

LAND REFORM AND NEW MARRIAGE LAW IN CHINA

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Preface

MARRIAGE law has always been the first to be enacted and promulgated after the great revolutions in history. This was the case with both the French and Russian Revolutions, and so it was in the case of the Communist Revolution in China. This phenomenon was not coincidental but natural.

Revision of the marriage law in China is contingent on a revision of the land law and other economic reforms. In the case of the Chinese Revolution, the revision of the marriage law was inseparably related to a reform of the land law. The present writer discussed the development of the landownership system in China since the eve of the revolution in the chapter on land reform in *Chūgoku Hōseishi Kenkyū* (The Study of the History of Chinese Legal System), (1960). In this paper, he intends to discuss the salient points of the new marriage law in connection with the land reform and subsequent developments.

I. COMPARISON OF OLD AND NEW SAYINGS RELATING TO MARRIAGE LAW

The new Marriage Law enacted in May 1950 is based on a philosophy negating the old Chinese marriage system, the nature of which may be inferred in the various expressions given below.

An old Chinese proverb says, "Noodles do not make a meal; likewise, women are not counted as human beings." In numbering children, girls were not taken into account. Lack of offspring used to be cited as a conventional ground for divorce, but even in this case girls were not reckoned with. Like slaves, women were treated as subjects of commercial transaction. Before the Revolution, a proverb was current in Shan-hsi Province to the effect that a one-year-old girl was worth one "shih" of grains and her value increased by one "koku" per year as she grew up. After being purchased, a woman was subject to the rule of the purchaser—the husband. It used to be said that a man was free to beat up or ride his wife or horse and that a husband

beats up his wife when she gets angry; and also when he gets angry. A husband was held in contempt if he failed to beat his wife. "*Lo-han-ch'ien*," a novel written by Chao-shu-li, refers to a husband who beat up his wife "for the sake of appearance." The Confucian concept that the husband is the "heaven" for the wife was rooted in the lot of the peasant, whose wife could not afford to leave her husband no matter how badly she might be treated because she had no hope of living by herself.

All this has changed after the Revolution. The contemporary maxim is, "Men and women are equal; everyone is worth his (or her) salt (i-jên-i-fên)." Women are no longer the objects of their fathers' commercial transaction or their husbands' domination. Thanks to the land reform women have acquired their share of land and become the creators of family wealth. In all respects, they have become the subjects of transactions and are free to join co-operatives (ho-tso-shê). In sharp contrast to her low pre-revolution status, a woman is now as important a member of society as a man. A new proverb says, "The Marriage Law cures laziness and helps to insure food supply." The revised Marriage Law has played a very important role in building a new society in post-revolution China.

II. LAND REFORM LAW AND THE NEW MARRIAGE LAW

In pre-revolution China, women were denied the freedom to marry as they wished, and at the same time men had not the freedom to marry. Among farming families, equality of family status (financial) used to be a matter for primary consideration in marriage. The freedom to choose one's spouse at will was also denied because of the framework governing the family labour force, the right to decide on the matter having been held by the patriarch. The patriarch often married his young son to a woman more than 10 years older just in order to acquire additional labour force for his family or bought a young girl at a low price and married her later to his son. The young girl was worked for household labour. The lot of such a girl, known as "t'ung-yang-hsi," is described in a number of novels including "The Snowy Morning" by Yü-ta-fu and "The Marriage of Hsiao-erh-hêi" by Chao-shu-li. As girls left a rural community as objects of commercial transaction, the female population of that community decreased in relation to the male population. Moreover, as landlords often took away their tenants' daughters in lieu of farm rents, adult males of that community had

correspondingly less opportunity of getting married. While wealthy landlords had more than one wives and concubines as well, many of the indigent peasants could not afford to have or to buy wives. It was not infrequent for men who had no opportunity of marrying and had passed the reproductive age to provide their nephews and younger brothers with wives solely in the hope of using their offspring as a new supply of family labour force for the future. Pawning (tien-ch'i) and leasing (tsu-ch'i) of wives were not uncommon practices in such Provinces as Fu-chien, Chê-chiang and Chiang-hsi. Both those who pawned their wives and those who took other men's wives were indigent. So were the wife lessors and lessees. These were contrivances whereby men who could not afford to have wives tried to secure labour force out of the children born of leased or pawned women. Whoever the biological fathers might have been, the offspring born during the term of the pawn belonged to the pledgee. The pawned wives were considered a kind of profit-bearing ransom and the offspring were regarded as "fructus naturalis." The transaction was conducted under the same legal concept as the one governing slaves and cattle. Although husbands were entitled to divorce their wives unilaterally, the indigent peasants could not afford to exercise that right. Women had no prospect of making a living independent of their husbands while men could not hope to marry again if they divorced their wives. Since men stood to lose if they divorced their wives, they had to feign ignorance if their wives committed adultery. The extreme poverty prevailing in rural communities thus served to protect the position of women.

