

# Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction\*

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**ABSTRACT** This article considers the principal changes in family law in the People's Republic of China during the post-Deng period. The developments that have occurred during the period of review have been notable for their pace and their contribution to a growing legal sophistication in China's corpus of family law. They expand on a series of major reforms in family law documented in my earlier *China Quarterly* article. Overall, it is in the area of divorce that the most dramatic changes have taken place in family law over the past decade.

This article examines the continuing evolution of family law in the People's Republic of China (PRC). Since the publication in 1995 of an earlier *China Quarterly* article on post-Mao Chinese family law,<sup>1</sup> the legal framework for family life has been reformed in order, inter alia, to deal with problems encountered with the regulatory system built up in the 1980s and early 1990s, and to respond to changes taking place in Chinese society. Two legislative developments are highly significant. First, the Marriage Law was revised in 2001,<sup>2</sup> and greater judicial attention then given to its implementation, especially

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1 Michael Palmer, "The re-emergence of family law in post-Mao China: marriage, divorce and reproduction," in Stanley Lubman (guest ed.), "Law in China Under Reform," *The China Quarterly*, No. 141 (1995), pp. 110–34; republished in Stanley B. Lubman (ed.) *China's Legal Reforms* (Oxford: Oxford University Press, 1996), pp. 110–34.

2 For details see, for example, Ma Yinan, *Hunyin jiating fa xinlun (New Discussions on Marriage and Family Law)* (Beijing: Beijing daxue chubanshe, 2002); Liu Shuqiang (ed.), *Zhonghua renmin gongheguo hunyin fa tiaowen jieshi (Explanation of the Articles in the Marriage Law of the People's Republic of China)* (Chengdu: Sichuan renmin chubanshe, 2001); Yang Xueming and Qu Zhi, *Xin "hunyin fa" redian jujiao (Focus on Controversial Issues in the new Marriage Law)* (Shenyang: Liaoning huabao chubanshe, 2001); Ma Yuan (ed.), *Xin hunyin fa ji sifa jishi shiyong zhinan (Practical Guidance on the New Marriage Law and Judicial Interpretations [on Marriage Law])* (Beijing: Renmin fayuan chubanshe, 2002); Ma Yuan (ed.), *Xin hunyin fa: anli pingxi (The New Marriage Law: Case Analysis)* (Beijing: Renmin fayuan chubanshe, 2002). Within family law circles in China, the debate on the reform of the Marriage Law amendments is regarded as a significant step forward in public participation in the process of law reform. Nevertheless, a number of the more radical suggestions made were rejected and the extent to which the debate was truly free and open must be doubted, given party-state control of the media.

in relation to divorce.<sup>3</sup> These changes were followed in 2003 by a further revision of the rules governing marriage (and divorce) registration.<sup>4</sup> Secondly, a synthesizing, national code of family planning was finally introduced, also in 2001,<sup>5</sup> and then extended in 2002 by State Council Measures on the Administration of Social Upbringing Charges.<sup>6</sup> Other notable developments include the 1998 revision of the Adoption Law<sup>7</sup> and the continuing evolution of a corpus of social protection law (*shehui baozhang fa* 社会保障法) including in particular the introduction of a law protecting the rights and interests of the elderly in 1996 and a revision of the 1992 Women's Protection Law in 2005.<sup>8</sup> A number of the changes mentioned above and considered in greater detail below are also related to shifting policies and practices regarding the role of various forms of dispute process – especially “mediation” (*tiaojie* 调节) – in Chinese social life in general and intra-familial disputes in particular.

Three specific aspects of family law are focused on: marriage, divorce and reproduction. These are the core of PRC “family law.” This focus does not accord exactly, however, with the “official” view in China, which regards rules and issues of family planning as largely falling outside family law, so that, for example, even compendia of rules on family law matters intended for judicial practice omit direct reference to legislation relating to reproduction and associated issues.<sup>9</sup> The present article and its predecessor, however, both assume that planned births and population policies and rules are so critical for

- 3 That is, the 2001 “Zuigao renmin fayuan guanyu shiyong ‘Zonghua renmin gongheguo hunyin fa’ ruogan wenti de jieshi [1]” (“Interpretation of the Supreme People’s Court on several problems concerning the application of the Marriage Law of the PRC [1]”), promulgated and in force 24 December 2001, and the 2003 “Zuigao renmin fayuan guanyu shiyong ‘Zonghua renmin gongheguo hunyin fa’ ruogan wenti de jieshi (2)” (“Interpretation of the Supreme People’s Court on several problems concerning the application of the Marriage Law of the PRC [2]”) promulgated 25 December 2003 and in force 1 April 2004 in *Hunyin fa peitao guiding (A Complete Set of Rules on the Marriage Law)* (Beijing: Zhongguo fazhi chubanshe, 2006) at pp. 14–18 and pp. 18–22 respectively. See also Zuigao renmin fayuan minshi shenpan diyi ting (First Civil Trial Chamber of the Supreme People’s Court) (ed.), *Hunyin fa sifa jieshi ji xiangguan falü guifan (Judicial Interpretations of the Marriage Law and Relevant Legal Provisions)* (Beijing: Renmin fayuan chubanshe, 2001); Huang Songyou (ed.), *Hunyin fa sifa jieshi (2) de lijie yu shiyong (Understanding and Applying The Second Judicial Interpretation of the Marriage Law)* (Beijing: Renmin fayuan chubanshe).
- 4 Marriage Registration Regulations (*Hunyin dengji tiaoli*), promulgated by the State Council, 8 August 2003 and in force 1 October 2003, in *A Complete Set of Rules on the Marriage Law*, pp. 42–48.
- 5 “Zonghua renmin gongheguo renkou yu jihua shengyu fa,” promulgated 29 December 2001 and in force 1 September 2002, in *Renkou yu jihua shengyu fa ji qi peitao guiding (The Population and Birth Planning Law and a Complete Set of its Rules)* (Beijing, Zhongguo fazhi chubanshe, 2003) at pp. 1–9.
- 6 “Shehui fuyang zhengshou guanli banfa,” in *ibid.* at pp. 135–37.
- 7 “Zhonghua renmin gongheguo shouyang fa,” revised and in force 4 November 1998, in *A Complete Set of Rules on the Marriage Law*, pp. 23–27.
- 8 See Michael Palmer, “Protecting the rights and interests of the elderly: developments in the family law of the People’s Republic of China, 1996–8,” in A. Bainham (ed.), *The International Survey of Family Law: 1999* (Dordrecht: Kluwer (for The International Society on Family Law), 1999), pp. 95–107, and Michael Palmer, “On China’s slow boat to women’s rights: revisions to the Women’s Protection Law, 2005,” in P. W. Chan (ed.), special issue of *International Journal of Human Rights* on “Equality in the Asia Pacific,” Vol. 11, Nos. 1 and 2 (2007), pp. 151–77.
- 9 See, for example, China Legal System Press, *Hunyin jiating ban’an changyong shouce (An Everyday Handbook for Handling Cases of Marriage and Family)* (Beijing: Zhongguo fazhi chubanshe, 2006), and Huang Songyou (ed.-in-chief), *Hunyin jiating sifa jieshi shili shijie (Marriage and Family: Explanation of Judicial Interpretations and Concrete Cases)* (Beijing: Renmin fayuan chubanshe, 2006).

family life in contemporary China that their inclusion is essential. The current study therefore examines developments in this area, as well as in another and related mode of reproduction and recruitment to the family, namely adoption. It thus considers the nature and significance of the legal changes that have taken place in these four dimensions of family law since 1995. While highly important changes have occurred in all four areas, it is probably in the law of divorce that the most significant developments have occurred.

