

FAMILY REFORM THROUGH DIVORCE LAW IN THE PRC

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INTRODUCTION

As the Chinese Communists tried to establish power during the 1930's, they condemned both the family¹ and the law.² During the Chinese Soviet period, the Marriage Regulation of 1931 validated the contested as well as uncontested divorce.³ Immediately after their victory in 1949, the Chinese Communists adopted the Common Program, which abolished "all laws, decrees and judicial systems of the Kuomintang reactionary government who oppress the people."⁴ Yet, neither the family nor law has van-

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1. Two reasons are given for the Chinese Communists' view that the traditional family is the "embodiment of all evil." One is economic and the other is political. The traditional family hindered economic progress by keeping women from participation in economic life. Politically, the old family focused an individual's loyalties upon his own family and thus failed to meet the demands of the Party. See Meijer, *Marriage Law and Policy in the People's Republic of China*, in CHINESE FAMILY LAW AND SOCIAL CHANGE 437 (D. Buxbaum ed. 1978).

2. Communists have traditionally viewed law as a tool of oppression. As Engels stated, "The law is sacred to the bourgeois, for it is his own composition, enacted with his consent, and for his benefit and protection." Marx rejected the claim that law is basic to social existence: "Society does not depend on the law. That is a legal fiction." See M. CAIN & A. HUNT, MARX AND ENGELS ON LAW 165 (1979) (citing from Engels, *The Condition of the Working Class in England*, in IV K. MARX & F. ENGELS COLLECTED WORK 514-517 (1975)); P. PHILLIPS, MARX AND ENGELS ON LAW & LAWS 187 (1980) (citing from Marx, *Trial of the Rhineland District Committee of Democrats in 1849*, in NEUE RHEINISCHE ZEITUNG Feb. 1849).

3. M. MEIJER, MARRIAGE AND POLICY IN THE CHINESE PEOPLE'S REPUBLIC, Appendix I. Marriage Regulation of the Chinese Soviet Republic of 1931 (1971).

4. Common Program, art. 17. See Li, *The Evolution and Development of the*

ished from the People's Republic of China (PRC). From the beginning, the Chinese Communists retained the use of law, especially in the area of marriage and divorce, even though law was considered of less value than other techniques of social reform, such as political education and mediation and persuasion.⁵ Indeed, law became the instrument of protecting the family, as the old goal of destroying the family was abandoned in favor of maintaining the institution in a modern form.⁶

The Chinese Communists have invested much energy in family reform, because they link family reform and reform of the entire society.⁷ The Communists' efforts can be seen in interrelated changes in land distribution patterns and alterations of the family structure from the time of the Jiangxi period⁸ onward. The idea of land redistribution from rich peasants to poor ones was first incorporated into the New Land Law of 1930,⁹ which initiated confiscation of all land and the cancellation of all debts.¹⁰ The goal of changing the family structure was officially introduced in the provisional constitution of the Chinese Soviet in 1931.¹¹

Since the establishment of the People's Republic of China, reform of the family has been initiated and controlled through a legal tool—the Marriage Law. This article examines the role of the Marriage Law by looking at its provisions on divorce. The article begins by sketching the history of divorce in China, including reform efforts before the emergence of the Communist movement in China. After discussing the principles governing divorce under the Marriage Law, the article describes the formal system of

Chinese Legal System, from CHINA MANAGEMENT OF A REVOLUTIONARY SOCIETY (J. Lindbeck ed. 1971) reprinted in CHINESE LAW 381 (W. Alford ed. 1982) (unpublished casebook, available in UCLA Law Library).

5. The "mass trial" combined these different approaches to social reform. Mass trials were used to adjudicate cases of political crimes and civil crimes with the participation of the public for educational and propaganda purposes. A 1951 Beijing trial was conducted in the presence of 1,300 spectators. See I. KIM, *THE POLITICS OF CHINESE COMMUNISM* 78 (1973); See also MEIJER, *supra* note 3, at 86.

6. See *infra* note 125 and accompanying text.

7. Marx tied family and society together: "Where there is a certain stage of development of production, exchange and consumption, there will be a certain system of family, grade or class organization." E. CROLL, *THE POLITICS OF MARRIAGE IN CONTEMPORARY CHINA*, 5 (1981) (citing Marx, Letter to B.V. Annikov (Dec. 28, 1849), in II MARX, ENGELS SELECTED WORDS 442 (1962)), RENMIN RIBAO (People's Daily) Dec. 13, 1963). According to Mao Zedong, land-owners and men preserved feudalism by oppressing the peasants and women. He cited four kinds of authority which subject a Chinese to domination: the state, the clan, gods and spirits, and the family. He believed all four systems should be overthrown, and that the downfall of one system would lead to the downfall of all systems. MEIJER, *supra* note 3, at 37.

8. The "Jiangxi period" refers to the Chinese Soviet Republic of 1931-1934 in Ruijin, a village in the hills of southern Jiangxi Province. See KIM, *supra* note 5, at 1.

9. See *infra* notes 78 & 117 and accompanying text.

10. KIM, *supra* note 5, at 112.

11. MEIJER, *supra* note 3, at 41.

divorce that the Marriage Law has fostered and its impact on Chinese society, including the status of women. Finally, the article discusses the debate over current attitudes toward the family in China and the likely future of divorce.

I. THE DEVELOPMENT OF CHINESE DIVORCE LAW

The following section will focus on the history of divorce in China, tracing its roots back more than two thousand years.

A. Historical Background

Divorce was not a customary practice in traditional China.¹² Nevertheless, it was not a rare event, especially in the early part of Chinese history.¹³ Although exact figures are hard to reach because divorce was not always labelled as such in traditional China.¹⁴ One euphemism for divorce described the dissolution of a marriage as the woman "going back" to her family or undertaking the "big return". Incidents cited from the Book of Ritual¹⁵ and the Spring and Autumn Annals¹⁶ indicate that divorce of this type was not uncommon. In the majority of the cases, only the male side of the family could initiate a divorce proceeding, although there were random accounts of wives leaving their husbands or abandoning their families.¹⁷

There was some resistance to divorce in the Qin dynasty (255-206 B.C.).¹⁸ The Legalists, who were dominant in the Q'in, strived to achieve a centralized and structured government through law as a mechanism of control. They looked on human

12. Many sinologists and scholars believe that divorce was a rare event in traditional China. See MEIJER, *supra* note 3, at 16. The term traditional China refers to a period of 4,000 years before the Chinese Republic of 1911. *Id.* at 1.

