

# Family Revolution by Law - Research on Development and Reform of Chinese Marriage Law

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**Abstract:** The basic function of law is to protect, consolidate and develop social relations and social order that are favorable and suitable for the ruling class (Zhu, 1957). As the first law promulgated (April 13, 1950) after the founding of the People's Republic of China (PRC, October 1, 1949), the Marriage Law<sup>2</sup> has undergone three major revisions in 70 years. Based on a comparative analysis of the principles and important rules in the four marriage laws, this article studies the entire historical process of Chinese marriage law systematically. By combining amendments of laws with social changes, including party policies (Communist Party of China, CCP), economic systems and family structure, this article displays the intimate relationship between social change, law revision and family revolution in an interdisciplinary manner. The improvement of Chinese marriage law also provides a lens into Chinese lawmakers' efforts on achieving gender equality, offering special protection for vulnerable groups<sup>3</sup> to pursue substantive justice, protecting personal property and balancing the relationship between individual freedom and family and social stability.

**Keywords:** Marriage Law; Family Revolution; Social Change; Gender Equality; Substantive Justice

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  - 2 It should be noted that the term "marriage law" has been questioned by Chinese and foreign scholars for a long time (Cook, 1986; Xia, 2019). They believe that the name cannot contain all the contents of the law, especially those related to family relations and adoption. Therefore the legislators adopted the name "Marriage and Family Law" in the draft of Civil Code. For consistency of terminology, the full text is collectively referred to as "the year & marriage law".
  - 3 Generally, "vulnerable groups" in Chinese marriage law includewomen, children and the elderly, however, in this paper, which mainly focuses on marriage relationships, the term is used to only refer to the special protection provided to women.

## Introduction

Traditionally, family is the most important social unit in China (Camille W. Cook, 1986; Lee, 1999; Wu & Xia, 2009). The different characteristics of Chinese marriage and family relationships at different ages witness the changes in the Chinese social ideology and values. For example, the entering into and the characteristics of marriage as well as the causes and the rates of divorce in different times show the changes in the concept of marriage and family. Additionally, the main disputes in divorce proceedings indicate people's gradually increased legal awareness, especially regarding individual freedom and property. In order to achieve specific goals and to respond to new social changes, the government often relies on policies and regulations, as routes or resources, to implement desired social change (Sharyn, 2010).

The focus of the legislation differs at different stages, and each version of the marriage law carries China's special mission in different contexts (Yang, 2011).<sup>4</sup> From the first formal law promulgated after the founding of the Public Republic of China (PRC) in 1950 to the first draft of the Civil Code published in 2019,<sup>5</sup> the marriage law has undergone three revisions with four versions in total. This article is divided into five parts whereof the first four parts correspond to the four different versions of the law in chronological order and the last part consists of a conclusion.

The 1950 Marriage Law, rather than the constitution with fundamental legal status in many other countries to be promulgated firstly, might be puzzling to some extent. However, it is reasonable if you take legislative necessity and feasibility into consideration: the necessity stems from the urgent needs of the people and the government; the feasibility stems from the accumulation of theoretical and practical experience. Assumed the mission of "*fei jiu li xin*" (breaking the old and establishing the new), the main purpose of the law is to destroy the feudal social system, and establish neo-democratic marriage and family relationships (Liu, 2014). With gender equality and freedom of marriage being emphasized both in the basic principles and specific provisions, the law was not only a profound revolution to China's marriage and family

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4 In an interview with a Beijing reporter in 2011 Professor Yang stated: "The focus of legislation differs at different stages. In 1950, China's first 'Marriage Law' completed the historical mission of abolishing the feudal marriage and family system and implementing the new democratic marriage and family system." See the details at: [http://www.360doc.com/content/11/0915/09/3556875\\_148371815.shtml](http://www.360doc.com/content/11/0915/09/3556875_148371815.shtml).

5 The first draft of the Civil Code was published by the Chinese People's Congress on December 28, 2019. There are 7 series and 1260 articles in total, including general rules, property, contract, personality, marriage and family, inheritance, tort liability, and supplementary provisions. See the full text of the draft (Chinese) at: <http://www.dffy.com/sitedata/resource/files/201912/20191228092140ns2s.pdf>

system, but it was also regarded as a milestone in the development of women's human rights (Zhang, 2010).

The 1980 Marriage Law undertook the role of “*cheng shang qi xia*” (a connecting link between the preceding and the following) (Yang, 2011). On the one hand, legislators added some new principles and provisions in order to complement the party's policies for economic development and population control. On the other hand, for the purpose of eliminating the negative impact of the political movement on marriage, legislators demonstratively provided the foundation for divorce. There were still some changes left, under the dual effects of policy revolution and social development, the Chinese people's awareness of personal property began to awaken, controversies over property ownership emerged.

The 2001 Marriage Law (Amendment), considered to be an “emergency measure”, was a response to a series of new marriage and family problems which emerged as a consequence of the revolutions, China's economy and society underwent and are characterized by soaring divorce rates and complex property disputes. For this reason, amendments mainly focused on offering guidance of judicial practice.<sup>6</sup> The legislators' efforts to seek a balance between individual freedom and social stability, and their efforts to protect vulnerable groups and personal property were also fully demonstrated in this amendment.