In such circumstances, it is evident that a reform of subjective conditions was impossible of realization without a change of objective circumstances. In other words, no reform is possible unless both the subjective and objective conditions are present. Successful enforcement of the Land Reform Law and Marriage Law was a prerequisite to China's social reconstruction. Success or failure in the implementation of these two laws was a problem of such importance as to determine the destiny of new China.

III. FUNDAMENTAL SPIRIT OF THE NEW MARRIAGE LAW

Since the enactment of a marriage law in the Chiang-hsi Soviet Republic in 1931, the marriage law of revolutionary-period China changed through various stages. The new Marriage Law of 1950, for example, was different from preceding marriage law reforms in that it

was related not merely to the liberation but to new targets of construction. Throughout the successive stages of development, the reform of marriage law in revolutionary-period China has been geared to a consistent, basic aim—the upholding of the principles of free marriage, monogamy, equal rights for men and women and the protection of the natural rights of women on the one hand and, on the other, the negation of feudalistic and patriarchal marriage practices centred on the interests of the family, husbands and males—such as bigamy, concubinage, child marriage and human traffic marriage. The new Marriage Law upholds the principle that matrimony should be based on the voluntary will of the man and woman concerned, and dispenses with any stipulation requiring the approval of legal proxies even in the case of the marriage of minors. The marriageable age has been set at 20 for males and 18 for females—both advanced from those stipulated in the pre-revolution marriage law. Other salient points in the new law include the prohibition of marriage between persons of a certain degree of consanguinity and those afflicted with venereal disease and certain other ailments, and nullification of marriages lacking substantial requirements (although the law does not provide for nullity and dissolution as does the Japanese Civil Code). The law does not prohibit wedding ceremonies provided they are simple and befitting the new society but it does not call for ceremonies as prerequisites. Incidentally, the new law is not particularly significant in regard to the freedom from religion because marriage in China has traditionally been free of religious connections.

IV. REGISTRATION SYSTEM

The registration system provided for in the new Marriage Law calls on the persons concerned to report personally to the government offices of their respective areas of residence. No proxy is permitted to register on behalf of the newly-married persons. The registration offices must issue marriage certificates to persons married according to the legal stipulations. The registration offices conduct substantial screening as to whether the marriage is based on the free will of the betrothed, the ages of the betrothed, and other essential conditions of marriage. The procedures are described in detail in “Marriage Registration,” a novel by Chao-shu-li. By screening the marriage licence applications, the registration office rejects matches forced by the patriarchs, human traffic marriages, “túng-yang-hsi,” child and infant marriages, bigamy,

consanguineous marriages and the marriage between persons afflicted with venereal diseases, mental troubles and other specified ailments. Thus, the registration system serves as a barrier for doing away with feudalistic practices in marriage and plays a large role in helping build a new society and healthy families capable of producing a sound new generation. The system provides a good lesson to the public about the spirit of the new Marriage Law and the Government encourages the laggards to register their marriage by all means.

There is room for doubt, however, as to whether registration is an indispensable condition for marriage. When the new Marriage Law was put into effect in 1950, it was announced that registration in accordance with the legal provisions was an essential condition for marriage and that unless duly registered, a marriage cannot be considered effective. Recently, however, new data that apparently contradict this contention have been provided by Saburō Kuroki, Atsushi Asai, and other persons. A statement issued by the Legal Affairs Committee of the Central People's Government on March 19, 1953, in regard to marriage problems (data furnished by Mr. Asai) declared that although unregistered marriages are illegal, such marital relations may be acknowledged and persons in such relations may have their marriage legalized at any time when they register.

