

Commentary on "Transforming Family Law in Post-Deng China"

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Michael Palmer's article examines the development of three important aspects in Chinese family law: divorce, adoption and family planning. It is a commendable effort to approach Chinese family law broadly in order to bring family planning policy within its study. There remains a glaring gap in Chinese legal scholarship between the study of family law and the study of population. The disciplines are divided into two camps with little cross-fertilization. Palmer's article clearly demonstrates the importance and necessity of including family planning within the study of family law. The article is also a laudable attempt to examine the dynamic interaction between family law and socioeconomic changes.

Chinese legal reform largely follows a liberal paradigm. The ultimate goal of the reform is to separate the Chinese Communist Party from the state and to limit the role of the state in economy and the society. Viewed historically, the Chinese state is contracting while the private economy is expanding in size and importance, and civil society is emerging and becoming more autonomous. In a sense, Chinese legal reform is to institutionalize the circumscribed state. Notwithstanding fluctuations, the overall result of reform in the past 30 years has been an increasingly limited and accountable government and a growing importance in market, society and individual autonomy, as evidenced by a number of constitutional amendments entrenching the rule of law and the protection of human rights. In a society where Hayek is replacing Marx as the most influential writer, the state is now viewed with great suspicion, especially in matters relating to family life. If government is regarded as a hurdle on the road to freedom, then its role has to be limited and controlled. Palmer studies the development of Chinese family law in this particular political context.

In the area of family life in particular, the reform has been to rid the party-state from the bedroom. Family law in Communist China in general and the 2001 Marriage Law amendment in particular are liberal and progressive in enlarging individual autonomy, in protecting gender equality and in creating a realm which is relatively free of government interference. The 2001 Marriage Law amendment, for example, simplifies the procedures for marriage, and places effective limits on judicial discretion in granting or refusing to grant a divorce. The subsequent administrative rules enlarge individual freedom in matters relating to marriage and divorce. There is now much less political and institutional intervention in this particular realm. Increasingly, the law recognizes and treats marriage and divorce as private matters. People recognize and fully exercise these rights, as shown by the surge in the divorce rate in China.

But the increase in freedom of choice in relation to marriage and divorce, while important, must be reviewed within the larger context, as Palmer cautions. One cannot merely discuss freedom and autonomy in marriage and divorce without considering family planning and its social consequences. When the family is understood from this broad perspective, freedoms are looked at differently. It is common ground that while family law (narrowly defined) is liberal, family planning as practised is repressive. It restricts people's reproductive rights, degrades women, reinforces gender discrimination, skews the gender ratio, and provides incentives for the abandonment of female infants and the neglect of the elderly. The policy has created many serious social problems and its implementation continues to be coercive and even brutal. Once the horizon of family law is broadened to include the family planning policy, the limited freedom in marriage and divorce pales and becomes marginalized. The irony is that, given the most intrusive family planning policies and the exposure of the family to the most meticulous scrutiny, it is difficult to imagine how autonomy and individuality can be genuinely respected and protected within the same legal framework. It is also difficult, though possible, to reconcile restrictive family planning with other freedoms in family matters.

The paradox in the Chinese political and legal reform is the contrast between severe repression in core policy areas and the lack of restrictions in peripheral areas. Thus, the government harshly suppresses critical political speeches but tolerates virtually uncontrolled commercial speeches and indecency; it executes the largest number of criminals in the world but is ready to ignore interpersonal violence; it invests great effort in combating corruption, but tolerates various forms of gift-giving and rebates. In family law, the state has been firm, extreme and brutal in its commitment to the birth quota and local implementation of family planning, but is willing to accept the social consequences, ranging from selective abortion, abandonment of female infants and neglect of the elderly to gender imbalance and gender discrimination. The clear lesson is that the state continues to exercise effective and firm control over the core policy areas, such as family planning and other politically sensitive matters, and is well-prepared and well-equipped to implement the policies at any cost. But at the same time it is prepared to tolerate, if not encourage, an expansive freedom outside these core areas, especially when the expansion of freedom does not incur much political and financial liability. But the vexing question is: will the enlarged freedom at the periphery eventually challenge the control at the core?

Under the market economy, freedom tends to be associated with people with resources and powers. Behind the limited freedom in China, the most vulnerable groups in society are left to the brutal force of the market with little government intervention. It makes little sense to talk about freedom in divorce without examining such well-documented gross neglect and abandonment.

This brings us back to the vexed issues of the role of state in promoting individual freedom and the need for a responsive state. The Chinese state in the post-Mao era has declined to play an active role in promoting social justice and

Chinese law continues to shift social burdens to families and society, even though the government recognizes the acute social problems it faces. Family desertion and domestic violence are examples. In cases of family neglect and family violence, the law continues to rely on villagers' and residents' committees, mechanisms which have been fundamentally weakened as a form of social control by the socioeconomic reform, to provide the primary intervention. As a result, vulnerable groups, largely the elderly, women and children, are left to the forces of market and society. Direct legal intervention remains secondary because victims are required first to approach their immediate and mostly dysfunctional communities.

Adoption is another sad example. China has abundant orphans lingering in its poorly run orphanages, but policy severely restricts domestic adoption. It is clear that the government chooses to promote international adoption; it is also clear that domestic demand for adoption exists had the government chosen to follow it. More flexible adoption conditions and procedures, a less greedy adoption bureaucracy, and a bit more sympathy and care would substantially alleviate the misery and suffering of the most innocent millions.

In conclusion, Michael Palmer's article serves as a reminder that autonomy in marriage and divorce and the decline in government intervention should also be seen in the larger context of the conspicuous failure of government, market and society to address certain social problems and social decay. It is misleading and superficial to claim that Chinese family law allows more individual autonomy and freedom, when the law fails to address the depressing social consequences of family planning and to provide an effective and meaningful mechanism to protect the interests of the vulnerable groups within the family. China needs an active and responsive state.

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