In 2019, with the codification of the Chinese Civil Code, the marriage law ended a long life in turmoil<sup>7</sup> and returned to the civil legal system (Xia, 2014). Realizing the systematization of the Civil Code is the most emphasized goal of this revise, so as to achieve integration with other civil legal norms which mainly focus on property relationship (Ran, 2019). When the third review of the Civil Code (draft) was published, the marriage and family field received the largest number of public

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6 After the promulgation of the 2001 Marriage Law (Amendment), the three judicial interpretations issued by the Supreme People's Court of the People's Republic of China successively, also explained the urgent needs of the courts for the specific rules and instructions to the constantly emerging new family legal disputes, especially property related.

7 Before commencing the civil code, marriage and family law was distinguished from typical civil law norms with property law as its core because of its strong identity, ethics, and public law characteristics. When planning the codification of the civil code, the experts conducted special discussions and debates on whether the content of the marriage and family law should be incorporated into the code, and finally reached an agreement that the marriage and family law should also be part of the civil code, but the interrelated rules between the general rules of civil law, property law and identity law must be adjusted and integrated correspondingly.

comments and letters,<sup>8</sup> and the 2019 marriage law improved in response to part of public proposals. Generally speaking, great progress has been made this time, but unfortunately, there are still shortcomings.

In summary, through the comparative analysis of the four versions of the marriage law, this article reveals that the family reform, social changes, and law revisions are interrelated and inter-conformed, and any slight movement in one part may affect the situation as a whole. More importantly, this article also exhibits the continuous improvement and development of Chinese legislative ideas and legal philosophy, characterized by redesigns in rules and systems.

## The 1950 Marriage Law

### Reasons for being the first promulgated law

According to Marxists, law is the embodiment of the will of the ruling class. It is a rule of conduct that is formulated or recognized by the state, and implemented under national coercion. The purpose of the law is to protect, consolidate and develop social relations and orders that are favorable for the ruling class (Zhang, 2007, p. 79). As a Chinese saying goes, “*mei you gui ju, bu cheng fang yuan*” (no rules, no standards). The Communist Party of China (CCP) abolished all the norms, rules and systems of the old society,<sup>9</sup> and tried to establish an entirely new socialist world from scratch. The state usually defines and reshapes the parameters of citizenship rights and obligations through law and its prescriptions, and then, consolidate the new government and maintain social order and peace (Margaret, 2003), this is the same for China. The reasons why the marriage law became the first formal law of PRC can be interpreted and understood in terms of both necessity and feasibility.

### Necessity: Happy Life and Social development

Law based on values of equality and freedom would satisfy the Chinese public, especially women, as this could give them an equal, free and happy life. After long and miserable war lives with both foreign aggression and domestic political struggle, the Chinese people were finally able to settle down and start a new chapter of life after the founding of the National People’s congress (NPC). In this context ‘happy lives’ means

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8 According to the spokesperson of the NPC Law and Work Committee, the third review of the draft of marriage and family drafts has seen a surge in public opinion. There were a total of 198,891 public comments and letters received from the public online. See:<https://baijiahao.baidu.com/s?id=1653413463992068215&wfr=spider&for=pc>

9 Including rules and systems both from the feudal society and implemented during the Kuomintang’s administration.

two things for the women: material happiness, coming from ownership of their land,<sup>10</sup> and spiritual happiness, coming from a happy family life (Zhao, 2009).

For thousands of years, Chinese people have lived with traditional social customs based on feudal gender perspectives and family systems.<sup>11</sup> Under Confucian ideas, “*nan zun nv bei*” (male superiority and female inferiority) was underscored by custom and belief and gave birth to the patriarchal family system (Camille, 1986). Women must meet the moral requirements of “*san cong si de*” (three obedience and four virtues).<sup>12</sup> Further, children were taught the adage: “*nv zi wu cai bian shi de*” (an ignorant woman is virtuous) (Butterfield, 1982). Women living in that era, have suffered both physical and psychological oppression, exploitation and torture with no rights or dignity at all. Chinese husbands had an expression for the status of their wives: “A wife married is like a pony bought, I will ride her and whip her as I like” (Galas, 1980). Other than that, feudal marriage was based on “*fu mu zhi ming, mei shuo zhi yan*” (parents’ orders, matchmaker’s advice), that means, neither men nor women have the freedom to decide their marriage. Gender inequality and maternity-oriented marriages have spawned “polygamy” and “concubine”. Daughters of the impoverished were sold as kitchen slaves or second wives to the wealthy (Naftulin, 1982). Marriage, without emotional foundations, were a source of pain and unhappiness for a large part of the Chinese public. Breaking the shackles of the traditional marriage system and pursuing a free, equal and happy life became the most basic, urgent and eager aspirations of the Chinese public, especially of the women, who made up more than half of the Chinese population.