It is true that registration is a means of evincing the agreement between the persons concerned of their will to get married and serves as a rational basis for recognizing the consummation of matrimony, but it seems that even among Chinese researchers, the opinion is predominant today that registration is not necessarily an essential condition of marriage. This fact has been revealed by some data including "Outline of the Marriage Law" by Mr Ma-ch'i which I borrowed from Mr Kanatoshi Morikawa recently.

Mr Ma-ch'i refers to registration, not in the chapter on "Conditions for Consummation of Marriage," but in "Legal Procedures of Marriage." He defines marriage registration as *the most effective notarial transaction* for establishing the personal relationship between man and wife. That relationship, he says, comes into existence when a competent registration office recognizes its validity in the light of the legally prescribed conditions of marriage and issues a marriage certificate. Mr Ma-ch'i also declares that the consummation of marriage is not affected by whether or not the couple are living together or held a wedding ceremony.

"In case a couple is actually married but has not taken the mar-

riage registration procedures after the promulgation of the Marriage Law, such matrimonial relationship should be recognized as effective," Mr Ma-ch'i says, "Cohabitation minus marriage registration constitutes *de facto* matrimony, but this does not mean that all unregistered marital relationships should be considered *de facto* marriages. The so-called *de facto* marriages must have three conditions one of which is that both the man and woman concerned are convinced of their marital relations." However, registration is the "*most effective*—though not the only—transaction for establishing the personal relationship between man and wife." It is a device for validating the legal effectiveness which the couple wishes to have, and not a mere technical means of certifying the marriage.

The fact that China's new Marriage Law recognizes the formality of marriage from dual standpoints—registration and social fact—can be considered a realistic approach in that this makes it possible for the Government to intercede against old feudalistic marriage practices not only by means of the registration system but also in other spheres, and also to extend legal protection to the women and their offspring. Let me here allude to the historical background of this dual standpoint taken in the new Marriage Law. This stand is a legal phenomenon which occurs naturally when an old national society moves to a new stage, all the more so when the shift is sudden and when the enforcement of the law is considered seriously. A gap is liable to develop between the objectives of a new set of laws and the old, entrenched consciousness of the people. If the law is pushed too fast, a segment of the people is liable to be left behind, no matter how progressive the law may appear. Such a phenomenon is disadvantageous not only to the people but also to the State. The method of solving this problem differs from one country to another and also according to the stage of development of the different countries. (Worthy of note in this connection is the fact that, prior to the enforcement of the Civil Code in Japan during the Meiji Era and also under the Soviet Law of 1926, the principle of *de facto* marriage was not discarded although the marriage registration system was in effect.) The fact that the Chinese Government, while positively pushing the registration system in its new Marriage Law, did not discard the principle of *de facto* marriage speaks of its very pragmatic policy geared to the actual conditions prevailing in that country. This approach stands in sharp contrast to the stand of the pre-revolution China which, while preoccupied with establishing an outwardly perfect legal system, did not bother to put it into practical

effect. Mr Asai maintains that the registration system provided for in the new Marriage Law transcends and renders obsolete both the conventional *de jure* and *de facto* principles of marriage. In my opinion, we must delve a little more deeply into the question. As mentioned earlier, the marriage registration system is designed to examine whether a marriage is legally in order, and particularly at the stage when this system was established, it was intended not only to destroy the vestiges of the old feudalistic practice—insuring the freedom of marriage and protecting the status of women and their offspring—but also to achieve the objective of constructing a society of higher order. This objective is apparent in the fact that the Government has chosen to concern itself with unregistered *de facto* marriages as with registered marriages. Therefore, if the nation reaches a stage when it needs no efforts to destroy the vestiges of feudalism, marriage registration as a means of eradicating feudalism is bound to undergo a change in its role. In that event, it will become meaningless to recognize the principle of *de facto* marriage and no trouble will remain *if* marriage registration is made a definitely essential condition for matrimonial formality. (If this supposition becomes a reality, the process of change will be similar to, if not exactly identical with, the process by which the Soviet Law abolished the principle of *de facto* marriage.) The present marriage system, in my opinion, is that of a transitory period which is suitable for the present stage of development and existing conditions rather than one representing the *Aufheben* of the two matrimonial principles. When China advances to a new stage of development and to new conditions, it is possible that a newer marriage system befitting the new conditions will emerge. The new system that I envisage is one under which legally prescribed rights and duties of a married couple are contingent on registration so that a sound, stable married life will be guaranteed not only for the present but also for future generations—a principle of registered marriage aimed at contributing to the sound development of the national community.

