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CHINA'S LATEST MARRIAGE LAW AMENDMENT AND FAMILY PROPERTY: TRADITION AND MODERNITY

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China's latest Marriage Law amendment illustrates how tradition contributes to China's modernity. Traditionally, a house was a necessity for a marriage in China. This is because in ancient China, marriage secured the continuation of the family line and provision for ancestors. In modern China, the one child policy and soaring housing prices collectively force the "three families" to buy a house for the new couple. However, what happens when the couple divorces? Shall the house then be considered community property? The 2011 Judicial Interpretation of the Supreme People's Court of Several Issues on the Application of the Marriage Law of the People's Republic of China, provides that where real estate is purchased by the parents of one party, and after the party's marriage is registered under the party's name, such real estate shall be deemed as a gift given by the parents to the party and the party's personal property. This interpretation represents a compromise between tradition and modernity.

The article will firstly introduce the marriage system in ancient China, illustrating that under the doctrine of li, the real purpose of marriage was to be a bond of love between two (families of different) surnames. Retrospectively, this secured observance of ancestral rituals in the ancestral temple, and prospectively, continuation of the family line. The house was a necessity for marriage because one of the six ceremonies required for marriage under li was the procession, and then welcome of the bride at the groom's home. (Other ceremonies involved a matchmaker securing a proposal, matching auspicious birthdates, exchanging gifts between the bride's and groom's families, setting an auspicious wedding date, honoring ancestors and deities, and having an elaborate banquet).

The article will then analyze the marriage law in the of Republic of China, in which even the post-dynasty marriage law adopted the western marriage system, the strong resistance of the old tradition forced the law-maker and the court to blend into the marriage law some traditional elements, making it a hybrid of tradition and modernity.

The article also pointed out that the Marriage Law of People's Republic of China wiped out textually almost all the traditional influence. However, the generally accepted rule which considered post-marriage assets as community property, led to intergenerational social, economic, and legal issues that could not reconcile tradition

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with China's rapid urbanization. This urbanization has been compounded by the one-child policy and rising divorce rates. The article will then explain how due to the tradition of the bride's welcome at the groom's home, even today people are unwilling to have a "naked marriage" (getting married with no house, no car and no thick wad of banknotes). The latest judicial interpretation of the marriage law pragmatically responded to the phenomenon in the new era with a strong tradition embedded in it. In sum, judicial interpretation indicates that in a country with a long history such as China, traditional legal culture is a necessary lens to examine contemporary social changes.

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INTRODUCTION

Today's China is a mixture of old and new. On one hand, the thousands of year's Confucian tradition, to some degree, still heavily influence the morality and behavior of the Chinese people, though not many traces of which can be located in the body of contemporary Chinese laws; on the other hand, the modern Western legal ideas and mechanisms has occupied a dominant stance in Chinese legislations and judicial decisions, which has evolved from the "introduction of Western learning to the East" after the Opium War, peaked in the European modeled law amendment in Late Qing Dynasty, finalized in the era of the Republic of China (ROC) and modified in the People's

Republic of China (PRC). For more than one century, to reconcile the tradition and the modernity has been consistently a huge challenge for Chinese legislature and judiciary to overcome in the pursuit of a harmonious society. As the marriage law usually stands as a strong fortification for preserving the endemic characteristics of different legal cultures, through briefly examining the evolution of Chinese marriage laws, this article will depict the "push and pull" of the interrelationship between the "law in books" and "actions in life": the traditional Chinese marriage molded by the Confucian doctrine of *Li*, the resistance of the tradition once facing with the intrusion of the Western legal ideas in the early 20th century and how the legislature and judiciary of new China blaze a trail in the thorny road of harmonizing the tradition, the economic growth and marriage law.

I. MARRIAGE IN TRADITIONAL CHINA: A SYSTEM UNDER THE DOCTRINE OF *LI* (礼, RITE/PROPRIETY)[1]

A. The Linguistic Explanation of Marriage in Chinese Language

Linguistically, the Chinese counterpart of "marriage" is *Hun Yin* (婚姻). *Shuowen jiezi* 说文解字 (Analytical Dictionary of Characters), the first Chinese dictionary which expounds the etymological origin of 9,353 Chinese characters, defines 婚 as the bride's family. Because woman belongs to 阴 (*yin*, the feminine or negative principle in nature. Within a day, the part of yin is the night and the part of 阳，the opposite of 阴，is the daytime), the wedding ceremony of bringing bride into the family of the bridegroom is held in the dusk. The ceremony is therefore called 婚.[2] Similarly, the character 姻 (*yin*) is interpreted as the bridegroom's family, which is the destination of the bride.[3]

Another significance about "marriage" in Chinese language lies in that the single meaning of "to marry" in English can be expressed by two Chinese characters: for a man to marry a woman, the character is 娶 (*qu*), which simply means, according to the Analytical Dictionary of Characters, to get or acquire a woman[4]; while for a woman to marry a man, the character is 嫁 (*jia*), meaning a woman leaving for a man's home.[5] In *Baihu tongyi* 白虎通义 (Comprehensive Discussions in the White Tiger Hall), the essential meaning of marriage is explained as: What is marriage? To marry a man is for a woman to leave her home to go to the home of her husband. To marry a woman is for a man to get a woman. What is the difference between a man and a woman: A man lives for

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[1] In fact, *Li* has manifold meanings in Chinese language. Some Chinese scholar contends that both rite and propriety are mistranslations of this multivocal word. *Li* could be interpreted, in different context as the principle of social organization, moral code, and reason. See LIN Yutang, *Li: The Chinese Principle of Social Control and Organization*, 2 中国社会及政治学报 (Chinese Soc. & Pol. Sci. Rev.) 106, (1917).

