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UNIVERSITY OF CALIFORNIA SAN DIEGO

Marrying Traditions and Transitions:
Multisourcing and Judicial Decision-Making in Beijing High Court (1912–1928)

A Dissertation submitted in partial satisfaction of the requirements
for the degree Doctor of Philosophy

in

Sociology

by

Yu Wang

Committee in charge:

Professor Kwai Ng, Chair
Professor Weijing Lu
Professor Richard Madsen
Professor Margaret Roberts

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The Dissertation of Yu Wang is approved, and it is acceptable in quality and form for publication on microfilm and electronically.

University of California San Diego

2023

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ABSTRACT OF THE DISSERTATION

Marrying Traditions and Transitions:
Multisourcing and Judicial Decision-Making in Beijing High Court (1912–1928)

by

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Doctor of Philosophy in Sociology

University of California San Diego, 2023

Professor Kwai Ng, Chair

Over the past century, China has undertaken the strenuous work of developing its own civil code to regulate civil matters. The codification project began in the early 20th century and culminated in 1930 with the enactment of China's first Civil Code. In the meantime, the philosophy, culture, and mentality in the courtroom also changed, influenced by the new civil

codification and professional training of legal professionals. These changes were not limited to a specific temporal or spatial context but denoted a transformation of the culture of judicial practice in China that accompanied the modernization of law. Drawing on cases from the Beijing High Court (1912–1928), this dissertation examines how appellate judges in Beijing reviewed decisions from lower courts in marriage-related cases and how judges reasoned through and resolved cases by adapting the newly introduced civil law tradition to traditional Chinese legal culture. Given that the legitimacy of normativity originated from different sources, this dissertation argues that there emerged an meso ground between potential legal bases and judicial decisions, where an array of legal bases was collated, debated, and reconciled in alignment with societal norms and traditions to develop compelling judgments. In some particular cases, this meso ground was fluid, embracing both domestic and foreign legal concepts. Leveraging the flexibility of translation, this meso ground also worked to integrate the historical legacy of imperial Chinese law and the fresh realities, ambitions, and legal trajectory of China during the early 20th century. This methodology and philosophy regarding the organization of law in China came to be called as *multisourcing* and has endured to the present day.

CHAPTER 1. INTRODUCTION

In January 2021, the new Civil Code of the People's Republic of China was officially promulgated. Throughout the codification process, attention was given to the Book of Family due to the evolving family structure, marital property laws, and shifting social attitudes towards gender, custody, and women's rights in China (Wang 2012; Zhu and Lu 2021). The definition and discernment of rights and obligations between married couples also sparked intense debates, and the new Book of Family was expected to address changes in practices and values of family and marriage in China.

The new Family Law is a significant milestone in China's legal system, as it is now part of an extensive civil codification project that governs civil relations and transactions through various legal provisions. This inclusion marks the fulfillment of a century-long process of modernizing China's legal system and unifying laws and court institutions under one set of rules for justice. This inclusion signifies the culmination of a century-long process of modernizing China's legal system and unifying laws and court institutions under a single set of rules for justice. The journey towards civil codification in China commenced in the late Qing dynasty and reached its peak with the promulgation of China's first official Civil Code in the 1930s. Throughout the entire 20th century, despite numerous reforms and revisions to the legal system, China persisted in its pursuit of legal modernity, one of the hallmarks of which is a complete set of civil codification.

Over the past one century, the legal system in China has undergone three phases of significant changes. In the early 20th century, during the transition from an imperial monarchy to republican democracy, China began introducing Western-derived codes and court infrastructure to replace its century-old imperial legal system. After the Communist Party took control of the

mainland in the 1950s, China abolished the laws and court organization established in the republican era and started building its own socialist legal system. Following the Cultural Revolution in the 1970s, China eased restrictions on individual activities and reduced domineering control over private ownership and commercial activities. This relaxation prompted another round of legal reforms within China's legal system (Baum 1986; Lubman 1999; Peerenboom 2002; Potter 1994).

In this context, the 2021 civil codification in China signifies a reiteration of an enduring narrative of legal modernization, which has its roots in the acquisition of legal knowledge, codes, and practices from Europe. Between traditional and modern Chinese law, foreign and domestic law, China continues to strive for a comprehensive Civil Code to govern civil relations under the law, a pursuit that can be traced back to the 19th century. This arduous and protracted process involved reformers diligently learning and attempting to reconcile the differences of translated laws from foreign nations. For many problems and struggles the Chinese legal system is struggling with today, despite the reasons and factors grounded in a renewed, contemporary context, the enduring influence of historical precedents remains palpable, casting its shadow over Chinese law, legal practice and the boundary between law and society. The 21th century legal changes still have its 19th century origin, akin to the Chinese idiom “new wine in old bottle” (*jiupinzhuangxinjiu* 舊瓶裝新酒).

The journey toward a modern legal system in China began in the late 19th century when China's own imperial legal system was deteriorating under the influence of foreign powers (Immanuel 1980). Unlike other countries that introduced the European legal system, mainland China was never fully colonized, and the rule of law from a single country was never entirely transplanted. However, many foreign countries had concessions in various coastal Chinese cities

and towns, exercising extraterritorial jurisdiction in these areas to preside over the cases involving their respective citizens (Ruskola 2013). These empires pursued their own interests, businesses, and evangelical work in China, but they were unable to directly impose their laws to replace the traditional Chinese legal system in the second half of the 19th century. However, this changed when imperial powers began reporting and documenting the punitive, gruesome, and inhuman punishments of the Chinese legal system, which became the basis for these powers to insist on exercising their extraterritorial jurisdiction.

One of the major conflicts between Western countries and China centered on the legal system of China. Historically, China has leaned on its imperial codification—a system heavily influenced by Confucianism—to adjudicate disputes, a practice that persisted for centuries (Bodde 1963). This Chinese legal tradition was built around the supreme authority of the emperor, incorporating a centralized and formalized legal practice, complemented by a corps of well-tune legal professionals. Cases were adjudicated at the local level in magistrate courts, wherein the magistrates not only adjudicated but also held leadership positions within local government. The traditional Chinese legal system, however, was characterized by a lack of clear distinction between civil and criminal matters, and it did not separate administrative and judicial powers (Bodde and Morris 1967).

In the late 19th century, legal theories in Europe posited that inherent differences in legal traditions between European and Asian countries could make it difficult for a European to be tried by local law in a culture with fundamentally different legal traditions (Cassel 2012; Kayaoğlu 2010; Quigley 1926). In China, some Western countries established extraterritorial jurisdictions, which later became the driving force to convince the ruling government of China to initiate and complete the legal reforms as expected by the international community.

Following the onset of Western influence, China embarked on a painstaking process of revamping multiple dimensions of its technology, politics, education, and social life in the second half of the 19th century (Fairbank and Liu 1980). The Qing government spearheaded projects to translate and import legal knowledge from European countries since the 1860s. These translations yielded a prolific body of work, including legal publications that were essential sources to support social, political, and legal transformations in China in the 1890s and 1900s.

In the early 1900s, China initiated the overhaul of its legal system, following the models of European continental laws. Starting in 1901, the Qing government launched a series of reforms to modernize the political and legal system, known as the "New Policy" reform (*xinzheng* 新政). The New Policy marked the onset of the modernization of Chinese law.

Throughout this reform, China adopted various aspects of European continental law, including criminal, civil, procedural, and administrative codification, primarily from Japan and European countries. China also implemented a new judicial system with independent courts and professional legal practitioners (Ng 2014). To ensure the proper training and qualification of legal professionals, China established law schools dedicated to teaching the newly introduced laws and developed bar examinations to assess and qualify legal practitioners. From codification to institution, China sought to replace its own longstanding legal traditions with a system guided by European principles. While this transformation appeared comprehensive, the legacy of Chinese law persisted as a spectral presence, haunting the vast expanse of China for decades. This enduring influence continued to cast a shadow over judicial activities in contemporary courts.

This research investigates the turning and tipping point in the history of Chinese law, focusing on a significant change arising from contested tensions along two dimensions. In the

first dimension, the study explores the tension between Chinese traditional law and foreign law. It maps out the historical context, debates, and struggles between these two seemingly different normative systems. By examining the modernization project of Chinese law, this research also provides a nuanced yet comprehensive understanding of the narrative of Chinese legal changes, highlighting the painstaking process of rejecting the Chinese past while embracing foreign laws.

In the second dimension, the research investigates the agency of legal professionals in rendering a judgment, including those who translated, created, and practiced the new laws. It delves into the agency as it navigates the complex historical landscape of legal judgment. Amidst the transformation of law in the early 20th century and against the backdrop of "law in the making," the agency of new legal professionals faced the challenge of reconciling the enduring tradition of justice with the emerging influence of Western laws.

Two Core Issues of Changing Legal Practice

ORIGINAL LAW AND PLURAL LAW: CONTESTED POSITION OF FOREIGN LAWS IN LEGAL CHANGES

Legal Originalism and Citing Foreign Law

Debates in legal literature address the legitimacy and applicability of laws from different sources and countries. One key question is whether foreign laws can be used in domestic cases and to what extent legal professionals can draw from jurisprudence outside their own country's legal system. The legal transplantation theory offers a framework for understanding the movement of law between different legal systems across countries.