### The Reforms of 2001

The socio-political contexts within which the two most significant statutory developments since 1995 took place offer a strong contrast. On the one hand, much publicity preceded and accompanied the revision in 2001 of the Marriage Law (*hunyun fa* 婚姻法) 1980, with often heated debate among those doing the revision, and also a considerable degree of openly expressed controversy over some of the key issues.<sup>10</sup> These included the nature of marriage, the notion of a “relative” (*qinqi* 亲戚), and various aspects of divorce including the grounds for divorce, property and custody rights, compensation for morally blameworthy conduct leading to divorce, and the appropriate responses to domestic violence. Within these discussions, it was possible to discern shifting ideas about appropriate boundaries between the public sphere and private life – in particular, the appropriateness of state intervention in family matters. On the other hand, remarkably little fanfare surrounded the promulgation of the Population and Birth Planning Law (*renkou yu jihua shengyu fa* 人口与计划生育法) later the same year. In formal, legal terms this is perhaps best explained by reference to the different legislative tracks that the two developments were apparently assigned. Although both legislative advances were promulgated by the Standing Committee of the National People’s Congress, the Marriage Law revisions took place within a procedural framework clearly informed by some of the reforms encouraging openness and greater public consultation introduced by the 2000 Law on Legislation. In contrast, the family planning code involved a much more restricted approach, with virtually no public deliberation. This lack of openness reflected the politically-sensitive nature of population control, and such conservatism should be borne in mind, for example, when making judgements about the significance of family law in post-Deng China for an emerging civil society.

### Marriage

As indicated in the earlier *China Quarterly* article, in the PRC marriages are concluded in law by registration, not by celebration. The legal requirement of

10 For an admirable analysis of key aspects of the reform of the Marriage Law in 2001 see William Alford and Yuanyuan Shen, “Have you eaten, have you divorced? Debating the meaning of freedom in marriage in China,” in William C. Kirby (ed.), *Realms of Freedom in Modern China*, Vol. 15, “Making of modern freedom” series (Stanford, CA: Stanford University Press, 2004).

registration must be fulfilled, but in practice is often ignored by couples and their families, who consider celebration of marriage in traditional style more important.<sup>11</sup> This has resulted in various difficulties including, in particular, official treatment of unregistered unions and enforcement of family planning rules.

The system of compulsory marriage registration remains in place today, but during the past few years attempts have been made to respond to pressures of legal practice and social change, and to give greater recognition to the view that marriage is a private process. Changes were introduced by, first, the 2001 revision to Chapter 2 of the Marriage Law; secondly, by two Interpretations from the Supreme People's Court on the revised Marriage Law in 2001 and 2003 respectively; thirdly, by the 2003 revision of the rules on the processes of marriage and divorce registration in which a new meaning for "marriage registration" is promoted (symbolically indicated by discarding the term "administration" from the rules' title)<sup>12</sup>; and finally, the 2005 revision of the Women's Protection Law.<sup>13</sup>

As a result, modifications have been made to the legal conditions of capacity for marriage. Reflecting medical advances in China, leprosy is no longer explicitly characterized as a condition rendering a person unfit for marriage.<sup>14</sup> In addition, difficulties in identifying and dealing with invalidity of marriage are addressed by provisions in the revised Marriage Law at Articles 10 and 12. In particular, a marriage is characterized as void (*hunyin wuxiao* 婚姻无效) *ab initio* if the minimum legal ages of marriage have not been attained (albeit with rectification possible if the union has not been registered: see below), one of the intending spouses is already married, or the proposed marriage falls within the prohibited degrees.

Unregistered "marriages" between parties in which at least one of the intending spouses is underage have been a widespread problem in post-Mao China, reflecting not only continued adherence to traditional ideals that regard marriage as a matter of celebration rather than registration but also social pressures for early wedlock in order to commence reproduction. The authorities' response has been increasingly to impose strict requirements of registration and to limit judicial recognition of unregistered unions as "de facto marriages" (*shishi hunyin* 事实婚姻). However, this restrictive approach, closely associated with family planning policy, was criticized during the debates on revision of the Marriage Law, and was in particular considered to be inimical to the interests of rural women. As result, the revised Marriage Law permits retrospective registration: "in the absence of marriage registration, the man and the woman

11 Palmer, "The re-emergence of family law in post-Mao China," at p. 118.

12 Marriage Registration Regulations, 2003 replacing the Regulations on the Administration of Marriage Registration, 1994. See further below, n. 19.

13 That is, "Zhonghua renmin gongheguo funü quanyi baozhang fa" ("The Law on the Protection of Rights and Interests of Women of the People's Republic of China"), revised and in force 25 August 2005, in *A Complete Set of Rules on the Marriage Law*, pp. 28–36.

14 Marriage Law of the People's Republic of China 1980, as revised 2001, at Article 7.

should (*yingdang* 应当) go through registration procedures.”<sup>15</sup> The 2003 revised Marriage Registration Regulations provide at Article 8 for a process of “remedial marriage registration” (*buban jiehun dengji* 补办结婚登记) for unregistered unions. In addition, the courts have the jurisdiction to deal with cases of void marriage, and their decisions in such cases are then filed with the relevant marriage registration organs (Article 16). The revised Marriage Law itself affords little scope for retrospectively legitimating a union as in many cases the problem is that the parties commenced their union when one partner (or both) was underage.<sup>16</sup> In order to deal with this problem, the 2001 Interpretation at Article 4 allows for recognition of unregistered relationship in which one party (or both) was underage: the union may be characterized as one of lawful marriage from the moment when the parties attain the age of capacity to marry. Moreover, when a couple in an unregistered relationship seek divorce, then the relationship may be characterized as *de facto* marriage if both parties satisfied the substantive conditions for marriage prior to promulgation of the Regulations on the Administration of Marriage Registration on 1 February 1994. In cases in which one or both parties only attained the age of capacity to marry subsequent to that date, the couple must register their union before any matrimonial proceedings may commence (Article 5).<sup>17</sup> Nevertheless, the above developments indicate an important shift in official policy on unregistered unions. Hitherto, the trajectory of change had been increasingly to regard unregistered unions an unlawful cohabitation (*feifa tongju* 非法同居). There is now some relaxation in this approach, reflecting official acknowledgement of the predominance in numerous areas of the countryside of customary celebration over legal registration in the conclusion of marriage.

In the process of declaring a marriage void, significantly greater attention is also given to procedural issues. Thus, Article 10 of the revised Marriage Law not only gives the spouses themselves but also confers on “persons with an interest” (*li-hai guanxi de ren* 利害关系的人) the right to apply for a declaration of void marriage in cases of bigamy. Such interested persons include not only close relatives but also “grassroots” organs. Moreover, in considering the validity of a marriage following an application under Article 10 of the revised Marriage Law, mediation may be used by the court only in respect of distribution of property and custody of children: the decision on the substantive validity of the “marriage” itself must be made by adjudication. In addition, the 2003 Interpretation provides that an application for a declaration of void marriage, once started, may not be retracted. The court must declare the marriage void if it finds merit in the application (Articles 2 and 3). If there are concurrent suits for a

15 At Article 8.

16 Article 10 provides that a “marriage” remains invalid if the parties fall short of the minimum legal ages of marriage, and a void marriage is invalid from its inception (Article 12).