[2] 婚，妇家也。娶妇以昏时，妇人阴也，故曰婚。

[3] 姻：壻家也。女之所因，故曰姻。

[4] 娶，取妇也。

[5] 嫁，女适人也。

making achievements while a woman for being subject to others: before marriage, to her parents; after marriage, to her husband; after the demise of her husband, to her sons….What a 夫妇 (couple) should be like? The 夫 (husband) is to support the family in the way the human nature requires him to do and the 妇 (wife) is to keep the household and serve the husband. What is 婚姻 (marriage)? The wedding ceremony is held in the dusk, and a woman's status depends on her husband.[6]

The plain meaning of marriage linguistically reveals two significant characteristics of the marriage in traditional China: First, marriage is not considered simply a union of man and woman, but rather a business between the families of the bride and the bridegroom; second, the domestic status of the husband and wife is not equal, that is, the husband is superior to the wife. Another implication of the marriage should not be overlooked, in order to marry his wife, the husband needs a house to welcome and accommodate her.

B. The Ethical Explanation of Traditional Chinese Marriage

Even though it is not rare in the ancient marriage of the West to witness the superiority of husband upon wife and the union of two clans or family thought the marriage[7], the marriage in traditional China has its own justification to be what it should be: the doctrine of *Li*.

Li constitutes the basis of the Confucianism. "To define *Li*, it is the good order of things."[8] The Confucian philosophy considers *Li* as "the regular procedure of heaven, the right phenomena of earth and the actions of man."[9] To be specific, once "heaven and earth existing, all (material) things then got their existence. All (material) things having existence, afterwards there came male and female. From the existence of male and female there came afterwards husband and wife. From husband and wife where there came father and son. From father and son there came ruler and minister. From ruler and minister there came high and low. When (the distinction of) high and low hand existence, afterwards came the arrangements of propriety and righteousness."[10]

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[6]《白虎通义・嫁娶》：嫁娶者，何谓也？嫁者，家也，妇人外成，以出适人为家。娶者，取也。男女谓男者，任也，任功业也；女者，如也，从如人也。在家从父母，既嫁从夫，夫歿从子也。《传》曰："妇人有三从之义也。"夫妇者，何谓也？夫者，扶也，扶以人道者也；妇者，服也，服于家事，事人者也。配疋者何？谓相与为偶也。婚姻者，何谓也？昏时行礼，故谓之婚也，妇人因夫而成；故曰姻。

[7] For example, the Manus Marriage of Roman Law treated the wife as the daughter of the husband and the sister of her children, even though the husband could not acquire such privilege until he became the head of his family. See Andrew T. Bierkan, Charles P. Sherman and Emile Stocquart, Jur., *Marriage in Roman Law*, 16 Yale Law Journal 303, 310 (1907).

[8] "礼者，即事之治也。" See 礼记・仲尼燕居 (*The Li Ki · Zhongniyanju*), translated by James Legge.

[9] "夫礼，天之经也，地之义也，民之行也。" See 左传・昭公二十五年 (*Zuo Zhuan · The Twenty-Fifth Year of the Duke Zhao*), translated by James Legge.

[10] "有天地，然后有万物；有万物，然后有男女；有男女，然后有夫妇；有夫妇，然后有父子；有父子，然后有君臣；有君臣，然后有上下；有上下，然后礼义有所错。" See 易经・序卦传 (*Book of Changes · The Orderly Sequence of the Hexagrams*) translated by James Legge.

According to Confucius himself, *Li* is neither abstract nor theoretical. On the contrary, *Li* is practical and could be performed in everyday life[11]. In 论语 (*The Analects*), a collection of sayings attributed to Confucius), the Confucius discussed with his disciple how to reach the goodness through the practice of *Li*: Yen Hui asked about Goodness. The Master said, "He who can himself submit to *Li* is good." If a ruler could for one day himself submit to *Li*, everyone under heaven would respond to his Goodness. For goodness is something that must have its source in the ruler himself; it cannot got from others. Yenhui said, I beg to ask for the more detailed items of this. The Master said, "To look at/listen to/speak of nothing in defiance of *Li*, never to stir hand or foot in defiance of *Li*."[12]

Regarding the marriage, the doctrine of *Li* lays down the fundamental requirements for the union between a man and a woman: If the young people, without waiting for the orders of their parents, and the arrangements for the go-betweens, shall bore holes to steal a sight of each other, or get over the wall to be with each other, then their parents and all other people will despise them.[13]

The purpose of the marriage[14] was then clarified as "a bond of love between two (families of different) surnames, with a view, in its retrospective character, to secure the services in the ancestral temple, and in its prospective character, to secure the continuance of the family line. Therefore the superior men, (the ancient rulers), set a great value upon it. Hence, in regard to the various (introductory) ceremonies — the proposal with its accompanying gift; the inquiries about the (lady's) name; the intimation of the approving divination; the receiving the special offerings; and the request to fix the day — these all were received by the principal party (on the lady's side), as he rested on his mat or leaning-stool in the ancestral temple, (When they arrived), he met the messenger, and greeted him outside the gate, giving place to him as he entered, after which they ascended to the hall. Thus were the instructions received in the ancestral temple, and in this way was the ceremony respected, and watched over, while its importance was exhibited and

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[11] According to Analytical Dictionary of Characters, *Li* means to practice (礼，履也). For further etymological discussion of the word *Li*, see JIANG Dong, 从"礼"字管窥中国传法文化的"礼"的起源 (*Probe of Doctrine of Li in Chinese Traditional Legal Culture through Analysis on the Word "Li"*), 29(2) 河北法学 (Hebei Law Science) 39, 39–44 (2011).