13. TAN Y.Z., *ZHONGGUO LIHUN YANJIU (RESEARCH ON CHINESE DIVORCE)* 1 (1932). The author cited incidents in history and classics showing that divorce was quite common before the Qin dynasty (255-206 B.C.). As a matter of fact, the concept of divorce can be traced back at least to the Eastern Zhou dynasty (770-479 B.C.). During the Zhou dynasty, when a woman married an emperor or into the imperial family, her sisters would have to go along as concubines, and when this woman was divorced, all her sisters would also have to leave. FU, *ZHONGGUO TONGSHI (CHINESE HISTORY)* 38 (1968).

14. TAN, *supra* note 13, at 3.

15. LI JI (*BOOK OF RITUAL*) was one of the six books accepted as classics by Confucian literati by the Han dynasty (206 B.C.-25 A.D.) and still exists today. It lists rules governing interpersonal contact. D. MUNRO, *THE CONCEPT OF MAN IN EARLY CHINA* 28 (1969).

16. CHUN QIU (*Spring and Autumn Annals*) contains accounts of the codes of laws during the mid-Zhou period. F. MOTE, *INTELLECTUAL FOUNDATIONS OF CHINA* 119 (1971).

17. CHEN Q.Y., *ZHONGGUO HUNYINSHI (A HISTORY OF MARRIAGE IN CHINA)* 235 (1936).

18. TAN, *supra* note 13, at 3; under the Qin rule, China was unified for the first time. *Id.* at 105.

beings as having no worth apart from their possible contribution to the state. They deemed moral concerns and individual desires unimportant. As a result, they discouraged divorce since it was an expression of individualism not wanted in the Legalist state.¹⁹ The virtue of chastity was heavily emphasized by the Emperor of Qin, thereby discouraging women from remarrying after divorce.²⁰ However, the influence of Legalism was limited and divorce was still generally accepted in the Eastern Han (25-221 A.D.).²¹ That little stigma attached to divorced wives can be seen in the following example. Deng Yuanyi divorced his wife because she didn't get along with her sister-in-law. The wife, who was sent home, later remarried Hua Zhong, a reputable magistrate. On one occasion when Hua was in a parade with his new wife, Deng told his neighbors he was proud that Hua's wife was his ex-wife.²²

Incidents of divorce were cited in the classics and in literature of the Jin dynasty (265-420 A.D.), the period of North and South Division (420-589 A.D.), and the Tang dynasty (618-907 A.D.).²³ One case cited in the classics during the Jin period describes a wife who was divorced before she joined her father for banishment. Another case of the Tang period depicts a wife who requested and received a divorce because of her husband's poverty. Divorcing a wife was seen as bad conduct for the first time during the Northern Song dynasty (960-1127 A.D.).²⁴ Until this time, virginity was not viewed as part of the virtue of chastity; divorced wives had a status equal to that of virgins. As attitudes changed during the Song period, however, men began to prefer virgins as wives.²⁵ As a result, many believed that heaven would strike those who were involved in assisting a divorce since the divorced wife would be left alone for the rest of her life.²⁶

Divorce appears to have been less frequent in both the Ming dynasty (1368-1644 A.D.) and Qing dynasty (1644-1912 A.D.) than in earliest dynasties.²⁷ This might be partly due to the fact that a system of statutory divorce called the seven conditions²⁸

19. W.T. DE BARY, *SOURCES OF CHINESE TRADITION* 137 (1969) (citing selections from the writing of Li Ssu to illustrate the legalist tradition).

20. CHEN D.Y., *ZHONGGUO FUNU SHENGHUOSHI*, (A HISTORY OF THE LIFE OF CHINESE WOMEN) 41 (1965).

21. Dull, *Marriage and Divorce in Han China*, in *CHINESE FAMILY LAW AND SOCIAL CHANGE* 52 (D. Buxbaum ed. 1978).

22. CHEN, *supra* note 20, at 56.

23. See CHEN, *supra* note 20, at 81, 119 (citing cases of divorce from the Jin and Tang dynasties). See also CHEN, *supra* note 17, at 235 (citing cases of divorce in the period of North and South Division).

24. Dai, *Divorce in Traditional Chinese Law*, in *CHINESE FAMILY LAW AND SOCIAL CHANGE* 81 (D. Buxbaum ed. 1978).

25. CHEN, *supra* note 20, at 146.

26. *Id.* at 145.

27. TAN, *supra* note 13, at 3.

was not widely used by the general populace after the Yuan dynasty (1286-1368 A.D.).²⁹

1. *Types of Divorce in Qing China*. Chinese law first established provisions for different kinds of divorce during the Chun-Qiu [Spring and Autumn period (770-479 B.C.)].³⁰ By the Qing dynasty (1644-1911 A.D.), it was possible to distinguish four different kinds of divorce: (1) divorce by mutual consent; (2) divorce pursuant to the "seven conditions and three limitations"; (3) divorce resulting from breaking the bond; and (4) the wife's suit for divorce.³¹

a. *Mutual Consent*. As the name implies, divorce by mutual consent was accomplished by the joint decision of a couple to dissolve their marriage. Such divorces left the husband in a better position than the wife. As seen in the Da Qing Luli (The Statutes and Substatutes of the Great Qing), the husband was allowed to remarry, whereas the wife had to return to her family and could not remarry.³²

b. *Seven Conditions*. The second category of divorce in Qing China involved repudiation based on one or more of the "seven conditions".³³ The seven conditions included the wife's (1) unfilialness to her parents-in-law, (2) bearing no son, (3) adultery, (4) jealousy, (5) malignant disease, (6) talking too much, and (7) stealing.³⁴ There were, however, three limitations on such divorce. A wife could not be divorced if (1) she had no place to return to, (2) she had observed three years of mourning for a parent-in-law, or (3) her husband had been poor at the time of marriage and later became rich.³⁵

28. See *infra* note 33 and accompanying text.

29. CHEN, *supra* note 20, at 240-242.

30. DAI, *supra* note 24, at 76 (divorce was permitted for seven different reasons as early as the Spring and Autumn period).