The CCP had similar claims. The new regime was established while social customs and marriage systems still bore the strong traces and mark of feudal society. On the one hand, as mentioned above, marriage is the basic of family, and family makes up basic “cell” in Chinese society. Therefore, the stability of marriage and family directly or indirectly influences social stability (Xiao, 2002). On the other hand, law, as social norms formulated by the state, has several normative functions such as guidance, evaluation, prediction, education, and compulsiveness (Shen, 1994, 67). Based on this,

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10 In order to address the farmers’ land needs, China promulgated the “Land Reform Law” in June 1950, and launched a two-year land reform campaign.

11 There is a lot of literature on this topic, some of the references in this article will be listed in the references at the end of this paper.

12 “San cong” (three obedience) means: woman is required to obey her father before marriage, and her husband during married life and her sons in widowhood; “si de” (four virtues) means: women are supposed to be good at morality, proper speech, modest manner, and good needlework.

the Party urgently needed to use the marriage law as a tool to stabilize social order, develop social economy and finally, consolidate the new political power. The 1950 Marriage law came out under such strong demand, both from the CCP and the public.

#### Feasibility: Accumulated Experience both in Theory and Practice

While the urgent demands of the people and the political needs of CCP laid the necessary foundation of the 1950 marriage law, the long-term accumulation of practical, theoretical, and regulatory experience laid a feasible foundation, making it possible for the law to be enacted within one year after the founding of the PRC.

The advanced ideas such as “freedom of marriage”, “gender equality”, and “monogamy”, which consisted of scientific Marxist views, had left a deep mark on the Chinese people already at the beginning of the nineteenth century, when western countries invaded China. As a practitioner of Marxism, gender equality and freedom of marriage have always been one of the goals pursued by the CCP (*Government White Paper*, 1994).<sup>13</sup> In 1922, the second year after the founding, the party lunched the “Resolution on the Woman’s Movement”. It combined woman’s freedom and liberation with the Party’s acquisition of political power together. From 1930 to 1949, various cities formulated and promulgated marriage regulations with both substantive and procedural content (Wang, 2019). On September 29, 1949, the National Committee adopted “People’s Political Consultative Conference Common Program” as the interim constitution. This document clearly stipulated the abolition of the feudal system, proclaimed that women have equal rights with men in all aspects, such as culture, education, and society. Together with some piecemeal local legislations and administrative orders, all of those documents laid the theoretical and textual basis for the promulgation of the marriage law. Guided by specific rules, family courts, set by the regime in the Shanxi-Gansu-Ningxia district, which was the revolutionary base of the CCP, handled a large amount of family cases and accumulated valuable practical experience (Wang, 2008). These trial experiences contributed a lot to the feasibility of promulgation.

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13 In the part “The Situation of Chinese Women”, the document deals with the legal status of Chinese women from the liberation period to the present, their equal rights and important roles in the economic field, their equal status in the family.

### Core Contents

There are 27 articles in total in the 1950 Marriage Law. Generally speaking, it is simple with less specific regulations. However, it had a huge influence at that time.<sup>14</sup> With the mission of “*fei jiu li xin*” (breaking the old and establishing the new), it was expected to realize the goal of “from feudal to democracy”, achieved through basic principles and specific rules.

As the core manifestation of the entire legal purpose, the importance of the basic principles is self-evident, however, we could also see it from the text position of chapter one and articles one and two. “Freedom of marriage”, “monogamous”, “gender equality”, and “protection of the legitimate interests of women and children” were set as the basic principles of the marriage law,<sup>15</sup> and became the most important and core concepts of the marriage systems until now. In order to make the principles more specific and clear, the legislators also enumerated in chapter 1 several phenomena that were prevalent in society but violated the principles. Violations of the “freedom of marriage” included arranged marriages, forced marriages and interference with widows’ freedom of marriage. “Gender equality” is mainly violated by “*nan zun nu bei*” (male superiority); The betrayals of monogamy include bigamy, concubine and “*tong yang xi*” (daughters of the impoverished who were sold as kitchen slaves or second wives to the wealthy). And at the same time, violations of the “freedom of marriage” and “*tong yang xi*” are also violations of “protecting the interests of women and children”. All of these phenomena are explicitly prohibited in the 1950 marriage law.

Guided by basic principles, the law also contained unified regulations and arrangements in the remaining six chapters, including the essential and procedural elements of marriage and divorce, and the legal relationship between husband-wife and parent-child, throughout the entire process before the marriage and after divorce. As Schneider (1992) argues, one of the functions of family law, is to “support social institutions which are thought to serve desirable ends and to channel people into them”. “Institution” here means mutual legal rights and obligations between different entities.

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14 See Notice of the Central Committee of the Communist Party of China on Ensuring the Enforcement of the Marriage Law, issued on May 1, 1950: “the Chinese masses, especially female, were liberated from the barbarous and backward marriage system. The new marriage system, family relations, and social ethics were constructed, which was conducive to promoting political, economic, cultural, and national defense construction and development in a new democratic China.”