In his seminal work on legal transplantation, Watson argues that laws operating in a society do not necessarily reflect the spirit of its people. He asserts that laws in Europe, for

example, have borrowed and assimilated elements from sources external to their existing legal systems (Watson 1974:22). This argument separates law from the society it governs, giving rise to debates over the challenges encountered throughout the borrowing, incorporating, assimilating, and receiving processes involved in adopting foreign laws (Harding 2019; Legrand 1997; Teubner 1998). From the dissemination of Roman Law to the global spread of European laws in the late 19th century, and the recent development of the universality of international law worldwide, the world has experienced various encounters with "foreign laws." Outside of Europe, however, transplantation assumed a different tone, accompanying the colonial expeditions of Europeans across the world. In regions that were once European colonies, such as India and some Caribbean countries, the imposition of British law, for example, formulated a distinction between British law and local law. The burgeoning plurality of different normative orders, originating from diverse sources of laws, regulations, and customs, also exposed various forms of tensions along the lines of foreign and domestic laws.

In the United States, debates also persist over the roles and functions of foreign law and how they can be integrated into the existing legal system. For example, in interpreting the US Constitution, Judge Scalia dismisses the legal authority of foreign law. In his keynote speech delivered to the American Society of International Law, he argues that citing foreign laws to interpret the US Constitution is misguided, and the application of comparative analysis is "inappropriate." In the limited cases where citation of foreign law could be possible, Scalia defends the relevant, textual, and original meaning of a law or statute. His defense is consistent with his proposition on the originalist reading and interpretation of the US Constitution, interpreting the utterance when it is originally uttered. "We must do our best to discern the meaning of the statute from its text" (Scalia 2004:306). Another reason for rarely citing foreign

law to interpret the US Constitution is that such an introduction of foreign law may be derived from a "moral sentiment" instead of a "logical analysis," thereby conceding the logic of argument to moral conformity. He also believes that citing foreign law could be "selective," primarily referencing European laws while neglecting laws from other "foreign" countries, thus creating a sense of superiority based on racial and cultural factors. This position and reading of law represent a type of understanding of the origin of law, not only from an "originalist" interpretation of the original text of law but also suggesting the existence of a fixed, ontological base supporting the core knowledge of justice, which takes precedence over the supposedly deviating, diverse, and ever-changing society over time. Thus, the debates over the foreign influence on the domestic legal system also reveal how legal professionals delineate and manage the boundary between law and society, and how law is supposed to maintain a communicative channel with society in a broader context.

Different from Scalia's view on foreign law, some judges' opinions in landmark US cases advocate for the country to emulate and conform to the standards established in a broader global community, particularly in European countries. For instance, in the case *Lawrence v. Texas*, for example, which reviews a conviction of private, consensual sexual conduct between same-sex individuals, Judge Kennedy issues the majority opinion, where he cites the case *Dudgeon v. United Kingdom* heard in the European Court of Human Rights. The opinion argues that "laws prescribing this sort of conduct are invalid under the European Convention on Human Rights." This reasoning is used to support the court's position that laws granting excessive state power to enforce ethical and moral considerations on the general public are invalid.

The use of foreign law in interpreting the US Constitution has been a subject of debate in the US. The Supreme Court's landmark cases of *Atkins v. Virginia*, *Lawrence v. Texas*, and

Roper v. Simmons have sparked discussions on citing foreign law in interpreting the US Constitution. Some scholars argue that foreign laws have long been used throughout the history of US law to reinforce arguments on human right issues, with the US court conforming to global legal norms, promoting human dignity and providing greater protection to individuals (Ginsburg 2005). Waters (2004:150) called this as a “transnational judicial dialogue,” wherein international courts reference foreign legal precedents in constitutional law matters. However, many other scholars disagree with the use of foreign legal sources in interpreting the US Constitution, asserting that it would undermine the legal hierarchy within the US legal system and cede the interpretation of the Constitution to foreign perspectives (Alford 2004). Other scholars maintain a cautious stance on citing foreign law to interpret the Constitution, limiting the use of foreign legal sources to non-Fourth and non-Eighth Amendment cases (Calabresi and Zimdahl 2005:756).

Even for those, like Judge Kennedy, who endorse foreign law and are willing to align judgments with ongoing "global legal norms," such adoption is selective. Legal systems across countries are ranked according to an outdated, Eurocentric view that evaluates and selects potential normative examples for the US legal system to learn from and align with. For some other countries, particularly those with long-standing, historically ingrained differences from European-originated justice models, the indoctrination of aligning the justice system with "global legal norms" (Boyle and Meyer 1998; Michelson 2019) incarnates the 19th-century discourse around civilization, modernity, and the disenchantment of Asian countries (Osterhammel 2019). This perspective alludes to the superiority of European legal traditions as models and templates for *alignment*.

In contrast to the situation in the United States, many countries around the world experienced extensive learning and borrowing of foreign laws during the 19th century, predominantly from European nations. In these countries, foreign laws were not generally perceived as conflicting with the existing, originalist interpretation of their own laws. Rather, foreign laws were seen as representing a doctrinal legal tradition originating from a more civilized, superior world. Throughout the development of modern law in numerous non-European countries, European laws were imposed, prompting discussions on the pluralistic forms and manifestations of law.

By considering both external and internal law, the literature on legal pluralism narrates a story of countries with limited flexibility to deviate from international standards while maintaining their own justice in court. The divergent responses to “citing foreign law” across different countries provide a rich and vivid example of colonial power in the modernization of the legal system in non-European countries, where learning from Europe became the pathway to modernize their own legal systems.

Legal Pluralism and Receiving Foreign Legal Influences

In the literature on legal pluralism and global legal studies, scholars investigate the intersection and multiplication of different legal traditions, local customs, and the will of sovereign in a global context. Adopting a critical and reflexive gaze towards the worldwide dispersion of European legal traditions, this line of research examines how we can understand the tension between universality and diversity. Given the foundational principles of law, scholars explore how European law has been adapted and integrated with local knowledge throughout its global journey in Asian, African, and American countries (Geertz 1983). Thus, the concept of pluralism has attracted interest from both legal anthropologists and doctrinal legal scholars. In

recent years, legal pluralism has garnered new theoretical and empirical insights due to the increasingly globalized nature of today's world (Berman 2006). As a result, scholars endeavor to establish a revitalized analytical framework to explain the distinct yet concurrent arrangements for managing diverse legal traditions in the past and the multilayered legal practices in the present global context (Berman 2012).

The first line of literature on legal pluralism sees law as a traffic light at an intersection, serving as a signal for laws from diverse directions to either proceed or halt. This approach is underpinned by two different sets of philosophies. Firstly, it assumes the superiority of a colonial power in determining the functioning of this traffic light. The existing literature in this line examines how the operation of law could be simplified by accommodating a subgroup's culture in resolving disputes, even if their traditions do not fully conform to the overarching legal norms. Secondly, this literature explores how various laws, particularly those with diverse origins, collaborate and multiply, consciously and rationally recognizing the unique cultures intrinsic to the subgroups along specific categorizing lines (Griffiths 1986; Merry 1988).

Another thread of literature challenges legal centralism and the do doctrinal approach to studying legal pluralism, deeming such an approach "weak." Instead, they argue that the multiple, pluralistic applications of law in practice can be explained by the diverse cultural subgroups and the distinct structural interpretations of these subgroups as the source of such pluralism. The perception of order and the ways to sustain that order differ from one group to another (Griffiths 1986; Hooker 1975; Vanderlinden 1971, 1989). In this vein, legal pluralism is not a legal system or a component thereof, but an inherent attribute of society, embedded within the historical context of local communities.

In this way, the literature on legal pluralism refutes legal centralism and suggests alternative approaches to understanding customs and practices of law at the local level. It argues that diverse methods of addressing law and customs should not be dictated or chosen solely by a sovereign power in the creation and implementation of law. This perspective on legal pluralism is often referred to as the "social scientific" view (Merry 1988), as it sees pluralism as shaped by the subcultural differences among various subgroups of people, resulting in a pluralistic configuration and arrangement of distinct legal norms. By examining the structural perspectives, this "social scientific" view on legal pluralism also demonstrates how the movement of legal orders within and across the borders of different subgroups generates such pluralism. Legal pluralism shifts its focus to the diversity of local culture and community, particularly the social dynamics that maintain a sense of justice and norms, keeping them fluid and changing.

Recently, legal scholars have been inspired to investigate the configuration and arrangement of legal pluralism in a global context, given the increasing collaboration and conflict between different cultures and countries. Theoretical and empirical contributions in sociolegal studies seek to reconcile normative differences across different cultures and countries, with the intention of closing the normative gap, without the a priori assumption that the pluralistic law is derived from the cultural differences between subgroups of people. This line of literature includes the work of international law which put a question mark on the singular, spatial view presented in the literature of legal pluralism and legal transplant (Berman 2012; Tamanaha 2008; Thornhill 2012; Twining 2009).

For example, Berman's work expands on the concept of legal pluralism, arguing that it exists in "a world of hybrid legal spaces" rather than being confined to a single legal system (Berman 2006). His research focuses on the hybridity of legal cultures and subgroups to develop

a new perspective and methods for legal pluralism in the global context (Berman 2012). He proposes a "second-best" approach to managing conflicts from different cultures, which entails applying a range of procedural mechanisms, institutions, and practices to manage, rather than eliminate, the hybridity of normative rules (Berman 2006). Berman also contends that pluralistic approaches to the global legal system should prioritize harmonizing cultural differences instead of enforcing a single dominant model of legal norms, which could result in the costly elimination of hybridity in an ever-changing global context.