31. *Id.* at 84-98.

32. Zhou, *Zhongguo Lihun De Sanjue, Three Separations in Chinese Divorce Law*, in LIHUN WENTI PINGLUN (DISCUSSION ON DIVORCE QUESTIONS) 91 (Zhang ed. 1973).

33. QU, ZHONGGUO FALU YU ZHONGGUO SHEHUI (CHINESE LAW AND CHINESE SOCIETY) 96 (1967). Seven conditions cited from DA DAI LIJI (BOOK OF RITES OF ELDER DAI), Vol. 12 (202 B.C. to 220 A.D.).

34. *Id.*

35. *Id.* Criminal sanctions were used to assure strict compliance with the divorce law and its provisions. The Tang Code provided that the husband would be incarcerated for one and a half years if the wife was divorced without committing any of the seven conditions or without breaking the bond. If the wife committed one of the seven conditions and qualified for one of the three limitations, but was divorced, the husband would be given 100 blows and forced to resume the marriage. See ZHOU, *supra* note 32 (quoted from the Tang Code).

c. *Breaking the Bond*. Divorce by breaking the bond was allowed when either spouse committed any of the following offenses: murder, adultery, and battery of a relative-in-law.³⁶ Government officials were required to intervene and divorce was mandatory.³⁷

d. *The Wife's Suit*. The wife's suit provided the only means by which a wife could initiate a divorce.³⁸ The wife was allowed to request a divorce if her husband disappeared or had been mistreating her. A waiting period was required before the husband could be deemed to have deserted the wife. This period decreased from five years under the Song dynasty to three years under the Qing dynasty.³⁹ Mistreatment of a wife consisted of the infliction of broken bones or a terminal sickness by battery. However, after an abused wife applied for a divorce, the local official was required to ask the husband to grant it. Thus, if the husband did not want to divorce his wife, he would only be fined for his wrongful behavior.⁴⁰

2. *The Functions of Divorce*. There were three principal reasons for allowing divorce under traditional Chinese law. The first, which was considered to be the most important, was to maintain the family line by the procreation of sons.⁴¹ Given this ultimate mission of marriage, it is possible that a wife without sons might be divorced under the seven conditions even though she was an excellent partner in all other respects.

Divorce in traditional China also served to maintain the embodiment of the ethical norms of Confucianism. Marriage was believed to have the traits of *li* (propriety), *yi* (righteousness), and *jen* (benevolence).⁴² *Li*, referring to rules of proper conduct designating different modes of behavior according to status and

36. DULL *supra* note 21 (source of citation is the Tang Code).

37. The Ming Code specified that if one spouse broke the bond and the couple refused to get a divorce, each would receive eighty blows. See *supra* note 32.

38. DULL, *supra* note 21, at 51.

39. *Id.*

40. TAN, *supra* note 13, at 12 (quoting ZHAO, ZHONGGUO FUNU ZAI FALU ZHI DIWEI (THE POSITION OF CHINESE WOMEN IN LAW) (1928)).

41. The family was referred to as the husband's family since China was a strongly patriarchal society even though during the Age of the Five Rulers (2852-2205 B.C.) the matriarchs controlled the society. See LU, ZHONGGUO ZHONGZU ZHIDUSHI (A HISTORY OF CHINESE CLAN SYSTEM) 3 (1935). See also QU, *supra* note 33, at 79. Quoted from Spring and Autumn Annals, "The difference between men and women is that men are respectful and women are spiteful, therefore men are honorable." Daughters were "married out" and so could not continue the family. The patriarchal nature of society was based in part on the belief that women were inferior. The custom of using a bride as merchandise also perpetuated the concept of male supremacy. See Zhou, *supra* note 32, at 91.

42. Zhou, *supra* note 32, at 91.

relationships, has the connotation of form and arrangement.⁴³ According to Confucius, it has an ethical significance for bringing order into one's life and into society.⁴⁴ An example of li would be filial mourning. Children were expected to mourn for a period of time, usually three years, after a parent's death, and they could neither marry during that period nor participate in any type of social event.⁴⁵ According to Qing law, a wife who committed any of the seven conditions would be violating li and should be divorced.⁴⁶

Yi means "social righteousness",⁴⁷ that is, "the sense of what is proper and improper, together with the feeling of an obligation to act accordingly".⁴⁸ Since *yi* involves a subtle process of evaluation, a tolerance of wrongfulness would destroy social righteousness. Accordingly, the Tang, Ming, and Qing codes each stated that one who refused a divorce which was required by breaking the bond threatened *yi*.

Jen refers to benevolence. Because *jen* and *yi* were considered the basic roots of good society,⁴⁹ *jen* had to be cultivated. If a husband could not live harmoniously with his wife and so was prevented from cultivating benevolence, divorce through mutual consent became desirable.⁵⁰

The least important purpose served by divorce was the pursuit of personal happiness. According to the *Book of Rituals*, a son who thought his wife to be inappropriate for him had to yield to his parents' will if they thought the pair was well suited. Sometimes a husband had to remain with his wife even though he would have liked to divorce her.⁵¹

3. *Problems in the Traditional System.* One serious problem of the traditional divorce system was the perpetuation of inequality between husband and wife. The divorce provisions allowed a man to divorce his wife based on any of the seven conditions,⁵²

43. *Id.*

44. *Id.*

45. XINGAN HUILAN, *Zuhan* 7, 25b-26. See also MUNRO, *supra* note 15, at 27.

46. Zhou, *supra* note 32, at 91. The violation was considered a total rejection of Confucianism, which required an individual to submit himself to the dictates of li. Most of the seven conditions such as a wife's unfiliality, jealousy, or stealing were behavioral in nature, a fact which might explain why an individual's improper behavior would jeopardize li, the foundation of all human virtues. See MUNRO, *supra* note 15, at 74.

47. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 16 (1967).

48. MUNRO, *supra* note 15, at 75.

49. D. BODDE & C. MORRIS, *supra* note 47, at 23 (quoting Han Fei-tzu, that one should cultivate the root rather than the branches of a society).