17 Article 6 provides that the same principles also apply where one party dies and the other claims succession rights in the estate of the deceased.

declaration of void marriage and for divorce, the former is given prior consideration by the court (Article 7).

A third significant area of development concerns forced marriage (*xiepo hunyin* 胁迫婚姻). The revised Marriage Law introduces new provisions (in Article 11) that empower a party coerced into marriage to seek abrogation of the marital relationship within one year either from the date of marriage registration or of securing their freedom. Only the coerced party in a marriage may make such an application, according to the 2001 Interpretation at Article 10, which characterizes such “marriages” as unions in which one party compels the other “to enter into marriage against her or his will by threatening the intimidated party or close relatives of that party with harm to life, health, reputation, property and so on.” This is clearly an important step in strengthening women’s rights, although the time limit of one year is rather short for a woman thus coerced to adjust to her new situation and to decide on whether to remain in the forced marriage.

Perhaps indicative of the relatively widespread nature of forced marriage, the 2003 revised Marriage Registration Regulations allow marriage registration organs as well as courts to handle applications from those pressed into marriage against their will (Article 9). The petitioner submits the appropriate documentation to a registration official who then considers the facts of the case. If there is sufficient evidence of coercion, and problems concerning child maintenance, property and debts are revolved, the registrar rescinds the marriage and declares the marriage certificate invalid (Article 9). It would seem, however, that no procedures are yet in place for dealing with customary unions that have been entered into by force.<sup>18</sup>

Fourthly, the revised Marriage Law attempts to deal with growing problems in the “monogamous” nature of marriage. In particular, there has been the re-appearance in southern China of the phenomenon of taking concubines (*bao'er nai* 包二奶). This reflects, inter alia, enhanced wealth in the southern China countryside and the continued popular belief in the importance of maintaining patrilineal descent lines (an importance that continues to be indirectly acknowledged officially in family planning regulations, as shown below). In the debates surrounding the revision in 2001 of the Marriage Law, the All-China’s Women’s Federation pushed hard to make the taking of concubines into a national moral panic, and in this atmosphere some critics of the practice of concubinage argued that the revised Marriage Law should make it a criminal offence. Such arguments were rejected on the ground that the Marriage Law is essentially civil law, and to criminalize concubinage would be to overextend public interest in private matters. However, the General Principles section of the revised marriage code now provides that “cohabitation of a married person with

18 The detailed rules on the property division dimensions of void and voidable marriages are not considered here, for reasons of space. Suffice it to note that the 2003 Interpretation at Article 1 guarantees cohabiting parties the right to bring suit if disputes arise over division of property and custody of children.

any third party shall be prohibited” (Article 3, para. 2), and concubinage is also made a ground for divorce. Nevertheless, concubinage does not in itself constitute a crime and the 2003 Interpretation also sets limits on the public response to it: in ordinary cases of cohabitation, the courts may not order the cohabitants to cease living together, and it seems that a man and his concubine in a stable relationship will not be required to terminate their cohabitation unless a complaint is made to the court (Article 1).

A fifth notable change is in the procedures for marriage registration. As noted above, the change in name from Regulations on the Administration of Marriage Registration (*hunyin dengji guanli tiaoli* 婚姻登记管理条例), promulgated in 1994, to Marriage Registration Regulations (*hunyin dengji tiaoli* 婚姻登记条例) in 2003 reflected official acceptance of the view that hitherto there has been excessive state interference in married life.<sup>19</sup> The more liberal procedures may also be seen as a response to the declining importance of state-owned enterprises as institutions of social control. The amendments were also a product of a change in official thinking on the “private international law” dimensions of marriage registration, as the 2003 reforms create a unified system in which the parties are not only Chinese citizens but also “compatriots” in Hong Kong, Macau and Taiwan, and foreign parties, thereby ending the hitherto separate regimes for these categories (Article 5). The revised Regulations introduce two further changes. First, the marrying parties must now themselves demonstrate that they have the capacity to marry – assuring the registrar that they are not already married to others nor close consanguines, and so on. Prior to this change, this responsibility was often assumed by work units. Secondly, the policy increasingly imposed in the 1990s requiring intending spouses to undergo pre-marital medical check ups – expressed in robust terms in Article 9 and 10 of the 1994 Regulations – has been abandoned. In part, this reflects the fact that the examination scheme has not worked well. It also reflects an official recognition that marriage and reproduction are not quite the same thing. Thus, although the 2003 Regulations no longer require pre-marital medical check-ups, the revised Women’s Protection Law of 2005 at Article 51 contains a new provision on pregnancy health care systems that suggests that women will still be encouraged to undergo pre-marital medical check-ups, and certainly prior to attempting pregnancy.

Finally, the revised Marriage Law also attempts to deal with the somewhat paradoxical situation that while parental interference in marriage has declined in post-Mao China, the obstruction of parental marriage by adult children – anxious, for example, about the adverse impact of an intended re-marriage on their inheritance rights – has been on the increase.<sup>20</sup> As a result, the revised Marriage Law contains a new provision at Article 30 which forbids children

19 See, for example, Yang Dawen and Long Yifei, *Hunyin jiating faxue (Marriage and Family Law)* (Beijing, Zhongguo renmin daxue chubanshe, 2006), pp. 116–19; the full text of the revised regulations is provided at pp. 330–33.

20 See Palmer, “Protecting the rights and interests of the elderly.”

from blocking the remarriage of a parent.<sup>21</sup> Moreover, and consistent with welfare policies that continue to define the family as an important unit of care and welfare for the elderly, the same Article stipulates that the remarriage of a parent does not release the children from their obligation to support (*shanyang* 赡养) their parents. This confirms Article 19 of the Elderly Persons Law 1996, which also safeguards the right of the elderly to divide and distribute their own property (*geren caichan* 个人财产) as they see fit, free from any obstruction from their children or other relatives, including attempts by such kinsfolk to secure the property by force.

## Divorce

The issue of divorce has also been subject to very significant legal change over the past decade. The statistical evidence points to a considerable increase in the divorce rate during the post-Mao period as a whole – from an initial figure of 3 per cent to 20 per cent in some areas by the late 1990s.<sup>22</sup> This is the result of a number of different causes, but several stand out as especially important: a relaxation in the grounds for divorce in contested applications,<sup>23</sup> a reduced willingness on the part of young people to endure unhappy marriages in China’s increasingly open and economically developed society, and the emergence of a more professional and younger judiciary. Freedom of divorce, especially for women, appears at long last to be becoming a reality in socialist China.

Nevertheless, the 2001 revisions to the Marriage Law continue to reflect a moralistic and judgemental approach to contested divorce. This approach infused the 1989 Supreme People’s Court Opinions on divorce,<sup>24</sup> and the 2001 revisions have now put in place a system that deals more effectively with issues of fault and compensation for blameworthy conduct. In particular, compensation may be sought by a “party without fault” (*wu guocuo fang* 无过错方) if matrimonial breakdown results from bigamy, cohabitation with a third party, domestic violence, or maltreatment and desertion.<sup>25</sup> Another highly significant

21 See also Article 18 of the 1996 Law on the Protection of Rights and Interests of the Elderly, which provides: “freedom of marriage of the elderly is protected by law. Children and other relatives may not interfere in the divorce, remarriage or married life of the elderly. The obligations to provide support ... does not alter with a change in the marital relations of the elderly person.” *Zhonghua renmin gongheguo laonianren quanyi baozhang fa*, in *Guowuyuan fazhi bangongshe* (Office of the Legislative Affairs Office of the State Council) (ed.), *Xinbian Zhonghua renmin gongheguo changyong falü fagui quanshu* (*Newly Compiled Compendium of Frequently Used Laws and Regulations of the People’s Republic of China*) (Beijing, Zhongguo fazhi chubanshe, 1999) pp. 1700–05.