Berman's research strives to transcend and dismantle the structural and enumerative approaches to studying legal pluralism. It illustrates that legal pluralism is rooted in the imperial history of the world and remains pertinent to a wide array of legal issues in contemporary society. However, the changing context, including the phenomenon of legal pluralism, has experienced significant transformations over the past centuries. Therefore, a reflection on the centering and "multicentering" of the movement of orders from one to many or vice versa is crucial to establishing a connection and a narrative continuity between the present and the past (Benton 2011; Berman 2012). A refined approach and a renewed outlook into the temporal and spatial complexity of legal pluralism would also be essential to address the growing tensions surrounding the diverse and multi-originated normative orders across many countries worldwide.

Two theoretical perspectives, originalism and pluralism, offer divergent views on the integration of foreign laws into domestic legal systems, each grounded in their historical, cultural, and social contexts. Originalism regards foreign laws as supplements to the existing domestic law, requiring logical legal reasoning and analysis for full integration into the domestic legal framework. In contrast, pluralism views foreign laws as embodying a nature of doctrinal

justice, which does not require integration into local laws. The divergence between originalism and pluralism draws a clear and rigid boundary between foreign and local law. In extreme cases, this separation has resulted in the exercise of powers from various directions, such as racialization of law, legal imperialism, and orientalism, as well as the extraterritoriality of colonial powers (Cassel 2012; Kayaoğlu 2010; Quigley 1926).

The debates surrounding foreign law and the two opposing ways of understanding its reception and impact also provide a valuable theoretical framework for analyzing the modernization of Chinese law. This framework contextualizes the transformation of the Chinese legal system within a global context and highlights the contrast between Chinese law and foreign law, revealing the underlying conflict between two different sets of legal principles and the pursuit of justice. The case of China's early 20th-century project for legal modernization provides an ideal empirical case for exploring how a country like China navigated its original legal tradition, local pluralistic customs, and the imposition of Western law throughout the long 20th century. This historical background and context can help illuminate both the empirical and theoretical debates surrounding “citing foreign law” in existing scholarship.

In this research, I examine the reception and application of foreign law in the modernization of Chinese law during the early 20th century. Drawing on court cases collected from the archive of the Beijing High Court in the 1910s and 20s, I examine the operation of a newly modernized court infrastructure in Beijing and focus on the views of Republican judges on cases and the methodology of sourcing and applying law from diverse sources.

During a period of profound change in Chinese legal history, when civil justice was being established and a solid foundation for judgment was lacking, this project explores how judges leveraged both the newly translated European civil codification and the traditional Chinese law

to seek justice for Chinese people. I argue that Beijing judges developed a *multisourced* legal basis for judgment from both foreign and domestic laws, with law still in the making and justice pending for civil cases. This strategy was particularly evident in cases that faced significant tensions and pressures for change during the revolutionary era of the 1910s and 20s. Using the example of the changing and adapting jurisprudence on concubinage by Chinese courts during this time, I demonstrate how Beijing judges put this multisourced justice into practice to deliver justice for Chinese women, accounting for underlying cultural dynamics. Furthermore, by illustrating the historical formation of this strategy, I argue that this approach and the findings would also contribute to understanding today's Chinese jurisprudence. The strategy's lasting impact on judicial mentality in China is evident, as courts continue to seek a balance between law and society at the micro level. This research provides a historical and empirical case for the theoretical discussions on the reception and impact of foreign law and contributes to a better understanding of legal pluralism and the modernization of Chinese law in a global context.

CULTURAL UNDERSTANDING OF LEGAL PRACTICE AND CITING FOREIGN LAW

In the discourse on the citation of foreign law, judges and legal scholars adopted different ways to frame and make sense of foreign law. Those who invoke foreign law to bolster their arguments, particularly those originating from European countries, view them as emblematic of progressive ideas. For example, in *Lawrence v. Texas*, the Court's opinion cited a case from the European Court of Human Rights (ECHR) that decriminalized voluntary same-sex intercourse. The citation transcends a mere reference and instead suggests that the ECHR case reflects values "shared with a wider civilization" (539 U.S. 558), which the U.S. Supreme Court determines the United States should and must engage in. This framing links the advancement of justice in the United States to a more comprehensive global community and presumes the existence of a

"wider civilization" as the fundamental mechanism that supports the exchange of justice between countries.

Moreover, this framing of foreign law citation perceives "foreign law" as a pervasive and fundamental justice that is shared among all human beings. This case shows how the value of "human justice" and the toolbox of "foreign law" work together to shape the practice of "citing foreign law". On the first level, the value of human justice, functioning as a governing ethical value, motivates judges to act as if such "shared values" are the appropriate course of action. Without this ethical imperative derived from these "shared values," the causality of judgment could not be exclusively attributed to the *culture in action*. The often-overlooked variable of value as jurisprudence in the legal lexicon may also serve as a significant factor in strategizing the elements sourcing processes for judges to cite foreign law. On the second level, ECHR cases, among other relevant court judgments, serve as tools in a legal toolbox that enables judges to design the argument-making process in their own judgments on a given case. In this context, foreign law is not only cited but also contributes to the formation of a legal toolbox that sources, stores, and provides support for a given argument in court.

Opponents of citing foreign law when interpreting the U.S. Constitution hold a different view of this practice. For instance, in Judge Scalia's speech, "foreign law" is depicted as an external, parallel normative structure outside the purview of the United States, which suggests that the U.S. judiciary system has no imperative to subject its rulings and appraisals to any external legal system. As Alford (2004) contends that the inclusion of foreign law citations may destabilize the U.S. legal structure, compromising its integrity and subverting the Supremacy Clause of the U.S. Constitution. This perspective positions foreign law as an intrusive and hostile

entity, potentially damaging to the established U.S. legal framework. A bill that was introduced during the 108th Congress in 2004 encapsulates this xenophobic stance on this matter:

“Judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.” (H.R.568, 108th Congress 2004)

The common thread that binds both advocates and critics of citing foreign law is the recognition that laws from other nations can serve as tools in the legal toolbox of US judges. Advocates and critics alike concur that the foreign laws do not inherently undermine the integrity of the core values at the heart of a case, especially those pertaining to the safeguarding of human rights. This interaction with international peers and the examination of pertinent rulings allows legal professionals to identify and propagate values that possess a universal resonance. Thus, the focal point of contention in this debate lies not in the value of foreign laws, but in the methods through which they are acquired, used, and adapted to form a legitimate foundation for logical reasoning and judicial decisions in court. Consequently, an intermediary space (*meso zone*) emerges between the availability of these legal tools and their application, where the tools are processed, debated, and selected, ultimately forming a *meso* toolbox that informs the strategy for rendering a judgment.

In cultural sociology, the analogies of “toolbox” and “repertoire” have been used extensively to explore the causal link between culture and action (Swidler 1986, 2001). According to this framework, culture equips actors with a priori “skills, tools”, as well as “symbols, rituals, stories, and guides”, which are used to construct "strategies of action" (Swidler 1986:277). When actors feel compelled to build a strategy to drive action, they engage in a process of selecting the required "tools" from their cultural inventory. However, this tool-seeking

process is not always linear; it is instead influenced and "situationally cued" by various external constraints. Swidler expands on this discussion in subsequent works, exploring the factors that mediate the effects of "culture" on "action" and recognizing the restricted capacity of actors in different situational or institutional settings (Swidler 1995, 2001). Vaisey (2008) and DiMaggio (1997) voice similar concerns about the missing explanatory link in using culture as a "toolbox" or "repertoire" for seeking the causal link between culture and action. They propose that in different contexts, individuals possessing similar cultural repertoires may undertake diverse actions, as these contexts influence their interpretation of cultural repertoires, the ensuing strategy for action, or even the resultant action itself. This often prompts individuals to reflect and deliberate on their actions. This conceptual approach also aligns with the Bourdieusian model of practice, where the "field", or the social context, plays a crucial role in triggering the habitus-moderated functions of "capital" in determining action within a specific context (Bourdieu 1984).

A crucial gap in the existing body of literature is how cultural sociologists should address and respond to the inadequacy of legal positivism (Hart 1994), which staunchly defends the domain of law by excluding culture from its purview. This raises the question: if we acknowledge that law does not always function as anticipated, continually adapting to reflect societal customs and historical developments, how should we situate "culture" within the practice of law? Viewing culture as a toolbox or repertoire may not entirely elucidate why similar cultural elements or limiting factors can lead to disparate judicial outcomes, or why uniform judicial outcomes can be predicted across diverse cultural settings. More specifically, within the practice of law, judges are expected to perform tasks beyond merely retrieving necessary tools from their legal toolbox. They are also obliged to build a ground within the legal

domain to legitimize, amalgamate, and synthesize the cultural tools they have accessed in order to provide reasoned judgement. This ground is different from the existing analogies in cultural sociology, such as the “toolbox” or “repertoire.” It suggests that the influence of culture on action is not a simple, situationally-moderated process, and that the tools from the toolbox do not directly lead to the formation of an action strategy. Instead, these tools participate in the development of an intermediary, a *meso zone* which provides the basis for action strategy, where various components are debated, contested, and negotiated for their inclusion in a strategy-making project.

The construction of this meso zone during judgment is not always a conscious process. It could manifest as "recontextualization" in the process of learning from legal practices in other countries (Frankenberg 2010) or as a situational negotiation in court to account for the "social considerations" pertinent to each specific case. Beyond merging legal components from various sources to establish a foundation for judgment, this meso zone also fosters a dialogue between the law and the specific circumstances of each case within the legal domain. In this way, cultural norms and deeply embedded societal factors can be justified and balanced under the guise of legal justice, eliminating the need to resort to extra-legal considerations.