15 See the 1950 Marriage Law, article 1, 2 and 3.

On the whole, the promulgation of this marriage law is undoubtedly of historical significance, and is called a “revolution of ideas and systems” in the field of marriage and family (Huang, 2011). Since then, the concepts of gender equality, freedom of love and marriage has been prevalent across the whole country. The Chinese people, especially women, have awakened their sense of human rights, and have begun to use legal weapons to defend their interests. Phenomena like women being able to go out of their homes, receive education and participate in collective activities as men, marry freely without their parent’s interference, was not uncommon any more. Although, compared with later amendments, legislation at this stage is mainly based on the preliminary realization of formal equality between men and women, valuing formal justice and equality over substantive, however, it still greatly improved the status of women in Chinese society at that time (Wu & Xia, 2008). Both individual freedom and social stability are pursued by the regime, while it is clear that legislators valued freedom over stability. After all, “*fei jiu li xin*” (breaking the old and establishing the new) is the core goal of this stage.

## The 1980 Marriage Law

### Motivations for Modification

From 1950 to 1979, 30 years after the promulgation of the 1950 marriage law, many pivotal historic events took place in China: Marriage Law Enforcement Inspection Movements, the Land Reform, the Cultural Revolution,<sup>16</sup> implementation of Family Planning Policy and so on. These dramatic social changes had a great impact on everyone as it spread to all aspects of their life, and the changes contributed to the revision of the 1950 marriage law, and ultimately created huge family revolutions.

In the early days of the founding of the PRC, the lack of living and production resources led to a huge conflict between the dramatic population growth and economic development (*Chinese population and family planning history*, 2007). According to statistics in the early 1980s, China increased with more than 11 million people every year, and billions of kilograms of grain each year needed to be increased to ensure the rations of the new population (Chen, 1981). “In the seven years between 1954 and 1960, there were more than 130 million people having been born. Some of them were married, some of them will enter the marriage and reproductive period in recent years.” (*People’s Daily*, 1981). A series of social problems were caused such as food shortages, insufficient medical and educational resources, limited housing conditions and

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16 Cultural Revolution, was a sociopolitical movement in the People’s Republic of China from 1966 until 1976. To see more details with [HTTP://en.Wikipedia.org/wiki/Cultural\\_Revolution](http://en.wikipedia.org/wiki/Cultural_Revolution)



depletion of natural resources. The population problem, as one of the important factors affecting China's economic development, was included in the "plan" by the party (Liu & Fei, 2017).

The promulgation of the 1950 Marriage Law and the Marriage Law Enforcement Inspection Movements implemented by all cities under the leadership of the central government, led to a surge in Chinese divorce cases (Zhang, 2010). The CCP launched a series of propaganda and campaigns aimed at accelerating the establishment of the new marriage and family concept. According to statistics, just in January and February 1953, almost 20 million copies of promotional materials were printed throughout the country (Zhang, 2003). People who suffered with arranged or forced marriages, especially women who were oppressed and humiliated, eagerly wanted to get out of the cage based on law. This led to the first climax of divorce in China since the founding of PRC.<sup>17</sup> However, the vague provisions of the 1950 Marriage Law only granted people freedom of marriage (including freedom of marriage and divorce), it did not clarify the legal grounds for divorce.<sup>18</sup> Coupled with the influence of the Cultural Revolution, during which political ideology prevailed for nearly two decades from 1957 to 1976, the marriage of young people showed a tendency of "pan-politicization" (Zhang, 2018), and it was common that they got married or divorced just depending on political factors. The lack of normative guidance on the grounds of divorce, made it difficult for judges to decide whether to grant a divorce and on which grounds.

Judicial difficulties were also reflected in the marital property division. The Land Reform improved the farmers' productivity, and accumulated family wealth aroused people's awareness of personal property. The lack of guidelines on how to address marital property disputes also became a common judicial trial problem.

### Legal Reconstruction

The Marriage Law of 1980 consisted of 5 chapters and 37 articles, and took the task of "*cheng shang qi xia*" (continue from the above and introduce the following). On the basis of inheriting the 1950 Marriage Law, it was modified and supplemented in accordance with social changes, practical experience, and new party policies (Ma, 2008).

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17 According to statistics, divorce cases accounted for 60% of the total number of civil cases in 1952 and reached more than 90% in 1953, most were filed by women. In 1953, divorce lawsuits were greatly increased throughout the country, with a total of 170,000 pairs in the whole year, and 528 divorces in the first half of Guangzhou. From Guangzhou Dairy, 2008.

18 See the 1950 Marriage law, Article 17.

The most noticeable change is the addition of basic principles. In order to effectively guarantee the implementation of the party's policies, legislators added "implementing family planning" to the basic principles and added the elderly into the category of special protection, which originally only included women and children.<sup>19</sup> Besides, in line with the "implement of family planning" principle, lawmakers also set additional three specific provisions: making the "family planning" one of the legal obligations for both spouses;<sup>20</sup> increasing the legal age of marriage to 22 for men and 20 for women, both increasing with two years; encouraging "late marriage and late reproduction" explicitly in the law.<sup>21</sup>

Legislators used "loss of affection (incompatibility)" as the substantial basis for divorce. Legislators explicitly specified "affection" as the only criterion for judges to decide whether the marriage should last, rather than the political factors which were popular during the Cultural Revolution. The legislators also used the abstract expression "loss" to give the judge discretion, and allow them to make decisions case by case (Qin & Li, 2003).