22 Michael Palmer, “Marriage reform and population control: changing family law in contemporary China,” in A. Bainham (ed.), *The International Survey of Family Law: 2005* (Bristol: Jordan Publishing (for The International Society on Family Law), 1997), pp. 173–201, at p.185.

23 See Michael Palmer, “The People’s Republic of China: more rules but less law,” in M. Freeman (ed.), *Annual Survey of Family Law: 1989*, Vol. 13 (London: The International Society on Family Law, 1991), pp. 325–42, at pp. 333–36.

24 *Ibid.*

25 These provisions, contained in Article 46, have been elaborated in the 2001 Interpretation, which provides that a court may not disallow a divorce application if the petitioner is to some extent also blameworthy (Article 23), and by the 2003 Interpretation, which stipulates at Article 27 that when marriage registration organs are dealing with cases of divorce by mutual consent, it is still possible for one party to seek compensation for the matrimonial misconduct of the other spouse.



development has been a growth in concern with the issue of domestic violence (*jiating baoli* 家庭暴力). Economic restructuring, international pressure (in particular from CEDAW)<sup>26</sup> and an increased tendency for husbands to take revenge against an unfaithful spouse<sup>27</sup> are among the factors which encouraged the introduction, at Article 43 of the revised Marriage Law, of new provisions which attempt to provide better protection for women victims. Moreover, the 2001 Interpretation offers a definition of domestic violence for the first time in national law, and includes within that definition beating, tying-up, maiming and restricting personal freedom (for example by the use of force) such that mental or physical harm results. Maltreatment, however, must be “persistent” and “frequent” before it can be characterized as domestic violence. Another significant limitation is that, according to Article 3 of the 2001 Interpretation, a victim of domestic violence may not bring suit under Article 4 of the revised Marriage Law, even though that Article encourages mutual respect and assistance between family members.

Women suffering from domestic violence continue to be encouraged to seek intervention from their local people’s mediation committee, which is expected to persuade the husband to cease his misconduct. However, in more serious cases the local public security bureau is also expected to intervene and, at the victim’s request, may impose administrative sanctions on the husband. In addition, a wife who has suffered domestic violence may bring a private prosecution (*zisu* 自诉), and both the public security bureau and the procuracy are expected to assist her.

This shift in the policy and regulatory framework for dealing with domestic violence is significant. Although the processes of mediation and administration sanctioning continue to be emphasized, domestic violence is now characterized as not only a private dispute but also a matter of public concern, and therefore also the concern of criminal law and judicially imposed punishment. As in the debates on concubinage, the public–private divide is shifting in order better to protect women.

### *Matrimonial estate*

The regulatory framework governing domestic property relations was put under increasing stress in the 1990s as a result of China’s rapid economic development and social change. The forms and value of domestic property have expanded significantly, and property dealings between spouses and third parties grown considerably. Accordingly, the ownership, contents and value of matrimonial

26 See “Patriarchy, privacy and protection: slowly conceptualizing domestic violence in Chinese law,” in Natalia Iu. Erpyleva, Jane Henderson and M. Butler (eds.), *Forging a Common Legal Destiny: Liber Amicorum in Honour of Professor W. E. Butler* (London & New York: Wildy, Simmonds and Hill, 2005), pp. 786–812.

27 Yang Xueming and Qu Zhi, *Xin “hunyin fa” redian jujiao (Focus on the Controversial Issues in the New Marriage Law)* (Shenyang: Liaoning huabao chubanshe, 2001), pp. 212–61.

assets have become more complicated, often making difficult the task of dividing the estate upon divorce.<sup>28</sup>

One probable result of this increasing complexity is that negotiation between the parties for securing division of the matrimonial estate is the preferred form of decision-making. While a negotiated outcome should be lawful, and not contravene the interests of third parties, serious power imbalances will nevertheless often affect the decision-making process. There is a real danger that the rights and interests of divorcing wives are insufficiently safeguarded. Some protection is offered by Article 47 of the revised Marriage Law, which provides that a party who is discovered to have concealed or alienated the property, or to have created false debts, will receive, *inter alia*, a smaller share of the matrimonial estate (Article 47).

The changing circumstances also stimulated vigorous debate on a number of key issues: for example, should the intellectual property rights of one spouse be included in the matrimonial estate to be divided at divorce, or excluded on the basis that this will be an incentive for originality and creativity? The revisions to the 2001 Law are a compromise, with earnings from intellectual property rights characterized as joint spousal property, but the ownership of the property rights themselves remaining under the individual ownership of the inventive spouse. These provisions are now contained in Article 17 of the revised Law, and that and the following Article together with the relevant sections of the two judicial interpretations of the Marriage Law now offer a significantly reformed system. Thus, the 2003 Interpretation now provides explicit rules on the often difficult

28 Custody is not considered to require new regulation so that the provisions in the Marriage Law and the 1993 “Zuigao renmin fayuan guanyu renmin fayuan shenli lihun anjian chuli zinu fuyang wenti de ruogan juti yijian” (“Several concrete opinions of the Supreme People’s Court on the problems of bringing up children in divorce cases handled by the Supreme People’s Court”), 3 November 1993 remain the main source of rules. The fundamental principle is found in Article 36 of the revised Marriage Law (Article 29 in the old version of the 1980 Law) which provides that after divorce ordinarily the mother is awarded custody of a child that is still being breast-fed (in the 1993 Opinions the wording is a child who is under two years of age). For older children, custody is a matter of agreement between the two parties. However, if they are unable to reach an agreement and a dispute arises, the court is expected to award custody on the basis of the child’s interests, the circumstances of the divorcing spouses, and in cases in which the child is ten years old or above, the wishes of the child (Article 36 of the revised Marriage Law, and Articles 3 and 5 of the 1993 Opinions). The 1993 Opinions at Article 3 envisage a range of circumstances in which custody might be awarded to the father rather than the mother. Although neither the revised Marriage Law nor the 1993 Opinions deal with the issue of access for non-custodial parents, the Opinions do allow for joint custody (Article 6). Child support payments for children up to the age of 18 are a function of the child’s needs, the financial circumstances of the parents and local cost of living, but ordinarily will not exceed 30% of a parent’s fixed income (Article 7). For a more detailed analysis of custody provisions at divorce see Michael Palmer, “Women to the fore: developments in the family law of the PRC,” in A. Bainham (ed.), *Annual Survey of Family Law: 1994* (Dordrecht: Kluwer (for The International Society on Family Law), 1996), pp. 155–79. Suffice it to say that court awards of custody to women continue to suffer from problems of enforcement, especially in rural areas. The revised Law at Article 38 does, however, confirm the rights of non-custodial parents to visit their children. These are in the first instance a matter of negotiation between the parents and only if they are unable to agree should a court make an order. If visitation by a non-custodial parent leads to a decline in the wellbeing (include mental health) of a child, then the court may order a cessation of the visits until such time as the child’s wellbeing is restored.

issue of betrothal gifts,<sup>29</sup> allowing for their return in matrimonial proceedings where the spouses failed to register their marriage or to cohabit after marriage registration, or where the donor has experienced financial difficulties as a result of his generous gift.<sup>30</sup> In Article 18 of the 2001 revised Law and Article 11 of the 2003 Interpretation, significantly clearer guidance is given to judges faced with the sometimes difficult task of separating out individual and matrimonial property. Very importantly, from the point of view of gender equality, the matrimonial estate includes investment income, endowment insurance and other property and benefits acquired during the marriage. Similarly, Article 13 of the 2003 Interpretation provides that any demobilization fee or similar payment made to a spouse leaving the People's Liberation Army is characterized as joint spousal property, to be divided equally at divorce.

