

Family Law and Resolution of Domestic Disputes in the People's Republic of China

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Some General Principles of Family Law: It may be useful to attempt to summarize certain general principles which seem to guide domestic relations in the People's Republic of China, so far as legal matters are concerned. *Firstly*, modern Chinese family relations are based on the nuclear family: husband, wife and their children, with sometimes grandparents, or another relative in the home. "The basic social unit in modern China is the family," said Wu De-Feng, President of the Political Science and Law Association and Chairman of the Bills Committee of the National People's Congress. *Secondly*, marriage is based on the free choice of the man and the woman. Within the marriage there is legal equality between husband and wife. There is mutual responsibility for children of the marriage. There is joint conjugal ownership of property and the mutual right to inheritance of each other's property. The wife has full rights of professional or technical training and employment. Each party to the marriage has a right to divorce. *Thirdly*, the stability of the marriage and of family life is considered to be of grave importance to the requirements of construction of socialist society in China.

The Marriage Law : The People's Republic of China was established in 1949. The Marriage Law was promulgated by the Central

* Of the Ontario Bar. The following observations are a result of two visits by the author and his wife, a graduate social worker, to the People's Republic of China during the summers of 1960 and 1965. The observations from the first trip result from a ten day stay during which the author visited Canton and Peking; from the second trip from a three week stay during which the author was able to study various aspects of Chinese domestic relations in Shanghai, Nanking, Peking, Canton, as well as other smaller cities and agricultural communes.

Neither the author nor his wife has knowledge of the Chinese language and could not, therefore, do any independent reading from Chinese sources. Their observations, therefore, are a product of conversations through the intermediary of an interpreter with officers of the Political Science and Law Association (upon whose invitation the author and his wife made both trips) in several cities, with factory and agricultural commune officials, leaders of women's groups etc. The author also personally observed the proceedings of a Neighbourhood Conciliation Committee and an appeal in a divorce action in the Middle People's Court of Peking. He also draws certain conclusions from the Marriage Law of the People's Republic, extracts of which are reproduced in the note. The author feels that the information received by him accurately reflects the situations throughout the country.

People's Government on May 1, 1950, after some 17 months of extensive public discussion throughout the country.

Article 1 : The feudal marriage system which is based on arbitrary and compulsory arrangements and the superiority of man over woman and ignores the children's 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.

The old Chinese family unit, based on Confucian ethics, was a clan which included persons of many degrees of relationship, usually headed by a male patriarch. Marriages were arranged by the elders, without any need for consultation or consent of the prospective husband and wife. (Many marriages were made after child betrothals.) Deeply inbedded was the Confucian idea that the man was superior to the woman. The wife became a mere chattel in her new home. Mr. Lo Chia-Ting, Vice-President of the Shanghai Higher People's Court, described a woman's place under the old marriage system by saying that she suffered from the "Three Rights": "The Rights of Gods": i.e. superstition; "The Right of Husband", who had almost complete legal and social power over her; and "The Right of Family": that is, the whole clan, with its chain of authority from the patriarch down. In one of the introductions to the Marriage Law, Teng Ying-chao writes as follows "(women) were not only denied political and economic rights and held in servitude but were also stripped of the right even to manage daily domestic affairs. At home their husbands could and did beat them and curse them, and their parents-in-law were free to insult them with impunity. The sufferings endured by luckless daughters-in-law were proverbial. Such miseries resulted in unhappy family life filled with sorrow and hatred. And this in turn had its direct adverse effects on the physical and mental health of the younger generation."

The extent of the change which has occurred in family relations must be left for more extensive and careful review by students of Chinese social history. But it is obvious that the change is fundamental. Arranged marriages seem to have disappeared almost completely, even in the countryside. Parental interference in the free choice of partners is minimal, according to our information. It goes without saying that concubinage no longer exists. It is, of course, difficult to assess the extent to which the legal freedom accorded to women in the 16 years since "Liberation" has become a social actuality. But it was apparent to us at many points that there is in fact a very large measure of social equality. This is, of course, reinforced by the unofficial organs

of community authority, such as Neighborhood Committees, trade unions, etc., as well as in the Courts.

