

THE FAMILY IN MODERN CHINESE LAW

WERNER LEVI

University of Minnesota

THE Civil Code of the Republic of China was published during the years 1929–1931, the Criminal Code in 1935. A great number of other law codes were published before and during this period. Almost all of them have the legal systems of Continental European countries as their basis. The driving power behind this feverish legislative activity was the endeavor of the Republican regime to modernize China and to eliminate every pretext of Western powers to perpetuate extraterritoriality.

Codification of laws was known and practiced in China before modernization began, but a codified civil law was lacking. Only a few odd special civil laws in written form existed, and they, together with custom and general legal principles were the sources for Chinese court decisions. Frequently the regulations of the Criminal Code were applied to civil law cases and the penal sanctions replaced by civil law sanctions.¹ This procedure was facilitated by the fact that a strict distinction between civil and criminal law was unknown to Chinese jurisprudence. These court decisions served as precedents and the case law thus developed became a part of Chinese common law. The importance of these precedents was increased by the power given to the Supreme Court president to unify the interpretation of the law.²

An attempt by the Manchu regime in 1910 to promulgate a modern civil code failed because the law did not take sufficient account of national customs and traditions.³ It can hardly be maintained though that the Civil Code of 1931 is much more successful in this respect. The substance of the modern code is only to a limited extent an outgrowth of Chinese legal development or popular conviction. Most of it is an imitation of French, German, and Swiss legal institutions combined with an attempt to adapt them to Chinese conditions without at the same time destroying their “modernism.”

Since the Chinese family is most solidly established by custom and tra-

¹ Jean Escarra, Liou Tchong-tchong, Houx Koung-ou, Liang Jen-kie, Hou Wen-ping, *Recueil des Sommaires de la Jurisprudence de la Cour Suprême de la République de Chine en Matière Civile et Commerciale*, Shanghai and Peking, 1924–1926 (hereafter cited as *Recueil*), p. 259; G. Jamieson, *Chinese family and commercial law*, Shanghai, 1921, p. I.

² Law of Judicial Organisation of February 7, 1910. Article 35.

³ Cf. *China Year Book*, Tientsin, 1926, p. 760; Chang Yao-tseng, *Recueil*, p. I.

dition and concerns the individual more intimately than any other institution, the dilemma of the legislator to combine concessions to the West with Chinese reality was particularly great. In part he solved the problem either by introducing a western legal institution and simultaneously leaving a way open for making the institution ineffective,⁴ or by simply remaining silent about a traditional Chinese legal institution, thus keeping it in existence as customary law parallel to the Code and leaving it to the courts to decide a particular case in accordance with custom.⁵ A third and possibly undesirable solution developed in the disregard with which large masses of the Chinese people treat the new codes.

In accordance with Chinese custom the concept of the family in Chinese law is a very wide one. Chinese codes do not give a definition of family, although the term is used frequently. The Civil Code does however determine which persons are to be considered relatives of each other. In addition to a fairly restricted relationship created by marriage, there is an unlimited relationship between persons of lineal descent and all those persons who can trace their descent back to a common ancestor, no matter how far removed.⁶ In individual cases legal consequences of relationship are restricted to a given degree⁷ but where such a degree is not specified, relationship exists if the persons concerned can find a common ancestor. For all practical juristic purposes relationship is, however, hardly ever traced back beyond the ninth generation.⁸ While this may appear as a considerable achievement it is not a particularly difficult task to the Chinese thanks to the age old institution of the family book which contains the history of the clan and its members.

Neither the clan nor the family book have found recognition in the Civil Code. Both institutions continue to exist nevertheless and it remains therefore with the courts to determine their legal regulation and consequences. The Supreme Court has invariably recognized the right of the clan to make its own rules regarding the conduct of the family book, the only limitation being that no rule must contravene peace, order, and good government (law and order). The rules, whether written or unwritten, are law to the clan members.⁹

⁴ For an example see below.

⁵ For an example see below.

⁶ Articles 967-970. (Unless otherwise specified, the articles refer to the Civil Code.)

⁷ Articles 983, 1131 et al.; Criminal Code Article 167.