[12] 颜渊问仁。子曰："克己复礼为仁。一日克己复礼，天下归仁焉。为仁由己，而由人乎哉？"颜渊曰："请问其目。"子曰："非礼勿视，非礼勿听，非礼勿言，非礼勿动。" See 论语·颜渊 (*The Analects · Book Twelve, Yen Hui*) translated by James Legge.

[13] 不待父母之命，媒妁之言，钻穴隙相窥，逾墙相从，则父母国人皆贱之。 See 孟子·滕文公下 (*The Works of Mencius · Teng Wen Gong, Part II*) translated by James Legge.

[14] The purpose of the marriage in China will include the continuance of the family line, see CHEN Guyuan, 中国婚姻史 (*History of Chinese Marriage*), Shanghai Bookstore Publishing House (Shanghai), at 6 (1984). Other scholars also pointed out that marriage in ancient China served as a worship to the ancestors and a financial aid to the family, See CHEN Peng, 中国婚姻史稿 (*Draft of Chinese Marriage History*), Zhonghua Book Company (Beijing), at 59 (1990).

care taken that all its details should be correct."[15]

In one of the thirteen Confucian classics, *Yi Li* (Book of Etiquette and Ceremonial), the "various ceremonies" for a gentleman's marriage are detailized in the following six steps:

1. The sending of presents (*nacai*, 纳彩). In making known his intentions to the father of the girl, the father of the young man sends a wild goose…. The host, standing between the pillars, and facing south, receives the goose. Thereafter the visitor descends the steps and leaves. The host also descends, and hands the goose to his head servant.[16]

2. Asking the girl's name (*wenmng*, 问名). The messenger, holding a goose in his hands, requests permission to be allowed to ask the girl's name, and the host, through the usher, consents. The visitor then enters and hands over the present to the host, observing the ceremonial already described.[17]

3. Sending news of the favorable divination (*naji*, 纳吉). In announcing the favorable result of the divination, a wild goose is presented. The ceremonial observed is similar to that with which the present was given.[18]

4. The sending of the evidences (*nazheng*, 纳征). The presents sent by the father of the young man to complete the preliminaries are a bundle of black and red silks and a pair of deer-skins.[19]

5. Asking the Time of the Ceremony (*qingqi*, 请期). A wild goose is sent by the messenger who goes to ask of the girl's father the time for the ceremony. He declines to name a time, and the messenger, assenting, announces the day which has already been discovered by divination, with ceremonial similar to that used in sending the evidences.[20]

6. The Meeting in Person. The bridegroom, dressed in a russet cap, crimson skirt with black border, his attendants in suits all black, mounts a black-lacquered chariot, and is followed by two other chariots in attendance, with men preceding the horses, torch in hand. The carriage of the bride is similar to that of the bridegroom, but is provided with a broidered cover. When the bridegroom arrives outside the bride's father's door, the bride's father, in black square-clothes, meets the bridegroom outside the gate, and…salutes him, inviting him to enter…. (T)he bridegroom goes down the steps and out, the bride following down the west steps, the father not going down the eastern steps to

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[15] 昏礼者，将合二姓之好，上以事宗庙，而下以继后世也。故君子重之。是以昏礼纳采、问名、纳吉、纳征、请期，皆主人筵几于庙，而拜迎于门外，入，揖让而升，听命于庙，所以敬慎、重正昏礼也。 See 礼记·昏义 (*The Li Ki/Record of Li · Hun Yi*), translated by John Steelle.

[16] 纳采，用雁……主人阼阶上北面再拜；授于楹间，南面。宾降，出。主人降，授老雁。摈者出请。See 仪礼·士婚礼 (*Book of Etiquette and Ceremonial · The Marriage of an Ordinary Officer*).

[17] Id, 宾执雁，请问名，主人许。宾入，授，如初礼。

[18] Id, 纳吉用雁，如纳采礼。

[19] Id, 纳征：玄纁束帛，俪皮。如纳吉礼。

[20] Id, 请期，用雁。主人辞。宾许，告期，如纳征礼。

take leave of them. The bridegroom mounts the bride's carriage…. When the bride arrives, the host (the bridegroom) invites the bride with a salute to enter. At the door of the sleeping-apartments he repeats the invitation. They go up by the west steps. The bridesmaid then spreads a mat in the lounge. Then the husband enters the room and goes to the mat. The bride takes her stand to the west of the wine-jar, with her face to the south, and the bridesmaid and driver pour out water for each other and wash their hands in turn.[21]

Li not only stipulated the formation of the marriage, but also the divorce of the marriage. In traditional China, the divorce of the marriage is a unilateral privilege of the husband, even though he could not divorce his wife without any reason. *Li* set forth seven reasons for divorce, known as the Seven Justifying Causes for Divorce in respect of a wife. To be specific, a wife could be divorced if one or more of the following causes could be established and proved:[22] 1. 不顺父母 (disregard of her husband's parents);[23] 2. 无子 (barrenness)[24]; 3. 淫 (lasciviousness); 4. 妒 (envious and suspicious temper); 5. 有恶疾 (noxious diseases); 6. 多言 (talkativeness); 7. 窃盗 (thievish propensities).

