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CHINESE FAMILY LAW: A Potential Statutory Revolution

CAMILLE W. COOK*

I. INTRODUCTION

China became largely a closed society upon the founding of the People's Republic of China ("People's Republic") in 1949. Not until the normalization of relations between China and the United States thirty years later was it possible to separate fact from fable in evaluating information regarding the Chinese society. Only in recent years have foreign scholars been given license to travel and conduct research in this vast country, which is home to one out of five people on earth.¹ The People's Republic, in an effort begun in 1980, now invites numerous professional groups into China to meet with their counterparts for study and discussion. Such a visit, at the invitation of the Chinese Ministry of Justice in April of 1986, provided the research opportunity and impetus for this article.

This article constitutes an examination of the laws as well as the attitudes of the Chinese people concerning marriage, children, family relations, and divorce. Traditionally, the family has been the controlling influence in the life of every man, woman, and child in China. Despite the dramatic social and economic change of recent years, this traditional family-centered society endures. For this reason, laws regulating family behavior are of primary importance.

China promulgated its first Marriage Law in 1950,² soon after the founding of the People's Republic. The 1950 law represented a dramatic shift from the traditional feudal family to the new-demo-

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In this article, Professor Cook, recently returned from a sabbatical visit to the People's Republic of China, attempts to give the reader insight into domestic relations in the People's Republic. Based upon her research and personal interview, she proceeds to assess whether a statutory revolution, ostensibly triggered by the Marriage Law of 1980, has indeed come to pass. Her ultimate conclusion is that change in Chinese family relations has been more revolutionary in the statutes that proclaim it than in the traditions and customs that measure it.

1. S. MOSHER, *BROKEN EARTH: THE RURAL CHINESE* 224 (1983).

2. Marriage Law of the People's Republic of China, May 1, 1950 (repealed September 1,

cratic family. This commitment to democracy throughout the family structure was reaffirmed in 1980, the year the Chinese government adopted its present Marriage Law.³

Although termed the 1980 Marriage Law, the new law's scope is far wider than its name suggests. For example, Article One provides that "[t]his law is the fundamental code governing marriage and family relations."⁴ Article Two adds further that "[t]he lawful rights and interests of women, children, and the aged are protected."⁵ Thus, it might be more appropriate to rename the law "The 1980 Family Relations and Marriage Law,"⁶ as it covers many aspects of family relationships.

The primary purpose of this article is to describe these new statutory rules and to examine the possible import they may have on the social mores of a society that has been steeped in feudal concepts for generations. An examination of the application and the acceptance, thus effectiveness, of these regulations will assist in the determination of whether there has indeed been a statutory revolution in Chinese family law.

II. MARRIAGE

A. *The Marriage Relationship*

1. Traditional Views

All marriage relationships in the People's Republic exist against the backdrop of the 2000 year old feudal family structure under which men are considered superior to women in every respect.⁷ Con-

1980) [hereinafter 1950 Marriage Law], reprinted in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 266 (A. Blaustein ed. 1962).

According to the "General Principles" of the 1950 Marriage Law:

The feudal marriage system which is based on arbitrary and compulsory arrangements and the superiority of man over woman and ignores the children's best interests shall be abolished. The New-Democratic marriage system, which is based on the free choice of partners on monogamy, on equal rights for both sexes, and on the protection of the lawful interests of women and children, shall be put into effect.

Id. at ch. I, art. 1. "Bigamy, concubinage, child betrothal, interference with the re-marriage of widows, and the exaction of money or gifts in connection with marriage, shall be prohibited."

Id. at ch. I, art. 2.

3. Marriage Law of the People's Republic of China of Sept. 10, 1980 (effective Jan. 1, 1981) [hereinafter 1980 Marriage Law], reprinted in Beijing Rev., Mar. 16, 1981, at 24.

4. *Id.* at ch. I, art. 1.

5. *Id.* at ch. I, art. 2.

6. See generally, Leung, *Sexual Equality in Marriage*, South China Morning Post, May 9, 1986, (Features), at 2, col. 3.

7. Galas, *Family Law in China*, POLY L. REV. 54 (1980).

fucious put girls at the bottom of the ladder in the order of family members.⁸ It was expected that a daughter would upon marriage become a member of her husband's family,⁹ thus any time and effort spent in her rearing was a waste.¹⁰ The words of a third century poet expressed the view that had been held by most Chinese for 2000 years: "How sad it is to be a woman! Nothing on earth is held so cheap."¹¹

As a daughter was deemed of little value, a poor family often disposed of her rather than incur the cost of raising her. The practice of female infanticide was not uncommon.¹² Daughters of the impoverished were also sold as kitchen slaves or second wives to the wealthy.¹³ If a daughter was to be marriageable, footbinding was not only popular but mandatory, especially in northern and central China.¹⁴ Between the age of five and seven years, a daughter would undergo the agonizing process of bending the foot back so that the bones of her instep were completely broken.¹⁵ Although a three-inch foot was considered fashionable,¹⁶ the girl would hobble in her old age.¹⁷

Girls were often betrothed in childhood by parents eager to receive money and gifts.¹⁸ Once married, a woman had no rights in her new home, and could expect to be beaten and cursed by her husband and in-laws alike.¹⁹ Chinese husbands had an expression for the status of their wives: "A wife married is like a pony bought; I'll ride her and whip her as I like."²⁰

Under the feudal marriage system, "[c]oncubinage and polygamy were permitted."²¹ Most women had no choice in selecting husbands; many were killed or committed suicide in their effort to avoid an ar-

8. See D. BLOODWORTH, *THE CHINESE LOOKING GLASS* 71 (1967).

9. A. CHAN, R. MADSEN & J. UNGER, *CHEN VILLAGE: THE RECENT HISTORY OF A PEASANT COMMUNITY IN MAO'S CHINA* 186 (1984).

10. A. CLAYRE, *THE HEART OF THE DRAGON* 68 (1984).

11. *Id.* at 68.