50. TAN, *supra* note 13, at 1.

51. *Id.*

52. See QU, *supra* note 33.

whereas the wife could not ask for a divorce even if the husband committed the same offense. She could defend herself only by invoking one of the three limitations.⁵³ Even divorce by mutual consent was to the wife's disadvantage because she could not remarry if she was divorced on this ground. The only feasible way for a woman to obtain a divorce was to behave in one of the ways designated in the seven conditions and then wait for her husband to divorce her. However, with the existence of concubinage in traditional China, many men preferred to turn to their concubines and avoid divorce proceedings. If the wife was lucky enough to get a divorce, she became "an object of contempt",⁵⁴ whereas the husband could remarry and expect little pressure from the community since it was standard for men to be involved with more than one woman. Given the disparity in treatment, it is not surprising that many women chose to commit suicide as a way out.⁵⁵ Other women refused to marry and remained virgins. These women went to live in "great aunt houses" where they stayed with others who shared their views.⁵⁶

4. *Efforts to Change the System.* Efforts to change the institution of marriage were undertaken by the populace during the Taiping Rebellion (1850-1864 A.D.). Besides attacking the political system, the Taiping rebels questioned feudalistic practices, including polygamy, slavery, and footbinding.⁵⁷ Unfortunately, the rebellion, with casualties of 20 million, failed.⁵⁸

After the establishment of the Chinese Republic in 1911, the government tried to change the marriage institution. However, traditional values posed a strong barrier to reform. As a result, the government chose other means to counteract the effects of the traditional marriage law. Reforms of education and social customs were designed to eliminate feudal behavior and ideology and to promote social equality between male and female.⁵⁹ Eventually, the government came to realize that legislated change might be essential. In 1926 the Nationalist government passed a resolu-

53. *See supra* note 35 and accompanying text.

54. RUSSELL, *CHINESE WOMEN LIBERATED* 3 (1970).

55. MEIJER, *supra* note 3, at 105.

56. CURTIN, *WOMEN IN CHINA* 15 (1975) (citing LANG, *CHINESE FAMILY AND SOCIETY* 108.) *See also* Topley, *Marriage Resistance in Rural Guangdong*, *WOMEN IN CHINESE SOCIETY* 67 (Wolf & Witke eds. 1975). The study has shown that the traditional patterns of female employment in all stages of silk production in Guangdong set the stage of the development of sisterhoods whose members rejected the traditional mother/wife role and were self-supporting.

57. D. BODDE & C. MORRIS, *supra* note 47, at 111.

58. *Id.*

59. PI Y.S., *ZHONGGUO FUNU YUNDONG*, (CHINESE WOMEN'S MOVEMENT) 17-18 (1973).

tion stating that "based on the principle of freedom in marriage and divorce, a marriage law should be enacted".⁶⁰ Later, however, the resolution was singled out as being too radical and presumably unacceptable to the populace. As a result, it was not implemented until 1931.⁶¹

B. The Modern Era Under Communist Leadership

1. *The Jiangxi Period and the Border Regions.* During the early 1930's the Communists recognized the potential strength of women as a political force. Women were the largest oppressed group in China and were ready for mobilization and liberation. A massive campaign of family reform was undertaken.⁶² The traditional family, being a product of feudal society, was targeted for elimination. The provisional constitution adopted at the First Congress of the Chinese Soviet in 1931 provided that the bonds of the family would be cast off by gradual stages as women gained economic independence.⁶³

The marriage regulations of the Chinese Soviet Republic of 1931 were a radical measure designed to establish freedom of divorce. As provided in Article 9, "Whenever both the man and woman agree to divorce, the divorce shall have immediate effect. When one party, either the man or the woman, is determined to claim a divorce, it shall have immediate effect".⁶⁴ The communists soon discovered, however, that radical measures created a new problem. The new regulations provided no protection for the spouse who did not wish to divorce, or who might be economically dependent or serving the Party away from home for a long period of time. As a result, modifications were made in the 1934 Marriage Law of the Chinese Soviet Republic.⁶⁵ Article 9 was kept, but a new article was added stipulating that wives of soldiers of the Red Army had to wait two to four years from the time their husbands' disappeared before they could request a divorce registration.⁶⁶ Whenever husbands were engaged in guerrilla warfare and disclosure of their whereabouts was not feasible, the article provided that in areas where communication by letter was easy, a

60. *Id.* at 17.

61. *Id.* at 17. See also TAN, *supra* note 13, at 19 (outlining the New Civil Code of 1930 with provisions 1049 and 1050 covering divorce).

62. CROLL, *supra* note 7, at 41.

63. MEIJER, *supra* note 3, at 41.

64. *Id.* It is likely that the Communists copied this divorce provision directly from the Soviet Union's divorce law. See Firenfelds, *Soviet Family Law and Comparative Chinese Development*, in CHINESE FAMILY LAW AND SOCIAL CHANGE 329 (D. Buxbaum ed. 1978).

65. MEIJER, *supra* note 3, App. II (Marriage Law of the Chinese Soviet Republic).

66. *Id.*

wife was allowed to request divorce if her husband failed to correspond with her for a designated period.⁶⁷

Further efforts were taken to modify the divorce provision to adjust to changing conditions. During the period from 1939 to 1945, special marriage regulations were promulgated for border areas, providing specific grounds for contested divorces. Only in specified circumstances could a spouse request a divorce; these included bigamy, adultery, ill treatment, and desertion.⁶⁸

2. *The First Marriage Law.* The first national legislation on marriage reform was enacted shortly after the Chinese Communists came to power in 1949.⁶⁹ Although the Marriage Law was brief and repeated many provisions of previous marriage laws, the drafting took one and a half years and involved forty revisions or more.⁷⁰ In fact, efforts to draft the law were initiated by the Central Committee of the Chinese Communist Women's Federation and the Chinese People's Government Central Legal Committee before the establishment of the new regime.

67. *Id.*

68. *Id.* at apps. II; III, Marriage Regulations of Shensi, Kansu, Nirghsia Border Area, 1939; IV, Revised Provisional Marriage Regulations of the Shen-Kan-Ning Border Area, 1944; and VI, Revised Provisional Marriage Regulations of the Border Area of Shansi, Hopei Shantung and Honan, 1943.