However, if any of the following three reasons against a divorce should exist, none of the above-mentioned causes would justify a divorce:

1. the wife's having no parents to receive her back again;

2. the wife having mourned three years for her husband's parents; and

3. the family having become rich after having been poor previously and at the time of marriage.[25]

Hence, *Li* regulated every stage of the marriage from the commence to the end. In addition, *Li* equipped the man another privilege: the polygamy. Anciently, the queen of

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[21] Id. 主人爵弁，纁裳缁袘。従者毕玄端。乘墨车，従车二乘，执烛前马。妇车亦如之，有裧炎。至于门外。主人……玄端迎于门外……宾……降，出。妇従……妇乘以几……妇至，主人揖妇以入。乃寝门，揖入，升自西阶，媵布席于奥。夫入于室，即席，妇尊西，南面。媵御沃盥交。賛者彻尊幂。举者盥。

[22] 妇有七去：不顺父母去，无子去，淫去，妒去，有恶疾去，多言去，窃盗去。不顺父母去，为其逆德也；无子，为其绝世也；淫，为其乱族也；妒，为其乱家也；有恶疾，为其不可与共粢盛也；口多言，为其离亲也；盗窃，为其反义也。See 大戴礼记・本命 (*Book of Rite compiled by Dai De · Ben Ming*).

[23] To obey the order of the parents in law and her husband is the fundamental duty for a wife. According to Mencius, "at the marrying away of a young woman, her mother administered her, accompanying her to the door on her leaving, and cautioning her with these words, You are going to your home. You must be respectful; you must be careful. Do not disobey your husband. Thus, to look upon compliance as their correct course is the rule for women." (女子之嫁也，母命之，往送之门，戒之曰："往之女家，必敬必戒，无违夫子！"以顺为正者，妾妇之道也。) See fn. 13.

[24] The have a son for the continuance of the ancestral lines is the fundamental duty for a man. As a man, having no descendant is the greatest of the three undutiful (or unfilial) acts. (不孝有三，无后为大。) See 孟子・离娄上 (*The Works of Mencius · Li Lou, Part I*) translated by James Legge.

[25] Fn. 22. Such three reason defying the divorce can also be found in Chapter of 仪礼注疏・丧服 (*Mourning Dress of Notes and Commentary on Yi Li*), noted by ZHENG Xuan and commented by JIA Gongyan).

the son of Heaven divided the harem into six palace-halls, (occupied) by the three ladies called *furen* (夫人), the nine *bin* (嫔), the twenty seven *shifu* (世妇), and the eighty one *yuqi* (御妻).[26] For the average person, his wife is called *qi* (妻) and his concubine is called *qie* (妾).

C. The Codification of Li-Oriented Marriage in Imperial China

From Han Dynasty, the doctrine of *Li* has been gradually integrated into the legislation and adjudication. In Tang Dynasty, the Confucianization of the law was finally accomplished[27], reflected by the codification of the doctrine of *Li* in the Tang Code. The main body of marriage law in the Tang code and the ensuing codes of different dynasties in imperial China adopted *Li*' stipulation on marriage as the statutory criteria.

For example, *Li*'s requirement on divorce verbatim turned into specific articles of Tang Code: All cases of divorcing a wife who has not given any of the seven causes for repudiation, nor any of the conditions for divorce, are punished by one and one-half years of personal servitude. Even if the wife has given one of the seven causes for repudiation, if any of the three conditions under which a wife cannot be divorced exists, and yet she is repudiated, the punishment is one hundred blows with the heavy stick. The sub commentary construes what should be the seven causes and the three conditions: In all cases of casting aside a wife, there must be one of the seven causes for repudiation: the first is not to have any children, the second is immoral behavior, the third is not serving her parents-in-law, the fourth is loquacity, the fifth is committing robbery or theft, the sixth is jealousy, and the seventh is incurable diseases…the three conditions under which the wife may not be divorced exist refers to the wife has mourned the death of parents-in-law, when she was married the family was of inferior class status but has now been ennobled and the wife has no family to receive her.[28]

Till Qing Dynasty-the last imperial dynasty of China, the same statutory language

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[26] See fn. 15, 古者天子后立六宫、三夫人、九嫔、二十七世妇、八十一御妻，以听天下之内治，以明章妇顺。

[27] The detailed discussion of the Confucianizaiton of the law in imperial China can be seen in QU Tongzu, 中国法律与中国社会 (*Law and Society in Traditional China*), Zhonghua Book Company (Beijing), at 328–86 (1981); Derk Bodde & Clarence Morris, *The Imperial Codes as Exemplification of Li*, in Law in Imperial China, Press of Pennsylvania University (Pennsylvania), at 29–39 (1973); WU Shuchen, 变革、继承与法的演进：对"古代法律儒家化"的法文化考察 (*Reformation, Inheritance and the Evolvement of Law: A Cultural Analysis of Confucianization of the Ancient Chinese Laws*), 6 山东大学学报 (哲学社会科学版) [Journal of Shandong University (Philosophy and Social Sciences)], 1–8 (2012); WU Zhengmao, 再论法律儒家文化对瞿同祖"法律儒家化"之不同理解 (*Rethinking Confucianization of Laws: A Different Understanding of QU Tongzu's Confucianization of Law*), 3 中外法学 (Peking University Law Journal), 484–99 (2011).