12. S. MOSHER, *supra* note 1, at 195.

13. *Id.*

14. A. CLAYRE, *supra* note 10, at 68.

15. *Id.*

16. *Id.*

17. F. BUTTERFIELD, *CHINA: ALIVE IN THE BITTER SEA* 164 (1982).

18. Galas, *supra* note 7, at 54.

19. *Id.*

20. *Id.*

21. Naftulin, *The Legal Status of Women in the People's Republic of China*, 68 *WOMEN LAW J.* 74, 75 (1982).

ranged marriage.²² A wife was expected to be completely submissive and, hence, had limited opportunities to become involved in non-domestic interests.²³ If her husband died, a woman could not remarry.²⁴

A Chinese woman married into a family in a much more literal sense than did her American counterpart. When she married, her links with her blood relatives were broken and she became a member of her husband's household.²⁵ She was often little more than a servant, and was subordinated to the older women in the family.²⁶ In the West, mother-in-law jokes were made by men; in China, however, mother-in-law jokes were told by women.²⁷ In contrast, a husband's mother-in-law had little effect on his life.

In feudal China, the mother-in-law passed along to the younger female members of the family the drudgery that she had endured a generation earlier.²⁸ She also enforced a strict code of conduct. For example, the mother-in-law made sure that the new wife did not leave home unaccompanied for three years after the marriage,²⁹ thus binding the young woman to the narrow circle of the marriage family.

Confucian ideas, which permeated Chinese society, promoted the enduring family, ruled by its senior male, and emphasized the concept of inferiority of women.³⁰ The female position of inferiority was underscored by custom and belief. For instance, a woman's clothes could not be hung on the second floor of the house because then they would be over the man's head, reversing the natural order of things.³¹ Further, children in traditional feudal China were taught the adage: "An ignorant woman is virtuous."³²

2. Modern Statutory Concepts

The 1950 Marriage Law abolished the feudal marriage system and instituted a "New-Democratic" marriage system.³³ Its successor,

22. *Id.*

23. S. MOSHER, *supra* note 1, at 196.

24. Galas, *supra* note 7, at 54.

25. A. CLAYRE, *supra* note 10, at 67.

26. *Id.*

27. *Id.*

28. S. MOSHER, *supra* note 1, at 196.

29. *Id.*

30. See generally D. BLOODWORTH, *supra* note 8.

31. *Id.* at 197.

32. F. BUTTERFIELD, *supra* note 17, at 164.

33. 1950 Marriage Law, *supra* note 2, at ch. I, art. 1. For text of article 1, see *supra* note

the 1980 Marriage Law, provides for a "marriage system based on the free choice of partners, on monogamy and on equal rights for the sexes."³⁴ The parties' complete willingness to marry is emphasized throughout the Marriage Law³⁵ and is protected by the Constitution of the People's Republic of China as well.³⁶ Thus, parents no longer have the right to force their children into arranged marriages or to seek to block unapproved marriages. It is not uncommon for parents to be imprisoned for up to two years for attempting to exercise these former parental prerogatives.³⁷ However, one still hears of child marriages, especially in the countryside.³⁸

Moreover, in some parts of China, families of daughters still exact large sums of money, household goods, bicycles, and other items as betrothal gifts, leading to a trade in women.³⁹ This thinly-disguised purchase of brides is not only a tremendous expense on the peasant household,⁴⁰ but has been rendered illegal by the Marriage Law.⁴¹ Nevertheless, this custom has been slow to die. In terms of labor, the cost of losing a daughter can be considerable, and parents are accustomed to being paid for the cost of rearing daughters.⁴²

Acceptance of the principle of free choice, as a substitute for the traditional practice of arranged marriages, is one of the most difficult social reforms the People's Republic has tried to implement.⁴³ In re-

34. 1980 Marriage Law, *supra* note 3, at ch. I, art. 2. "The marriage system based on the free choice of partners, on monogamy and on equal rights for the sexes, is put into effect. The lawful rights and interests of women, children and the aged are protected. Family planning is practised." *Id.*

35. *Id.* at ch. II, art. 4. "Marriage must be based upon the complete willingness of the two parties. Neither party shall use compulsion and no third party is allowed to interfere." *Id.*

36. Const. of the People's Republic of China ch. II, art. 49, *reprinted in* XXIX KEESING'S CONTEMPORARY ARCHIVES 31953, 31957 (Feb. 1983) [hereinafter Chinese Constitution] ("Violation of the freedom of marriage is prohibited.").

37. Bell, *Family Law: Notes from China*, 28 SOC. WORK 239 (1983).

38. *Id.*

39. See E. CROLL, CHINESE WOMEN SINCE MAO 79-80 (1983) [hereinafter E. CROLL, CHINESE WOMEN].

40. *Id.* at 79.