69. One factor that might have facilitated the implementation of the previous divorce laws was the condition of the society when the laws were first introduced. During 1917-1921, a movement and social reform known as the May Fourth Movement swept China. It originated as a student movement led by intellectuals protesting Japan's influence in China and the Treaty of Versailles which did not return areas under German control fully to China. The movement grew as it gained support in the cities, into a movement for internal reform as well. See MEIJER, *supra* note 3, at 23. Many expressed concerns over "the reform of the family system, marriage reform, divorce, communal rearing of children, chastity, suicide, suffrage, etc." See Witke, *Mao Tse-Tung, Women and Suicide in the May Fourth Era*, 31 CHINA QUARTERLY 129 (1967). Mao was also involved in the movement and wrote articles regarding the suicide of a woman protesting her arranged marriage. *Id.* Many Chinese were exposed to the idea of family reform during the May Fourth period for the first time. Although no actual massive reform of the family was undertaken at the time, a sound foundation had been laid for the new system on marriage reform. However, there was little evidence showing that the influence extended beyond the cities.

After the establishment of the Communist Party in 1921, the communists tried to assert control in the countryside. During the Jiangxi period, the Long March and the Yanan era, the party saw many oppressive marriages among peasant families. At the same period, the communists were able to experiment with marriage legislation in various social and geographic settings. See MEIJER, *supra* note 3, at 61. By the time the Marriage Law of the People's Republic of China was introduced in 1950, the Chinese Communists had had many opportunities to experiment and had managed to develop laws to suit the social conditions of that period. See ZHONGGUO RENMIN ZHENDFU FAZHI WEIYUANHUI, HUNYIN WENTI (COLLECTION OF REFERENCE MATERIALS ON MARRIAGE PROBLEMS) 108-110 (1950).

70. Chen, Report on the Draft and the Chinese Marriage Law, 4/13/1950, ZHONGGUO RENMIN ZHENGFU FAZHI WEIYUANHUI, HUNYINFA JI QI YOUGUAN WENJIAN (THE MARRIAGE LAW AND RELATED DOCUMENTS) 8 (1952).

Three of the eight chapters of the Marriage Law dealt exclusively with divorce.⁷¹ Chapter five outlined the types of divorce: (1) divorce by mutual consent, and (2) divorce by ex parte application. The steps leading to divorce were also included in this chapter. Chapter six focused on the maintenance and education of children after divorce. Chapter seven handled problems relating to the property settlement between the couple.

The concept of mediation prior to divorce was officially incorporated into law for the first time in the Marriage Law of 1950.⁷² During the Yanan period in the early 1940's, a similar tool, called "persuasion" or "conciliation," was used by cadres to resolve family differences. As provided in the first Marriage Law, divorces contested by one spouse would be granted only "when mediation by the district people's government and the judicial organ has failed to bring about a reconciliation."⁷³ It was not clear whether the mediation clause was intended to prevent frivolous divorces by either husbands or wives, or to provide protection solely to wives by discouraging husband-initiated divorces. Some believed that increases in divorce would have a disruptive effect on both production and the society at large since the Party was in the process of consolidating its power by means of creating a new family structure.⁷⁴ According to the *Report of the Chinese Marriage Law* by Deng Yingchao, the vice-chair of the National Democratic Women's Federation in 1950 and the wife of Zhou Enlai,⁷⁵ the mediation provision was intended for the protection of women.⁷⁶ Deng encouraged women to fight for their freedom in marriage, arguing that the mediation provision gave women an advantage over men. She cited statistics showing that in Beijing, Shanghai, Tianjin, Xian, and four other cities in 1949 and 1950, over half of the marriage disputes were divorce cases, most of which were initiated by wives.⁷⁷

The People's Republic of China undertook intermittent efforts during the next three decades to implement the 1950 Marriage Law. A publicity drive was undertaken in 1950 and 1951 to

71. *Id.* The first Marriage Law has 27 articles divided into 8 chapters.

72. The Marriage Law of the People's Republic of China 1950 [hereinafter cited as First Marriage Law], reprinted in HUNYINFA Ji Qi YOUGUAN WENJIAN, *supra* note 70, at 2.

73. HO, THE STATUS AND THE ROLE OF WOMEN IN THE CHINESE COMMUNIST PARTY 105 (1973). See also LENG, JUSTICE IN COMMUNIST CHINA 16 (1967).

74. LANDY, WOMEN AND THE CHINESE REVOLUTION 31 (1968).

75. Deng, Report on Chinese Marriage Law, 5/14/1956. ZHONGGUO RENMIN ZHENGFU FAZHI WEIYUANHUI, *supra* note 70, at 107.

76. *Id.* Deng stated: "Why is it [mediation] so stipulated [in the law]? It is to meet the demands of our urban and rural women. . . ." *Id.*

77. *Id.*

make the law known to everyone.⁷⁸ Pamphlets, posters, cartoon strips, and copies of the Marriage Law were distributed. Operas, movies, folk tales, rhymes, and songs were written or revised to include themes on the Marriage Law. Nevertheless, in 1952 the implementation was found to be uneven, with many still distrusting the new law.⁷⁹ As a result a new nationwide campaign to republicize and enforce the provisions of the Marriage Law was launched. This time the result was a considerable success.⁸⁰

During the Great Leap Forward (1958-1959) and the movement to establish rural communes in late 1958, marriage reform was encouraged because the goal of the campaigns was to reduce the role of the household as a unit of production and consumption.⁸¹ Later, the Socialist Education Movement of 1962 devoted much attention to the proletarian transformation of the family.⁸² During the period of Cultural Revolution (1966-1969), however, many magazines devoted to socialist education stopped publication. Reforms concerning the family were deemphasized or even neglected.⁸³ Tan, a staff reporter for *China Reconstructs*, supports this view:

But in the turmoil of the ten years "cultural revolution," the Marriage Law, like all other laws, was ignored. Older people forgot about it and many young people did not learn it. The result was that feudal practices already criticized and rejected were revived.⁸⁴

During the 1970's there were attempts to reaffirm the Party's position in support of women's equality both inside and outside the family. The 1975 and 1978 Constitutions both stipulated that "women enjoy equal rights with men in all respects,"⁸⁵ including "political, economic, cultural, social and family life."⁸⁶

3. *The Second Marriage Law*. In 1980 a new Marriage Law was enacted. The changes in the divorce provision provided an answer to the line-drawing problem of distinguishing legitimate grounds for approving divorces which were contested. The Marriage Law of 1950 provided a procedural guideline for handling contested cases, namely the mediation process. It provided no

78. E. CROLL, *FEMINISM & SOCIALISM IN CHINA* 232 (1978).

79. *Id.*

80. *Id.*

81. CROLL, *supra* note 7, at 21.

82. MEIJER, *supra* note 3, at 149.

83. Zhu Yuanshi, *The Cause of Cultural Revolution*, from BEIJING REV. (Sept. 14, 1981) reprinted in CHINESE LAW 410 (W. Alford ed. 1982).