[28] 诸妻无七出及义绝之状，而出之者，徒一年半；虽犯七出，有三不去，而出之者，杖一百。(疏)……故妻无七出及义绝之状，不合出之。七出者，依令："一无子，二淫泆，三不事舅姑，四口舌，五盗窃，六妒忌，七恶疾。……虽犯七出，有三不去"，三不去者，谓：一，经持舅姑之丧；〔三〕二，娶时贱后贵；三，有所受无所归。See 唐律疏议·卷十四·户婚，第 189 条 (Article 189，Chapter 14 of The Household and Marriage, The Tang Code), translated by Wallace Johnson.

appeared in The Qing Code: Although one of the seven justifying cases of divorce should be chargeable upon the wife, namely, bareness, lasciviousness, disregard of her husband's parents, talkativeness, thievish propensities, envious and suspicious temper and inveterate infirmity; yet if any of the three reasons against a divorce should exist, namely, the wife's having mourned there years for her husband's parents; the family's having become rich after having been poor previous to, and at the time of, marriage; and the wife's having no parents living to receive her back again. In these cases, none of the seven aforementioned causes will justify a divorce, and the husband who puts away his wife upon such grounds, shall suffer punishment….[29]

In a word, before the entering into the republic era of China, the Doctrine of *Li* had dominated the marriage law for thousands of years.

II. THE HYBRID OF OLD AND NEW IN REPUBLIC OF CHINA: INTRUSION AND RESISTANCE

The Opium War forced China to open its door to the west. Not surprisingly, the western legal ideas and system were introduced into China to "modernize" its traditional Confucianism legality. The first peak of such "modernization" is the law amendment movement in late Qing Dynasty. Since then, China gradually adopted the continental law system and bitterly abandoned the influence of Confucianism in its legal system. However, the shadow of the traditional Chinese legal culture, no matter in the mindset or in the actual conducts of the people, refused to fade away as easily as erasing from the paper the imperial codes and replacing them with western terminologies of law. In fact, in the early republic era, Chinese people realized that they were "living in a period of fundamental changes. The whole scheme of Chinese society is upset and exposed to great changes. The principle at its very basis may possibly be ruled out entirely, but when this degree of change is reached, the change will certainly involve more loss than gain. It all depends on how well the present social scheme can stand the stress of the new industrial environments and the influx of new ideas. But one thing is clear wherever the western ideas prevail, individualism will be found the deadliest foe of *Li*. In the fight or the adjustment of these two principles, will the future structure of Chinese society be mainly determined.[30]

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[29] 出妻：……虽犯七出 (无子、淫佚、不事舅姑、多言、盗窃、妒忌、恶疾)，有三不去 (与更三年丧、前贫贱后富贵、有所娶无所归) 而出之者，减二等追还完聚。 See 大清律例・户律・婚姻之二, 116 条 (Section 116, Book Three, Marriage, Third Division, Fiscal Law, Ta Tsingleu lee/Code of Qing), translated by George Thomas Staunton. Except for the slight difference of the sequence of the seven justifying causes, the statutory languages governing the divorce in the Tang Code and Qing Code are virtually the same, yet the English translations have certain wording difference between James Legge's version of Tang Code and George Staunton's version of Qing Code.

[30] See LIN, fn. 1 at 118.

A. The Adoption in Principle the Western Marriage Law

The introduction of the western law into China was not a mission easy to be done. The law amendment in late Qing Dynasty caused severe political controversies. Until the collapse of the Qing Dynasty, most of its efforts remained on paper, resulting in the drafts of codes in various areas of law rather than the binding legislation.[31]

As for the marriage laws, the evolution to the western patterned legislation could be exemplified through the comparison among the un-promulgated Civil Code Draft of Qing Dynasty (大清民律草案，completed in 1911), the Un-promulgated Civil Code Draft of Republic of China (民国民律草案, completed in 1925) and the Civil Code of Republic of China (中华民国民法典, promulgated in 1930):

In terms of the formation of the marriage, Article 1338 Civil Code Draft of Qing Dynasty provided that the marriage should be under the permission of the parents; Article 1105 of the Un-promulgated Civil Code Draft of Republic of China, the marriage should be under the permission of the parents; and Article 972 of the Civil Code of Republic of China, the agreement of marriage should be made by the spouses themselves.

In terms of divorce, Article 1362 of Civil Code Draft of Qing Dynasty provided that the spouse can petition for divorce under the following conditions: bigamy, adultery of the wife, adultery of the husband with the close relatives and punished by the criminal law and the abuse of wife/husband; Article 1147 of the Un-promulgated Civil Code Draft of Republic of China, the spouses can divorce at their will; and Article 1049 of the Civil Code of Republic of China, the spouses can divorce at their will.