41. 1980 Marriage Law, *supra* note 3, at ch. I, art. 3. "Marriage upon arbitrary decision by any third party, mercenary marriage and any other acts of interference in the freedom of marriage are prohibited. The exaction of money or gifts in connection with marriage is prohibited." *Id.*

42. See generally E. CROLL, CHINESE WOMEN, *supra* note 39, at 79-81.

43. E. CROLL, THE POLITICS OF MARRIAGE IN CONTEMPORARY CHINA 188 (1981) [hereinafter E. CROLL, MARRIAGE].

cent years, the government and the All-China Women's Federation⁴⁴ have publicized and advocated the principle of freedom of marriage.⁴⁵

The legacy of a two-thousand-year old feudal system could not be easily dissolved by the passage of a new law. Complete adherence to the principles outlined in the 1980 Marriage Law cannot be expected until there has been a corresponding change in social attitudes. However, the attitudes of the Chinese people have been slow to change.

B. *Creating the Marriage Relationship*

Under the 1950 Marriage Law, the minimum age for an individual to contract to marry was 20 for men and 18 for women.⁴⁶ The 1980 law has raised the minimum age limits to 22 and 20 for men and women respectively.⁴⁷ Despite the statutory specified minimum age, localities may enact higher age requirements.⁴⁸ The government encourages late marriage as part of its program to slow population growth.⁴⁹

In addition to establishing age requirements, the Marriage Law

44. The All-China Women's Federation is an organization dedicated to the protection of women's and children's rights.

45. E. CROLL, CHINESE WOMEN, *supra* note 39, at 81. In an interview, Madame Wang Deyi, Director of the Legal Advisory Office of the All-China Women's Federation, emphasized the need to popularize the idea of freedom of choice in marriage. In addition, Madame Wang discussed the problems relative to putting the regulations into practice and the need to create the social conditions necessary for implementing the practice of free choice. She also stated that as all women are workers today, the need for a dowry is not a necessity as it was in feudal times. Interview with Madame Wang Deyi, Director of the Legal Advisory Office, All-China Women's Federation in Beijing, People's Republic of China (April 29, 1986).

46. 1950 Marriage Law, *supra* note 2, at ch. II, art. 4. Under previous law, a marriage between a male under 18 years and a female under 16 years was voidable. Family Law of 1931, art. 980, *reprinted in* E. CROLL, MARRIAGE, *supra* note 43, at 60.

47. 1980 Marriage Law, *supra* note 3, at ch. II, art. 5.

48. *Id.* at ch. V., art. 36.

The people's congresses and their standing committees in national autonomous areas may enact certain modifications or supplementary articles in keeping with the principles of this law and in conformity with the actual conditions prevailing among the minority nationalities of the locality in regard to marriage and family relations. But such provisions enacted by autonomous prefectures and autonomous counties must be submitted to the standing committee of the provincial or regional people's congress for ratification. Provisions enacted by autonomous regions must be submitted to the Standing Committee of the National People's Congress for the record.

Id.

For example, Beijing requires that a man be 27 and a woman be 25 before they may marry. Bell, *supra* note 37, at 239.

49. D. BONAVIA, THE CHINESE 80 (1980). The problem of the growing population in the People's Republic, and how the government is attempting to deal with it, is discussed *infra* at notes 69-72 and accompanying text.

prohibits marriage where a party is suffering from a disease "which is regarded by medical science as rendering a person unfit for marriage."⁵⁰ Moreover, marriage is prohibited between blood relatives up to the third degree of relationship.

The Marriage Law sets forth a relatively simple procedure for establishing a marriage. The man and woman must register in person with the marriage registration office.⁵¹ If the proposed marriage conforms to the Marriage Law, a marriage certificate is issued. At that point, the marriage is created.⁵²

In rural areas, many peasants still mark the marriage of their children with a big celebration.⁵³ In cities, the ceremonies are usually simple, in deference to the Party's emphasis on frugal arrangements.⁵⁴

III. RELATIONSHIPS WITHIN THE FAMILY

A. Husband and Wife

The Marriage Law emphasizes the equal status of husband and wife,⁵⁵ and states that "neither party is allowed to restrain or interfere with the other."⁵⁶ These provisions seek to obviate the dominion of the males over the females. Each partner is entitled to manage his or her own affairs. However, both parties are obligated to support each other if the need arises.⁵⁷

Traditionally, when a woman married, she became a member of the man's family. Her parents no longer had claim to her labor and the children she bore would carry on her husband's line, not her par-

50. 1980 Marriage Law, *supra* note 3, at ch. II, art. 6. Article 6 of Chapter II states: Marriage is not permitted in any of the following circumstances: a) Where the man and woman are lineal relatives by blood or collateral relatives by blood (up to the third degree of relationship).

b) Where one party is suffering from leprosy, a cure not having been effected, or from any other disease which is regarded by medical science as rendering a person unfit for marriage.

Id.

51. *Id.* at ch. II, art. 7.

52. *Id.*

53. D. BONAVIA, *supra* note 49, at 68. For a discussion of the modern practice of the Chinese ceremonial marriage, see E. CROLL, MARRIAGE, *supra* note 43, at 108-26.

