

BUXBAUM

Washington

1911

CHINESE FAMILY LAW
AND SOCIAL CHANGE
by *Maxwell and Constance Buxbaum*



CHINESE FAMILY LAW AND SOCIAL CHANGE

in Historical and Comparative Perspective

Edited by
DAVID C. BUXBAUM

UNIVERSITY OF WASHINGTON PRESS
Seattle and London

Copyright © 1978 by the University of Washington Press
Printed in Hong Kong

All rights reserved. No portion of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without permission in writing from the publisher.

Library of Congress Cataloging in Publication Data

Main entry under title:

Chinese family law and social change in historical and comparative perspective.

(Asian law series; 3)

“A collection of papers delivered (and discussed) at a conference sponsored by the University of Washington Law School in August 1968.”

Includes index.

1. Domestic relations—China—History—Congresses. 2. Domestic relations—Taiwan—History—Congresses. 3. Domestic relations—Asia—History—Congresses. 4. Sociological jurisprudence—Congresses. I. Buxbaum, David C. II. Washington (State). University. School of Law. III. Series. Law 301.42'0951 76-7781 ISBN 0-295-95448-5

ASIAN LAW SERIES
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON

Number 3

The Asian Law Series was initiated with the cooperation of the University of Washington Press and the Institute for Comparative and Foreign Area Studies in 1969 in order to publish the results of several projects under way in Japanese, Chinese, and Korean law. The members of the editorial committee are: Herbert J. Ellison, Director of the Institute for Comparative and Foreign Area Studies; John O. Haley; and Dan Fenno Henderson, chairman.

1. *The Constitution of Japan: Its First Twenty Years, 1947-67*, edited by Dan Fenno Henderson
2. *Village "Contracts" in Tokugawa Japan*, by Dan Fenno Henderson
3. *Chinese Family Law and Social Change in Historical and Comparative Perspective*, edited by David C. Buxbaum
4. *Law and Politics in China's Foreign Trade*, edited by Victor H. Li
5. *Patent and Know-how Licensing in Japan and the United States*, edited by Teruo Doi and Warren L. Shattuck
6. *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70*, by Hiroshi Itoh and Lawrence Ward Beer

Preface

The subject of "law and social change" has been frequently discussed in recent years by law scholars and social scientists. However, little research has been undertaken on the role of law as an instrument of social change in China, and theories about this process are generally unsubstantiated. Just how little has been done in this field becomes obvious when one realizes that rarely, if ever, have American law scholars and social scientists come together to discuss even a specific domestic area of law and related social institutions, although Americans have done more of this type of research than most Western scholars. Nevertheless, judges, legislators, and scholars in the United States still frequently assume that a judicial decision or passage of legislation is in itself invariably sufficient to bring about intended social change. Hopefully, comparative law scholars and social scientists with comparative interests have provided a lead in the research presented in this manuscript to those who restrict their scholarship to one jurisdiction.

Quite simply, in order to know why social change occurs and the role of law and other institutions therein—a subject of great importance throughout the world—it is necessary to evaluate change on the basis of field research and other detailed data. This truism, trite as it is, has yet to find its way into the minds of most law scholars and law makers dealing with problems of law and social change. This volume is a collection of papers delivered (and discussed) at a conference sponsored by the University of Washington Law School in August 1968. The contributors represented the disciplines of sociology, anthropology, and law, and came from Europe, Taiwan, and Japan, as well as from the United States. Because major research efforts had recently been devoted to the Chinese family and family law, it was felt that at conference time much new data would be available which would permit us to examine changes in the Chinese family and thereby an excellent opportunity would

also be provided for an evaluation of the role that law played, if any, in bringing about such changes. In order to accomplish this we examined Chinese family and law in historical and comparative perspective, hoping thereby to clarify developments. We were most fortunate in our ability to bring together many of the best scholars in the world of both the family and family law to discuss this subject. Although there have been many unforeseen delays between the presentation of the original papers and publication of this volume, it is hoped that the overview of Chinese family law and social change presented here will be no less significant today than it was at the time the conference was held.

While I chaired and organized the conference, much of its initial impetus was provided by the Director of the Asian Law Program of the University of Washington, Dan Fenno Henderson, who saw its possibilities at an early date and helped to sponsor several of the major research projects that culminated in this meeting. In view of the very conservative and traditional bias of American law schools, few law scholars have exhibited both the imagination and courage required to sponsor a project such as this one. Certainly Professor Henderson in his own teaching and research and in his sponsorship of the research of others, has done much to take comparative law out of the realm of the esoteric and superficial and to bring it into the world of real scholarly endeavor. He has contributed in the same manner to the field of law and social change. He had the good fortune to be supported in his endeavors by an imaginative dean, Lehan K. Tunks, and a senior scholar of renown, Warren L. Shattuck.