84. Tan, *Why New Marriage Law was Necessary?* from CHINA RECONSTRUCTS (—) reprinted in CHINESE LAW 753 (W. Alford ed. 1982).

85. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA § 26 (1975).

86. *Id.* at § 52 (1978).

principle, however, for deciding these type of divorce cases. Cadres and mediators used different criteria to approve or disapprove requests for divorces.⁸⁷ As a result, the 1980 law declared that divorce will be granted "if the relationship between the couple is irreconcilable."⁸⁸ The clause also served the purpose of eliminating the problem of prolonged mediation. Under the 1950 law, mediation often lasted from two to three years.⁸⁹ Many came to believe that the government was purposely delaying the process.⁹⁰

Another distinct feature of the 1980 Marriage Law allows the spouse initiating a divorce to have the option of requesting a divorce directly from the local people's court. Under the 1950 Marriage Law, the use of the local people's court was limited to appeals only after mediation failed. Parties who do not wish to go through mediation by local units now have another avenue for applying for divorce. Nevertheless, the local people's court has to initiate mediation before a divorce can be granted.

As in the case with the first Marriage Law, the 1980 law addresses issues of child custody and property settlement after divorce. The 1950 law stipulated that the mother should have custody of the children and the father should provide child support payments. The second Marriage Law provides that either party may have child custody or be held responsible for child support.⁹¹ The property settlement provisions of the two laws are very similar. The couple is supposed to decide, but if negotiations fail, the people's court will decide the issue according to what benefits the wife and the children.⁹²

II. PLANNED CHANGE THROUGH DIVORCE LAW

The government found that legislation regarding divorce was quickly accepted by the people, especially in urban areas. After the Marriage Law was introduced in 1950, the divorce rate in Beijing increased by a factor of 1.3 over 1949. By 1953, the divorce rate was 12 times greater than it was in 1949.⁹³ On the national level, divorce cases handled by the various people's courts totaled

87. CROLL, *supra* note 78, at 235. See also Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967).

88. The Marriage Law of the People, Republic of China (1980) [hereinafter cited as Second Marriage Law], reprinted in JIN & YAN, HUNYIN JIATING WENTI FALU KUWEN JIANGHUA (LEGAL CONSULTATION ON MARRIAGE AND FAMILY QUESTIONS) 93-103 (1981).

89. Liu, *Lun Woguo Hunyinfu Zhong Guanyu Lihun Wenti De Guiding, Discussion on Divorce Questions in the Marriage Law*, 6 FAXUE YANJIU 6 (1980).

90. *Id.*

91. Second Marriage Law, *supra* note 88, § 30.

92. *Id.*

93. Wu, *Youguan Lihun Anjian De Jige Wenti, Related Cases on Divorce Questions*, 5 SHEHUI KEXUE 51 (1982).

460,000 in 1950 and escalated to 1,170,000 in 1953.⁹⁴ Confirming the importance of the new law in bring about social change, the major reasons cited for divorce in this period were the desire to break free of arranged marriages, forced marriages, and buy-sell marriages.⁹⁵ A sample of 877 divorces in five cities—Shanghai, Beijing, Tianjin, Xian, and Changchun—in a three-and-a-half month period during 1949 and 1950 was studied: 82.8 percent cited the reasons for divorces as arranged marriages, mistreatment by husband or in-laws, bigamy, polygamy, and concubinage.⁹⁶ Most the of 877 divorces were initiated by the wife.⁹⁷ The figures are significant because they reflect the fact that many women were dissatisfied with their feudal marriages and perceived divorce as a real alternative to the oppressive conditions they had previously suffered silently.

A. The Formal System of Divorce

Emergence of a formal legal system was the most important factor enhancing the effectiveness of divorce as a tool for social change.⁹⁸

1. *Substantive Elements.* Substantively, the formal system includes laws passed by the legislature, plus rules and regulations made by administrative agencies. In the five decades following 1930, at least eight marriage laws or regulations were enacted or promulgated.⁹⁹ They permitted the government to penetrate the family in matters related to the marriage institution. In order to strengthen the linkage between the government and the family on family issues, both the 1950 and 1980 laws used a system of registration for marriage and divorce.¹⁰⁰

The current divorce registration process has three major steps. The first is application, followed by investigation and finally recording. Parties wanting a divorce go to the local marriage registration department to apply. Then the department con-

94. Liu, *supra* note 89.

95. A forced marriage refers to a marriage arrangement made against the will of the child by his or her parents. WOLFE & WHITE, *supra* note 56, at 56.

96. ZHONGGUO RENMIN ZHENDFU FAZHI WEIYUANHUI, HUNYIN WENTI YANKAO ZILIAO HUEIBIAN (COLLECTION OF REFERENCE MATERIALS ON MARRIAGE PROBLEMS) 98 (1950).

The data on Harbin are excluded because its sample was collected over a period of three years whereas the data from the other 5 cities were collected over a period of a few months.

97. *Id.* (77.8 percent, 59.3 percent, 74.9 percent and 78 percent of the divorces were initiated by the wife in Shanghai, Beijing, Tianjin, and Xian, respectively).