54. See D. BONAVIA, *supra* note 49, at 67-68.

55. 1980 Marriage Law, *supra* note 3, at ch. III, art. 9 ("Husband and wife enjoy equal status in the home.")

56. *Id.* at ch. III, art. 11. "Both husband and wife have the freedom to engage in production, to work, to study, and to participate in social activities; neither party is allowed to restrain or interfere with the other." *Id.*

57. *Id.* at ch. III, art. 14.

ents'.⁵⁸ Thus, having daughters was of secondary importance. The 1980 Marriage Law changed this practice, allowing freedom of choice. Now a couple may choose whether they wish to become a member of the wife's family or of the husband's.⁵⁹ Likewise, "[c]hildren may adopt either their father's or their mother's family name."⁶⁰

Because of the shortage of industrial jobs, numerous married couples are unable to live together.⁶¹ Separated by their work assignments, a husband and wife may live as far as a thousand miles apart.⁶² Currently, such married couples are entitled to 12 days annual leave to visit each other, and the government has proclaimed its intention to resolve their plight.⁶³

One of the more important provisions of the 1980 Marriage Law gives husbands and wives, as well as parents and children, the right to inherit each others property.⁶⁴ This "property" consists primarily of personal property since the government owns most of the land in China. Under the feudal system, daughters were not considered legal heirs.⁶⁵ Despite the government's attempt at change, this feudal thinking persists. As a practical matter, family property passes directly to the sons when a father dies, especially in rural China.⁶⁶ Thus, many women, particularly widows planning to remarry, have encountered problems seeking their inheritance.⁶⁷

In an effort to deal with the growing number of disputes over inheritance rights, the National People's Congress has drafted a new

58. A. CHAN, *supra* note 9, at 186.

59. 1980 Marriage Law, *supra* note 3, at ch. II, art. 8. "After a marriage has been registered the woman may become a member of the man's family, or the man may become a member of the woman's family, according to the agreed wishes of the two parties." *Id.* Although the 1950 Marriage Law had no such provision, it provided, as does the 1980 Marriage Law, that each of the parties may use his or her own family name. 1950 Marriage Law, *supra* note 29, at ch. III, art. 11 ("Both husband and wife shall have the right to use his or her own family name."); 1980 Marriage Law, *supra* note 2, ch. III, art. 10 ("Husband and wife each has the right to use his or her own family name.").

60. 1980 Marriage Law, *supra* note 3, at ch. III, art. 16.

61. D. BONAVIDA, *supra* note 49, at 72. As many as 50 million people are separated in this way. *Id.*

62. *Id.*

63. *Id.*

64. 1980 Marriage Law, *supra* note 3, at ch. III, art. 18.

65. See *Law on Inheritance Pushes Equal Rights*, China Daily, Jan. 16, 1985 at 1, col. 1 [hereinafter *Law on Inheritance*].

66. S. MOSHER, *supra* note 1, at 198-99.

67. *Law on Inheritance*, *supra* note 65, at 1, col. 1.

inheritance law.⁶⁸ The goal is "to insure equality between the sexes and to protect old people."⁶⁹

Population growth has become an economic problem, threatening to wipe out the recent achievements of the People's Republic.⁷⁰ Traditional customs promoting early marriage⁷¹ and large families⁷² have fueled the problems of overpopulation. In an effort to reduce population growth to zero by the year 2000, the government, in conjunction with the Communist Party, has sought to limit the birth rate to one child per couple.⁷³ Late marriage, achieved by raising the minimum age for marriage,⁷⁴ and planned parenthood are important components in this goal.

Both the Constitution⁷⁵ and the 1980 Marriage Law⁷⁶ require couples to practice family planning. Additionally, the policy of the one-child family is supported by persuasive government action. For example, to encourage their use, the government provides free contraceptives, sterilization, and abortions.⁷⁷

Couples who promise to have only one child are rewarded. They receive salary increases of about five percent, and are given high priority for new, more spacious housing.⁷⁸ Upon retirement, they will receive a subsidy in addition to their pension.⁷⁹ The only child receives many benefits as well: priority in admission to hospitals, clinics and schools, and waived or reduced medical or educational costs.⁸⁰ Fur-

68. *Id.*

69. *Id.*

70. D. BONAVIDA, *supra* note 49, at 76. Government officials are concerned that China's resources are inadequate to house, clothe, feed, and educate such a growing population. E. CROLL, CHINESE WOMEN, *supra* note 39, at 88-89. For a more detailed discussion of the government's program to curb population growth in the People's Republic, *see id.* at 88-103; D. BONAVIDA, *supra* note 49, at 76-83.

71. For example, in 1953, in a village of nearly one hundred households in Hunan province, all but one of the girls over the age of thirteen were married. E. CROLL, MARRIAGE, *supra* note 43, at 67.

72. *See* S. MOSHER, *supra* note 1, at 236. Currently, Chinese women, on the average, bear three children during their lifetime. D. BONAVIDA, *supra* note 49, at 76.

73. *See* D. BONAVIDA, *supra* note 49, at 76.

74. *See supra* notes 46-48 and accompanying text.

75. Chinese Constitution, *supra* note 36, at ch. II, art. 49 ("Both husband and wife have the duty to practise family planning.").

76. 1980 Marriage Law, *supra* note 3, at ch. I, art. 2 ("Family planning is practised.").