⁸ Jean Escarra, *Recueil*, p. 263.

⁹ Supreme Court, *Recueil*, 531-1918, p. 261; Suppl., 949-1919, p. 64; 940-1917, p. 65; 873-1919, p. 66. 869-1920, p. 64; 949-1919, p. 64.

The rules of the family book may refer to a variety of subjects. They may, firstly, establish who is to be a member of the clan. The limit to discretion here is only the fact that the family book cannot create or extinguish a relationship which is definitely established by law.¹⁰ Apart from this limitation, the clan has considerable leeway in determining its own membership. This is of importance in view of the widespread habit of concubinage and adoption in China. Since today the status of an adopted child is made almost equal to that of a natural one,¹¹ the name of an adopted child must be entered in the family book. The only decision left to the family book rules is whether or not the fact of adoption should be mentioned in the book.¹² A child born of a concubine is in principle illegitimate. In practice, however, the Civil Code itself has so many exceptions to the principle that in most cases a concubine's child has the status of a legitimate child¹³ and its name has therefore to be entered into the family book.

The rules of the family book may further determine who is to be eliminated from the genealogical table. They may, for instance, order the name of a clan member to be cancelled if the behavior of that member dishonors the clan,¹⁴ or if such a member should engage in illegal activity.¹⁵

Another field of application of the family book rules would be the regulation of proceedings at clan meetings and the way in which clan decisions should be arrived at. The Supreme Court decided that if all the members of the clan had established the constitution of the clan, an amendment to the constitution could only be made in the same way.¹⁶ If once a decision is arrived at by the clan regarding the whole family book or a particular entry, the editor of the book is obliged to comply with this decision and his obligation can be enforced by the courts.¹⁷ In such a case, the court will only investigate whether the decision was reached according to the rules prescribed by the family book, but will not investigate the rules themselves.¹⁸ In other words, the court accepts the rules *prima facie*, but reserves the right to interpret them.¹⁹

¹⁰ Supreme Court, *Recueil*, 1—1913, p. 260.

¹¹ Articles 1072—1083.

¹² François Thery (transl.), Supreme Court, *L'Année judiciaire Chinoise*, Shanghai, 1934—298—1932, p. 10 (hereafter cited *L'Année*).

¹³ See below.

¹⁴ Supreme Court, *Recueil*, Suppl. 949—1919, p. 64.

¹⁵ *Ibid.*, 949—1919, p. 64.

¹⁶ *Ibid.*, 1100—1919, p. 64.

¹⁷ *Ibid.*, 861—1919, p. 65.

¹⁸ Supreme Court, *L'Année*, 439—1932, p. 143.

¹⁹ *Ibid.*

The legal significance of the book lies mainly in the fact that persons whose name appears in the family book are presumed to be members of the clan. The evidence is conclusive. The legality of the entry can only be contested by persons with a direct interest in the relationship status established by such an entry.²⁰ If the entry should be found illegal, the cancellation of the name from the book affects only the persons concerned and his descendants, but not his ascendants.²¹

The entry in the family book is of considerable importance to the individual for more than sentimental reasons. Relationship as evidence in the family book establishes a great number of rights and duties of the individual of a very material character such as inheritance,²² common property of the clan in sacrificial grounds or ancestor temples,²³ contributions to or benefits from all kinds of clan activities as for instance clan schools, clan meetings, clan festivals and others,²⁴ and most cases with which courts are concerned deal with some such aspect of the family book.

Family in the wider sense (*chia*) is the largest unit of which the Civil Code takes particular cognizance. Articles 1129 to 1137 are devoted to the establishment and procedures of the family council. The institution was known before the inauguration of the Code and is not an exclusively Chinese invention. Germanic law too knows a family council. Yet, the council as established in the Chinese Code differs characteristically from, for instance, the council as established in the German Civil Code, articles 1858 ff. The individualistic German law aims at the protection of the person for whose benefit the council is to be established and a judge is therefore chairman of the council. The Chinese Civil Code, stressing the importance of the family, includes only family members in the composition of the council.