To these scholars, and to all who helped in bringing this volume, I express my sincere thanks.

DAVID C. BUXBAUM
New York
September 1976

Contents

Family Law and Social Change: A Theoretical Introduction David C. Buxbaum	3
PART I. MARRIAGE AND DIVORCE IN TRADITIONAL CHINA	
Marriage and Divorce in Han China: A Glimpse at "Pre-Confucian" Society Jack L. Dull	23
Divorce in Traditional Chinese Law Tai Yen-hui	75
PART II. PARTITION IN TRADITIONAL CHINA AND IN COMPARATIVE PERSPECTIVE	
Family Property and the Law of Inheritance in Traditional China Shūzō Shiga	109
Succession to Ancestral Sacrifices and Adoption of Heirs to the Sacrifices: As Seen from an Inquiry into Customary Institutions in Manchuria Tatsuo Chikusa	151
Family Partition as Contractual Procedure in Taiwan: A Case Study from South Taiwan Myron L. Cohen	176
Adjudication and Partition in the Tibetan Stem Family Melvyn C. Goldstein	205

PART III. MARRIAGE AND DIVORCE IN TAIWAN

A Case Study of the Dynamics of Family Law and Social Change in Rural China

David C. Buxbaum 217

Rural to Urban Migration in Taiwan: Its Impact on Chinese Family and Kinship

Bernard Gallin 261

Modernization and Household Composition in Taiwan

William Parish 283

PART IV. MARRIAGE AND DIVORCE IN THE
PEOPLE'S REPUBLIC OF CHINA

Soviet Family Law and Comparative Chinese Developments

W. Müller-Freienfels 323

Family Law and Social Mobilization in Soviet Central Asia: Some Comparisons with the People's Republic of China

Gregory J. Massell 400

Marriage Law and Policy in the People's Republic of China

Marinus J. Meijer 436

PART V. COMPARATIVE DEVELOPMENTS

Remarks on Family Law Change in Post-Revolutionary Indonesia

Daniel S. Lev 487

Remarks on Family Law and Social Change in India

Marc Galanter 492

Hindu Family Law and Social Change

Harold Lewis Levy 498

Bibliography 503

Glossary 529

Index 541

*Chinese Family Law and Social Change
in Historical and
Comparative Perspective*

Family Law and Social Change: A Theoretical Introduction

DAVID C. BUXBAUM

This introduction is an attempt to build a preliminary theory of the role of law in social change based only in small part upon data provided by the papers in this volume which deal primarily with China. The theory is offered to other scholars interested in the field for criticism and refinement so that we may be able to develop more sophisticated concepts for dealing with problems of law as an instrument of change, but is not offered as definitive theory.

TOWARD A THEORY OF THE RELATIONSHIP BETWEEN LAW AND SOCIAL CHANGE

The successful use of positive law as an instrument of social change is dependent upon many variables. Isolation of some of the more significant factors should permit a theoretical conception of the entire process.

Judicial-Political Power

Communications. In order to function as an instrument of change, legal institutions must be able to communicate their decisions to the population. Therefore, a good system of communications within the society is required. Aside from the ability to physically transmit information from one place to another, there must be political-legal communication with members of the populace. Education plays an important role in this area because it is obviously easier to transmit information rapidly to a literate population. On the other hand, even in traditional societies with low levels of literacy, there are relatively efficient means of transmitting legal information, particularly if there is a literary elite. Notice boards were used in both Japan¹ and China in

¹ See D. Henderson, *Promulgation of Tokugawa Statutes*, in *TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA* 9, at 19 (D. Buxbaum ed. 1967).

traditional times. Public readings² and lectures by gentry elite³ are other means of spreading information. In modernizing societies such as China with increasing levels of literacy, radios and loudspeakers as well as frequent political meetings are utilized to communicate legal norms and decisions to the population.

Extent of judicial penetration. Aside from communications within the society, another major factor affecting the utilization of positive law to bring about social change is the degree to which the judiciary has penetrated the society.

The formal court system must be available at reasonable expense and distance from the numerous centers of population. It must also use language and law that are intelligible to the people of the community within which the court operates.⁴ Even if there is no linguistic problem, rules that are imported from foreign soil and substantially vary from indigenous practice, may be misunderstood, resulting in indifference or hostility on the part of the populace to the formal judicial institutions.

In many modernizing nations the formal court system is staffed by a foreign-educated elite. The new judicial personnel, if educated outside their own nation or in foreign-type schools within their nation, must acquire knowledge of the social circumstances within which they administer law, if they are to be able to effectively administer justice. A jurist trained in England or the Soviet Union, although of Chinese ancestry, is not necessarily aware of the social circumstances in Singapore or China, within which he dispenses justice.