77. Galas, *supra* note 7, at 57.

78. D. BONAVIDA, *supra* note 49, at 81.

79. E. CROLL, CHINESE WOMEN, *supra* note 39, at 89. Traditionally, Chinese couples bear several children to ensure that they will have someone to support them in their old age. *See* S. MOSHER, *supra* note 1, at 236-38.

80. E. CROLL, CHINESE WOMEN, *supra* note 39, at 89.

ther, the only child will be given priority in job allocation.⁸¹

Should the parents break their promise and have a second child, the family loses all benefits⁸² and must repay many of the economic rewards they have already received.⁸³ Further, their neighbors will make them feel unpatriotic and anti-social.⁸⁴ Couples who have more than one child are harshly penalized, incurring an "excess child levy."⁸⁵ Their earnings are reduced five to ten percent upon the birth of the subsequent child; should the couple have more children, this percentage may be increased.⁸⁶ For several years after the birth of an extra child, the parents are ineligible for bonuses and promotions at work, and, should they encounter financial difficulties, they are also ineligible for subsidies.⁸⁷

Reports indicate that the government's measures have been successful, especially in urban areas.⁸⁸ However, in rural areas, the government's efforts have not been as effective.⁸⁹ An unfortunate result of the government's strict one-child family policy has been a reappearance of the practice of female infanticide.⁹⁰ The ancient tradition of ancestor worship mandates that Chinese parents should have sons.⁹¹ Traditionally, daughters are destined to become members of their husband's family.⁹² As a practical matter, parents depend on their sons for economic support in their old age, since their daughters usually move to a new household or village when they marry,⁹³ and the government's welfare system is not adequately developed to handle the large number of elderly Chinese.⁹⁴ This preference for boys and

81. *Id.*

82. See D. BONAVIA, *supra* note 49, at 82.

83. E. CROLL, CHINESE WOMEN, *supra* note 39, at 90.

84. D. BONAVIA, *supra* note 49, at 82.

85. E. CROLL, CHINESE WOMEN, *supra* note 39, at 89-90.

86. *Id.*

87. *Id.* at 90.

88. A 1980 survey of couples who already have one child indicates that about sixty percent of those living in urban districts have pledged not to have any more children. See *id.* at 95. In the larger urban districts such as Beijing and Shanghai, the average number of those pledging is approximately ninety percent. *Id.* at 94.

89. According to the same 1980 survey, in some rural districts, less than 20 percent of married couples with one child have pledged not to have any more children. *Id.* at 95.

90. E. CROLL, CHINESE WOMEN, *supra* note 39, at 121.

91. See D. BONAVIA, *supra* note 49, at 78.

92. A. CLAYRE, *supra* note 10, at 67.

93. E. CROLL, CHINESE WOMEN, *supra* note 39, at 98.

94. A. CLAYRE, *supra* note 10, at 93-94. Currently pensions are paid only to persons who have worked in heavy industries run by the state, and a few other jobs. *Id.* See also *infra* notes 109-13 and accompanying text.

the state's population control policy has led to the neglect, abandonment, and even drowning of baby girls.⁹⁵

B. Children

According to the Constitution⁹⁶ and the Marriage Law,⁹⁷ parents have the duty to rear and educate their children, daughters as well as sons; in turn, when children grow older they have the duty of caring for their parents. Additionally, parents are economically liable for the misdeeds of their children.⁹⁸

In the past, only Chinese males received an education.⁹⁹ According to an 18th century proverb: "A woman with education causes trouble."¹⁰⁰ This view prevailed well into the 20th century.¹⁰¹ Today, however, women are almost as literate as men.¹⁰² Despite her increased opportunity for education, as a practical matter, when an extra hand is needed at home, a sister will be taken out of school before

95. A. CLAYRE, *supra* note 10, at 77.

96. Chinese Constitution, *supra* note 36, at ch. II, art. 49. "Parents have the duty to rear and educate their minor children, and children who have come of age have the duty to support and assist their parents." *Id.*

97. 1980 Marriage Law, *supra* note 3, at ch. III, art. 15.

Parents have the duty to rear and educate their children; children have the duty to support and assist their parents. When parents fail to perform this duty, their children who are minors or who are not capable of living on their own have the right to demand that their parents pay for their care. When children fail to perform the duty of supporting their parents, parents who have lost the ability to work or have difficulties in providing for themselves have the right to demand that their children pay for their support.

Id.

98. 1980 Marriage Law, *supra* note 3, at ch. III, art. 17. Article 17, chapter III states:

Parents have the right and duty to subject their children who are minors to discipline and to protect them. When children who are minors have done harm to the state, to the collective, or to any other person, their parents are in duty bound to compensate for any economic loss.

Id.

99. A. CLAYRE, *supra* note 10, at 96.

100. *Id.*

101. See, e.g., F. BUTTERFIELD, *supra* note 17, at 173. (A Chinese woman expresses her concern that her son, not her daughter, needs to make good grades so that he will get into a good school.)

