedure, the parties meet with a court clerk. In privacy the parties are encouraged to discuss their problems. The clerk will attempt to guide the parties to settlement. If no conciliation can be reached with the clerk, the parties may go before the judge. Conciliation is stressed, but it appears to be satisfactory only in one out of ten cases.⁵⁴

As part of the conciliation process, mediators may be appointed by the court or by the parties. Parties have a distinct advantage in selecting their own mediator from the local district or village. These mediators function much like social workers, monitoring at regular intervals the progress of the settlement.⁵⁵ Only

50. McAleavy, *supra* note 38.

51. *Id.* at 86.

52. Wang, *The Family Court System of Taiwan*, 26 INT'L. & COMP. L.Q. 204 (1977).

53. *Id.* at 202-03.

54. *Id.* at 205.

55. *Id.* at 206.

when all avenues have been explored, and conciliation has failed, will the family court grant a divorce.

V. PEOPLE'S REPUBLIC MODEL

After the exodus of the Nationalist Chinese from mainland China in 1949, the Communist government brought the marital laws in line with their philosophical position. The purpose of the 1950 Marital Act (1950 Act) was to implement the economic, cultural, and national security goals of the Chinese state. Under the old feudalistic marital system, women were effectively disenfranchised and lacked the ability to change their political, social, and economic status. The new code extended to females the ability to change their roles if they wished to do so.

The new government, in viewing the 1950 Act as a vehicle for "revolutionizing" the social order, intended to strictly enforce the new regulations. The government's tough position was disseminated by the Party cadres, women's organizations, village political units, and factories. Those who resisted the new marital laws were labeled feudal reactionaries.⁵⁶

A. Marriage Regulations

Article 3 of the 1950 Act reasserted the Nationalist and early Communist requirement that consent to marry must be free and without duress. One marital partner is not to assert his or her will against the other or allow a third party to determine whether re-marriage is proper.⁵⁷

According to Article 4, marriage is not permitted where the male is less than twenty years of age or where the female is less than eighteen. In fact, in the People's Republic, the common age for marriage is between twenty-seven and thirty.⁵⁸ Minimum age for marriage in the People's Republic is intended to ensure that the goals of the socialist revolution will not be subverted. Marriage at a latter age results in fewer pregnancies, lesser demand on resources, and the utilization of female labor.⁵⁹

Article 5 of the 1950 Act is similar to the 1933 Nationalist

56. VAN DER VALK, *Conservatism*, *supra* note 17, at 3.

57. Tsien, *Le Droit de la Familleen Chine Populaire*, in *REVUE INTERNATIONALE DE DROIT COMPARE* 388 (1972) [hereinafter cited as Tsien].

58. *Id.*

59. L. LANDY, *WOMEN IN THE CHINESE REVOLUTION* 33 (1974).

Code, as well as to the rules of the dynastic period: "Marriage is forbidden in the case of impotence and physical defect. It is not enough that the spouses be of different sexes, they must be able to have normal sexual relations. The marriage is not legal if the parties suffer a venereal disease or mental defect which has not been healed."⁶⁰

Article 8 almost duplicates the 1933 Nationalist Code. In each instance, the text is organized according to the *Da Xue* premise that once the family is in order, then the state shall be in order. Article 8 provides the following:

The husband and the wife have a duty to love one another and to respect one another, to help one another, to sustain one another in life, to unite in good understanding, to participate in work and production, to raise children and to struggle together for the well-being of the family as well as for the edification of a new society.⁶¹

B. Rules of Succession

The traditional marital rules (*li*) excluded the wife from possessing or passing property. Article 12 of the 1950 Act permits either surviving spouse to inherit. Article 12 casts aside old rules of succession and places the wife on equal footing with her male and female children. The wife may carry with her to a new marriage assets from her former marriage. The husband's family cannot control her or her property. The sole restriction on distribution of property is that if the woman chooses to abandon her children or the former marriage, she must provide sufficient funds for the children to survive.⁶²

C. Divorce Procedures

The rules which govern the dissolution of marriage in the People's Republic do not fit neatly into the old dynastic order. Rather, they stand distinct and new, an invention of the twentieth century. Seven articles are devoted to divorce. Article 17 provides in part as follows: "Divorce shall be granted when husband and wife desire it. In the event that either the husband or the wife alone insist upon divorce, it may be granted only when mediation by the district people's government and the judicial organ has failed to bring

60. Tsien, *supra* note 57, at 395.

61. *Id.*

62. *Id.*

about a reconciliation."⁶³

Conciliation is a key function of the divorce laws. The demand for divorce is presented before the local administrative authority, whose function is to try to obtain an informal settlement. If those efforts are not successful, the local administrator will then transfer the matter to the local tribunal.

In the People's Republic, there are no special divorce courts like those in Taiwan. Domestic problems are first brought in the lowest level of the People's district court. The judge investigates the facts and issues, and then tries to settle the case. The judge may send the parties back to the neighborhood conciliation committee for further assistance. Only if this last effort fails will the divorce be granted.⁶⁴ The effect of this system is to discourage any disruption in the family unit, the peace and harmony of which is believed to be essential to the building of a prosperous nation.