Article 4 : A marriage can be contracted only after the man has reached 20 years of age and the woman 18 years of age.

There was a good deal of variation of opinion among our informants as to the average age of marriage in China today. It was generally agreed that the ideal age should be considerably older than the Marriage Law allows. The most common views were that the desirable ages should be about 28-30 for men and 26-28 for women. The reasons given for this were chiefly that both men and women needed the time in their younger years for education or vocational training, for their full personal development and to prepare themselves for their best service to their society. Apparently this view is held most strongly by women. It was stated that under the old system women never had opportunity to develop their own interests and abilities. Now, with equality of rights of both sexes, women especially want full freedom to develop their own personalities as fully as possible, before they are more limited in marriage to some of the duties of housekeeping and child bearing and raising. This subject of the proper age of marriage has been discussed widely throughout the People's Republic of China by the young people themselves, in discussion groups and through various youth publications and the young people favor later marriages. My own guess is that the actual ages of marriage are considerably lower than the "ideal" suggested: probably varying between different parts of the country and between professionally-trained or college-educated young people and workers in factories or agricultural communes.

Article 5 : The prohibitions against marriage are :—

a) Blood relationship... Collateral relationship by blood up to the fifth degree is to be determined by custom.

A good deal of cultural autonomy is granted to minority peoples in different regions of China. Presumably the wording of this clause is to protect such minority group custom.

b) Impotence due to physical causes.

c) Where one party is suffering from venereal disease, mental disorder, leprosy or any other disease which is regarded by medical science as rendering a person unfit for marriage.

Article 6 establishes the necessary formalities of marriage: that is, registration in person by the parties in the district in which they reside.

Articles 7 to 12 are included in a Chapter entitled "Rights and duties of Husband and Wife."

Article 8 : Husband and wife are in duty bound to love, respect, assist and look after each other, to live in harmony, to engage in productive work, to care for the children and to strive jointly for the welfare of the family and for the building of the new society.

Judging from comments made to us and from the remarks addressed to the husband and wife by the judges at the hearing of a divorce case in Peking, these are not mere pious observations, but the social and legal requirements demanded of husbands and wives in the new China. Indeed, each one of the elements of the above article received particular comment from the judges.

Article 9 frees the wife from any authority of her husband over her choice of occupation.

Article 10 : Both husband and wife shall have equal rights in the possession and management of family property.

It would appear that the term "property" means personal chattels, money in the bank and similar personalty, since ownership of land, farm animals and crops, buildings, factories, etc. are mainly vested in communal groups or in the state. However, in the agricultural communes, members build and own their own homes and are allowed to cultivate small pieces of land for production of crops for personal use, or to keep ducks, chickens, pigs, etc.; and these crops or animals are personal property and may be sold and the profit kept by the owner. There is no marriage contract affecting property known to Chinese law.

It also appears to be customary, at least in the parts of China we visited, for the wife to manage the household. She often is handed all her husband's earnings to be spent for all household needs, including personal expenses of the various members of the household.

Article 11 : Both husband and wife shall have the right to use his or her own family name.

In the new China, the wife commonly continues to use her own surname after marriage. Children take their father's surname.

Article 12 : Both husband and wife shall have the right to inherit each other's property.

And, by Article 14, children share the right of inheritance with their parents.

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Article 13 defines the duties of parents and children to support and to assist each other.

Article 15 : Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock.

The father is liable for maintenance until the child is 18. With the consent of the mother, the father may claim custody. According to all the persons with whom we discussed the matter, pre-marital sexual relations are severely disapproved and are uncommon. Birth out of wedlock is therefore a rare occurrence. It may also be added that there is public education in the use of contraceptives, and abortion and sterilization are legal, if both husband and wife consent, although the latter are not frequently resorted to.

Article 17 : Divorce shall be granted when husband and wife both desire it. 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.