102. In rural areas, sixty percent of adult women are literate as compared to eighty percent of adult men. Parish, *The Family and Economic Change*, in CHINA: THE 80S ERA 222, at 224 (1984). In urban areas, women educated since 1949 lag behind men by only one year in total education. *Id.* at 232 n.24. However, women comprise only twenty-four percent of post-secondary school enrollments. *Id.* This disparity in education, coupled with her burdensome household chores, keeps the Chinese woman out of the powerful political positions traditionally held by men. *Id.* at 233-34.

her brother.¹⁰³ Although women's rights have been protected by law since the People's Republic was founded in 1949, the feudal attitude that women are inferior did not end simply with the birth of a new society.¹⁰⁴

The Marriage Law expressly protects illegitimate children, adopted children, and step-children. Illegitimate children are entitled to the same rights as children born in marriage.¹⁰⁵ In addition, the father of an illegitimate child is required to furnish support, in whole or in part, until the child is self-sufficient.¹⁰⁶ By law, the relationship between adoptive parents and adopted children is the same as the relationship between natural parents and their children.¹⁰⁷ Upon adoption, the relationship between the natural parents and the adopted child is terminated.¹⁰⁸ Step-parents must treat step-children as if they were their own.¹⁰⁹

C. Family in General

When the communist government came into power in 1949, it initially proposed the replacement of the family unit with People's Communes to care for those in need.¹¹⁰ They soon discovered that the communes were an inefficient and expensive method of caring for children and the elderly.¹¹¹ Hence, this prime responsibility was returned to the family.¹¹² Today, the policy of the family as the pri-

103. *Id.* at 224.

104. *See generally*, Zhiye, *Safeguarding Women's Rights*, Beijing Rev., Oct. 15, 1984, at 27.

105. 1980 Marriage Law, *supra* note 3, at ch. III, art. 19. "Children born out of wedlock enjoy the same rights as children born in lawful wedlock. No person shall harm them or discriminate against them." *Id.*

106. *Id.* "The father of a child born out of wedlock must bear part or the whole of the cost of maintenance and education of the child until he or she can live on his or her own." *Id.*

107. *Id.* at ch. III, art. 20. "The state protects lawful adoption. The relevant provisions in this law governing the relations between parents and children are applicable to the rights and duties in the relations between foster-parents and their foster-children." *Id.*

108. *Id.* "The rights and duties in the relations between foster-children and their natural parents are terminated on the establishment of relationship of adoption." *Id.*

109. *Id.* at ch. III, art. 21. Article 21, chapter III states:

No maltreatment or discrimination is allowed between step-parents and their step-children. The relevant provisions in this law governing the relations between parents and children are applicable to the rights and duties in the relations between step-fathers or step-mothers and their step-children who receive care and education from their step-parents.

Id.

110. A. CLAYRE, *supra* note 10, at 93.

111. *Id.*

112. *Id.* at 94.

mary caretaker is reflected in the Constitution¹¹³ as well as the Marriage Law.¹¹⁴

Parents and children have reciprocal duties of support under both the Marriage Law and the Constitution.¹¹⁵ Where they are able, grandparents are required to care for minor children whose parents are deceased.¹¹⁶ Conversely, where their parents are deceased, the children must assist their grandparents, if they are able.¹¹⁷

If they have the capacity to do so, elder siblings must care for their minor brothers and sisters if their parents are deceased or are unable to care for the younger children.¹¹⁸ This policy not only relieves the state of the costly burden of caring for dependent family members, but it also strengthens the family structure.

IV. DIVORCE

Although men were free to divorce their wives under the feudal system,¹¹⁹ women first became free to divorce their husbands in 1950 with the passage of the First Marriage Law. Many women have since exercised this new right, yet China's divorce rate is still far below that in most western countries.¹²⁰ Displeased with this new freedom of divorce, many men resisted enforcement of the Marriage Law.¹²¹ Even to this date, divorce is considered "an act of immoral degeneracy and is condemned by public opinion."¹²²

When the Marriage Law was first passed, there was a marked rise in the number of divorce suits filed in China's courts.¹²³ How-

113. Chinese Constitution, *supra* note 36, at ch. II, art. 49. See pertinent text of art. 49, *supra* note 96.

114. *E.g.*, 1980 Marriage Law, *supra* note 3, at ch. III, arts. 14, 15, 19, 20, 21, 22, 23, 29, 30, 33.

115. See *supra* note 96 and accompanying text.

116. 1980 Marriage Law, *supra* note 3, at ch. III, art. 22. "Grandparents or maternal grandparents who have the capacity to bear the relevant costs have the duty to rear their grandchildren or maternal grandchildren who are minors and whose parents are deceased." *Id.*

117. *Id.* "Grandchildren or maternal grandchildren who have the capacity to bear the relevant costs have the duty to support and assist their grandparents or maternal grandparents whose children are deceased." *Id.*

118. *Id.* at ch. III, art. 23. "Elder brothers or elder sisters who have the capacity to bear the relevant costs have the duty to rear their minor younger brothers or sisters whose parents either are deceased or have no capacity to rear them." *Id.*

119. A. CLAYRE, *supra* note 10, at 74; F. BUTTERFIELD, *supra* note 17, at 175.

120. See *Survey Shows Low Divorce Rate*, China Daily, May 1, 1986, at 3, col. 3.

121. See V. SHUE, PEASANT CHINA IN TRANSITION 28 (1980).

122. Naftulin, *supra* note 21, at 75.

123. Ning, *How Does China Deal with Divorce?*, Beijing Rev., Feb. 4, 1985, at 18.

ever, by the mid-1950's, the government slowed its efforts to publicize the new law¹²⁴ and the number of divorce cases began to decline gradually.¹²⁵ The leaders of the communist party reasoned that if a partner was freely and carefully chosen at the right age, there should be no need for divorce.¹²⁶ Many women¹²⁷ applying for divorce were persuaded to remain in unhappy marriages. During the turmoil of the Cultural Revolution (1966-1976),¹²⁸ divorces were difficult to obtain and thus the divorce rate plunged even lower.¹²⁹ A more liberal standard for obtaining a divorce was incorporated into the 1980 Marriage Law and its passage has led to a sharp increase in the number of divorce applications filed.¹³⁰ The Chinese government, in an effort to educate the people, began publicizing the new law months before its effective date.¹³¹