The concept of the meso zone is not confined to a specific area or understood as an independent sub-toolbox. It can also be envisaged as a phase or process during which the culturally sourced tools are legitimized, integrated into the existing legal system, or naturalized as a given. In this regard, the meso zone also embodies an implicit facet of culture in Bourdieu's work. Throughout his research, from the study of cultural taste and elite education systems to the examination of gender, Bourdieu explores the paradox of doxa, which entails the naturalization of "intolerable conditions of existence" with minimal transgression (Bourdieu 2001). For

instance, in his studies of taste and elite education systems, Bourdieu identifies culturally shaped habitus that are so ingrained they become an objective environment in the mind. In this manner, within Bourdieu's framework for understanding practice, actors are not solely driven by tool-equipped strategies or meaning-attached perceptions, but actions occur naturally as a given. Bourdieu's work focuses on the naturalization process and the resultant array of divergent choices presented in the spheres of culture, education, and law (Bourdieu 1986b, 1986a). Therefore, between the culture viewed as a toolbox or repertoire and the resultant action, there exists a third space, an intermediate zone, where symbols, tools, customs, and laws from various binding sources converge to establish a ground for reasoning and legitimizing the ensuing action.

The development of this intermediary or 'meso-ground' has posed a significant challenge in the evolution of Chinese law. Delving into this meso-ground, especially with an emphasis on judgment during the expansion of the "legal toolbox," could offer profound insights and a more comprehensive understanding of this process.

During the early 20th century, China embarked on its first major legal reform, which brought about significant changes to its legal system as the nation sought to modernize. As part of this reform, new laws, heavily influenced by Western concepts and principles, were introduced. During this transition, Chinese judges were charged with crafting solutions for individual cases by sourcing and choosing tools from their available legal resources. In the meantime, the deeply entrenched Chinese customs, which significantly differed from the laws originating in Europe, presented Chinese judges with a considerable challenge in integrating foreign law into domestic legal practice and negotiating with culture in the form of customs and even older laws.

In the 1990s and 2000s, the increased availability of archival materials on court cases from the Qing and early Republican eras facilitated in-depth scholarship on these cases to decode the functioning of local courts during these periods. Scholars analyzed these court cases to examine the operation of the Chinese legal system during the imperial era, and its transition from imperial Qing style to the independent Republican era, with a particular focus on the flourishing "civil law" in court and in practice (Bernhardt 1999b, 2014; Bernhardt and Huang 1999; Huang 2001; P. C. C. Huang 2014). This body of scholarship highlighted the gap between codification and practice, attributing such "deviation" to the distance between "representation" and "practice" (Huang and Bernhardt 2014). Huang argues that this tension often serves as a catalyst for changes in law (2014:25). These works also reveal the unique aspects of the operation of the legal system and how the reasoning behind judgments could align with the cultural system, for instance, by formulating "moral" considerations and principles for each case in imperial times. Huang posits that such implicit, non-legal considerations distinguish the Chinese legal system from the Continental one, noting that "Qing law did not try to develop abstracted principles of universal applicability; rather, it seemingly postulates that only when joined to real legal practice can abstract principles be properly clarified and carry real meaning and applicability" (2014: 28). Such deviation between law in book and law in practice, and the variance in "representation" and "practice," is a characteristic feature of Chinese legal culture. This trait continues to exert influence on the contemporary Chinese legal system and the structure of reasoning underpinning judicial judgments.

Set against this backdrop, I examine the changing Chinese legal practice in the 20th century, focusing on how judges developed and maintained the methodology to source binding laws from various origins and how they ruled, negotiated, and incorporated culture within the

domain of law while seeking and formulating the reasoning ground for judgment. Throughout this process, it becomes clear that the causal link between law and judgment, or culture and action, does not always adhere to a linear, cause-effect pathway; rather, a meso ground exists, serving as an accommodating intermediary space for both culture and law when adjudicating a case.

Data Selection

To explore the issue, my focus narrows to marriage-related court cases from 1912 to 1928. This period, characterized by transition, is notable as old laws were still in effect, new laws were in development, and society was experiencing significant shifts. This era provides a valuable vantage point from which to examine how Chinese judges navigated and interwove diverse cultural and legal components in their formulation of judgments.

I have chosen to focus on marriage-related cases for two primary reasons. First, these cases are believed to have been less influenced by foreign legal systems, allowing cultural norms to play a more significant role in the practice of justice. Second, marriage cases offer an ideal context to examine the separation between law and culture, and the disparity between representation and practice observable in legal judgments. Since marriage was traditionally considered a mundane matter, it affords an opportunity to empirically observe legal practice, revealing how “what this system said was one thing, what it did was another, but these two combined was yet another thing” (Huang and Bernhardt 2014:34).

In 2018, I began conducting extensive research into court cases spanning from 1912 to 1928, utilizing various national and municipal archives, as well as university collections. Specifically, I visited the First Historical Archive of China, situated in Beijing's Forbidden City,

to collect documents related to the late Qing legal reform. These documents were sourced from *Bureau of Compiling and Editing Law* (*xiuding falüguan* 修訂法律館) and *Bureau of Constitutional Compilation and Research* (*xianzheng bianchaguan* 憲政編查館). Within the same archive, I also gathered first-hand materials on the operation of the Beijing High Court from 1907 to 1911, which covers the inception of this court. Furthermore, in the municipal archive of Beijing, I obtained letters, decrees, and correspondence between the Beijing High Court and other courts, as well as between the Procuratorate of Beijing and the lawyer association in Beijing. I also curated several documents about how the Beijing High Court organized its daily practice and protocols regarding the reception of appeals from lower-level courts. These materials provide a rich and nuanced picture of the legal system and practices in China during this transformative period, offering a unique perspective on the interplay between law, culture, and society.

The collected materials offer valuable insights into the institutionalization of the Beijing High Court through the implementation and revision of formalized rules governing daily activities. These documents provide an institutional snapshot of the developing legal infrastructure, shedding light on the organization of everyday tasks and the achievement of justice through the application of protocols and procedures. While these materials do not directly provide empirical evidence of the judgment-making process in each case, they can still serve as "controlling variables" for examining variance in judicial practice when holding these court operation attributes constant across the observed cases. In this research, the primary outcome is variance across judgments. To identify mechanisms or explanations underlying these differences or similarities in judgments, besides a certain level of similarity across cases within the same group, it is equally necessary to include materials documenting the infrastructure and protocol of

courts managing daily caseloads. In this historical context, these documents on court performance contribute to an overall understanding of the institutional framework underlying changing legal practice.

In selecting cases, this research first identifies the causes and types of marriage-related disputes, such as divorce, breach of engagement promises, and misunderstandings. Within these categories, the cases also demonstrate diverse reasoning processes and reflect different social factors underlying the defenses. To link law, cases, and judgments, the selection process created a schema to label and categorize the various dispute types, social factors at play, relevant laws, and observed judgments. As this study's central outcome of interest is judicial decisions and the mechanisms connecting law and cases, variance in outcomes and similarity in other factors (or consistency in judgments despite different factors) are of great interest and provide supporting evidence for analysis. This methodology sits at the core of the data selection process.

The primary source of archival documents used in the empirical investigation of court practices includes 263 pieces of Beijing High Court's reviewing judgments on lower-level court decisions on marriage-related cases. These materials were initially archived in the Second Historical Archive in Nanjing, where access to Beijing High Court's archival documents was unavailable to researchers. Thus, this research uses photocopies of these materials archived in the Huang-Bernhardt Special Collection at Stanford University's East Asia Library as an alternative source. To this end, the Daliyuan's cases were acquired from Box 47, Beijing High Court's cases from Boxes 49 and 50, and the divorce cases in Beijing from Boxes 60-66. It is important to note that these cases had been previously categorized and refined before being placed in the special collection, thus forming the foundational corpus of this research.

The selection process also involved a systematic method to identify the relationships between judgments across different levels and procedures of court. Specifically, I established links between the judgments in Beijing High Court and relevant judgments from the Daliyuan Supreme Court, which allowed me to identify two types of links. The first type is case-specific procedural linkage. For instance, a case heard in the Daliyuan Supreme Court may have come from Beijing High Court, where the second-instance judgments were rendered. Conversely, Beijing High Court's cases may also originate from lower-level courts. These procedural links represent the first type of linkage. The second type of linkage is not case-specific, but rather relates to judges' tendencies to view judgments from higher-level courts as precedents. While China did not operate under a common law system with *stare decisis* in the early 20th century, some cases from the Daliyuan Supreme Court are legally binding for lower-level courts, including the Beijing High Court. To account for such connection, I marked Beijing High Court cases in my sample with the citation index from Daliyuan, to which the High Court's judgments were required to adhere. This methodology enables a thorough exploration of the top-down transmission of a given legal principle identified by the Daliyuan Supreme Court across courts.

In closing, the methodology used in this research for the collection, sampling, and analysis of archival materials enables a systematic and comprehensive approach to examine judgment-making processes and the underlying reasoning influencing judicial practice. Drawing on archival documents, this research aimed to reconstruct the institutional context of the changing legal practice in China during the early 20th century, with a focus on marriage-related court cases from 1912 to 1928. The process of selecting and categorizing the court cases based on different criteria allowed for a more precise and nuanced understanding of the factors that mediate the explanation for the variance between judgments. This approach makes it possible to

identify the linkage between judgments across diverse procedures and levels of court, which in turn helps to map how legal principles identified by Daliyuan are disseminated from higher to lower courts in a top-down manner.