In view of the awakening of property awareness and the addressing of property disputes in divorce proceedings, legislators set common ownership as the legal property system. The new property system stipulated shared ownership over property acquired during the marriage, and simultaneously respected the couples' willingness, allowing them to decide the ownership of property freely.<sup>22</sup>

In conclusion, the main objectives of the regime during this period were to promote economic development and enhance productivity. The surge in population at that time brought some obstacles and challenges to social development. To deal with the negative effects brought by the population pressure, such as food shortage and burdensome economic development, the government introduced the basic family planning policy, which was directly or indirectly reflected in the amendment of the marriage law (Yang, 1979). Those additives related to family planning in the marriage law, shaped the family concept, changed people's attitudes towards marriage and fertility eventually (Wu, 1981). A greater number of couples chose to have only one child, which not only further promoted the concept of equality between men and women, but also replaced the traditional Chinese extended family structure with stem and nuclear families

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19 See the 1980 Marriage Law, Article 2.

20 See the 1980 Marriage Law, Article 12.

21 See the 1980 Marriage Law, Article 5.

22 See the the 1980 marriage law, article 13.

gradually (Xia, 2019).<sup>23</sup> Led by the goal of “*cheng shang qi xia* (continue from the above and introduce the following)”, legislators clarified individual rights and obligations about marriage and property further and explicitly, in order to continue to promote gender equality and freedom of marriage while protecting people’s property rights. Not only did the 1980 Marriage Law respond to the newly occurred social changes, it also reshaped the Chinese marriage, and achieved the social change that lawmakers desired (Sharyn, 2010).

## The 2001 Marriage Law (Amendment)

### Reform and Opening-up: Economic Transformation and Family Turmoil

The 2001 Marriage Law (Amendment) was the first law in China to solicit public opinions after the promulgation of the Chinese Legislation Law.<sup>24</sup> The amendment, made in response to the strong demands of society during China’s huge transformation period, was referred to as “a general census of Chinese national, legal, moral, and marriage, family, sexual concepts in the early 21st century” (Xia, 2019).

The Chinese “reform and opening-up” policies were instituted in 1978. Since then, China has ushered in the “golden age” of the economy. The Party’s work was mainly focused on economic construction, and the entire society had begun a socialist modernization drive with a sustained and stable growth in productivity (Xing & Chen, 2006). Promulgation and implementation of new political policies signaled China’s transition from a command economy to a market economy (Hannum, 2005), which meant the national unification was broken, instead, a dual structure of the state and society gradually took shape. Various new ideas, values and lifestyles were introduced to China, making Chinese people aware of ideas of individualism and liberalism which they increasingly adapted. These new, imported and adapted ideas altered the Chinese society with both positive and negative consequences (Cai, 1999, 315).

As an important mechanism and foundation of a society, the family system could be shaken by social change (Lee, 1999). Rapid economic growth and socialist modernization have changed the Chinese family in many ways, including the family system and practice. For example, traditional extended families have been broken down,

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23 See Legal Report, June 21, 2019, at: <http://ha.people.com.cn/n2/2019/0621/c351638-33064396.html>

24 The Legislative Law of the People’s Republic of China came into effect on July 1, 2000, and was revised in 2015. Article 5: Legislation should reflect the will of the people, carry forward socialist democracy, insist on legislative openness, and ensure that people participate in legislative activities through multiple channels.

and instead stem families and nuclear families have become the fashion ( Lee,1999); With increasing economic freedom and the withdrawal of the Chinese state from people's private lives, China saw a huge rise of different forms of extramarital affairs, such as bigamy, extramarital affairs, and concubines (Woo, 2003). The divorce rate increased continuously and dramatically, and accordingly, an increasing number of divorce cases flooded into courts and the majority of them were related to the division of property (Zang, 2020).

As already mentioned, Chinese families are the basic cells of society (Cook, 1986; Lee, 1999), the stability and harmony of the family directly affect the stability and development of the whole society. Unlike the other countries, Chinese families bear the basic obligations of supporting the elderly and raising children (He & kwai, 2013). The family has been the controlling influence in the life of every man, woman, and child (Camille, 1986), thus the disintegration of a family will have a huge impact on every family member and even the whole society. For these reasons, regulating family behavior by law is of primary importance (Camille, 1986). As the 1980 Marriage Law made divorce easier with the "incompatibility" divorce ground, which led to a significant increase in the divorce rate (Ceello & Kholoussy, 2016), it was time for legislators to take some proportional measures to maintain the stability of family relations.

### Refinements of the Provisions

Both general and specific rules have been greatly refined in this amendment. To begin with, some ethical norms were added to the general rules, including "spouses should be faithful and respectful to each other" and "no cohabitation". These regulations were aimed at "extramarital affairs", which had become more prevalent at that time. In order to reshape people's family behavior and create stable and healthy marriages and family relationships, private behavior which was originally regulated within the scope of moral adjustment, now fell into the scope of legal adjustment (Cai, 2004).