The function of the family council is mostly to act on behalf or in the interest of persons who because of age or for other reasons are unable to make legally valid decisions and if there is no one else better qualified than the council to act. The law specifies in what case the council should convene. The usual activity of the family council is to name a proper heir or deal in some other way with questions of inheritance.²⁵

The membership of the council consists of five persons who should be

²⁰ Supreme Court, *Recueil*, 834—1916, p. 261.

²¹ *Ibid.*, 861—1919, 940—1917, p. 65.

²² *Ibid.*, 861—1919, p. 65.

²³ Supreme Court, *L'Année*, 251—1929, p. 52.

²⁴ P. G. von Moellendorff, *Le droit de famille Chinois*, Paris, 1896, p. 73.

²⁵ Cf. Supreme Court, *L'Année*, 272—1930, p. 73, 291—1932, p. 4, 353—1932, p. 57, 527—1933, p. 41, 593—1933, p. 114.

related to the person whose affairs are dealt with as closely as possible. Paternal relatives have precedence over other relatives of equal rank. Membership in the council is a duty which may not be avoided without good reason. The procedure in the council is democratic; decisions are made by majority vote; and nobody can participate in the deliberations of the council who has a personal interest in the matters under discussion.

In recognition of the family as the basic unit of Chinese society the Civil Code prescribes elaborate rules for the organization of the "House." "A house is a body of relatives who live together in one household with the object of sharing a life in common permanently."²⁶ In contrast to western legal systems, which treat family relations as most personal affairs, the Chinese Civil Code interferes to a considerable degree in the intimate relations of members of a household. Yet this will hardly be resented by the masses of the Chinese people. Westernized and urbanized Chinese may find the regulations unwarranted, but most Chinese who still live in accordance with tradition will find in them only an institutionalization of customs and habits.

The head of the household is to be elected from the relatives of the group or, failing an election, the headship is invested in the person highest in rank of relationship or, if there are persons of equal rank, in the person of highest age.²⁷ The office of head cannot be refused by the chosen person, but the actual management of the house affairs can be transferred to a member of the house who will act on behalf of the head.²⁸ The function of the head consists in the management of the household in the best interest of the whole body of relatives.²⁹ No further directions regarding the fulfillment of his obligations are given, nor are his specific rights and duties determined in detail. The Judicial Yuan stated as its opinion that the head of the house has no right to dispose of the personal and inherited property of the members of the house without their consent,³⁰ but according to a Supreme Court decision he may raise loans for the management of home affairs without the previous consent of the members.³¹ Previous to 1929 a considerable number of court decisions³² had established a far-reaching power of the head of the house in the management of family affairs and where the new Code is not contrary

²⁶ Article 1122.

²⁷ Article 1124.

²⁸ Article 1124.

²⁹ Articles 1125, 1126.

³⁰ Quoted by V. A. Riasanovsky, *Chinese Civil Law*, Tientsin, 1938, p. 273.

³¹ Quoted by William S. H. Hung, *Outlines of Modern Chinese Law*, Shanghai, 1934, p. 192.

³² Cf. *Recueil*, pp. 268-269.

to such power it may be assumed that it is still in existence. The establishment of various property regimes of the members of the house by the Civil Code,—personal property, a variety of possible property regimes between husband and wife, common property,—could be a fruitful source of litigation.³³ However, to judge by the absence of litigation in this respect, it seems that this situation does not create particular difficulties.

The basic importance of the household as the foundation of Chinese society is further emphasized by the rule that persons who are not relatives but live in the household “with the object of sharing a life in common permanently are deemed to be members of the house.”³⁴ Such persons are practically equal in their legal status to family members except in cases where rights and duties are the result of blood relationship rather than membership in the house. Concubines would be most frequently concerned by this rule.³⁵

The greatest significance of the institution of the house lies in the fact that it serves as a social insurance system. The head and members of a house owe each other mutual assistance.³⁶ Only the duty to maintenance among lineal relatives is more important than that among members of the house. Brothers and sisters, for instance, need only maintain each other if means are left over after members of the house have been provided for.³⁷ If a member of the household group is separated from the house, his right or duty to maintenance on the basis of membership extinguishes.³⁸ In order to prevent machinations by members in the status of membership with a view to increasing or decreasing it for materialistic reasons, the law prescribes certain rules for such eventualities. The head of the house cannot separate a member of full age or a married minor from the house without good reason.³⁹ On the other hand, he cannot keep such a member in the house against the member's will.⁴⁰ The cohesion of the house group is guaranteed to an extent by making it a criminal offense to induce a married person to leave the house even if such person consents.⁴¹ Larceny or theft among relatives of the same

³³ Cf. *North China Herald*, November 30, 1929, p. 368.