Structure for Chapters

The dissertation is organized into three chapters, which elucidate the research process and present the findings. The analysis primarily rests upon empirical investigation, focusing on court cases from the Beijing High Court and the Daliyuan Supreme Court. Notably, the Beijing High Court functioned as Beijing's appellate court, reviewing judgments from lower-level courts, while the Daliyuan Supreme Court served as the ultimate court within the new court infrastructure. These two courts were classified as the "third" level of the court system. By examining court cases from these two courts, this research undertakes a comprehensive exploration of the development of China's legal system and the practical application of legal principles by judges.

Chapter 2 delves into the legal modernization project of early 20th-century China, drawing upon legal history literature and pertinent archival materials. This chapter furnishes a historical backdrop for the initial endeavor to modernize China's legal system, which emerged during the late Qing dynasty as part of the New Policy reform. Despite the political and social upheavals of the 1910s, this reform persevered and underwent various stages under the governance of the imperial Qing government and the republican Beiyang government in the 1910s and 20s. The chapter highlights the internal and external pressures that shaped the legal reform.

Internally, the changing bureaucratic structure, financial constraints, and setbacks experienced in conflicts with foreign nations all contributed to public dissatisfaction with the judicial system. This system amalgamated judicial and administrative powers without a clear demarcation between civil and criminal justice. Externally, foreign powers had been exercising extraterritoriality in China since the 1840s, while Japan's adoption of the Western legal system in the 1890s offered a potential path to ending extraterritoriality. The Boxer Rebellion and the subsequent Boxer Protocol at the turn of the 20th century compelled the Qing government to revamp its legal and political systems, with the termination of extraterritoriality in China mirroring Japan's model as a definitive motivation.

Within this chapter, two key themes are emphasized: codification and infrastructure. In the section on codification, I examine how China adopted foreign laws as models for legal reform and how Qing reformers formulated their criminal, civil, and procedural codes based on translated works from Europe, the United States, and Japan. The second section elucidates the historical progression of the Qing government's establishment of a "four-tier, three-instance" court infrastructure and the subsequent construction of new independent courts across China in the 1910s. This restructured court system provided a platform for newly qualified professionals to practice law as both judges and lawyers. Additionally, this chapter also introduces the organization of new courts in Beijing jurisdiction, where the court cases in this research are mainly derived. However, due to a scarcity of professionals, the newly established "four-tier" system existed only briefly in Beijing. In some years, the lowest-level local courts were either reverted to magistrate courts or merged into second-instance courts. Alongside the profound modernization of legal infrastructure, the early Republican era witnessed a significant social

revolution pertaining to marriage and family in China. Previous scholarly research on this subject provides an additional contextual dimension in which this dissertation's research is situated.

Chapter 3 focuses on the court cases collected from Beijing High Court and examine how judges reviewed first-instance court judgments in marriage-related cases. The choice to focus on marriage-related cases is based on the assumption that judgments in these cases are more inclined to navigate and reconcile local customs, as well as diverse sets of laws and regulations, among other normative considerations. Thus, these cases offer rich information on such negotiation.

Within the context of the profound changes undertaken by the legal system in the 1910s and 20s, this chapter explores how judges at the Beijing High Court molded their judicial perspectives and arguments by sourcing, selecting, and interweaving different components of laws. Through an analysis of ruling cases, the review of judgments, and the application of laws, the High Court constructed a tapestry of considerations that encompassed customs, past and future laws in China, and the codification of civil justice in other nations. This analysis uncovers the existence of an intermediary space, a "meso ground," in the application of law, which lies between the institutional realm of law and the social dimension of extra-legal factors. However, as shown in this chapter, this meso ground existed as a judicial approach and a case-specific accommodation, rather than serving as an ontological basis for grounding a judgment by law. Such an approach resonated with various social factors, customs, and normative principles that had the potential to undermine the disciplinarity of law. Therefore, this chapter posits that the meso ground, as a methodology of law, introduced buffers to the modernization of Chinese law. Initially, the multisourced translation and transplantation of foreign laws to China engendered

inconsistencies and incompatibilities, and the adoption of the meso ground mitigated these challenges.

To further substantiate the validity of the meso ground as a methodology, Chapter 3 identifies two significant types of judgments that were prevalent during the transitional years: oscillatory and omissive judgments. These judgments did not solely rely on the effective laws governing civil justice but instead amalgamated three distinct components: the de jure "effective" laws derived from the imperial code, the unpromulgated draft of Civil Code inspired by the Continental Law, and the binding interpretations and judgments from Daliyuan Supreme Court. Although the three components formed the foundation of civil justice, they were applied in different ways.

In some cases, judges exhibited different attitudes toward the same law, while in others, they overlooked the de jure authoritative and legitimate grounds, opting instead to rely on paternalistic teachings, folklore justice knowledge, and common-sense reasoning. This chapter delves into a specific xiaotiao case and investigates cases with no application of law and questions how such cases could be adjudicated using the de jure effective legal bases of that time. By applying this reasoning and method to examine legal practice, this chapter sheds light on the meso ground in the application of law. It becomes evident that the meso ground plays a pivotal role in enabling the existence of these two types of judgments.

Furthermore, the meso ground functions as a cushioning zone, alleviating tensions between traditional Chinese laws and the newly derived Western-inspired laws. In the case of xiaotiao, the buffering function of the meso ground provided a platform for dialogue and negotiation between tradition and modernity, facilitating the convergence of old and new legal systems during the early 20th-century legal system transition.

Chapter 4 shifts its focus to the legal complexities surrounding concubines and concubinal relationships in China. The practice of maintaining multiple female partners within a family has been deeply rooted in Chinese tradition, although the legal constraints surrounding concubinage have changed over time. A key issue revolves around determining the legal status of concubines within the family structure. Throughout history, concubines have been treated as maids, secondary wives, or occupying a position somewhere in between. However, with the influence of Western ideals promoting monogamous marriage, the new laws introduced during the Republican era raised a pressing question: How should the legal status of concubines in the family be defined?

In the 1910s, both Beijing High Courts and Daliyuan Supreme Court received numerous cases debating marriage-related issues about concubines. Against the backdrop of a profound revolution in family structure, with an increasing emphasis on monogamous marriage and individual marriage rights, judges were compelled to address the longstanding issues surrounding concubines that had persisted in Chinese society for centuries. These judges were confronted with intricate questions, such as how to define the nature of the concubinage relationship, whether a concubine could seek a divorce, and if so, how divorce could be attained if the institution of marriage did not recognize concubinage as a formal aspect of marriage. The approaches and resolutions adopted by the courts in tackling these issues contributed to a lasting legacy of both theoretical and methodological significance for future generations of judgments. This legacy includes the building and application of the meso zone as a methodological approach for addressing intricate legal matters and navigating the complexities inherent in concubinal relationships.

In the courtroom, judges grappled with the challenge of reconciling the long-standing tradition of concubinage with Western legal concepts. To bridge this gap, they constructed a "tunnel" that connected the two realms. The Daliyuan Supreme Court argued that "concubinage" should be understood as a form of "contract" that could be dissolved if all parties involved agreed. However, a deeper examination of the various types of "concubines" and their historical incorporation into marital families within Chinese customs revealed that this "contract" transported the concept of human-selling arrangements to one where an individual legal person possessed the autonomy and independence to engage in legal matters. This chapter contends that the introduction of the new Western concept of a "contract" granted Chinese women the status of contracting parties under the law, rendering them equal to their husbands (or husband-masters in the context of concubinage). This fundamentally transformed the perception of women as chattel exchanged in a contract for a human-selling transaction.

Furthermore, this chapter examines how judges mobilized the multisourced and fluid meso zone of judgment when adjudicating cases involving concubines in the 1910s to accommodate the specific needs of concubines and safeguard their well-being. In certain cases, judges defined concubines as family members, keeping them within the marital family, while invoking interpretations of law from the Daliyuan Supreme Court and traditional Chinese principles such as the "three causes for remaining." However, in cases involving bigamy, which constituted a criminal offense, judges automatically categorized concubines as "secondary wives." Such rulings prevented civil disputes from escalating into more severe criminal accusations.

When judges applied these considerations to specific cases, they also demonstrated an appreciation for the intricacies of concubinal contracts. They placed importance on the agency of

women who were initially sold into concubinage, carefully examining their autonomous will regarding the relationship and their right to terminate it. Additionally, judges were inclined to protect the vulnerable party and strategically integrated different elements of law from reliable legal sources. By constructing, mobilizing, and applying the meso ground, judges effectively incorporated extra-legal factors into the realm of law, establishing a solid foundation for legal judgments. Thus, this chapter argues that the meso ground not only serves as a methodology for identifying, sourcing, and invoking law, but it also maintains an enduring and interconnected relationship with social factors throughout the process of hearing and ruling on diverse cases. In this way, with the meso zone functioning as both a methodology for applying law and a consideration for accommodating social factors, the domain of law transcends mere legality and became a sociological construct. The meso ground, existing before judgment, represents the social construction of the legal basis, providing a framework for the legal system's interaction with society.

CHAPTER 2. MODERNIZATION OF CHINESE LAW IN THE 1910S

The Chinese legal system underwent significant transformations during the late 19th and early 20th centuries. Beginning in the late Qing dynasty as part of the New Policy reform, China sought to emulate legal systems from foreign countries such as Japan, Germany, France, and the United States to overhaul its own legal system (Meng 2010). This ambitious reform initiative encompassed extensive systematic changes aimed at revamping the entirety of the Chinese legal system. During a relatively condensed period from 1906 to 1930, China underwent significant overhauls in its legal codifications, adopting models from Europe. China established a new infrastructure for its courts, restructuring the judicial system to align with the new legal landscape. From codification to the professionalization of law, China discarded its legal traditions and replaced them with a western-inspired system.