It will be noted from this article that divorce is "of right" when both parties desire it. However, there is an elaborate system of conciliation in domestic disputes which would probably be brought into play even where both partners seek a divorce, since divorce is considered a serious breach of social relationships. In cases where only one party desires the divorce, the machinery of conciliation is a mandatory part of the legal proceedings. More will be said about conciliation procedures below. There appear to be no legal limits to the grounds for divorce. At the same time, divorce will not be granted as of right for any particular cause: for example, adultery is not, in itself, a ground for divorce.

Article 18 : The husband shall not apply for a divorce when his wife is with child. He may apply for divorce only one year after the birth of the child. In the case of a woman applying for divorce, this restriction does not apply. Articles 20 : The blood ties between parents and children do not end with the divorce of the parents. No matter whether the father or the mother acts as guardian of the children, they still remain the children of both parties.

After divorce, both parents still have the duty to support and educate their children.

After divorce, the guiding principle is to allow the mother to have custody of a baby still being breast-fed. (Breast feeding continues to a much later age in the child than would be the case in Canada).

After the weaning of the child, if a dispute arises between the two parties over the guardianship and an agreement cannot be reached, the people's court shall render a decision in accordance with the interests of the child.

Article 21 : If, after divorce, the mother is given custody of a child, the father shall be responsible for the whole or part of the necessary cost of the maintenance and education of the child . . .

Article 23 : In case of divorce, the wife shall retain such property as belonged to her prior to her marriage. The disposal of other family properties shall be subject to agreement between the two parties. In cases where agreement cannot be reached, the people's court shall render a decision after taking into consideration the actual state of the family property, the interests of the wife and child or children, and the principle of benefiting the development of production.

Article 25 : After divorce, if one party has not re-married and has maintenance difficulties, the other party shall render assistance. Both parties shall work out an agreement with regard to the method and duration of such assistance; in case an agreement cannot be reached, the people's court shall render a decision.

Community Conciliation Procedures : As has been said earlier, the nuclear family is the basic social unit in the People's Republic of China and any disturbance of that basic unit is viewed as a threat to the social stability of the community; hence the direct intervention of the community. The intervention of the local community in domestic disputes is not a feature peculiar to the People's Republic. It was found prior to the establishment of the present government and it is also found, for example, in Japan. However, the present system in China is distinct and new.

The machinery for effecting this community intervention is the Neighborhood Conciliation Committee. These Committees are to be found in all communities. In large cities there may be several hundred Conciliation Committees, depending on the requirements of the population. Generally, they are elected by the population group that elects the Neighborhood Committee (another organ of social organization roughly comparable to the Executive of a ward electoral association in some of our cities). (In Japan, by contrast, Conciliation Committees are appointed by officers of the Court). In some communities, the Conciliation Committee may be elected by the local trade union, university staff, etc., if the community consists of one occupational group. The number of members of a Conciliation Committee varies from place to place, ranging from 3 to 10 persons, and the term of office is usually for one or two years.

Although Conciliation Committees are recognized agencies of community government, they do not have judicial authority. There is no formal relationship between the Conciliation Committees and the regular courts, although a close liaison exists, as will be seen from what follows. The influence of the Committee depends on the prestige of its members, who are elected because of their good reputation

and the general respect accorded to them by their neighbors. Usually, therefore, they are senior members of the community.

The functions of Conciliation Committees are to hear and to try to settle inter-family and intra-family disputes and to deal with problems of juvenile misbehavior that cannot adequately be dealt with by the parents. Cases may be brought to the attention of the Committee by one of the interested parties, or by other members of the local community. Proceedings are quite informal: the members of the Committee hear the parties and the evidence of neighbors, discuss the issues with the parties, and endeavor to advise and suggest acceptable compromises. The Committee has no coercive powers. According to Lo-Chia-ting, Vice-President of the Shanghai Higher People's Court, the principles by which a Conciliation Committee should be guided in its work are: "Firstly, to distinguish what is right from what is wrong; secondly, to seek harmony and unity in the family; and thirdly, to seek to benefit production and socialist construction." Paraphrased this might read that the members of the Committee are guided by their concepts of personal ethics, good family relations and the needs of the body politic.