"No Domestic Violence" came into the books for the first time in the Chinese legal system. Proposals to deal with domestic violence squarely, to bring it into the public sphere and place it within the authority of the courts sparked heated public debate, because it broke the Chinese traditional social norm of "*fa bu ru jia men*" (the law should not interfere with private family affairs) which have been around for thousands of years (Margaret, 2003). Simple but significant, this stipulation witnessed the government intervention in pursuit of justice and laid the foundation of ideas and legal sources for the promulgation of the Anti-Domestic Violence Law (Xia, 2019).

Along with the new amendment, many new and specific rules about marital property were implemented. Compared with the original law, the amendment further elaborated on the definition of personal property within marriage and introduced provisions for financial compensation (Margaret, 2003; Palmer, 2007; Emma Zang, 2020). In response to the social realities of an increasing divorce rate and the difficulty of handling property disputes, the 2001 Marriage Law made more detailed provisions on the property matters, by clearly specifying the types and scopes of couples' common property<sup>25</sup> and personal property.<sup>26</sup> Furthermore, according to the amendment, couples could choose their wanted property system among separate, common or part-separate and part-common freely.<sup>27</sup>

Besides, parallel with the changes made to the marriage and family law, the Chinese government also continued to implement new rules to further develop gender equality. At this time gender equality had made significant progress, especially in the educational attainment, where women have achieved near parity with or even surpassed men (Woo, 2003). However, the gender gap was still broad in terms of family status and economics, women were still in a disadvantaged position and they were the main bearers of housework (Woo, 2003; He & Kwai, 2013; Zang, 2020). In response to this social reality, legislators gave special care to women in the divorce property division rules and set up a housework compensation system.<sup>28</sup> Lawmakers also created a divorce damages compensation system, listing several faulty divorce grounds which were very common at that time as the basis for the victims to claim compensation.<sup>29</sup> Lawmakers sought to reduce the incidence of bigamy, cohabitation, and domestic violence through economic means, thereby stabilizing family relationships and providing some economic relief to vulnerable women.

In summary, during the period of radical transformation, Chinese social customs, moral framework and family concepts faced extraordinary challenges and shocks (Whyte, 1996; Wu & Xia, 2009). When stability was threatened by excessive freedom, it was necessary for the legislators to find a new balance between personal freedom and social stability. The divorce damage compensation system, did not only guide the correct marriage behavior to a certain extent, but also provided relief and protection for vulnerable Chinese women, majority of whom were non-faulting parties (Xia & Deng,

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25 See the 2001 Marriage Law (Amendment), Article 17.

26 See the 2001 Marriage Law (Amendment), Article 18.

27 See the 2001 Marriage Law (Amendment), article 19.

28 See the 2001 Marriage Law (Amendment), Article 44.

29 See the 2001 Marriage Law (Amendment), Article 46.

2002). Hence, it can be seen that women's rights protection has been further advanced in this amendment, as well as the substantive gender equality and justice (Xia & Deng, 2005). As for the legal property system, stipulation that spouses can freely choose one of the alternative forms of property ownership is a manifestation of lawmakers' greater respect for individual freedom and private rights. (Wu & Xia, 2009). The detailed rules on property and divorce grounds, stemming from previous judicial experience, provide guidance for future trials, indicating that lawmakers have begun to pay attention to the uniformity and efficiency of practice work from this amendment (Wu & Xia, 2009).

## The 2019 Marriage (and Family) Law (draft)

### Formal and Substantial Improvements under Systematic Requirements

Codification is systematization (Xu & Xiong, 2009). The integration, improvement, unification and systematization of different civil legal norms<sup>30</sup> are the basic demands of the compilation of the Civil Code (Wang, 2001), and also the basic driving force for the refinement of the marriage law. After the party made the codification of the Civil Code one of the important works in the following years in 2014,<sup>31</sup> everything went steadily as planned: the General Principles of the Civil Code were promulgated and implemented in 2017;<sup>32</sup> the other finalized drafts were also collectively released at the end of 2019 after three deliberations.<sup>33</sup> Under the guidance of systematic goal, combined with solutions to new social problems and response to public comments on previous deliberations (Xia, 2017), both the external form and the internal substance of the

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30 Affected by factors such as inadequate legislative skills and the rapid pace of social change, China had never had a unified civil code even after its 70th anniversary. Different civil law norms in the field of private law exist separately according to their different adjustment targets. Separate civil law norms in Chinese lay system including the General Principles of Civil Law, the Marriage Law, the Contract Law, the Property Law, the Tort Law and Inheritance Law.

31 The Fourth Plenary Session of the Eighteenth Central Committee of the CCP adopted the Decision of the Central Committee of the CCP on Several Important Issues Concerning the Comprehensive Advancement of Governing the Country According to Law on October 23, 2014, which explicitly stated that "codification of Chinese Civil Code" was one of the major tasks in the next few years (Guang Ming Daily, 2017).