This chapter aims to identify the key historical developments and key actors involved in the legal changes that China undertook in the early 20th century. Introducing a foreign legal system to China was a multifaceted and challenging endeavor, involving the displacement of the traditional Chinese legal framework. Throughout this process, the two legal systems encountered both conflicts and exchanges. To comprehensively address these dynamics, this chapter is divided into two parts, delving into the transformations and conflicts that unfolded.

The first part of the chapter focuses on the historical background of the codification process in civil justice. Specifically, it examines the incremental stages of making the new family law. Moreover, it elucidates the tensions that arose between tradition and modernity throughout the codification of civil justice. The creation of the new family law was the most challenging project, requiring meticulous steps to address debates concerning Confucianism, individualism, tradition, and modernity. It needed a reevaluation of individual roles and positions within the

family, as well as the authority of parents. This part also demonstrates how the issue of family law accentuated the contrast between traditional and contemporary societal teachings. The process was intricate, entailing the reconciliation of traditional values with modern legal concepts. The difficulties encountered in crafting the new family law served as a testament to the challenges of introducing a foreign legal system into China and the complexities associated with harmonizing traditional values with modern legal principles.

The second part of this chapter shifts the focus to China's endeavor in establishing an independent court infrastructure. Following the New Policy reform in the late Qing dynasty, China reformed its bureaucracy and embraced the idea of an independent court infrastructure separate from its administrative body. In 1910, China enacted the Law of Court Infrastructure (*fayuan bianzhifa*, 法院編制法), laying the groundwork for the establishment of courts at various levels, following the "four-tier, three-instance" structure. Based on this law, China established Daliyuan 大理院 as the last-resort, Supreme Court in the new infrastructure of court. During the period when new codes were being developed (1912-1928), the judgments and interpretations of law by Daliyuan acquired binding legal authority over lower-level courts.

This section of the chapter aims to address several crucial questions regarding the significance of the court infrastructure change as a prominent legal foundation for the Chinese judiciary during this period and its impact on the changing judicial rationale of the Chinese legal system. The short answer is that the court adopted a multisourcing approach to establish the basis for judicial decisions by incorporating diverse legitimate sources of normative orders. As demonstrated in this chapter, such a multisourcing method provided a solution for incorporating laws from different countries in response to the imperative of modernizing the Chinese legal system. It also represents a governing philosophy of doing justice in China when the substantive

law was still in the making and the code for legal practice was unclear. Instead of relying solely on laws and codes, the court sought balance and harmony at the levels of each individual case to de-litigate it, which continued the long-standing Chinese legal culture of "de-litigation" (*xisong* 息訟) (Fei 1992).

At the heart of the multisourcing method is the fundamental notion that codification draws upon diverse countries' legal systems, resulting in a composite collection of articles derived from multiple sources. This approach deliberately avoids relying exclusively on any single country's model of codification. Instead, it suggests the careful selection and incorporation of legal codes from various origins, incorporating them into a coherent legal system that is distinctively Chinese. However, multisourcing goes beyond a mere process of borrowing legal codes from other nations. It is also a nuanced process of adaptation and translation, whereby legal principles and concepts are adapted to fit within the framework of Chinese law. This process is often complex and challenging, as it requires reconciling different legal traditions and adapting them to the Chinese context. However, by adopting a multisourcing approach, China was able to create a legal system that was both modern and uniquely Chinese.

From the very beginning of the codification process, the Minister of Justice of Qing, Dai Hongci 戴鴻慈, argued that China, as one of the last countries undertaking codification by learning from the experiences of other nations. By drawing on the best practices from various legal systems, China could develop a legal system that catered to its distinct requirements and circumstances. This approach mirrored a broader trend towards legal globalization, wherein countries worldwide began to acknowledge the value of mutually benefiting from the knowledge and insights offered by each other's legal systems (*Gugong Bowuyuan Mingqing Dang'anbu* 1979, p. 841):

In this era of advancing global civilization, the development of law has reached its zenith, with a tendency towards worldwide unification. As China embarks upon the compilation of its legal code at this juncture, it is theoretically feasible to adopt the most recent laws from various nations and amalgamate them into the most comprehensive and consummate legal code the world has yet seen.

[方今世界文明日進，法律之發達，已將造乎其極，有趨於世界統一之觀。中國編纂法典最後，以理論言之、不難採取各國最新之法而集其大成，為世界最完備之法典。]

The multisourcing method was also a solution to mitigate the tension between customs and codes, and the conflict between old and new laws. Legal reformers in Qing, for example, often interpreted the differences between the existing past and the introduced present as a dichotomous pair of "new" and "old." Dai Hongci, in particular, argued that legal reform was imperative due to the accumulation of long-standing issues within the established imperial Chinese legal system (*jiufa jijiubisheng*, 舊法積久弊生). Moreover, customs held deep-rooted significance in people's everyday lives, and people were often more comfortable with familiar norms (*anchang shougu*, 安常守故). In this way, the multisourcing method functioned as a compromise to seek a legal basis for judgment and a solution when conflicts emerged throughout the legal reform process. It was an approach that allowed for the integration of both old and new legal principles into a coherent legal system that reflected the unique needs and circumstances of China.

The legal reform in China during the early 20th century started with a restructuring of bureaucratic systems and involved revising the existing Great Qing Code and drafting a new criminal code. In 1907, the focus of legal reform shifted to other areas, including the codification of civil justice, the creation of new court infrastructure, and the implementation of separation of powers. This wave of changes did not fully finish before the end of the Qing dynasty in 1911. As

a result, many unfinished projects and drafts of laws were carried over into the new Republican era.

This chapter aims to provide a comprehensive background and context for the later chapters that examine the changing practice of law during the early stages of the Chinese modern legal system. By exploring the key actors, events, and content of the legal reform process that took place in the early 20th century, this chapter provides readers with an orientation to the historical and cultural context of the Chinese legal system. Through this exploration, readers gain a comprehensive understanding of the factors that shaped the development of law in China during this pivotal period.

Codification

The concept of codification of law in Europe can be traced back to the work of Bentham (Bentham 1817). However, the project of codification, following a "formal", "systematic", and "rational" approach (Weber 1978), gained significant traction after the 17th century, particularly in France, Germany, and Italy (Halpérin 2018). Codification of law involved the sourcing and compilation of normative rules, regulations, and customs from various traditions and jurisdictions in a systematic and rational manner. During the 19th century, the concept of codification was no longer limited to European countries. Instead, it became a fundamental principle that supported legal reforms in many countries outside of Europe.

In the 19th century, several non-European countries, such as Japan, China, Siam, and Ethiopia, sought to reform their legal systems by translating and introducing codes from European countries. However, unlike the process of systematizing laws based on homegrown rules and customs, these countries heavily relied on the translation of foreign codes. As a result,

some unfitted contents and mistranslated concepts were added, creating a new layer of complexity to legal knowledge (Graziadei 2019; Teubner 1998). This round of codification outside of Europe occurred within the context of the global conquest of European powers during the 19th century. The changes brought about by these codification efforts led to a complex interplay of irritation, compromise, and dialogue between the orders from Europe and the customs from the receiving countries' past (Duve, 2016). Against this backdrop of European dominance, the global dissemination of European law proceeded along the differential of economic strength and political influence between the sending and receiving countries. The adoption of European law was often seen as a means to attain recognition, elevating the status of a country from being perceived as uncivilized to civilized (Vanderlinden 1971; Watson 1985).

In addition to territories under colonial rule, countries that were never colonized, such as China and Japan in Asia, also underwent legal reforms aimed at aligning their legal systems with European models. However, unlike a doctrinal imposition of a single European country's law, these countries adopted strategies of translation and adaptation to create their own codes based on European models. The legal reforms in China and Japan were not a simple process of imitation or transplantation of foreign legal systems. Rather, they involved a careful examination and selection of foreign legal principles and concepts, while also considering local customs and practices. In this way, the legal reforms in these countries represented a unique fusion of European and local legal traditions.

In the early 20th century, the Qing government of China undertook a legal reform program that included codification of law, with the aim of sourcing and compiling the best practices and models from other countries. Despite China starting its codification project later than some nations that had already embraced European continental law, such as Japan, this

timing allowed for a broader range of examples and sources to draw from in its own codification process.

During the drafting of China's Civil Code, legal principles and concepts from multiple countries were incorporated, including Germany, Switzerland, France, Japan, and Italy. This approach to codification emphasized a process of learning, whereby Western-derived law was introduced to China gradually, replacing the existing legal system. The Chinese experience with the codification of law in the early 20th century exemplifies a unique amalgamation of European and Chinese legal traditions, underscoring the significance of learning and adaptation in the context of legal reform.

CIVIL CODIFICATION IN LATE QING AND EARLY REPUBLICAN ERA

The reform of law in China during the early 20th century started from the process of translating foreign legal texts. However, it is important to note that translation itself was not initially intended to directly support legal reform. The translation of foreign laws began in the late 19th century, around the 1860s, when the Qing dynasty established foreign language teaching schools to train students in foreign knowledge (Zhang 2004). One example of such a translation was the work on the *French Six Codes*, which was translated and published by faculty members of the school in 1880. However, these translations were not used to drive legal reform at the time. It was only in the early 20th century, with the initiation of the Qing dynasty's New Policy reform, that the translated texts began to be actively employed to drive and facilitate legal reform in Qing.