Under the 1950 Marriage Law, the courts had great discretion to refuse a divorce where only one party sought it. Many divorces were denied, especially where the wife was the party opposed to the divorce.¹³² The people's court would try to effect a reconciliation by referring the parties to a mediator.¹³³ Where mediation failed and

124. *Id.*

125. E. CROLL, CHINESE WOMEN, *supra* note 39, at 82.

126. *Id.*

127. Even today, approximately seventy percent of divorces are filed by women. Ning, *supra* note 123, at 18.

128. The Cultural Revolution was one of the most complex political events in the entire history of the Chinese communist party.

[In] the Cultural Revolution Mao Zedong attempted to bring about a second revolution to purify Chinese society by intensifying what may be called 'virtuocracy,' the awarding of life chances to those who are deemed the most morally and politically virtuous. During the 1966-76 decade, political criteria eclipsed intellectual and professional ones in every sphere of Chinese life.

Shirk, *The Evolution of Chinese Education: Stratification and Meritocracy in the 1980s*, in CHINA: THE 80S ERA 245, at 260.

The Cultural Revolution rapidly became a "reign of terror," and did not accomplish what Mao himself had planned. A. CLAYRE, *supra* note 10, at 29. Instead, "it created one of the most dangerous of all the legacies of his rule: a generation of young people whose confidence in any code of belief had been destroyed, and who had also lost their chances of education. A. CLAYRE, *supra* note 10, at 29.

For a more extensive discussion and analysis of the Cultural Revolution and its impact on Chinese society, see generally H. LEE, THE POLITICS OF THE CHINESE CULTURAL REVOLUTION (1978).

129. Ning, *supra* note 123, at 18.

130. *Id.* The number of divorce suits filed in 1981 was twenty-seven percent higher than the number filed in 1980, and sixty-four percent higher than the number in 1979. *Id.*

131. *Id.* at 18-19.

132. *Woman Leader on New Marriage Law*, Beijing Rev., Mar. 16, 1981, at 21, 23.

133. Galas, *supra* note 7, at 58.

there had been a complete alienation of affection, the 1950 law provided that the court "may" grant a divorce.¹³⁴ The 1980 law, however, provides that a divorce "should" be granted.¹³⁵

The present Marriage Law, as did the 1950 Marriage Law, states that a divorce is automatically granted where both parties desire it.¹³⁶ Nevertheless, as a practical matter, before a divorce will be granted a couple will first undergo mediation to attempt a reconciliation, whether only one or both parties seek divorce.¹³⁷ Mediation is often successful in convincing many Chinese couples to resolve their differences and reconcile.¹³⁸

Elected to their neighborhood mediation committee, mediators are usually housewives and retired workers.¹³⁹ Often enlisting the aid of the couple's co-workers and family,¹⁴⁰ the mediator examines the relationship between the husband and wife to determine whether they have truly lost affection for one another.¹⁴¹ Interestingly, unlike American states, China has no explicit grounds for divorce.¹⁴²

Even with the more liberal standard, the Marriage Law restricts a party from obtaining a divorce in certain situations. Where his wife

134. 1950 Marriage Law, *supra* note 2, at ch. V, art. 17. "In the event of either the husband or the wife alone insisting upon divorce, it *may* be granted only when mediation by the district people's government and the judicial organ has failed to bring about a reconciliation." (emphasis added) *Id.*

135. 1980 Marriage Law, *supra* note 3, at ch. IV, art. 25. Article 25, chapter IV states: When one party insists on divorce, the organizations concerned may try to effect a reconciliation, or the party may appeal directly to the people's court for divorce. In dealing with a divorce case, the people's court should try to bring about a reconciliation between the parties. In cases of complete alienation of mutual affection, and when mediation has failed, divorce *should* be granted.

Id. (emphasis added).

136. 1950 Marriage Law, *supra* note 2, at ch. V, art. 17 ("Divorce shall be granted when husband and wife both desire it."); 1980 Marriage Law, *supra* note 3, at ch. IV, art. 24. Article 24, chapter IV states:

Divorce is granted when husband and wife both desire it. Both parties should apply for divorce to the marriage registration office. The marriage registration office, after clearly establishing that divorce is desired by both parties and that appropriate measures have been taken for the care of any children and property, should issue the divorce certificate without delay.

Id.