³⁴ Article 1123.

³⁵ Cf. Supreme Court, *L'Année*, 280—1931, p. 84, 401—1932, p. 104, 441—1932, p. 146, 593—1933, p. 114.

³⁶ Article 1114.

³⁷ Article 1116.

³⁸ Supreme Court, *L'Année*, 546—1933, p. 68, 609—1933, p. 126, 651—1933, p. 182.

³⁹ Article 1128.

⁴⁰ Article 1127.

⁴¹ Criminal Code, Article 240 II.

household need not to be punished,⁴² and members of the house can refuse to be witnesses against other members.⁴³ Here again the endeavor of the Chinese law to protect the family unit rather than the individual becomes clear.

The most outstanding novelty in the new Civil Code in regard to the regulation of matrimony is the absolute equality of sex. The law avoids scrupulously any trace of discrimination between the sexes and the Supreme Court decided that any existing law which is in any way contrary to the modern principle of sex equality has no more validity.⁴⁴ This is a concession both to the West and the demands of modernized Chinese, which did not meet with unanimous approval.⁴⁵ On the other hand, the law maintained old forms and customs wherever they could be combined with the modern legal ideas.

The conclusion of marriage is preceded by the equivalent of the western engagement.⁴⁶ The agreement to marry has to be made by the parties on their own accord.⁴⁷ Minor men above the age of seventeen and minor women above the age of fifteen may become engaged with the consent of their statutory agents, but the promise has to be made personally by each party.⁴⁸ If on reaching majority one of the parties does not want to keep the engagement, it can be broken.⁴⁹ There are no further consequences to the breaking of an engagement by minors by one of the parties under such circumstances. However, if a valid engagement by majors is broken by a party without good reason, the other party, male or female, can demand compensation for material and immaterial damages,⁵⁰ but fulfillment of the contract in which marriage has been promised cannot be enforced.⁵¹ This regulation of the

⁴² Criminal Code, Article 324.

⁴³ Code of Criminal Procedure, Article 167.

⁴⁴ Supreme Court, *L'Année*, 282—1931, p. 86.

⁴⁵ Francis S. Liu, "Adultery as crime in China," *The China Law Review*, VII, 1934-5, pp. 144-147,

⁴⁶ Cf. on the social and legal meaning of the "engagement" in China, Jean Escarra, *Recueil*, pp. 278 ff.

⁴⁷ Article 972.

⁴⁸ Articles 973, 974, Supreme Court, *L'Année*, 523—1933, p. 39.

⁴⁹ Supreme Court, *L'Année*, 226—1929, p. 33, 289—1932, p. 3, 372—1932, p. 76, 549—1933, p. 80, 594—1933, p. 115, cf. 523—1933, p. 39. The great number of Supreme Court decisions dealing with the question of marriages concluded by parents on behalf of children shows how widespread this custom still is and how little the new law agrees with popular usage.

⁵⁰ Articles 976-979. In western law codes only women can demand compensation for immaterial damages for reasons based on the natural differences between the parties.

⁵¹ Article 975.

engagement abolishes the Chinese custom of having marriages arranged by go-betweeners or between parents even before the children are born.

Marriage, like the engagement, is a contract which has to be concluded personally between the parties. The minimum age is eighteen for men and sixteen for women, and both need the approval of their statutory agents.⁵² The prescribed form for the marriage contract is celebration of the marriage in public and the presence of at least two witnesses.⁵³ The law does not specify in what the ceremony ought to consist. Rather than to introduce the western institution of a marriage before the civil authority, the legislator sanctioned Chinese customs.