The local tribunal and district court, in reality, have less power than the neighborhood conciliation committees, which not only resolve domestic disputes, but serve as a didactic tool of the revolution. The neighborhood conciliation committees disseminate to the public new standards of personal morality, social responsibility and interpersonal relationships. In effect, the conciliation committees are the primary vehicle for social adjustment.⁶⁵ There is a conciliation committee in each village and city. Large cities may have several committees. The members are elected by the cadres of the neighborhood for a term that is usually one to two years.⁶⁶ One commentator notes:

According to Lo-Chia-Ting, the Vice-President of the Shanghai Higher People's Court, the principles by which a conciliation committee should be guided in its work are: Firstly, to distinguish what is right from what is wrong; secondly, to seek harmony and unity in the family; and thirdly, to seek to benefit production and socialist construction.⁶⁷

Should the wife be with child the application for divorce will not be heard. Article 18 provides that: "[T]he husband shall not apply for a divorce when his wife is with child. He may only apply

63. Woodsworth, *Family Law and Resolution of Domestic Disputes in the People's Republic of China*, 13 MCGILL L.J. 169, 173 (1967) [hereinafter cited as Woodsworth].

64. *Id.* at 176.

65. *Id.* at 177.

66. *Id.* at 174.

67. *Id.* at 175.

for a divorce only one year after the birth of a child. In the case of a woman applying for divorce, this restriction does not apply."⁶⁸ Article 18 is perhaps contrary to the Communist position of complete equality between the sexes. The official view is that during pregnancy, the mother is in a state of physical and moral feebleness and the infant has a need for parental protection.⁶⁹ It is not viewed as an exception to complete equality. Should the wife seek the dissolution, it is granted because such an act is in the best interest of the mother and the child.

The long term success of the People's Republic depends on how its children are treated. The modern divorce rules are designed to protect the child's interests and to assure him or her a proper education. Article 20 provides that: [T]he blood ties between parents and children are not dissolved by divorce of the parents. After divorce both parents still have a duty to support the children."⁷⁰ Article 21 elaborates on this point: "If, after divorce, the mother is given custody of a child, the father shall be responsible for the whole or part of the necessary cost of maintenance and education of the child . . ." ⁷¹ The custody of children is decided by the parents or by the tribunal which grants the divorce. The tribunal and the parents are expected to act in the best interests of the child. The custody of the child is not determined by the culpability of either parent in the divorce. The solution chosen by the parents is binding, provided they are in agreement and the solution is not in conflict with the interests of the child.⁷²

The distribution of personal property follows equitable lines that did not exist during the dynastic period. The wife is no longer compelled to forfeit all property acquired since marriage. Equality is stressed; each party has equal power to arrange for the disposal of property. Article 23 provides as follows:

In the case of divorce, the wife shall retain such property as belonged to her prior to her marriage. The disposal of other family properties shall be subject to agreement between the two parties. In cases where agreement cannot be reached, the people's court shall render a decision after taking into consideration the actual state of the family property, the interests of the wife and child or

68. *Id.* at 173.

69. Tsien, *supra* note 57, at 398.

70. *Id.* at 399.

71. Woodsworth, *supra* note 63, at 174.

72. Brown, *supra* note 16, at 478.

children, and the principle of benefiting the development of production.⁷³

It would run contrary to the spirit of the revolution to allow a divorce which makes one of the parties destitute and therefore a drain on society. Each person must produce to his utmost to ensure the success of the revolution. Article 25 prevents a divorcee from being forced to return to her parents, as was the case in feudal times. Thus, when the spouse's share in the community property is not sufficient to protect her well-being, the state insists that the other party assume that obligation. Article 25 provides that: "[A]fter divorce, if one party has not remarried and has maintenance difficulties, the other party shall render assistance. Both parties shall work out an agreement with regard to the method and duration of such assistance; in case an agreement cannot be reached, the people's court shall render a decision."⁷⁴

VI. CONCLUSION

The fall of the Ch'ing dynasty in 1910 and the rise of a new "popular order" marked the end of a long period of unyielding custom and law. The laws of the People's Republic of China and Taiwan provide that women be emancipated, congruent with the ancient dogma that a prosperous state depends on the stability of family life. The visions of Sun Yat-sen and Mao Tse-Dung were shaped by capitalism and communism. Nevertheless, for each, the importance of emancipation of half the labor force was primary. That which each modern government has declared to be "natural order" — equality of the sexes, equal rights to inheritance, obliteration of the old kinship system, equal rights to divorce on failure of conciliation, protection of the child's economic interests — all fit within the matrix of cultural continuity. Where one might expect to find differences, there are none. Despite the practice of each government to openly condemn the other's existence, there is a similarity in marital customs.

The similarity of modern Communist and Taiwanese marital laws is best explained by a philosophical underpinning which permeates and transcends current political ideologies. That common philosophical bond is the doctrine of the *Da Xue*.

73. Woodsworth, *supra* note 63, at 174.

74. Brown, *supra* note 16, at 476.