137. Ning, *supra* note 123, at 20.

138. For example, mediation resulted in reconciliation in over thirty-one percent of all divorces filed in Beijing from 1981 and 1983. *Id.*

139. See Zheng, *China's System of Community Mediation*, Beijing Rev., Nov. 23, 1981, at 23-24.

140. A. CLAYRE, *supra* note 10, at 104.

141. Ning, *supra* note 123, at 20.

142. Naftulin, *supra* note 21, at 75.

is pregnant or the couple has had a child in the past year, a husband may not seek a divorce.¹⁴³ This restriction does not apply to the wife, nor does it apply where the people's court deems it absolutely necessary to deal with a divorce application by the husband.¹⁴⁴

Where mediation fails to effect reconciliation, the problems of child custody and support, distribution of property, and allocation of debts must be resolved before divorce is granted. The underlying principle of the Marriage Law is that the parties should resolve these problems by agreement; however, the court will order a settlement where the parties fail to reach an agreement.¹⁴⁵

The law indicates that the parent-child relationship should remain intact even after divorce, and, regardless of whether a party has custody of the children, both parties retain "the right and duty to rear and educate their children."¹⁴⁶ According to the Marriage Law, "[t]he guiding principle after divorce is to allow the mother to have the custody of a breast-fed infant."¹⁴⁷ In other cases, the Marriage Law gives only general guidelines on this determination.¹⁴⁸ As a practical matter, the courts will award custody to the mother where the child is less than one year old, breast-feeding being the decisive grounds.¹⁴⁹ Custody of the children age one to three is usually awarded to the mother.¹⁵⁰ To determine custody of children over the age of three, the court will consider: 1) the interests of the child; 2) agreement of the parents, if any is possible; and 3) whether one of the parents has been sterilized.¹⁵¹ The court will also consider the preference of the child, if he or she is over the age of six.¹⁵²

The noncustodial parent is responsible for part or all of the cost of the child's maintenance and education.¹⁵³ Visitation rights of the noncustodial parent are not specifically addressed by the Marriage Law. The child has the right to request an increase in the amount of

143. 1980 Marriage Law, *supra* note 3, at ch. IV, art. 27.

144. *Id.*

145. *See id.* at ch. IV, art. 29 (child custody); art. 30 (child support); art. 31 (property settlement); art. 32 (allocation of debts).

146. *Id.* at ch. IV, art. 29.

147. *Id.*

148. *Id.*

149. Interview with Madame Wang Deyi, Director of the Legal Advisory Office, All-China Women's Federation in Beijing, People's Republic of China (Apr. 29, 1986).

150. *Id.*

151. *Id.*

152. *Id.*

153. 1980 Marriage Law, *supra* note 3, at ch. IV, art. 30.

support provided by either parent.¹⁵⁴

Any property acquired during the marriage is jointly-held, unless the parties have agreed otherwise prior to marrying.¹⁵⁵ Upon divorce, distribution of jointly-held property is subject to agreement between the parties.¹⁵⁶ If the parties cannot reach an agreement, the court will make an award, taking into consideration the state of the property, and the rights and interests of the wife and children.¹⁵⁷ Debts incurred jointly should be paid out of the joint property, whereas separately incurred debts should be paid by the party responsible for them.¹⁵⁸

Since both parties work, spousal maintenance is usually no problem.¹⁵⁹ However, should one of the divorced spouses experience financial difficulties, the other party has a duty to assist.¹⁶⁰ In the event the parties cannot reach an agreement on the matter, the people's court will render a judgement.¹⁶¹ By placing the responsibility on the former spouse, once again, the state avoids the expense of caring for needy family members.

V. CONCLUSION

Traditionally, the family has been the most important social and economic unit in China.¹⁶² Since 1949, the communist government

154. *Id.* Article 30, chapter IV states:

An agreement reached between parents or a judgment made by the people's court in connection with the cost of the maintenance and education of a child does not obstruct the child from making a reasonable request where necessary for either parent to increase the amount decided upon by agreement or by judicial decision.

Id.

155. *Id.* at ch. III, art. 13. "The property acquired during the period in which husband and wife are under contract of marriage is in the joint possession of the two parties unless they have agreed otherwise." *Id.*

156. *Id.* at ch. IV, art. 31.

157. *Id.*

158. *Id.* at ch. IV, art. 32.

159. Galas, *supra* note 7, at 58.

160. 1980 Marriage Law, *supra* note 3, at ch. IV, art. 33. "In case of divorce, if one party has maintenance difficulties, the other party should render appropriate financial assistance. Both parties should work out an agreement with regard to the details; in case an agreement cannot be reached, the people's court should make a judgment." *Id.*

161. *Id.*

162. Due to the agrarian nature of China's economy, Chinese parents felt compelled to have many children in order to have extra hands to assist the family in tending the land. A. CLAYRE, *supra* note 10, at 91-92. Traditional Chinese philosophy and religion also emphasized the primary importance of the family. *Id.*

Even today, the family maintains a prominent position in the governmental scheme. See *supra* notes 110-18 and accompanying text.

has adopted numerous new policies and programs, attempting to re-define the roles of women and men. The government has emphasized the equal status of men and women in the home as well as on the job.

Many of the new forms of liberty were alien to Chinese tradition, and, hence, were either ignored or only half-heartedly accepted. The new laws and programs could have had a tremendous impact on the family unit had they been immediately and strictly enforced by the government. However, implementation, and thus change, has come slowly. Certainly the feudal ideas of traditional China will not endure, but how quickly the citizens of the People's Republic of China will accept and enforce the letter of the law cannot be readily predicted.¹⁶³ Nevertheless, a statutory plan has been devised which has the potential for revolutionizing the framework of the family as it has been known in China since feudal times.

163. Leung, *supra* note 6.