Another problematic area of matrimonial property relations arises from the fact that increasingly the estate involves property that is in part external to the family in that it relates to business dealings, debt, and equity and partnerships. Take, for example, the case of a partnership in which one of the divorcing spouses is a partner. Article 17 of the 2003 Interpretation stipulates that the other spouse may join the partnership if all the other partners agree. If such consent is not forthcoming, one of several solutions is permitted, including purchase or return of the divorcing spouse's share, followed by a partitioning of the proceeds between the wife and husband. To take another example, in the case of a family debt, should repayment be made by the party who originally borrowed the sum, or should it be repaid by both parties from their mutual property? The 2003 Interpretation offers a variety of answers, depending on the circumstances under which a debt was incurred and used. Thus, a debt incurred by one spouse prior to marriage remains a personal debt unless it has been "spent on family living during the marriage" (*yongyu hunhou jiating gongtong shenghuo* 用于婚后家庭生活共同生活) (Article 23) whereas a debt incurred during the course of the marriage is presumed to be the joint liability of the spouses unless otherwise agreed, with the spouse against whom a joint debt has been enforced able to recover the money from the other spouse by an agreement at divorce or a court order (2003 Interpretation, Article 23; 1980 Marriage Law [as revised 2001], Article 31).

The development of privately owned housing, too, requires new rules for apportioning rights in the matrimonial home. Reflecting the shift from housing provided by the work unit to private ownership, Article 19 of the 2003 Interpretation provides that a home rented by one spouse before marriage but

29 For earlier discussions of the difficulties that the people's courts have faced in resolving betrothal gift disputes, see Michael Palmer, "The People's Republic of China: problems of marriage and divorce," in M. Freeman (ed.), *Annual Survey of Family Law: 1987*, Vol. 11 (London: The International Society on Family Law, 1988), pp. 57–79, at pp. 65–66, and Michael Palmer, "Caring for young and old: developments in the family law of the People's Republic of China," in A. Bainham (ed.), *The International Survey of Family Law: 2000* (Bristol: Jordan Publishing (for The International Society on Family Law), 2000), pp. 95–107, at p. 100.

30 See Section 10, paragraph 1 of the 2003 Interpretation.

purchased by the couple post-marriage is characterized as joint property even if registered in the name of only one spouse. If there is a dispute between the parties on ownership or the value of the matrimonial home, a negotiated agreement is the preferred outcome, and the people's court is not allowed to make a decision on ownership. If the property is not sold and the proceeds divided (Article 20), the court may award occupation to one of the spouses based on actual circumstances of the case (*yingdang genju shiji qingkuang panjue you dangshiren shiyong* 应当根据实际情况判决由当事人使用) (Article 21). The lack of detail and precision in these rules seems unlikely to assist the position of the divorcing wife, although some protection may be offered in the characterization in Article 22 of parents' contribution to the purchase price of matrimonial property as a personal donation to their own child. With respect to work unit housing, Article 42 of the revised Marriage Law is confirmed by Article 27 of the 2001 Supreme People's Court Interpretation as encouraging a husband whose work unit has provided accommodation for a married couple to assist in continuing to provide such accommodation for the use of his erstwhile wife. Again, the lack of a firm requirement for such help is not likely to safeguard the position of the wife in these circumstances.

## Reproducing – Population Control

Although one of the most important ways in which the state has intruded into Chinese family life in the post-Mao period has been through restrictions placed on reproduction and family size,<sup>31</sup> it was not until the turn of the century that a full, national-level code of birth control was introduced. In 2000 the Central Committee of the CCP and the State Council issued a joint Decision on Strengthening Population and Family Planning Work,<sup>32</sup> and late in the following year the Law on Population and Birth Planning was promulgated. This provides a general framework within which the more detailed provincial regulations on family planning may now operate. It continues to reflect an approach that sees population control as a demographic problem, to be dealt with by bureaucratic regulation, rather than an issue of reproductive rights. The Law has since been supplemented by, in particular, the State Council's 2002

31 For excellent analyses of the tensions between the state and the family, especially as manifested in the countryside, and of the conflicts between the official ideal of a "socialist family" and continued adherence to the values of the patriarchal family see the work of Tyrene White, including "Two kinds of production: the evolution of China's family planning policy in the 1980s," *Population and Development Review*, Vol. 20, Supplement: "The new politics of population: conflict and consensus in family planning," 1994, pp. 137–58, "Domination, resistance and accommodation in China's one-child campaign," in Elizabeth J. Perry and Mark Seldon (eds.), *Chinese Society: Change, Conflict and Resistance* (London & New York: Routledge, 2000) and the splendid *China's Longest Campaign: Birth Planning in the People's Republic 1949–2005* (Ithaca, NY: Cornell University Press, 2006). Also see the insightful study by Susan Greenhalgh and Edwin A. Winkler, *Governing China's Population: From Leninist to Neoliberal Biopolitics* (Stanford, CA: Stanford University Press, 2005).

32 "Zhonggong zhongyang, guowuyuan 'guanyu jiaqiang renkou yu jihua shengyu gongzuo wending dai shengyu shuiping de jue ding'," issued 2 March 2000, at [http://www.chinapop.gov.cn/rkzh/rk/wxzl/t20040326\\_2869.htm](http://www.chinapop.gov.cn/rkzh/rk/wxzl/t20040326_2869.htm).

Measures on the Administration of the Upbringing Charge, as well as some revisions to the provincial regulations.

Article 2 of the 2001 Law declares that birth planning is a fundamental policy of the state, and re-affirms the commitment to both the quantitative and eugenics aspects of population control. In recognition of the manner in which the population control programme has persistently affected women negatively, the 2001 Law stipulates that population and birth planning work should be supplemented by efforts to enhance women's educational and employment opportunities, health and social status. In addition, Article 22 prohibits maltreatment of both daughters and women who give birth to daughters or who are infertile. Family planning workers are obliged to observe the law in performing their duties, to respect citizens' rights and interests, and to enforce the law in a civilized manner (*wenming zhifa* 文明执法). Birth targets remain a central feature of the system, according to Articles 9 to 12 of the 2001 Law, with all levels of government – from the State Council down to neighbourhood and township government, assisted by local urban residents' and villagers' committees – being given responsibility for meeting such targets. Local regulations too sustain the target system: “a target management responsibility system (*mubiao guanli zeren zhi* 目标管理责任制) is implemented in population and birth planning work. A people's government at a higher level assigns population and birth planning responsibilities to lower level people's governments, and examines, rewards and punishes the lower entities” according to their success in implementing such responsibilities (Article 11, Beijing Municipal Regulations on Population and Birth Planning, 2003).<sup>33</sup>

Chapter 3, “Regulating reproduction” (*shengyu tiaojie* 生育调节), structures the way in which this system affects individual families. It continues to be assumed that reproduction only takes place within marriage,<sup>34</sup> and therefore requires “husbands and wives” to practise family planning (Article 17) by using contraceptives, accepting the advice of birth planning services and terminating “unwanted pregnancies” (非意愿妊娠 *fei yiyuan renshen*) (Article 20). Late marriage and late childbirth are encouraged, and ethnic minorities are also required to practise birth planning (Article 18). Nevertheless, Article 17 also concedes that “citizens have the right of childbearing (*shengyu*

33 “Beijing shi renkou yu jihua shengyu tiaoli” (“Beijing municipal regulations on population and birth planning”), at <http://www.bjfc.gov.cn/Article/Detail.asp?UNID=6485>, adopted 18 July 2003 and in force 1 September 2003. Since the introduction of the 2001 Law, many of the provincial regulations on family planning have been amended, and the 2003 Beijing Regulations are used here as an illustration of the new generation of such rules.