98. See MEIJER, *supra* note 3, at 32.

99. MEIJER, *supra* note 3, apps. I, II, III, IV, V, VI.

100. See *supra* notes 72 & 89.

ducts an investigation to assure the request is legitimate before the divorce certificate is granted.¹⁰¹ Through the provision for registration, the government can monitor marriage and divorce matters. In comparison, divorce was largely a private concern in the early Qing period and received little attention from the government. A divorce did not have to be registered or reported to the local officials unless it had to be reviewed or settled.¹⁰²

The divorce law of 1950 provided for an auxiliary structure, a mediation institution. This institution was used to resolve differences between couples and to give advice to parties in contested divorces. Mediation became an essential step before a divorce could be granted.¹⁰³ During 1979, of the divorce petitions received by the People's Court in Tianjin, seventy-eight percent of the cases were resolved by means of mediation, with forty-three percent resulting in divorce.¹⁰⁴ In 1980, the mechanism of mediation was incorporated into the judicial process. Now disputes over divorce can be brought directly to the local people's court for mediation instead of going through the local mediation committee. Though the change might not seem significant, a possible explanation for the change might be that the People's Republic saw a need to incorporate the various processes and proceedings of divorce within the formal legal system. This might have been done for the purpose of establishing a uniform system of mediation since some cities have their mediation sections under judicial institutions such as the district courts, and others have mediation committees under political authorities at the basic level such as the residents committees.¹⁰⁵

In implementing the marriage laws, the government issued numerous instructions, directives, and decrees. In the case of the 1950 Marriage Law alone, there were at least twenty five government related instructions on its operation.¹⁰⁶ One concern was the misconduct of cadres in carrying out this law. A directive of the

101. JIN & YAN, *supra* note 88, at 65.

102. Dai, *supra* note 24, at 100 (citing DAQING HUIDIAN SHILI (SUPPLEMENT TO COLLECTED INSTITUTES OF THE GREAT QING DYNASTY)).

103. Lubman, *supra* note 87, at 1317. Since the mediation committee consists of members elected by resident representatives, many members are able to exert influence over families. As a result, a spouse can be pressured to reconcile or to dissolve the marriage if his or her peers believe she/he should do so. The problem of discretion comes into play in the use of informal networks, though the mediation committee members have an advantage over the courts because as residents of the same community "they are on the spot and know the people concerned." For precisely the same reason, bias and prejudices would enter the mediation process since it is more than likely the committee members knew the parties involved personally before the conflict evolved to the mediation stage.

104. Liu, *supra* note 89, at 11.

105. Lubman, *supra* note 87, at 1314-15.

106. ZHONGGUO RENMIN ZHENGFU FAZHI WEIYUANHUI, *supra* note 70, at 8.

government administrative council concerning the enforcement of the law, issued in 1953 by Prime Minister Zhou Enlai, declared that many cadres "have interfered with the freedom of marriage" and "committed acts in violation of the Marriage Law".¹⁰⁷ He stated "two types of treatment should be rendered."¹⁰⁸ In cases where cadres' acts had not led to serious consequences, their behavior was to be sharply exposed and criticized. They were to be educated, and if they were determined to reform themselves, they were not to be punished. In more extreme cases of violating the Marriage Law, which involved ill treatment and even killing of women, the cadres were to be "duly punished according to the law."¹⁰⁹

2. *Structural Elements.* Structurally, the formal system includes courts, administrative agencies, judges, lawyers, and cadres. After adoption of the 1950 law, the local people's courts were used as appeal panels if mediation failed. When necessary, the courts would take up the task of fact investigation.¹¹⁰

The judges who presided in the courts were mostly cadres and activists with the "proper" political attitude. Many formally trained judicial personnel were condemned for using "legal procedure" to frustrate the "will of the people," and were ousted.¹¹¹ Usually two people's assessors presided with the judge; these were local residents, such as shopkeepers and housewives.¹¹² The rationale behind this arrangement was improvement of the quality of judicial work through popular supervision. Lawyers were rarely used, at least during the 1950's. Two documented divorce cases during the 1950's, one in Hankou¹¹³ and the other in Shanyang¹¹⁴, did not utilize any lawyer in the proceedings.

The lack of legal counsel was later recognized as prejudicial to the litigants.¹¹⁵ Provisional regulations concerning the work of lawyers were adopted in 1980 to allow a lawyer to act on behalf of litigants involved in civil suits.¹¹⁶

107. MEIJER, *supra* note 3, at 303-04 (App. IX).

108. *Id.*

109. *Id.*

110. RUSSELL, *supra* note 54. In announcing the ruling of the petition for divorce, the Judge made a statement: "The Court made an investigation before the case was called . . ."

111. Lubman, *supra* note 87, at 1315.

112. GREENE, *AWAKENING CHINA* 198 (1961).

113. RUSSELL, *supra* note 54, at 35.

114. GREENE, *supra* 112, at 201.

115. Cohen, *Due Process, THE CHINA DIFFERENCE* 247 (Terrill ed. 1980).

116. He, *China Lawyer*, 23 *BEIJING REV.* 14 (1982).

B. Social Groups Affected

The impact of the divorce laws reached virtually everyone in China. The divorce provisions of the 1950 and 1980 Marriage Laws stipulated that women had equal right to demand a divorce. Within the family, the notion of equal status between husband and wife undermined men's traditional superior status over women. Furthermore, parents were affected, since their influence over the marriages of their children was minimized. No provision was made for parents to assert authority over their children's divorces. Their traditional role is now filled by neighbors and fellow workers involved in divorce mediation.

Women in the countryside as well as in the cities are now able to see divorce as a viable option. In the countryside, divorced women have a means of subsistence as a result of the land reform which took place in the late 1940's. Peasant women were given their own land certificates and their names were put next to their husband's on a joint certificate, thereby allowing them to take their share of land upon divorce.¹¹⁷ In the city, women were encouraged to join the labor force.¹¹⁸

III. FUTURE DIRECTIONS

Despite the importance of the Marriage Law's divorce provisions in the implementation of social policy in the PRC, the future of divorce is currently the topic of much debate.¹¹⁹ There are two positions in the debate. One side supports more flexibility in divorce, the other believes that divorce in China should be restricted.

The attitude favoring liberalization is illustrated by an article written by a spokesman of Beijing People's High Court, Wu Wenzao.¹²⁰ He stated that the need for "self determination" in marriage requires freedom to marry and divorce. Although Wu is against frivolous divorce, he sees no reason to maintain a marriage only because others consider the reasons for divorce insufficient. He argues further that the increase of divorce after the enactment of the Second Marriage Law in 1980 will only be a temporary phenomenon. Wu also cites the temporary nature of the drastic increase of divorce during the first few years after the introduction of the 1950 Marriage Law to support his view.

Judging from the way in which divorce law has changed

117. CROLL, *supra* note 78, at 239. *Id.*

118. *Id.* at 242.