V. NEGATION OF THE OLD GROUP PRINCIPLE AND THE DEVELOPMENT OF A NEW ORGANIZATIONAL SYSTEM

The Marriage Law provides that man and wife are partners in community life and enjoy equal status in the home. The law places man and wife on an equal footing not only in the provision cited above but in all other stipulations. Whereas the old Chinese family system

restricted matrimony and parent-child relations by the yardstick of "family," the new Marriage Law is free of the system of the "family" in the conventional sense. Whereas the Civil Code of the Republic of China contained provisions on the ascendant and descendant relations, the new Marriage Law is free of any such status concept. One of the provisions obligates man and wife "to love, respect, help and support each other, to unite amicably, to strive for production, to bring up children and to endeavour jointly in the interest of the happiness of the home and the construction of a new society." Another provision states that each of the couple "enjoys the freedom to choose his or her occupation, to participate in work and take part in social activities." The law refers to discipline centred around the couple and stresses the freedom to choose one's occupation and participate in social activities, but has no stipulations concerning family discipline and status relationship in the old sense. This new Marriage Law represents a system befitting, and geared to, a new economic order aimed at socialistic construction. The new saying current in rural communities in Ho-nan, Lu-shan Province to the effect that the new Marriage Law cures laziness and helps increase foodstuffs is indeed a good maxim befitting a new era.

One of the property ownership systems prevalent in pre-revolution China was family communalism, namely, a system of ownership by dominant or comrade groups such as parents and children, married couples or brothers. There was also an ownership system by status groups such as family clans. The man-and-wife property ownership system provided for in the Civil Code of the Republic of China was a sham. One of the 40 articles provided for a man-and-wife property contract but this provision was conspicuously impractical. The new Marriage Law contains only one article regarding the property of the married couple, which states that both the husband and wife have equal rights to own and dispose of family property. According to a report by Mr Ch'ên-shao-yü, the "family property" consists of the following three: (1) assets owned by the husband and wife prior to their marriage, (2) assets acquired after their marriage, and (3) assets of the children under age. Under the Land Reform Law, all persons—men and women, old people and infants—are entitled to equal acreage of land, with no difference by sex and age. The land may be received in the name of the individual or in a whole-family unit but even in the latter case, the share of each family member is clearly defined. Gone are the days when women were not considered human beings; today "man and

woman are equal and everyone is worth his or her salt." Women's right to own and dispose of family properties and their contributions to the home have been clearly defined. Thus, it has become, according to Miss Kazuko Tsurumi, the objective of married life not only for the husband and wife but all members of the family to "engage in planned production and communal labour" on an equal footing. "Planned production and communal labour," however, are not limited to the framework of one family but are now being carried out in a more developed form of social groups. This development cannot but affect the properties of the married couple and the family. The conventional "community" and "patriarchal group" systems have now come to an end under China's new marriage system and reformed land system. At the outset of the land reform when farming families operated independently, land was given in terms of family unit and farming was also carried out likewise although the land was allotted equally to each individual regardless of the difference in sex and age. In those days, vestiges of patriarchal rule in the form of paternal or husband rights remained in various aspects of work, consumption, and distribution. The same state of affairs continued even when China advanced to a stage when families began to interchange farming implements and labour-force among themselves. Individual landownership shifted to collective ownership (Articles 5~8 of the Constitution), however, when agriculture became to be administered under the co-operative system, or highly-developed Co-operative Society. At the same time, labour force was socialized, that is, family-unit labour shifted to collective labour. A comprehensively rational system thus came into effect in landownership, farm management, work arrangement, and the distribution of produce, destroying the last vestiges of old-fashioned family and group setups. The patriarchal domination built up around labour force discipline has finally crumbled in this new environment. The elimination of patriarchal rule will become complete when the collective ownership now in force under the people's commune system advances to State ownership in the future. The system of married couple's and family property ownership has undergone a radical change in comparison with the state of affairs that prevailed immediately after the land reform, not to speak of the pre-revolution era. In present China which is advancing towards a new social system, the means of production, management formulas, labour force, and distribution of produce have broken out of the shell of family units.