34 “Waishengbu ‘guanyu xiuding renlei buzhu shengzhi jishu yu renlei jingziku xiangguan jishu guifan jiben biao zhun, he lunli yuanze de tongzhi’” (“Notice of the Ministry of Health ‘Regarding the revision of the relevant technical parameters, basic standards and ethical principles related to IVF technology and sperm banks’”) (available at <http://www.moh.gov.cn/newshtml/3215.htm>) at Section 4, Articles 5 and 13 bans surrogacy, thereby overruling a radical provision introduced by the Local People's Congress of Jilin which allowed surrogacy and therefore birth outside marriage. “Jilin sheng renkou yu jihua shengyu tiaoli” (“Regulations of Jilin province on population and birth planning”) adopted 27 September 2002 and in force 1 November 2002, available at <http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co32938550-7>.

生育)”<sup>35</sup> and Article 18 confirms that while the basic rule is that each married couple may bear only one child, there are certain circumstances in which a second is permitted. These conditions, which are detailed in local-level rules, typically include the birth of a first child who has developed a non-hereditary disability that will make it difficult to perform productive labour later in life, the fact that both husband and wife are themselves single children, a misdiagnosis of barrenness in the wife combined with a passage of more than five years after the adoption of a child, a remarrying husband and wife who have between them only one child, and so on.<sup>36</sup>

Chapters 4 and 5 of the 2001 Law codify the schemes of incentives and penalties that evolved in the 1980s for the purpose of promoting good conduct in family planning matters. In Chapter 4, Article 25 allows couples who marry and give birth at a relatively late age to enjoy, *inter alia*, the bonus of an extended wedding holiday and longer childbirth leave. Article 26 stipulates that benefits may be conferred on individuals who undergo abortion and sterilization, as well as special protection afforded working women during pregnancy, childbirth and breast feeding. In addition, couples willing to make a public pledge to use birth control and to limit themselves to one child are entitled to receive their “Honour Certificate for the Parents of a Single Child” (*dusheng ziniu fumu guangrong zheng* 独生子女父母光荣证) and the benefits this may bring. Such rewards will vary from area to area but typically include monthly subventions, privileged housing provision, access to health service without charge, reduced school fees and so on. More generally, Article 24 promises the development of pension and similar welfare schemes in order to encourage couples to think of the state rather than a large family as a source of support in old age. On the other hand, Chapter 5 provides for punishment of those who break the official rules of the family planning game: perhaps most importantly, there is the Social Compensation Fee (*shehui fuyang fei* 社会抚养费), regarded as reimbursement to society for the additional load imposed on it by a couple bearing a child outside the plan. Failure to pay such charges on time gives rise to additional charges, and if necessary these may be enforced through the people’s courts (Article 41). In addition, those employed by the state who bear a child outside the plan will also incur administrative or disciplinary punishments (Article 42). An unanticipated consequence of the system of heavy fines, however, is that those outside the state sector who are able to afford the charges increasingly see such payments as merely an additional cost necessarily incurred for the sake of having a family of

35 This has given rise to worries within China that Article 17 may be relied on as a defence against accusations of rape within marriage.

36 Ordinarily, the couple will also have to wait four years after the birth of their first child before a second child application will be permitted: see Article 17 of the Beijing Municipal Regulations. Article 17(6) allows a couple to apply for a second child where the husband is a rural resident and he is the only one of several brothers who is able to procreate. In these circumstances he is likely to allow any son born as the second child to be adopted by his brother in the classic form of *jiantiao* or “double ancestral hall” adoption, which is aimed specifically at continuing a patriline that would otherwise become extinct.

the size that they want.<sup>37</sup> Perhaps in an effort to counteract this tendency, the 2002 Measures provide that the level of charges may vary in accordance with local living standards (Article 3). Other punishments include return of a single-child certificate and the benefits it has conferred (see, for example, the Beijing Regulations, Article 39), and sanctions against state officials and others who produce false certificates, take bribes, overcharge and otherwise conduct themselves in an unlawful manner that undermines the system (2001 Law, Articles 36–39). Those subjected to punishment under the Measures may seek relief through either administrative review or an administrative suit (Article 9).<sup>38</sup>

Three additional problems that receive attention in the 2001 Population and Birth Planning Law are eugenics, migrants and gender. Thus, the Law confirms the Mother and Child Health Care Law's concern with eugenics. At Article 11 it states that its purposes include not only the protection of the health of mothers and children but also the enhancement of the quality of China's population (*renkou suzhi* 人口素质). The 2003 Beijing Regulations, too, at Article 2 maintain the goal of improvement of "population quality," and both the national Law and local regulations support the system of gynaecological clinics that is strongly linked with China eugenics policies (2001 Law, Articles 30–34, and Beijing Regulations, Articles 28–32). The problem of evasion of birth limitation rules by China's migrant workers<sup>39</sup> is addressed in Article 14 of the 2001 Law. This provides that ensuring migrant workers' compliance with the family planning restrictions is a task for not only their place of household registration but also their current place of residence, and that it is the authorities in the current location that bear the principal administrative responsibility. The Beijing Regulations stipulate that a special duty for managing population and birth planning work among migrant workers is borne by the public security organs.

With respect to gender issues, in addition to the problem of domestic violence, a continuing general difficulty is the disproportionate responsibility placed on women for shouldering the burdens of the population control system. The post-2000 revisions to birth planning law do little to change this situation other than by the general provisions noted above, although the greater role in the legislative process that is envisaged for the All-China Women's Federation by the 2005 revisions to the Women's Protection Law may also improve the position longer

37 The ability of some families to afford an extra child does, of course, have eugenics dimensions: in effect, it allows economically more successful urban residents to enjoy larger families, and this is something that has been considered in the past as a way of helping China to develop a "higher-quality" population. See Michael Palmer, "Protecting the health of mothers and their children? Developments in the family law of the People's Republic of China," in A. Bainham (ed.), *The International Survey of Family Law: 1995* (Bristol: Jordan Publishing (for The International Society on Family Law), 1997), pp. 107–16.

38 On these two systems, see Michael Palmer, "Controlling the state? Mediation in administrative litigation in the People's Republic of China," in Larry Backer (ed.), "China: law, finance and security," *Transnational Law & Contemporary Problems*, Vol. 16, No. 1 (2006), pp. 165–87.