B. The Practice of the Marriage: Li's Resistance by the Layperson and the Legislature

The statutory language of *Li* can be wiped out of the books of law in the Republic of China, but *Li*'s influence had been deeply rooted in people's mind and survived stubbornly in the real life.

In a survey made in early 1920s, the marriage in the rural area of China still strictly followed the *Li*'s requirement, namely, the ceremonies for a marriage: In the village, sons and daughters give their parents a free hand in arranging their marriage affairs and will obey accordingly. It is considered as improper and shameful to talk about one's own marriage…. Therefore，there is no such thing as courtship. The parties to this transaction are not acquainted with one another; and after the engagement is fixed, must avoid each other…. A third party is thus need for making arrangements for the marriage…. The first step by the match-maker is to ascertain the time of birh of the girl. This is written on a red

[31] The process and results of the law amendment in late Qing Dynasty can refer to ZHANG Sheng, eds. 中国法律近代化论集 (*Collection of Papers of Modernization of Chinese Laws*), China University of Political Science and Law Press (Beijing), (2009).

paper with eight characters defining the year, month,date and hour of the birth…. The nexst step is for the boy's mother to bring the red paper to a professional fortune teller, who will answer quesitons as to the compatibility of the girls in question and the members of the boy's Chia (family)…. But it must be clearly understood that the real factor in the selction is the personal preference of the boy's parents…. The marriage gift, including money, dress, and ornaments, will be sent on three ceremonial occasion…. The bridegroom goes in person to meet his bride, traveling by a special meeting-boat used for this purpose…. The next stages of the procedure are the transporting of the bride by the meeting-boat, the act of union, the ritual recommendation of the bride to her husband's relatives, and the worshipping of her husband's ancestors…. A big feast is prepared by the bridegroom's parents for their relatives and friends.[32]

The far-reaching influence of *Li* and people's stick to it helped to shape how the law was made and enforced in early republic of China. Under the disguise of the modernity imported from the west, the indigenous forces made both the law in books and law in action a complexity of tradition and modernity.

Before the promulgation of the Civil Code of the Republic of China, The Effective Civil Law Section of the Amended Penal Code of Qing Dynasty (大清现行刑律民事有效部分) played the role of the binding civil law. As for the formation of formation of the marriage, it provided that on the engagement, once the prospective husband or wife being impaired, ill, aged, a juvenile, a concubine's child and so forth are already know, all cases of betrothal of a daughter where the marriage contract had been signed, or where there has been a private agreement, punish improper cancellation of the contract or the agreement…. If marriage gifts have been received, where there is no marriage contract, it is the same as if there were a marriage contract.[33]

The traditional idea of the marriage even found its way into the Civil Code of The Republic of China, causing a self-contradiction within the body of the law. Article 985 provided that any spouse can not commit bigamy, and Article 1052 provided that bigamy was the first reason for divorce. However, Article 1053 provided that if the marrying a concubine has been admitted by the wife, or has been known by the wife for more than six months, or has happened for more than two years, it cannot be the reason for the wife

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[32] FEI Xiaotong, *Peasant Life in China: A Study of County Life in the Yangtze Valley*, Kegan Paul, Trench, Trubner & Co., Ltd (London), at 39–45 (1939).

[33] 凡男女定婚之初，若有残、疾、老、幼、庶出、过房、乞养者，务要两家明白通知，各从所愿，写立婚书，依礼聘嫁。若许嫁女已报婚书，及有私约而辄悔者，处五等罚。虽无婚书，但曾受聘财者亦是。《大清现行刑律民事有效部分・婚姻条》。 The statutory language is almost the same as that of the Tang Code：诸许嫁女，已报婚书及有私约，约，谓先知夫身老、幼、疾、残、养、庶之类。而辄悔者，杖六十……虽无许婚之书，但受娉财，亦是。《唐律疏议・卷十四・户婚，第 189 条》, and the Qing Code：凡男女定婚之初, 若 (或) 有残 (废或)、疾 (病)、老、幼、庶出、过房 (同宗)、乞养 (异姓) 者，务要两家明白通知，各从所愿 (不愿即止愿者同媒妁)，写立婚书，依礼聘嫁。若许嫁女已报婚书，及有私约 (谓先已知夫身残、疾、老、幼、庶养之类)，而辄悔者，(女家主婚人) 答五十，(其女归本夫)。虽无婚书，但曾受聘财者亦是。《大清律例・户律・婚姻之一，101 条》。

to seek divorce. In addition, No. 647 of The Interpretation of Judicial Department (issued in 1931) stipulated that marrying a concubine is not a marriage and could not be one of the reasons for divorce (bigamy).

To sum up, in the era of the Republic of China, even though marriage law fundamentally adopted the western rules, the traditional Chinese marriage survived at least partially in both the real life and the law. The legislature and the judiciary bowed to the reality of the society, making the marriage law then a hybrid of new and old.

III. THE NEW MARRIAGE LAW IN NEW CHINA: HOW THE JUDICIARY PRAGMATICALLY SOLVE THE MARRIAGE RELATED PROPERTY RIGHTS DISPUTES

A. The Marriage Law of 1950: A Foundation for the Marriage System in New China

To seek the equity between man and woman is one of the most important goals of Chinese revolution. On the birth of The People's Republic of China, the Marriage Law of 1950 was enacted to realize the man and woman equity. In general, the Marriage Law of 1950 was an overhaul of the old marriage system, meaning it has eliminated the old feudal marriage and family system and established the new democratic and socialist marriage and family system. The significance of Marriage Law of 1950 lies in that it is the first law in the nature of basic law since the establishment of new China. A quote from Chairman Mao can illustrate the importance of this law: "Marriage law is related to the close interest of each household, men and women, old and young, and its universality is second only to the Constitution as one of the country's basic laws."