32 On March 15, 2017, the Fifth Session of the Twelfth National People's Congress adopted the General Principles of the Civil Law of the People's Republic of China. See the full text at: <http://www.npc.gov.cn/npc/c12435/201703/7944f166a8194d788c63cc6610aebb4a.shtml>

33 On December 23, 2019, at the fifteenth meeting of the Standing Committee of the 13th National People's Congress. See the report at: <http://www.npc.gov.cn/npc/c30834/201912/c68dabb916e944cd856ce9e341d26dc1.shtml>

Marriage (and Family) Law (draft) have been amended, which has caused widespread participation and discussion in society.<sup>34</sup>

Formally, there are three main changes in the draft. The first change comes with the conversion of the name from “Marriage Law” to “Marriage and Family Law”, which shows the response of legislators to scholarly criticism. The name of the “Marriage Law” only reflects the marital relationship between husband and wife and does not cover another important component of the law: Parent-child relationship (Ran, 2019; Cook, 1986). In order to be consistent with the newly-added “socialist core values”<sup>35</sup> in the General Principles of Civil Law promulgated in 2017,<sup>36</sup> another ethical norm, “building a good family style”, was incorporated into the marriage law norms.<sup>37</sup> Both lawmakers and experts hope that through this clause, the “core values of socialism” will be implemented in the field of the family and further achieve family stability and harmony (Chinese People’s Congress, 2019). Instead, “Family Planning”, which used to be one of the basic principles derived from the party policy, was deleted to adapt to the recent tendencies of the Chinese population— continuous declining fertility rates, aggravating population aging and imbalanced male to female ratio (Wang & Liu, 2019). Finally, conspicuous but unimportant, the incorporation of the previous separate Adoption Law into the marriage (and family) law is only a matter of systematization.

Essentially, the hot topics that have received responses from lawmakers include the following: The “cooling-off period” of agreement divorce has been added in the chapter of “Divorce” after fierce arguments. This means, that after the couples apply for “contested divorce” (divorce by common agreement) to the Civil Affairs Bureau, the authority will ask them to think carefully about their decision for a month before issuing a divorce certificate. The “cooling-off period” is set to demand the parties to reconsider the divorce and its various consequences carefully, limit frivolous and

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34 The Chinese People’s Congress’ online draft of comments shows that there were 35,314 participants in the Civil Code Marriage and Family Law (Second Review Draft), and a total of 67,388 opinions were solicited; 213,634 people participated in the Third Review, 276,948 opinions were solicited. <https://mp.weixin.qq.com/s/NFc-BKLRGJeLdNGvIRD1Q>

35 In October 2006, for the first time, the Sixth Plenary Session of the 16th Central Committee of the Party clearly put forward the major propositions and strategic tasks of “building a socialist core value system”, clearly proposed the content of the socialist core value system, and pointed out the core of the socialist Values are the core of the socialist core value system. The 18th National Congress of the Communist Party of China has officially defined the “socialist core value body” including: prosperous, strong, democratic, civilized, and harmonious; freedom, equality, justice, the rule of law; Patriotic, dedicated, honest, friendly. <https://baike.baidu.com/item/社会主义核心价值观/3271832#1>

36 See the General Principles of the Civil Law, Article 1.

37 See the Civil Code (Draft), Article 1034.

impulsive divorce, and then, maintain the stability of family relationships. However, determined in the draft does not mean that there are no objections to it, in fact the proportion of opposition is higher than approval according to official survey results.<sup>38</sup> Some scholars also believe that the original intention of legislators is good, but that they should apply it differently according to divorce reasons (Li, 2019). For example, the “cooling-off period” is not suitable for a divorce caused by domestic violence. Generally speaking, there are many different views on the topic, and it is therefore difficult to predict how legislators will respond to criticism.

The housework compensation system, the economic assistance system and the divorce damage compensation system, all aimed at providing women with relief and protection because of the essentially disadvantaged status, have been further improved. According to Article 40 of the 2011 Marriage Law, a party of a divorce has the right to demand the other to compensate for (his or her) sacrifice related to housework such as raising children, caring for the elderly, or assistance of the opponent’s work. However, this article does work on the premise that the couple adopted a separate property system,<sup>39</sup> that is to say, they have made an agreement specifically on separation of ownership of respective income, which is rarely operated by Chinese couples (Xia, 2003). In the absence of prerequisites, the “housework compensation system”, aiming at achieving substantive fairness, has only become a right on paper. The new drafters believed that the value of housework should be valued by compensating the party (women account for the vast majority) for the family donation no matter what form of property system is chosen. Similar improvements have been made to the financial assistance system. The financial assistance system is no longer based on the premise or limitation of “one party suffers extreme economic difficulties (lower than local minimum level) after divorce”, as the economically disadvantaged party can ask the other for financial assistance as long as there is a large gap between the financial situations before and after their divorce. The way to assist is no longer limited to providing a place to live. As for the judgment of

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38 “China Women’s News” once initiated a vote on Weibo: “Agreement on the cool-off period of the divorce, do you agree?” As a result, the voting result was one-sided: only 10,248 thought it was conducive to avoid false and impulse divorce, accounting for 4.2%, while 232,164 votes against it, accounting for 95.1% and the rest 0.7% thought it does not matter. See: Democracy and the Legal Weekly, January 13, 2020 at: <https://mp.weixin.qq.com/s/NFc-BKL-rGJeLdNGvIRDT1Q>

39 According to the Law, there are two forms of couple’s property systems: one is called “separate property system”, which means that they have made an agreement that their respective incomes will be owned by each of them during the marriage; the other one is “community property system”, which is the legal system and will be implemented if the couples do not make a decision on their property. The system stipulates that their individual incomes belong to the family’s community property and this is shared in half when the couple divorce.