The translation and introduction of foreign language occurred within a broader historical context, shaped by the Qing dynasty's efforts to learn from foreign countries during the latter half of the 19th century. This era was characterized by China's military defeats in conflicts with

European nations and Japan. Following each war, foreign powers exerted pressure on China, prompting the country to open up specific territories for commercial and missionary activities. Furthermore, China was urged to adopt extraterritoriality, a practice that granted foreign legal jurisdiction over their own citizens residing in China. Consequently, Chinese law and bureaucracy were unable to govern disputes occurring in these territories, while foreigners residing in China enjoyed privileges that were beyond the reach of Chinese law.

After the defeat in the war against Japan in 1894, China shifted its focus to Japan as a source of inspiration for modernization. Both countries had experienced foreign invasion and occupation, and they shared cultural and linguistic similarities. Japan's victory over China and its Meiji Restoration made it an appealing model for reform. The Restoration introduced Japan not only technological and cultural changes but also the adoption of European law as a foundational principle to regulate social and political order. Importantly, despite the comprehensive nature of these reforms, the Emperor of Japan retained his position of authority, and the new constitution and other substantive laws reinforced, rather than undermined, the Emperor's authority. These factors influenced the Qing dynasty's decision to turn to Japan and consider the translation of European law as a potential model for legal reform (Chu 1980:94).

After the Boxer Rebellion, the Qing dynasty regained control in Beijing. Beginning in 1902, the dynasty initiated a comprehensive series of reform programs intended to modernize politics, bureaucracy, and law in China. This period marked the inception of legal reform in modern Chinese history. It was a time characterized by significant transformations, yet also accompanied by considerable uncertainty. The Qing dynasty faced the challenge of reconciling the foreign knowledge they were introducing with the deeply ingrained customs and traditions of

Chinese law. This juxtaposition between new ideas and established practices created a climate of uncertainty as the Qing dynasty sought to navigate the path of legal reform.

LATE QING LEGAL REFORM

The late 19th and early 20th centuries proved to be a turbulent period for China, characterized by internal turmoil, external aggression, and profound disruptions to its long-established customs. Such formidable challenges instilled widespread apprehension and anxiety among the populace, while also prompting the ruling Qing regime to urgently fortify its weakening grip on power.

As part of this broader plan for change, the Qing government implemented a legal reform agenda aimed at incorporating Western legal principles into the existing Chinese legal framework. This initiative sought to address cases where the traditional imperial Chinese codification proved inadequate, particularly in response to the growing demand for commercial law to facilitate business activities within China. The translation and integration of Western law were regarded as a supplementary measure designed to complement the existing legal system in China.

The legal reform agenda pursued by the Qing government transcended the mere reaction to immediate challenges confronting China during the turn of the century. It represented a comprehensive endeavor to modernize the nation and align its legal and political systems with those of Western powers. In this pursuit, the government of Qing sought to learn from the experiences of other countries, particularly those that had undergone similar processes of modernization, such as Japan.

The excerpt from the order issued by the Qing government to initiate legal reform shows that the introduction of foreign legal codes and the broader legal reform were seen as complementary to the existing legal system in China.

The jurisprudence of China, commencing from the eras of Han and Tang, has witnessed alterations and amendments throughout successive reigns. Our current legal tome, the "Great Qing Code," embodies a judicious synthesis of principles, exhibiting utmost perspicacity and exactitude. Notwithstanding, the art of governance necessitates adaptation in accordance with the times. The circumstances of yore and present day are disparate, and without due deliberation and adaption, it is impracticable to effectuate consummate policies. Furthermore, in these recent epochs, the propitiousness of our land has burgeoned, and the realm of commerce has broadened. Statutes concerning mining, infrastructure, and mercantile affairs demand prudent negotiation and specialized clauses.

I do hereby propose that our distinguished emissaries abroad shall undertake a meticulous examination of the extant legal codes of various nations, forwarding their findings to the Ministry of Foreign Affairs. In addition, I commission the esteemed Yuan Shikai, Liu Kunyi, and Zhang Zhidong to exercise circumspection in selecting individuals possessing proficiency in both the Chinese and Western legal systems. These individuals shall journey to the capital, standing in readiness for expeditious appointment to a dedicated institution, tasked with the compilation and emendation of laws. Upon receiving Imperial assent, these laws shall be disseminated. In summation, our objective is the attainment of unmitigated equitableness, facilitating the promulgation of laws across domestic and international spheres, thereby manifesting our profound commitment to embracing change and advancing the welfare of our citizenry.

[中國律例，自漢唐以來，代有增改。我朝《大清律例》一書，折衷至當，備極精詳。惟是為治之道，尤貴因時制宜，今昔情勢不同，非參酌適中，不能推行盡善。況近來地利日興，商務日廣，如礦律、路律、商律等類，皆應妥議專條。著各出使大臣，查取各國通行律例，咨送外務部。並著責成袁世凱、劉坤一、張之洞，慎選熟悉中西律例者，保送數員來京，聽候簡派，開館纂修，請旨審定頒行。總期切實平允，中外通行，用示通變宜民之至意。]

Several external factors played a crucial role in compelling the Qing government to undertake legal reforms. One significant driving force was the imposition of extraterritorial protections on foreign nationals in China following the Treaty of Nanking in 1842. This treaty granted foreign nationals exemption from Chinese law and established consular courts under

their respective countries' jurisdiction. Similarly, Japan recognized this status for foreign nationals in 1858, leading to the establishment of consular courts in Japan as well. However, following the successful overhaul of its legal and political system during the Meiji Restoration in 1868, Japan regained judicial autonomy and abolished extraterritoriality in 1899. The success of Japan's legal reforms served as a source of inspiration for the Qing government, motivating them to consider the introduction of foreign law as a means to end foreign countries' extraterritorial jurisdiction over Chinese territory. This objective was aligned with the broader goals of modernization and catching up with the West, while also addressing the limitations of the existing Chinese legal system. In response to the need for legal reform, some foreign countries, including Britain, pledged to terminate extraterritoriality in China if the Qing government initiated legal reforms to meet Western expectations regarding law and order. Thus, the introduction of foreign law and legal reform became intertwined with the goal of ending extraterritoriality, a crucial external factor that drove the Qing government to undertake legal reforms in the early 20th century (Cassel 2012:175).

In this context, Qing government initiated the New Policy reform, where the legal system was included as a part of the agenda. The reform began in 1902 and progressed in several steps to prepare both talent and institutions for this reform. First, the government appointed the leader and established several dedicated translation and legislation offices to organize the texts for codification. In 1902, Shen Jiaben and Wu Tingfang were appointed as the Ministers for Editing Law (*xiulü dachen*, 修律大臣). Shen possessed expertise in the traditional Chinese legal system, while Wu, having been called to the bar in Lincoln's Inn, brought experience as a barrister since 1874. Their combined knowledge of Chinese and British laws facilitated the task of translation and editing the foreign laws.

Second, the Qing government dispatched a 5-member envoy, including members of the core leadership of the Qing government, to conduct an extensive investigation into the political, economic, and social structures of foreign countries. They visited Japan, the United States, and some European countries, such as Germany, Britain, and France. Following their return, members of the delegation published a wide array of books, memoirs, and diaries documenting and elucidating the reasons behind the potential success of adopting Western practices as part of the New Policy reform in China. Given their esteemed positions in the Qing government, the recommendations put forth by these envoys swiftly gained recognition and were elevated to Memorials to the Throne. These memorials proposed a reform plan the Qing government could use for the legal reform.

Third, in 1904, the Qing government established an official institution dedicated to the compilation of law to supervise and oversee the translation of law from western countries, which was named the Bureau for Revision and Compilation of Law (*xiudingfalüguan* 修訂法律館). Unlike the translations of laws by *Tongwenguan* 同文館 in the 1870s and 80s, the translation that took place in the early 1900s showed a clear orientation towards reforming the existing Chinese law. More institutionalized and oriented towards a political goal, the Bureau led the translation of laws not just for introducing foreign law to China but also led several projects to amend the old law for temporary use and some easy codifications for the quickly growing commercial activities in China, which was more pressing for Qing.

The Bureau first worked on a project to revise the Great Qing Code, a traditional Chinese legal code first promulgated in 1646. Simultaneously, the Bureau made preparations for the translation and codification process. Recognizing that the translation of foreign codes would be a lengthy endeavor, the Bureau opted to modify the existing code to make it appear less punitive.

The revision expunged certain articles to reduce the severity of punishments and eliminated outdated terms. The revised Great Qing Code was subsequently re-promulgated in 1910. In the following decades before the full promulgation of the Republican Civil Code in 1930, the civil portion of the revised Qing Code served as the legal foundation for civil cases in the early Republican era. Additionally, the Bureau also collected legal texts and publishing legal scholarship from foreign countries, serving as inspiration for the codification project of China's criminal and civil justice codes (Zhang 2004:41).

At the outset of the reform, the Bureau did not undertake a complete overhaul of the entire legal system. Instead, it focused on specific areas of law that were essential for managing international business and foreign affairs. For instance, in 1903, as a preliminary step towards legal reform in the New Policy, the Qing government made the Business Law of Great Qing (*qinding daqing shanglü*, 欽定大清商律) and the Company Law (*gongsilü*, 公司律). The introduction of foreign laws proceeded with caution, and the emphasis on business laws demonstrated Qing's anticipation that the new laws would address the pressing issues of trade and commerce at that time. The reform efforts primarily prioritized pragmatic solutions, with major systemic changes not being the immediate focus in the initial stage.