39 See, for example, Thomas Scharping, *Birth Control in China 1949–2000: Population Policy and Demographic Development* (London & New York, Routledge, 2003), at p. 155.

term. A more specific issue is the severe shortage of girls that has developed in China over the past two decades, largely as a result of an intensification of the traditional preference for male children.<sup>40</sup> In addition to female infanticide and neglect of young daughters as causes of this growing problem, the increasing availability of amniocentesis testing and its use to ascertain foetal sex has encouraged sex-selective abortion.<sup>41</sup> From the late 1990s onwards provincial regulations specifically prohibited such misuse of pre-birth testing,<sup>42</sup> and then the 2001 Population and Birth Planning Law at Article 36 (b) stipulated that “identifying the gender of a foetus or aborting the pregnancy based on gender by using ultrasound technology or other technologies” without a specific and acceptable medical need is punishable by administrative warnings, a fine on illegal gains up to a level of six times the amount unlawfully acquired through the testing, and in more serious cases, withdrawal of practising certificate and even prosecution and imprisonment. Similar provisions were introduced into the 2003 Beijing Regulations at Article 37. Subsequently, in 2005, during the course of revisions to the Criminal Law 1997, the Standing Committee of the National People’s Congress gave serious consideration to characterizing ultrasound testing for foetal sex (especially when followed by sex selective abortion) as a criminal offence, punishable by up to three years’ imprisonment. However, a divergence of opinion amongst lawmakers undermined this possibility, with opponents asserting that pregnant women should have the right to know the sex of their child.<sup>43</sup>

The introduction of a national code of family planning is to be welcomed, as are its attempts to address some of the difficulties that the population control programme has created and exacerbated. But the 2001 Law has an ethos that is essentially administrative, demographic and policy orientated, with little room left for any statement of individual reproductive rights that might enable a citizen to secure redress through the courts for injustices as a result of official misconduct and mistakes. Although a key justification for the overall programme is that the demographic pressures on China are such that they threaten to undermine the economic reforms, the system that has been put in place is in a sense a curious relic of state planning. It rests uneasily with – and is often undermined by – the drift to greater individuality and more autonomous decision-making that are important features of socio-economic conditions in post-Mao China.

40 See, in particular, Judith Banister, “Shortage of girls in China today,” *Journal of Population Research*, Vol. 21, No. 1, pp. 19–45.

41 Thus, Banister reports that China, with a population sex ratio of 106.7 males for every 100 females, is the most extreme example of overall imbalance, adding that among children aged 0–4 “China reports 120 boys per hundred girls” (p. 22) and concluding that demographic analysis shows that “by 1999, girls were permanently lost primarily through sex-selective abortion of female foetuses and secondarily through excess female infant deaths, due to infanticide, abandonment, ill-treatment or neglect of infant girls. The third factor was selective maltreatment or neglect of girls aged 1–3” (p. 27).

42 This development may explain one of the few rays of light in the data identified by Bannister, namely the puzzling fact that “the sex-ratio at 0–4 stabilised for the five years 1997–2001” (p. 27).

43 Josie Liu, “Changes to criminal law under NPC Review,” *South China Morning Post*, 26 December 2005, p. A-4, cols. 2–3.



## Reproducing – Adoption

In post-Mao China adoption (*shouyang* 收养) has been officially regarded as an important social and legal institution not only in its own right but also because of its contributions to the role of the family in providing care – especially for the elderly – and its relationship to population control.<sup>44</sup> Adoption was provided for in the 1979 Opinions of the Supreme People’s Court Concerning the Implementation and Enforcement of Civil Affairs Policy and Law,<sup>45</sup> given major legislative support in the 1980 Marriage Law at Article 20, and then made the subject of a full national code in 1991: the Adoption Law (in force 1992). That Law was revised in 1998 and in the following year supplemented by new rules on adoption registration.

One of the most notable aspects of the 1991 Adoption Law is that the rights and interests of the adopting parents were defined as being nearly as important as those of the child. Thus, the main objective of the code was not one ordinarily ascribed to adoption in many modern jurisdictions, namely the welfare of the adopted child *per se*. Rather, the law offered protection to both adopted child and adopting parents, and to the “legitimate adoptive relations” between the parties (Article 1). In Article 2 of the 1998 revised Adoption Law, a clause has been inserted giving greater emphasis to the need to safeguard and promote the relations between the adopted person and the adopting parent or parents. In so doing, it further strengthens the policy emphasis on the reciprocal nature of the adoptive relationship in Chinese law, and thereby gives even greater weight to the adopting adults’ wellbeing.

The basic conditions under which a child is considered to be suitable for adoption remain essentially unchanged under the revised Law. Article 4 stipulates that the adopted person should be a child under 14 years of age who is disadvantaged in one of three ways: as an orphan, a foundling or whose natural parents are untraceable or unable to raise the child as a result of unusual hardship. The requirement that an adoptant must be childless and “capable of rearing and providing education for the adopted child” also remains unchanged. However, the relatively stringent condition that adoptants must be 35 years or older has been relaxed in the 1998 revisions: they now need be only 30. This is an important shift, intended to make adoption easier.<sup>46</sup> Article 7 is amended in the revised Law to confirm that even with this reduced minimum legal age,

44 Thus, both the 1991 and revised 1998 version of the Adoption Law robustly declare at Article 3 that “adoption shall not contravene laws and regulations on family planning.” For a comprehensive analysis of adoption, abandonment and orphanage care in post-Mao China see, in particular, Kay Ann Johnson, *Wanting a Daughter, Needing a Son: Abandonment, Adoption, and Orphanage Care in China* (St. Paul, MS: Yeong & Yeong Book Company, 2004).

45 “Zuigao renmin fayuan guanyu guanche zhixing minshi zhengce falü de yijian,” 2 February 1979, in Liu Suping (ed.), *Hunyin faxue cankao ziliao* (*Reference Materials for Marriage Law*) (Beijing Zhongguo renmin daxue chubanshe, 1989), pp. 145–55 at p. 154.

46 An additional safeguard has also been introduced by the 1998 revisions at Article 6, namely, that the adoptant may not suffer from an illness considered inappropriate for the adoption of children. This parallels Marriage Law provisions which prohibit marriage if one party is deemed to be suffering from a disease rendering her or him unfit for marriage (Marriage Law 2001, Article 7).

continued recognition will be given in Chinese law to the customary practice of adoption of an agnatic nephew for the purpose of continuing a patriline that would otherwise be extinguished.<sup>47</sup> Changes to Article 8 are also intended to make adoption easier, and to enhance the family as a unit of care and welfare. They permit couples who already have a child (including an adopted child) to adopt an orphan, foundling or handicapped youngster in the care of a social welfare organ. In addition, Article 21 now regulates more clearly the processes by means of which foreign parties may adopt Chinese children, thereby encouraging greater overseas adoption.

The 1991 Adoption Law did not lay down specific formalities for the creation of lawful adoptive relations. In particular, it did not require registration of an adoption, even though adoption often necessitates changes under other systems of registration (such as household registration status). In order to regulate adoption better, however, subsequent regulations encouraged registration with the Civil Affairs Department<sup>48</sup> and Article 15 of the revised (1998) Adoption Law now stipulates that adoptions should be registered with civil affairs departments at the county level or above. Adoptive relations commence from the date of registration. Similarly, Article 28 encourages parties who wish to dissolve their adoptive relations to register the dissolution with a civil affairs department. The general direction of change throughout much of the 1990s was thus towards a system of compulsory registration of adoption, one which would parallel that already in place for marriage. Finally, the revised Law at Article 31 strengthens the rules against abandonment and subsequent sale of children under the guise of adoption.