The ways of celebrating a marriage vary with the locality and the Supreme Court, recognizing these variations, decided that a marriage is valid if local custom has been followed in the celebration.⁵⁴ Nevertheless, in a general way the usual procedures in the celebration of marriage may be summed up as follows: the exchange of red cards on which the "eight characters," representing the birth year, month, day, and hour, are inscribed; the exchange of gifts of a certain minimum value; the prostration of husband and wife before the family tablet in the house of the husband. All these acts have a definite meaning⁵⁵ and have been in practice in China for many centuries. The performance of any or all of them have been recognized by the Supreme Court as a ceremony making marriage valid.⁵⁶ In the older law there was no definite difference between engagement and marriage; the two ceremonies together established matrimony. In the modern Civil Code the two ceremonies are apparently independent of each other and a marriage could be concluded without a previous engagement. However it seems that the Supreme Court is inclined to consider the engagement as a part of the ceremony which is needed to make marriage valid.⁵⁷ Lack of the ceremony or of the witnesses prescribed by law makes the marriage invalid, even if the man and woman considered themselves to be married and acted accordingly.⁵⁸

The usual effect of marriage is that the wife adopts the husband's family name and moves into his house where both are obliged to live together, unless they cannot do so for a good reason.⁵⁹ As a consequence of the principle

⁵² Articles 980, 981.

⁵³ Article 982.

⁵⁴ Supreme Court, *Recueil*, 336—1914, p. 283, 80—1917, p. 283.

⁵⁵ Cf. Jean Escarra, *Recueil*, pp. 278 ff.

⁵⁶ Supreme Court decisions quoted in *Recueil*, pp. 278 ff.

⁵⁷ Supreme Court, *L'Année*, 343—1932, p. 46.

⁵⁸ *Ibid.*, 539—1933, p. 60.

⁵⁹ Articles 1001—1002.

of sex equality the status of the wife has been radically changed as compared to older days. Formerly the wife was completely subject to the domination of her husband and had very few rights of her own. Nowadays she occupies a position equal to that of her husband and subject to no more restrictions than a wife in the western world. The law determines expressly that husband and wife shall act as agents for each other in the daily affairs of the household.⁶⁰ While the law here introduces a revolutionary break with Chinese traditions, it made an important concession to the Chinese desire to perpetuate the line of descendants through the son by sanctioning the institution of the *chiu-fu*. The *chiu-fu* is a man who adopts his wife's surname and moves into her house, thus reversing the normal order. In fact he remains, of course, a husband, but in the legal sense he is largely treated as the wife. He severs relations with his own family and becomes a member of his wife's house. The purpose of the institution of *chiu-fu* is to give parents of daughters the satisfactory knowledge that their own family will be continued and that they will be worshipped by their descendants after death.⁶¹

This strong desire of the Chinese for the perpetuation of the family in the male line gave, historically, rise to the establishment of concubinage. The new Civil Code does not recognize this institution. The makers of the new Criminal Code intended to take the age old custom into consideration and to make adultery punishable only if committed by women. But agitation of Chinese women's organizations fighting for equality of treatment changed the legislator's mind and adultery was made a crime for both parties.⁶² The Civil Code declares sexual intercourse by either party with another person a cause for divorce.⁶³ However, adjusting the law to reality, both the Criminal Code and the Civil Code make the application of sanctions to concubinage and adultery mostly dependent upon action by either the husband or the wife, as the case may be.

Prosecution for adultery or divorce for infidelity can only take place upon demand by the injured person. And even action by this person is strictly limited. In the case of adultery, if the injured person has connived at the offense or pardoned the offender no prosecution can take place.⁶⁴ In civil law, the injured person cannot demand divorce if he or she consented to or condoned the sexual relations or had known of them for over six months

⁶⁰ Article 1003.

⁶¹ Articles 1000, 1060.

⁶² Criminal Code, Article 239; Francis S. Liu, *op. cit.*, pp. 144-147.

⁶³ Article 1052 II.