In general, the Marriage Law of 1950 set forth the following principles:

1. Article 1 eliminates feudalism marriage system represented the marriage arranged by the parents, the superiority of the man, and the disregard of feminine rights. It also provides for the freedom of marriage, monogamy and the quality of man and woman.

2. Article 2 prohibits the bigamy and concubine age. It also prohibit any intervention of the remarriage of the willow, demanding property under the disguise of marriage[34] and the child bride.

3. Article 17 provides for the freedom of divorce, while Article 18 provides that the no divorce will be permitted while the wife is pregnant.

4. As for the property related issues arising under the marriage and divorce, Article 23

[34] But granting a "grand gift" to the bride's family is still popular in China, which could be considered as remnant of *nacai* (纳彩) of the first ceremony of the traditional marriage. Of course, it is not legally mandatory. A survey shows that in China, the average price of such gift is not cheap: In Shanghai and Tianjin, it is more than one million RMB; in five provinces, it is more than 500,000 RMB, in three provinces, it is more than 100, 000 RMB. The price of other province is below 100,000. Only in Chongqing, it is not necessary to grant such gifts. See The Billboard of the "Marital Gifs in China," available at http://finance.huanqiu.com/data/ 2013-06/4012937.html (last visited Nov. 4, 2014).

provides that the pre-marital property belongs to her own after divorce while husband's personal property before marriage would be regarded as common property; Article 24 provides that common debt should be repaid jointly and the husband should continue to repay the debt even it is not paid off after divorce; Article 25 provides that husband should cover the wife's living expense if she has no source of income after divorce including fees related to her death.

The above mentioned provisions showcase the special care to women and the determinacy of new China to establish a brand new marriage law. In the ensuing days of the promulgation of the Marriage Law of 1950, the efforts bore fruits: In Beijing and other 20 big and middle sized cities, from January to April, the courts received 9,300 marriage cases. From May to August — the following four months after the promulgation of the marriage law, the marriage cases increased to 17,763. In addition, from 1950 to 1953, the courts at all levels in China received 1.17 million divorce cases. In Shaanxi province, the divorce rate in 1953 was 27 times higher than that of 1950. In early 1950s, marriage cases accounted for a great proportion of civil case. In cities, the percentage was 17.4–46.19% and in rural areas, from 33–99%.[35] Not surprisingly, in the marriage cases, divorce cases accounted for a great proportion. In cities, the percentage was about 46.44–84.32% and in rural areas, from 54.1%–90%. In 21,433 divorce cases, 76.56% was brought by the man and 23.44 % by women.[36]

Undoubtedly, the Marriage Law of 1950 witnessed a new era of the marriage system in Chinese history. Yet, the open up and reform policy in the late 1970's unveiled another dramatic social transition. Family planning, the concern of the property rights gradually took the dominant position in the 1980 and 2001 marriage law amendment.

B. The Marriage Amendment: From Marriage Law of 1980 to Marriage Law of 2001

The most notable change in the Marriage Law of 1980 is the statutory requirement of the family planning. Article 2 provides that family planning shall be practiced and Article 12 provides that husband and wife shall have the duty to practise family planning. But with the robust economic growth, the marriage law paid more and more attentions to marriage related property rights. If we compare the provisions regulating the community properties in Marriage Law of 1980 and Marriage Law of 2001, we will tease out the track of the social changes in the last 2 decades of the 20th century.

In terms of the community property, Article 13 of the Marriage Law of 1980 provides that the property acquired by the husband and the wife during the period in which they

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[35] BI Haixin, 社会细胞的变迁——关于婚姻·家庭·感情以及其他 (*The Change of the Social Cell-Marriage, Family, Affection and Others*), available at http://www.chinatoday.com.cn/china/china-5/china-3/3-hunyin.htm (last visited Nov. 4, 2014).

[36] SHI Liang, 认证贯彻执行婚姻法 (*To Fulfill the Marriage Law Earnestly*), 11 新华月报 (Xinhua Monthly) 63, (1951).

are under contract of marriage shall be in their joint possession, unless they have agreed otherwise. Husband and wife shall enjoy equal rights in the disposition of their jointly possessed property. While in the Marriage Law of 2001, Article 19 provides that husband and wife may come to an agreement whether the property incurred during the existence of marriage or prior to marriage to be owned by each party, to be jointly owned or partially owned by each party and partially owned by both parties. The agreement shall be made in written form. Where there is no such agreement or it is not explicitly agreed upon, the provisions of Articles 17 and 18 shall apply. The agreement concerning the property obtained during the existence of marriage and pre-marital property shall be binding upon either party. Where husband and wife agree to individually own their property, the debt of either the husband or the wife shall be cleared off by the individual property of the debtor if the creditor has the knowledge of the said agreement.