The trend towards greater bureaucratic control of adoption was continued in 1999, when attention was again given to issues of registration. The Measures for the Registration of Adoption of Children by Chinese Citizens<sup>49</sup> were introduced, in order to standardize the practice of registration (Article 1). The Measures assume that henceforth most, if not all, adoptions will be registered, following the basic requirement in Article 15 of the revised Adoption Law noted above, namely, that “adoptions should (*yingdang* 应当) be registered with the civil affairs departments at the county level or above, and adoptive relations are established on the day of registration.” The Measures lay down strict rules on the provision of relevant documentation, including an undertaking in writing by the adoptants not to use adoption in any way to violate family planning

47 As noted above, n. 33.

48 “Minzhengbu, Zhongguo gongmin zai zhongguo banli shouyang dengji de ruogan guiding” (“Ministry of Civil Affairs, certain provisions [governing the] procedures for registration of adoptions by Chinese citizens in China”), promulgated 1 April 1992, in Liang Wenshu (ed.), *Zhonghua renmin gongheguo hunyinfa quanshi* (*Explanatory Notes on the Marriage Law of the People’s Republic of China*) (Beijing: Renmin fayuan chubanshe, 1995), pp. 105–08.

49 “Zhongguo gongmin shouyang zinu dengji banfa,” approved by the State Council, 12 May 1999 and in force 25 May 1999, in Zhonghua renmin gongheguo guowuyuan fazhi bangongshe (Office of the Legislative Affairs Office of the State Council) (ed.), *Zhonghua renmin gongheguo shewai fagui huipian 1999* (*Laws and Regulations of the People’s Republic of China Governing Foreign-Related Matters 1999*) (Beijing, Zhongguo fazhi chubanshe, 2000), pp. 206–13.

provisions (Article 6); the procedures to be followed in difficult cases, such as when a child's biological parents cannot be found (Article 8); the system to be applied when the prospective adoptants are Chinese citizens resident in Hong Kong, Macau or Taiwan (Article 14); and the process by means of which an adoptive relationship may be ended by mutual consent (Articles 9 and 10). At exactly the same time, the Measures for the Registration of the Adoption of Children by Foreigners in the PRC were introduced in order to standardize the procedures necessary for foreign-related adoptions.<sup>50</sup> These require adoptions of Chinese children by foreigners to comply with the adoption laws of both China and the country of residence of the adoptants (Article 3), and also provide detailed rules on key practical aspects of the process. These include the requirement of a written adoptive agreement with the person placing out a child for adoption (Article 9), extensive documentation (Article 10), application examination formalities (Article 10), fees to be charged (Article 14) and supervision of the system as a whole (Article 15).<sup>51</sup>

## Conclusions

In 2001, major revisions to the 1980 Marriage Law introduced clearer rules on void and voidable marriage, recognized the need for a system of retrospective registration of marriage, made efforts to deal with the increased social practice and problem of concubinage, reformed the grounds of divorce as well as the rules governing custody and property division at divorce, and attempted to promote a new approach to the treatment of domestic violence. These changes, which to a significant degree attempted to assist the position of women in the family context, were made in response, inter alia, to the rapid social and economic developments that have taken place in China in recent years. The reforms introduced by the amendments to the Marriage Law were further elaborated in two important interpretations of that law issued by the Supreme People's Court in 2001 and 2003, as well as by revised Marriage Registration Regulations (2003). The vigorous public debate that accompanied the process of amending the Marriage Law stands in stark contrast to the unheralded introduction of China's first national code of family planning, the 2001 Law on Population and Birth Planning. Unlike other areas of family law, the regulation of reproduction continues to be seen as a form of administrative rather than civil law. The Population Law lays down the basic policy norm of the single-child family, provides the possibility of a second child in certain circumstances, and serves as a consolidating code of basic principles that inform provincial birth

50 "Waiguo ren zai Zhonghua renmin gongheguo shouyang zinu dengji banfa," approved by the State Council 12 May 1999 and in force 25 May 1999, in *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters 1999*, pp. 213–23.

51 The system was further strengthened by the introduction of "Shouyang dengji dang'an guanli zhanxing banfa" ("Provisional measures for the administration of adoption registration archives"), promulgated and in force 17 December 2003; available at [http://www.mca.gov.cn/artical/content/WJYL\\_SYDJ/2004812163113.html](http://www.mca.gov.cn/artical/content/WJYL_SYDJ/2004812163113.html).

planning regulations. It also embraces eugenics policies, designed to improve the quality of China's population. In 1998 and 1999 further reforms were introduced to China's legal framework for adoption, with a relaxation of rules on capacity and greater attention being given to the formalities of adoption registration.

In this process of reform, the relationship between the state and the family, and the role of individual choice in the processes of marriage and family, have changed and been made problematic in many important ways. Both substantively and procedurally, family law is, much more than it was in the 1980s, a matter of negotiation between the state and its increasingly vocal citizenry. Greater freedoms – in particular in respect of marriage and divorce – have been achieved and greater tolerance of social practice has been shown in the law. Significantly, marriage registration is now seen as being more of a civil responsibility of the individual than a purely an administrative act. Even more notably, a genuine freedom of divorce appears to have been established, with mediation no longer being used as a barrier to divorce even in contested cases in which the petitioner is a woman. Enhanced concern for individual rights has, in turn, led to debates about the appropriate boundaries for rights to privacy in the family context, especially in the areas of domestic violence and concubinage.

China has, in the reform of its family law, moved from a situation in 1980 in which the law governing marriage and family relations was still seen as a matter of control, an administrative instrument and a form of social engineering, to a contemporary situation in which these elements are significantly reduced and greater attention given to the technical and legitimating dimensions of law – in particular, there is a felt need to make law reflect popular social values as well as to change them. Procedurally, this has meant a decline in the use of mediation to resolve family disputes and a steady increase in reliance on the courts in such matters as divorce and domestic violence. But this acknowledgement of social practice is primarily true in terms of “family law” as officially understood within China itself. Birth limitation does not, except in terms of general principles, form part of family law. The continuing emphasis on law as a tool of administration and social engineering continues to manifest itself in the 2001 Population and Birth Planning Law which is considered to be a form of administrative law rather than civil law. Moreover, moral and ideological conservatism continue to complicate reform, restricting the pace of change and ensuring that debates about legal developments are kept within politically acceptable bounds. On the highly sensitive matter of birth control, very little debate was allowed even at the time of the promulgation of the first national law of family planning. Moreover, it is clear that those responsible for revising family law are also experiencing great difficulty in dealing with inter-generational conflicts of social values and conduct. The ever-growing disparity in social conditions between the Chinese littoral and its large metropolitan centres and the less well-developed areas inland, especially in the west, is another complicating factor, as is the demographic problem of the ageing population. The growing number of elderly, the associated increase in average life expectancy, and the physical and financial

needs of older persons all mean that the state must continue for some time yet to rely on the family as a unit of care for the elderly. Relaxing the conditions of adoption and prohibiting adult children's interference in the re-marriage of parents are just two areas of family law reform that reflect this continuing reliance. Even family planning constraints are now the subject of public debate, as the authorities come to acknowledge the contradictions between population and social welfare policies which emphasize the role of the family as a provider of care.<sup>52</sup>

An important change is clearly taking place with respect to the treatment of women as victims of domestic violence. There has been, at the formal level, a shift from viewing this problem as a domestic or purely family dispute to be dealt with by means of mediation to seeing it as an issue of criminal justice to be dealt with by the public security organs, the procuracy and the courts in a manner that is more consistent with the PRC's international obligations under CEDAW. Elsewhere, in the revised Marriage Law (especially in its provisions on divorce), the 2001 Population and Birth Planning Law and the two Supreme People's Court interpretations on the Marriage Law, there is enhanced support for women's rights and interests, a matter of considerable importance in a society that was, and to a significant extent still is, strongly patriarchal in its family cultural values.

52 Alice Yan, "China's one-child policy questioned," *South China Morning Post*, 31 December 2005, p. A6, cols. 1-6.