VI. DIVORCE

Under the new Marriage Law, men and women enjoy equal legal rights and the freedom to marry and divorce. Only by mutual agreement can the man and woman concerned establish marital relations and dissolve them. Both the husband and wife have equal rights to ask for a divorce. Unlike the old Chinese society, requests for divorce from wives have increased in post-revolution China, obviously because of the enhanced economic status of women resulting from land reform. In case of divorce, the husband and wife must divide the family property under the new system and the husband is obligated to repay joint liabilities which cannot be repaid with the assets acquired during the couple's married life. As Edgar Snow pointed out, divorce has come to pose a new threat to husbands who used to enjoy unilateral domination and hold one-sided rights to divorce under the old social custom.

1. *Divorce by Consent.* The new Marriage Law permits divorce by consent at any time. Such a divorce requires the agreement between the husband and wife only and nobody else. Patriarchal compulsion is prohibited. As for divorce procedures, the couple wishing to divorce must apply to the people's government of the district of their residence for divorce registration and obtain a divorce certificate. On receiving a divorce application, the people's government concerned screens the application and confirms the intentions of the couple and the propriety of the proposed plans for post-divorce disposal of the offspring and properties.

2. *Divorce by Mediation.* When a divorce claim is filed, the court, instead of passing its judgment immediately, must try to mediate as best as it can. The mediation system in Chinese society is deeply rooted in history and it would seem that the old tradition in China of the people trying to settle problems by themselves has been inherited by the new Chinese society. I do not mean that the authoritarian mediation system practised in the old Chinese society, an example of which is described in the first chapter of Chao-shu-li's novel "Transition in Li-chia-chuang," has been inherited just as it is. A revision must be made in inheriting the old tradition. According to the provisional rules of the people's mediation committee promulgated in February 1954, the committee's task lies in mediating people's common civil disputes including those concerning matrimonial affairs. The mediation by the committee, however, is not necessarily a mandatory step preced-

ing a lawsuit. Even after divorce mediation fails and the suit is filed with the court, the court tries to mediate again, as will be mentioned later. Incidentally, the idea of divorce mediation apparently originates from the Marriage Law of the Soviet Union.

According to the new Marriage Law, when either party of a married couple insists on a divorce, the people's district government concerned may undertake mediation and if the mediation proves ineffective, the case must immediately be forwarded either to the prefectural or municipal court. In other words, the new Marriage Law calls for two stages in divorce procedures. In the first stage or first instance, the people's district government undertakes mediation and if this effort fails the case is transferred to the second stage or second instance—trial by the prefectural or municipal court. The court either decides in favour of divorce or rejects the divorce claim, but before handing down the decision the court makes an attempt at reconciliation as in the first stage. Both in these two stages, the court tries to control a tendency towards the so-called liberalistic slight of marital union on the one hand and, on the other, to prevent one-sided compulsion by the husband or the wife's in-laws. The spirit underlying this system is that a family life is inseparably related to the objective of building a new social and economic order not only from the standpoint of women but also from the need to foster children and that, therefore, an easy-going breaking-up of a family unit must be avoided by all means.

3. *Divorce by Trial.* If mediation fails in the second stage of the divorce procedure, the court hands down its decision. Although the court decision is a necessary procedure for divorce, the overriding determinant is, after all, a decisive desire for divorce on the part of either party of the married couple. The Civil Code of the Republic of China listed a set of grounds for divorce and permitted a divorce claimed by either party of a married couple if one or more of such grounds were found to be present. This was based on the principle of divorce on absolute grounds. Under this Civil Code, a court decision was needed to confirm the presence of such grounds. The grounds listed in this law included not only bigamy and adultery but matters not directly related with the husband and wife such as "in case cohabitation is unbearable because the wife maltreats the husband's lineal ascendants or vice versa." The new Marriage Law of 1950 has no stipulation regarding grounds for divorce and leaves it up to the discretion of the court to judge the divorce claims. This line was presumably adopted from the Soviet Union's marital legislation which is character-

ized by the principle of divorce on relative grounds. If a party of a married couple has a strong desire to divorce his or her consort and if court mediation fails, the court must immediately hand down a decision. But the court does not necessarily give a divorce decision in all cases. Although divorce is free in principle, the court always watches for a slight of matrimony and the abuse of the divorce procedure. The would-be divorcee must have sufficient reasons for forcing a divorce on his or her marriage partner. Thus, the court may reject the divorce claim.

DATA FOR REFERENCE

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