In most premodern societies, the law is largely administered by an informal court system. The clans, families, and guilds of traditional peasant society, or the tribal organizations of preliterate society, mediate most disputes.

If positive law is going to influence social practice in these societies, it must also be applied by the informal courts. It is necessary either to replace the

² *Id.* at 16.

³ K. HSIAO, *RURAL CHINA, IMPERIAL CONTROL IN THE NINETEENTH CENTURY* 184 ff. (1960).

⁴ See S. Ottenberg, *Local Government and the Law in Southern Nigeria*, in *TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA* 26, at 39 (D. Buxbaum ed. 1967), where he notes that the language of certain rules of council in Nigeria were ". . . detailed, complicated, in a second language, and foreign to many persons." This linguistic problem exists in many "former" colonial nations such as Singapore, Malaysia, India, and Hong Kong to name just a few. The problem is partially one of the colonial-trained elite having a vested interest in the colonial language and, furthermore, a problem of what language to use in multi-ethnic states with communal conflicts. Even dialects are important where, for example, in Taiwan, the police and judicial officials are often "mainlanders" who cannot communicate easily with the "Taiwanese." However, the problem of communication in Taiwan is not a serious one. There are also dialect problems in mainland China as seen by the deliberate transfer of southern cadre to the north, and vice versa.

informal courts (which generally emphasize conciliation) by other semi-formal institutions, as has been done in the People's Republic of China, or to politicize the existing traditional structure sufficiently to affect the norms used by these "courts" in their administration of justice.

Degree of judicial-political power available. In order to affect the norms used by the informal courts and to catalyze social change, the state must be favorably disposed toward the use of judicial-political power. The degree of power needed will vary with the size of the group affected by the law and with the degree to which the law deviates from traditional norms, thus creating a potential reaction of hostility or resistance.

Judicial-political power may be applied by propaganda-education methods. The dissemination of new norms may take place in schools and at political meetings as well as through the mass media and the theater. They may also be publicized by the use of show trials or mass meetings at which trials are discussed.

Another important aspect of judicial-political power is the application of coercion. The ability of the courts and other institutions to impose judicial sanctions upon violators of the new "legislation"⁵ will noticeably affect compliance. Of course, there is no direct relationship between willingness and ability to apply sanctions, and the impact of "legislation" upon social practice. Excessive or misdirected sanctions may create additional hostility to an enactment.

Power of the Social Groups Affected

The effectiveness of positive law depends not only upon judicial-political power, but also upon the size of the groups affected and the extent to which they feel a benefit or detriment.

The size of the group affected by the new law naturally influences the ease with which a particular norm may be institutionalized. If there is a small alien landlord class which controls the land, it may be easy to redistribute this land to the peasant population. On the other hand, new laws that raise the social status of women in a traditionally patriarchal society are ordinarily difficult to institutionalize. The whole social structure, or a large part of it, may have to be altered in order to bring about the desired change.

In addition to the function of size, the power of the group affected is very important in determining its ability to resist new positive law. If a small landlord class controls local credit necessary to finance farmers until harvest time, it may well be difficult to effectively take their land from them, even if they are a small group. Similarly, if a relatively small group (such as the farm organizations in the United States) exerts important influence upon the

⁵ "Legislation" by a legislative, administrative, or judicial body is included in this term.

political-legal institutions, it may be difficult to enact and/or enforce legislation against it. A diminution in the real economic, political-legal, or social power of a group may make it easier to affect them by new legislation.

A third related factor is the degree to which the group feels affected by the "legislation" aimed at it. In many cases part of a group may regard a particular law as bestowing a benefit, and another part may feel adversely affected. If the group feels its very existence is endangered by new legislation, it is more likely to resist it strenuously. If, on the other hand, the group feels that while its interests are adversely affected, nevertheless it may survive, while opposition on the other hand may bring destruction, the group affected may then, as certain capitalists in China did in the 1950's, prefer to cooperate with the regime and to abide by the new legislation even when it is partly directed against them. The important factor here is not to what extent the group actually is affected, but to what extent it feels itself affected. Furthermore, it is often difficult for a group actually threatened with destruction to accept that fact, and if rationales are provided for by the lawmaker, the group may grasp at them as many Jews did in Europe and many capitalists did in China.

Values of the Society and the New Laws

The extent to which groups in the society believe they are affected by a particular piece of legislation is in part dependent upon the values of the society.