119. Luo, *How to Handle Divorce Cases Properly?* 7 MINZHU YU FAZHI (DEMOCRACY AND LEGAL SYSTEM) 21 (1981). This article favors restraining divorce. See *supra* note 93 for article supporting liberal flexible policy on divorce.

120. Wu, *supra* note 93.

under the Chinese Communists during the past five decades, this author is persuaded that those favoring a moderately restricted policy will win the debate. In the marriage regulations of 1931, there was total freedom in divorce. Even if a spouse contested the divorce, it would still be granted. Later, additional provisions were added in the Marriage Law of the Chinese Soviet Republic and the marriage regulations of the border regions during the 1930's and 40's.¹²¹ Restrictions were increased by the divorce provisions of the 1950 Marriage Law. Mediation was required for contested divorces. For uncontested divorces, investigations into child custody and family property were to be conducted before registration and the divorce could occur.¹²² The 1980 Marriage Law added the requirement that "all related departments"¹²³ are to be involved in the mediation of contested divorces, and only when the marriage is considered irreconcilable, will a divorce be recommended.¹²⁴

The Chinese government has asserted more and more control over divorce practices, in part, because it has come to believe that the family is socially indispensable. As one article pointed out even as early as 1959:

The family, as a form of joint life of the two sexes united in marriage, we may definitely say will never be eliminated. . . . Even in Communist Society, we cannot conceive of any objective basis and necessity for the elimination of the family!¹²⁵

An editorial in the September 16, 1980 edition of *Renmin Ribao* (People's Daily), reflects the government's present belief that the family is the "nucleus of society".¹²⁶ The Commune Movement which tried to break up the family during 1957 was condemned at an official conference on Chinese marriage and family in 1981.¹²⁷ The government has sought to reinforce this position by using family as an economic, educational, reproductive and consump-

121. Revised Provisional Marriage Regulations of the Shen-Kan-Ning Border Area, Promulgated 20th March, 1939, reprinted in MEIJER, *supra* note 99; see also *supra* note 66 and accompanying text.

122. First Marriage Law, *supra* note 72, art. 27.

123. YANG, HUNYIFA YU HUNYIN JIATING WENTI JIANGHUA (TALKS ABOUT MARRIAGE LAW AND THE FAMILY) 78 (1979).

124. Second Marriage Law, *supra* note 88, arts. 24, 25.

125. CROLL, *supra* note 7, at 3 (quoting Chen Jiannei, *The breake down of the system of feudal patriarchy*, HEBEI RIBAO, April 8, 1959).

126. An editorial from the People's Daily on standards of marriage and family life, 9/16/80, ZHONGGUO QUANGUO FULUNHUI, HUNYIN XUANCHUAN SHOUCE (HANDBOOK ON THE PUBLICITY OF MARRIAGE LAW) 17 (1980) [hereinafter cited as ZHONG].

127. Ye, *Ruhe yanjiu xinminzha jiating yu Hunyiu, On Developing Research on Marriage and Family to Develop the Democratic New Family*, 11 ZHONGGUO FUNU (WOMEN OF CHINA) 8 (1981).

tion unit.¹²⁸ Examples include food rationing, housing assignments, and family planning.

The frequently alleged abuses that resulted from the divorce provision are a second reason for efforts to further restrain divorces. These abuses are considered bourgeois in nature and are divided into three types. The first is divorce to marry a third party. During 1980 and 1981 in one district studied in Shanghai, these cases constituted 68.2 percent of all divorce cases presented this problem.¹²⁹ The practice of "deserting the old to take on the new" has been condemned.¹³⁰ The second abuse which is considered bourgeois in nature is the serial marriage, which is viewed as a form of polygamy indirectly approved by policies favoring easy divorce.¹³¹ The third abuse involves families without children or with only female children. Men are able to manipulate the divorce provision to have the infertile wives or the mothers who bore female children "consent" to divorce. This last abuse has been condemned vigorously. As indicated in the editor's response to a letter sent to the *China Youth Journal* in 1962 on the issue of whether a wife must be divorced if she does not bear children, he stated that if a husband thought that the wife had ruined him because they had no children, and insisted on a divorce, "this way of looking at things was wrong" and the "situation had not reached the stage when divorce could not be avoided".¹³²

A third reason for the restrictive approach on divorce practices of the government is the rising divorce rate among socialist marriages. The original divorce provisions of 1950 were designed to eliminate feudal marriages from the old society. After 30 years, the liberated socialist marriages existing today should move closely toward the approximate ideal arrangement and have the essential element of political purity as advocated by the government. However, looking at the statistics, 78.4 percent of the 633 divorce cases in Yuhuai area of Shanghai from 1979 to 1981 were marriages of less than ten years.¹³³ It is possible that the government sees a contradiction in its marriage policy if divorce is encouraged among the younger generation.

A last reason influencing the government to place restrictions

128. See ZHONG, *supra* note 126.

129. See Wu, *supra* note 93, at 57.

130. Le, *Diaojie Wuxiao De fenxi, Analysis on Irreconcilability*, 3 ZHONGGUO FUNU (WOMEN OF CHINA) 38 (1981).

131. Serial marriage here is referred to as an individual changing his or her marriage partner over a period of time, so in essence, he or she is having various spouses, although they do not live together at the same time.

132. Chiang, *Must a Wife be Divorced if She Does Not Bear Children*, 3 CHINA YOUTH JOURNAL 2 (1962). ZHONGGUO QINGNIAN. Cited in Alford, *supra* note 4, at 726.

133. See WOLFE & WHITE, *supra* note 93, at 57.

on divorce is the national economy. Authorities can reasonably question whether it is economically feasible for the government to duplicate scarce resources such as housing. Moreover, additional administrative duties have to be performed as a result of divorce, such as reassigning worksites and enforcing child support payments.

CONCLUSION

This article has shown that the People's Republic of China has been able to utilize a legal tool, marriage law, to help eradicate deeply rooted and oppressive aspects of the traditional Chinese family and attendant divorce customs. Although they were at first very hostile to both the family and law, the Chinese Communists have adopted changes in divorce law to support their increasing emphasis on the family as an important unit of socialist society. Whether increased reliance on the family will lead to a restrictive divorce policy is a topic of current debate in China. This article concludes that the history of Communist policies in China, critical reform attitudes, and current needs of the state favor a moderately restrictive approach to divorce.