Courts Dealing with Family Law : There are no separate, specialized courts dealing with Family Law in the People's Republic of China. In the ordinary courts, no particular judges specialize in family law matters, so that family disputes are dealt with in the ordinary courts, by the judges who try other types of civil cases.

The court of first instance for matters coming within the general heading of Family Law are the District People's Courts, the lowest civil courts in the hierarchy of the court system. Cases are heard before a judge and two People's Assessors.¹ Appeals from a District People's Court go to a Middle People's Court. On appeal, the case is heard before three judges. (In the divorce case that I attended in Peking, one of the judges was a woman).

In family matters, both at trial of cases on first instance and on appeal, the courts have three functions. The first is that of investigation. At both levels, courts may make their own independent investigation of the facts. The second function is that of conciliation. All possible efforts are made towards conciliation before a binding judgement is given in a domestic dispute. Accordingly, the judges themselves, both in open court and with the parties separately, attempt conciliation. Also the matter may be adjourned and sent back to the Neighborhood Conciliation Committee for further con-

¹ See (1961) IV CBJ 299.

ciliation efforts. This process takes place at the appeal level as well, so that an appeal is, in effect, a new trial. The third function of the Court after all efforts at conciliation prove fruitless is its ordinary judicial one.

Some General Observations : In discussion with a number of officials in various cities, the following were given as some of the causes for cases brought before Conciliation Committees, or the Courts, and about in the order of importance as listed :

(1) Antagonism between husband and wife arising out of conflicting ideas of their respective roles in the family; particularly in situations where the husband has ideas of male dominance.

(2) Disputes arising out of differences between wife and mother-in-law.

(3) Disputes over the management of the household.

(4) Disputes over upbringing of children.

(5) Differences in personal interests.

(6) Adultery or other marital misconduct.

With regard to the attitude of the courts generally, it may be noted that although the grounds for divorce are not limited, great importance is attached to maintaining the family as a unit. Accordingly, divorce is difficult to obtain and is rare. One informant said that only about 10% of cases coming before the Courts result in a decree of divorce.

There seems to be an appreciation and tolerance of the difficulties of adjustment from the old to the new society. Some of these problems of adjustment have to do with the abolition of feudal attitudes towards marriage: the subservience of the wife to her husband; the servient relation between the wife and her mother-in-law; and the autocracies within the clan group. It may be some time before these feudal attitudes are finally eradicated and the principles of the new Marriage Law are fully realized. It may be presumed that the younger generation which is now coming into adulthood, educated in the conceptions of the new relationships, will be largely free of the old ideas.

A related area of adjustment is the achievement of full personal recognition for women. Given feudal relationships and ethics and the economic insecurity of women, the predominant ideas of male superiority condemned all women under the old system to permanent

social inferiority. The new society asserts complete social and legal equality for women and a large measure of equality has been achieved. Here, too, the attitudes of the younger generation may be expected to reflect the new morès.

Another area of adjustment lies in the pressures on individuals of conflicting ideas in a society that is seeking radical changes. These pressures arise in conflicting ideas about household management and care and upbringing of children; in conflicting ideas about the continuing education of husband and wife in a society that encourages each partner to develop his or her technical and intellectual skills to the full; in conflicting ideas about work roles; in conflicting ideas on general social and political issues.

In this struggle for personal and social adjustment in the new society, the process of conciliation in the Neighborhood Conciliation Committees and in the Courts is of paramount importance. Conciliation is seen not only as a means of resolving the disputes between the parties themselves. Conciliation procedures are considered one of the means of public education to the new standards of personal morality and the new social relationships and responsibilities of the People's Republic of China. In this setting, the conciliation procedures are a much more significant mechanism of social adjustment than are the regular Courts in their traditional judicial role.