“large gap”, it falls into the judge’s discretion, and will be decided on the case-by-case basis.

The “damage compensation system” has been criticized for its limited scope of application (Xia & Zheng, 2007), which merely take “bigamy”, “living with the third party”, “domestic violence”, “abuse and abandonment of family members” as a manifestation of “fault”.<sup>40</sup> However, in daily life, the forms of “fault” that lead to divorce are far more diverse from the four types listed above, especially “extramarital sexual relations”, which is widespread in society but has not received enough attention. (Xia, 2003). In accordance with the recommendations of experts, the draft has added a flexible and inclusive “other major faults” as the pocket clause and the normative basis for compensation (Xia & Zheng, 2007). With this pocket clause, judges are given flexible space to adopt other possible fault forms into the damage compensation scope.

## Unresolved Problems

However, apart from these advances of the draft, there are still some new and controversial issues unresolved. Firstly, lawmakers failed to respond to the fierce discussion of whether same-sex couples should be legalized, even though the call for the legalization of same-sex marriage is pretty high and a large part of the public opinion collected on the review draft was about this issue.<sup>41</sup> Academic scholars hold different views on this issue: some think that freedom of marriage is a basic human right, and that legislators should give same-sex couples a legal marriage status to protect their rights and interests equally and universally (Sun, 2002). On the contrary, others believe that same-sex couples have subverted traditional Chinese cultural practices and social norms, and the majority of the public will not accept the legalization of same-sex marriage at this stage (Jiang, 2007). A compromise proposal to set a separate law to regulate the “cohabitation relationship” which is also protected by law but is different from marriage was also put forward by some scholars, as they believe this “indirect approach” is more easily accepted by society (He, 2010). Unfortunately, the legislators did not respond to those opinions in the end. Moreover, legal issues related to artificial reproduction, such as artificial insemination, IVF and surrogacy, which have been

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40 See the 2001 Marriage Law (Amendment), article 46.

41 Yue Zhongming, spokesman for the Standing Committee of the National People’s Congress of the People’s Republic of China, introduced that they received a total of 237,057 comments and 5,635 letters from the public on the Internet, and “the opinions are mainly focused on the scope of close relatives, the revocation of revokable marriages, the further improvement of joint debts between husband and wife, and legalization of same-sex marriages.” See more details at: <https://baijiahao.baidu.com/s?id=1653416399392818767&wfr=spider&for=pc>

regular targets in scholarly articles for a long time, were not mentioned at all. Besides, issues like how to calculate relatives, whether the best interests of children should be viewed as a basic principle, and how to solve the left-behind children's custody problems, haven't been resolved in the draft.

To sum up, under the dual effects of technological development and the promotion of rights awareness, a considerable number of the public have participated in the revision of this law and made recommendations for reviewing the draft. The final version of the draft has both progress and shortcomings. The improvement of the three economic-related systems is another step forward for legislators in their pursuit of substantial equality and justice, while the change of name and the adoption of the adoption law are requirements for achieving systematization. However, under the core pursuit of "harmonious society", legislators created a cooling-off period to stabilize social relations, and also avoided some radical issues in order to avoid social unrest. As Lee asserted (1999), any proposal of legal reform has to be made with sensitivity to cultural practices and recognition of the power structure within the family, market and society. The legislators have carefully avoided new issues that have been hotly debated but not yet accepted by the general public in the draft. Possibly, they prefer to regulate them after public comments become clearer, through special legislation or judicial interpretation in the future.

## Conclusion

Changes in family structure and concepts are the epitome of social change, and social change is related to and influenced by policies and laws (Wu & Xia, 2009). Through a comparative analysis of the systems and rules of different versions of the marriage law, we can see the symbiotic relationship between family concepts, social changes, and laws at specific stages. In addition, law must be rooted in specific social soils, blended with the customs and traditions of this society (Lee, 1999). Also, it is eternal that law is designed by legislators intentionally to meet the expectations of power owner (Ding, 2013). Therefore, from the initial "breaking the tradition" to the "economic development" in the middle stage to the "harmonious society" in recent years, the alterations in the core pursuit of power owners are not only reflected in policy reconstructions, but also step by step, reflected in the revisions of law.

The changes in systems and rules are a reflection of the revolution in the concept of legislation in marriage law. Therefore, the research in this article also reveals in depth the changes and development of the concept of legislation in China as a whole. As

mentioned before, all of this progress, such as the goal shift from formal to substantive equality and justice, the focal change from state regulation to respect of individual freedom, the protection of individual private rights and the mastery of balance between individual freedom and social stability in different social contexts, have witnessed the continuous improvement of China's legislative philosophy (Xia, 2019).

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