⁶⁴ Criminal Code, Article 245.

or if five years have elapsed since the relations existed.⁶⁵ In practice therefore, if the wife does not object, concubinage can continue in modern China. The complaint of some conservative Chinese that this "good and venerable institution" of concubinage has been abolished and that therewith "the most cohesive influence of family has been annihilated" is hardly justified.⁶⁶ In addition to the very liberal treatment concubinage received in the laws, the Supreme Court has invariably recognized concubinage as a system established by old custom and has never curtailed the concubine's rights on the ground that in principle the Criminal as well as the Civil Code condemn the institution.⁶⁷

Since the legislator facilitated the continuation of concubinage the problem of the status of a concubine's child had to be solved in an equally broad-minded manner. Consequently the Civil Code makes it very easy for an illegitimate child to become legitimate. The mother of an illegitimate child can claim acknowledgement from the father if she lived with the father during the period of conception⁶⁸ and acknowledgement is presumed if the father maintains the child.⁶⁹ The Supreme Court added to this by declaring that the child of a concubine if born after the father has died is deemed to be acknowledged by the father.⁷⁰ The result of acknowledgment is that the child is considered to be legitimate.⁷¹

The law of divorce in the modern Civil Code has considerably altered the rights and the status of the divorced wife as compared with the old law. The significance of the new regulations lies more in the changes which they have brought about than in the new order which they created, at least in the eyes of the westerner. There are very few clauses in the new law which differ from any commonly found in western legal systems. Somewhat unexpected in view of the constant attempt of the law to maintain the family, may be the ease with which marriages can be dissolved. Just as the marriage is concluded without the concurrence of civil authorities so the marriage can be dissolved by simple written agreement between husband and wife which requires the signatures of two witnesses.⁷² This is the perpetuation of old custom. Either one of the spouses can demand divorce by the court for a

⁶⁵ Article 1053.

⁶⁶ Francis S. Liu, *op. cit.*, p. 145.

⁶⁷ E.g. *L'Année*, 280—1931, p. 84, 401—1932, p. 104, 441—1932, p. 146, 593—1933, p. 114.

⁶⁸ Article 1067 I.

⁶⁹ Article 1065.

⁷⁰ Supreme Court, quoted by V. A. Riasanovsky, *op. cit.*, p. 266.

⁷¹ Article 1064.

⁷² Articles 1049, 1050.

number of reasons not different from those usually found in the west, with perhaps the exception of one which has its basis in the institution of the house. Divorce may be demanded if a spouse has so much ill treated lineal descendants of the other spouse or has been so ill treated by them that life in common becomes intolerable.⁷³

The granting of equal rights for divorce to the wife is a radical departure from the older law under which the wife had for all practical purposes no right to divorce whatever.⁷⁴ It is another important change from older conditions that custody for the children is determined either upon agreement between the husband and wife or on the basis of law, which treats husband and wife alike.⁷⁵ Formerly, the children became a part of the husband's family and remained there under all circumstances.⁷⁶

This review of the peculiarly Chinese aspects of the family law indicates quite clearly the problem with which the Chinese legislator was faced. His main aim was to comply with the demands of western powers and modernized Chinese. On the other hand he was aware that the promulgation of new laws could not change traditions thousands of years old. In order to have reality, the law had to be adapted to Chinese ideas and customs, otherwise the new codes would have remained without meaning and might only have stimulated disrespect for the law. The compromise which the modern Chinese family law represents is a move away from the individualistic European law codes and a part concession to that collective basic unit of Chinese society: the family. The individual is better protected in modern Chinese family law than was the case before 1929, but at the same time the legislator attempted to preserve the existence of the family on traditional bases at the expense of the individual wherever he could possibly do so without appearing too "old fashioned." Modern Chinese family law represents a step toward Europeanization. Large masses of the Chinese people are ignoring it and live unaffected by the new laws. Yet the great number of cases reaching the Supreme Court indicates that the Codes find application.

⁷³ Article 1052 IV.

⁷⁴ Cf. G. Jamieson, *op. cit.*, pp. 53 ff.

⁷⁵ Articles 1052-1055, L'Année 585—1933, p. 106.

⁷⁶ G. Jamieson, *op. cit.*, p. 55.