The traditional values of the modernizing society are important from at least two points of view. The first is the degree to which traditional values manifest receptivity to change. If the society's values are fairly rigid ones and there is a low tolerance for perceived change, then any "legislation" may be met with resistance. If, on the other hand, change was acceptable even in the traditional value system, there would be less resistance to institutionalizing new laws. We might expect therefore that in a Muslim country with fairly strict religious laws and a high regard for the *Koran* and other religious norms, it might, under most circumstances, be more difficult to effect change than in a Muslim country in which the *adat* always played an important role in law and in which the *adat* was subject to change, including perceived change.

Traditional values permeate different societies in different ways and to different degrees. Thus, a further factor in determining the susceptibility of a particular society toward change would be the degree to which traditional values continue to hold sway. This depends upon numerous factors such as the impact of foreign ideas and institutions, the passage of time since the downfall of the traditional political hierarchy, and the extent to which economic and social changes deviating from traditional patterns have taken place.

Finally, the extent to which traditional or existing values conflict with the new law will determine the extent to which "legislation" might find opposition within the society. If, for example, traditional values were always ambivalent about secondary wives and it was in fact possible for only a few wealthy citizens to take advantage of such an institution, then legislation to prohibit the taking of secondary wives might easily be enforced and might rapidly affect social behavior.

The other side of the coin is the extent to which the values of the new positive law conflict with traditional or existing values. The greater the degree of conflict with existing values, the more difficult one might expect it to be to change actual social practice.

Summary

We have talked of judicial-political power, of the power of the social group affected, and of the values of the society and the new laws as if each of these three factors could be discussed in isolation. Actually, they are all mutually dependent and interrelated. Furthermore, there are other factors—such as the degree of legitimacy of the regime, and the economic and social institutions that support the political-legal institutions—that we have only touched upon indirectly. Nevertheless, we have, hopefully, isolated some of the more important factors that determine the impact positive law may have on social change.

In order to test the above analysis, and to see whether it helps us to understand law and social change, we may examine it in light of some facts presented in this volume.

THE THEORY IN LIGHT OF REALITY

Judicial-Political Power

Communications. In traditional China levels of literacy were low and dialect barriers imposing. These limitations had a substantial effect upon legal administration, making it difficult to introduce new laws into the countryside.

In Taiwan, under Japanese rule, and in mainland China under the Communists, education has been stressed, as Tables 1 and 2 demonstrate. In Taiwan in 1899, there were 10,295 students in primary schools, exclusive of trade schools and others. By 1944, the enrollment figure had jumped to 932,525, more than 90 times greater than the number enrolled in 1899.⁶ This increase is impressive even when compared to the population growth, which doubled between 1905 and 1943.⁷

⁶ Taiwan Provincial Government, TAIWAN SHENG WU-SHIH-YI NIEN LAI T'UNG-CHI T'I-YAO (Essential Statistics of Fifty-one Years of the Province of Taiwan) 1212 (Taipei 1946).

⁷ *Id.* at 76. There were 3,123,302 people in Taiwan in 1905 and 3,976,098 in 1923. In 1933, there were 5,060,507 and in 1943, 6,585,841.

TABLE 1
PRIMARY SCHOOL ENROLLMENT IN TAIWAN
UNDER JAPANESE RULE

<i>Year</i>	<i>Enrollment</i>
1899	10,295
1910	49,556
1923	238,574
1933	349,112
1938	544,946
1944	932,525

Similarly, in mainland China, the school enrollment for 1949 more than doubled by 1952 and more than tripled by 1959, when ninety million students were attending elementary schools.⁸

TABLE 2
PRIMARY SCHOOL ENROLLMENT
IN MAINLAND CHINA AFTER 1949

<i>Year</i>	<i>Enrollment</i>
1949	24,391,033
1952	49,999,944
1959	90,000,000

In traditional China, as noted above, dialect differences created additional communications problems. Since a magistrate was not permitted to serve in his own area, he might be unfamiliar with local dialects and local customary law. In mainland China, and to an even greater extent in Taiwan, emphasis upon Mandarin Chinese as the national dialect is helping to eliminate this problem.

China was and is a country of enormous size. A warrant for arrest often took many days if not weeks to reach a defendant by traditional methods of transportation. The result was that evidence was often difficult to acquire and warrants hard to serve.

On Taiwan the Japanese "... enlarged communications facilities; a thorough public network of roads, bridges, railway lines, telegraph and telephone installations, tunnels and mountain trails . . ." was constructed.⁹ From the beginning of Japanese rule,¹⁰ railways were pushed forward, so that by

⁸ T. Chen, *Elementary Education in Communist China*, CHINA QUARTERLY 98, at 102 (April-June 1962).

⁹ G. BARCLAY, *COLONIAL DEVELOPMENT AND POPULATION IN TAIWAN* 26 (1954).

¹⁰ V. Lippit, *Development of Transportation in Communist China*, CHINA QUARTERLY 101 (July-Sept. 1966).