In the Marriage Law of 1980, Article 24 provides that divorce shall be granted if husband and wife both desire it. Both parties shall apply to the marriage registration office for divorce. While Article 46 of the Marriage Law of 2001 provides that in any of the following circumstances which has led to the divorce of husband and wife, the innocent party shall be entitled to claim damages: bigamy; cohabitation between a person who has a spouse but co-habitats with a third person; domestic violence; and maltreating or deserting any family member.

It is the first time in China that the husband and wife can seek equally the compensation if the divorce resulted from the wrongful act of the opposing party of the marriage. But a scan of the three judicial interpretation issued by the Supreme People's Court of China will illustrate that almost 70% of the interpretations deals with the provision of the marriage law concerning the property rights.

C. The Latest Efforts in 21st Century: How the Court Awkwardly Solve the Property Rights Dispute in the Marital Cases

The Chinese economy has kept booming in the first ten decade of the 21st century. While China is becoming more and more modernized, the traditional marriage ceremony could still be popular.[37] In the meanwhile, the living costs are soaring, in particular, the housing prices. A survey shows in Beijing and Shanghai, the average costs for a marriage is about 2 million yuan, 80% of which account for a decent house about 80 square meters.[38] While in the year of 2013, average income per month in Beijing is only about

[37] See *Wedding in China*, available at http://www.chinatravel.com/facts/weddings-in-china.htm (last visited Nov. 4, 2014), in which we can find many relics of the traditional Chinese marriage, even it is legally required any more.

[38] See *How Much Does Getting Married In China Cost?*, available at https://www.chinaabout.net/how-much-does-getting-married-in-china-cost-bride-price-to-be-paid-to-the-chinese-girlfriends-parents/ (last visited Nov. 4, 2014).

5,223.[39] A very interesting phenomenon in China is that woman is much more strongly against the "naked marriage" (裸婚, getting married without a car and a house).[40] Therefore, to have a house becomes a necessity for a marriage, especially for a man. Understandably, buying a house leads to family efforts for a decent marriage in China. Hence came the problem: If the house for marriage was bought by the parents or the family of a spouse, once the couple is going to divorce, how to deal with the house? Is it considered a community property and should it be divided equally between the husband and wife. The answer is no.

In 2011, the Supreme Court of China issued the Interpretation (III) of the Supreme People's Court of Several Issues on the Application of the Marriage Law of the People's Republic of China, Article 7 of which stipulates that where the title to a real estate purchased by the parents of one party for the party after the party's marriage is registered under the party's name, such real estate shall be deemed a gift given by the parents to the party and be determined as the party's personal property according to item (3) of Article 18 of the Marriage Law (of 2011). Where the title to a real estate purchased by the parents of both parties is registered under the name of one party, such real estate may be determined as jointly owned by both parties according to the proportion of capital contributions made by their respective parents, unless it is otherwise agreed on by the parties concerned.

A survey shows that 63% of the public object to such provision.[41] Some scholars even labeled it as "trumpet blowing for capitalizing the Chinese family."[42] There is no denying that the judicial prevision will make the financially strong even stronger and the weak even weaker. It is not fair in this sense. Will China have a new judicial interpretation or amendment of marriage law? Just wait and see.

If having a second thought upon it and looking retrospectively of the evolution of Chinese marriage law, we will realize that the judiciary sticked to its stance: It yielded to the social reality, rather than to make it better. The future of Chinese marriage law will go hand in hand with the economic situation and the public attitude about marriage and the

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[39] See 去年北京月平均工资 5223 元 行业差距、岗位差距仍很大 (*The Average Income in Beijing Last Year was 5,223 yuan and the Gaps among Different Industries and Posts Still Exist*), available at http://news.xinhuanet.com/fortune/2013-06/09/c_124836922.htm (last visited Nov. 4, 2014).

[40] The survey shows that almost 75% man prefers the naked marriage, but the number shrinks to 25 for woman. Available at http://lady.163.com/special/00261MPK/luohun.html (last visited Nov. 4, 2014).

[41] Available at http://lady.163.com/special/sense/2012lianghui04.html (last visited Nov. 4, 2014).

[42] ZHAO Xiaoli, 中国家庭资本主义化的号角 (*Trumpet Blowing for Capitalizing Chinese Family*), 1 文化纵横 (Beijing Cultural Review), 31–34 (2011). Professor Zhao reviewed all three judicial interptation and contended that the marriage law in China now virtually transformed the free union of man and woman into a family investment for parents of spouse. A detailed discussion of the 2011 judicial interpretation can be seen in YU Di, *Marriage is between A Man and A Woman: Latest Evolution of Marital Residence Regime in China*, 88 Chi.-Kent L. Rev. 1013 (2012–2013).

role of property in it.

CONCLUSION

In general, the traditional Chinese law was ethic-oriented, reflected by the codification of *Li*, the institutionized Confucian ideology. However, the modern Chinese legal developmentconsistently themes on learning from the west, a process of building up the rule of law in China. No doubt, the old and new legal thoughts will conflict, with the Chinese marriage law serving as a very illustrating example, which reveals that more than one hundred years' overall adoption of the western legal system cannot completely defy the visible and invisible influence of the tradition, a social product surviving for more than two thousand years. What makes the situation in contemporary China more complicated is China now confronts with a dramatic social transformation which has never been seen in the history. For long period of time, the Chinese laws have to figure out the solution of how to harmonize the tension between the old and new. The pragmatic approach adopted by the latest Marriage Law Judicial Interpretation may be an option, even though it cannot be a cure-all solution.