The years 1906 and 1907 marked a significant turning point in the short but comprehensive legal reform of the New Policy. During this period, Qing's leadership prioritized the reform of the court infrastructure and the introduction of both criminal and civil codification, separating judicial power from administrative power to create independent courts.

CIVIL CODIFICATION AND DISTINCTION BETWEEN CRIMINAL AND CIVIL JUSTICE

During the early stages of China's legal reform, the Qing Dynasty placed great emphasis on revising the existing Great Qing Code and drafting a new criminal code. However, this was

not the only area of focus. The concept of civil codification was also brought to the forefront by legal and political scholars, who contended that a standalone civil code was needed to complement the new criminal code. These discussions generated intense debate within the scholarly community and were widely documented in law-related publications in 1906 and 1907.

As a result of these discussions, the reform of law became increasingly determined to initiate the codification for civil justice. In 1907, the Ministry of Domestic Affairs (*minzhengbu*, 民政部) petitioned to start the codification of civil code, and the reasons given for doing so were compelling. Advocates argued that a civil code would facilitate fair and impartial judgments in civil matters, which had long been governed by customary practices or the relevant provisions in the Great Qing Code (Zhu 1958:5664):

Upon examination of Eastern and Western nations' legal systems, one discerns a distinction between public and private law. Public law delineates the relationship between the state and its citizenry, encompassing the realm of criminal law; private law, on the other hand, prescribes the relationships amongst individuals, falling within the purview of civil law. These two branches are interdependent, and neither can be neglected. Criminal law addresses deviance and malefaction after the fact, whilst civil law preemptively forestalls disputes and deception before they transpire. The administration of these intertwined domains is of paramount importance.

Although the civil codes of various nations differ in their compilation, the quintessential principles and overarching frameworks exhibit striking similarities. For instance, property law defines the sovereignty of property ownership; contract law upholds the integrity of interpersonal transactions; family law elucidates the relationships among kin; and succession law curtails disputes over inheritance. These principles ought to be meticulously delineated and enshrined in law. When legal precedents are established, judgments shall be rendered with confidence and clarity, ensuring harmonious governance and social cohesion. The linchpin of such harmony lies herein.

Chinese legal tradition often merges civil and criminal law, with the term "civil law" appearing in the commentaries of the Book of Shang. Throughout the legal texts of successive dynasties, provisions on households and marriage approximate civil law, though they are invariably incomplete and inadequate. With utmost reverence for Your Majesty's sagacious counsel and with deep contemplation of my duties, I humbly submit that the implementation of civil governance and thorough investigation of its origins necessitate the expeditious establishment of a comprehensive civil code. Only then can

the fundamental principles and lofty intentions of just laws be upheld and effectively applied.

I propose that Your Majesty instruct the esteemed ministers responsible for legal reform to carefully consider the customs, sentiments, and political traditions of our land. By drawing upon the political and legal systems of various nations, they shall establish a civil code, working in concert with other ministerial departments to secure approval and promulgation.

[查東西各國法律，有公法私法之分。公法者定國家與人民之關係，即刑法之類是也；私法者定人民與人民之關係，即民法之類是也。二者相因，不可偏廢。而刑法所以糾匪僻於已然之後，民法所以防爭偽於未然之先，治乎所關，尤為切要。各國民法編制各殊，而要旨宏綱大略相似。舉其葦葦大者，如物權法定財產之主權，債權法堅交際之信義，親族法明倫類之關係，相繼法杜繼承之紛爭，彌不縷析條分，著為定律。臨事有率由之准，判決無疑是之文，政通民和，職由於此。中國律例，民刑不分，而民法之稱，見於尚書孔傳。歷代律文，戶婚諸條，實近民法，然皆缺焉不完……仰體聖謨，深思職守，竊以為推行民政，徹究本源，尤必速定民律，而後良法美意，乃得以挈領提綱，不至無所措手。擬請飭下修律大臣斟酌中土人情政俗，參照各國政法，釐定民律，會同臣部奏准頒行。]

Advocating for the commencement of civil justice codification by the Qing government, this text argues that the implementation of a comprehensive civil code would enhance effective governance and the regulation of local customs. Despite the absence of a distinct civil code in China for several generations, such a code would play a crucial role as a fundamental component of the legal system. Therefore, the author contends that alongside criminal and business law, China should prioritize the establishment of its own civil code to effectively govern civil matters during this phase of legal reform.

Prior to the present plea, the leadership of the Bureau for Revising and Compiling Law grappled with criticism and political rivalry, particularly in the context of translating foreign law and formulating the new legal code of the Qing. Internal conflicts within distinct government sectors posed significant challenges to the Bureau's authoritative capacity. In 1907, key figures from the Ministry of Justice (*fabu* 法部) and the Daliyuan Supreme Court (Daliyuan 大理院)

appealed to the throne, calling into question the Bureau's legislative power in shaping the new Civil Code. Applying the principle of separation of powers, the Supreme Court sought a collaborative session with leaders from both the Ministry of Justice and the Daliyuan Supreme Court, advocating a shift from the Bureau's solitary operation. In response to the Ministry of Justice's appeal, one of the Bureau's leaders, Shen Jiaben, found merit in the Daliyuan's proposition and subsequently appealed to the throne. His aim was to modify the Bureau's structure to integrate the collective legal expertise from both the Ministry of Justice and Daliyuan Supreme Court during the translation and codification processes. Several months later, the Ministry of Justice presented another formal statement, asserting that the codification process required a robust institution for final decision-making efficiency. Therefore, it wished to retain all codification power within its purview, following Shen Jiaben's agreement to cede some of the Bureau's power in the formation of the new law. However, three months later, the Qing arrived at the ultimate resolution, informed by the doctrine of separation of powers. The ruling confirmed that the Bureau for Revising and Compiling Law would operate independently from the Ministry and Daliyuan, maintaining its leading role in the codification project.

The contention surrounding the Civil Code's content transcended disputes among differing powers and factions, reflecting variances in cultural and ideological perspectives. In 1908, a new skirmish arose between two camps, one favoring traditional Chinese ritual and another prioritizing the accurate implementation of foreign codes. This rift added further complexity to the existing conflict between the Ministry of Justice and the Supreme Court. The ritual camp contended that the codification project also required joint leadership from both the Bureau of Rituals and Scholarly Learning (*lixueguan*, 禮學館) and the Bureau for Compiling and Revising Law. In response to this suggestion, the Qing, echoing its previous decision

regarding the Ministry of Justice and Daliyuan dispute, confirmed the independence of the Bureau for Compiling and Revising Law in the creation of the Civil Code. However, it acquiesced to incorporating input from other sectors of Qing's government. The aim was to foster coordination among the divergent voices within different functional sections in law organization. Furthermore, it sought to reconcile disparate values held by different scholars, thereby elucidating the role of ritual and law in the emergent legal domain (Zhang 2004:59–62).

The Bureau for Compiling and Revising Law faced many challenges in its quest to create a new civil code in 1907. Despite the hurdles, the Bureau established a cogent agenda for the codification project in a document titled "Reasons for Compiling the Civil Code" (*bianzuan minfa zhi liyou*, 編纂民法之理由), which is now held in the First Historical Archive of China (Anonymous 1910).

This document outlines three main aspects and focuses of the project. First, it argues that Qing still required a dedicated civil code, distinct from the criminal code, even after the introduction of business and corporate law. This approach aims to curb social instability arising from public disputes. Secondly, the draft of the Civil Code places commercial law in a separate book, demarcating it from the remainder of the Civil Code. Lastly, the Civil Code was structured into five books, namely General Principles (*zongze*, 總則), Family Law (*qinshu*, 親屬), Law of Succession (*jicheng*, 繼承), Law of Obligation (*zhaiquan*, 債權), and Law of Property (*wuquan*, 物權). The sequence of these books was in line with traditional Chinese customs, prioritizing family law and placing importance on different parts as they had been assembled in European and Japanese models.

MULTISOURCING CODES FROM FOREIGN COUNTRIES

Qing initiated the project of civil codification through two preliminary endeavors: researching domestic civil customs and gathering codes from foreign nations. In 1907, Shen Jiaben presented a memorial to the throne, providing an update on the ongoing development of the civil code. The memorial listed the 26 codes that the Bureau had translated, with a focus on criminal and procedural codes from Germany, Japan, Russia, Netherlands, Belgium, Switzerland, Finland, and the United States. Notably, of these translations, only the German Civil Code was a civil code (Gugong Bowuyuan Mingqing Dang'anbu 故宫博物院明清档案部 1979:838).

In 1909, two years into the project, the Bureau for Revising and Compiling Law continued its efforts to translate civil codes from various foreign countries. A memorial submitted that year reported that the Bureau was in the process of translating the Civil Codes from Germany, Japan, France, Austria, and Switzerland, although these translations were yet to be completed. The Bureau also noted that it had compiled a glossary of legal terms to facilitate understanding and annotating the German Civil Code. Additionally, it announced the completion of translations of the Book of Family Law from both Germany and France, as well as the General Principles section of the Civil Codes from Germany, Switzerland, France, and Austria (Xiudingfalüguan 修訂法律館 1909).

In 1910, the codification of the Civil Code entered its final stage as reported by the Bureau. The Bureau had finalized all five books and named the code as the Draft of Civil Code (*minlü cao'an*, 民律草案). This draft comprised five books, 37 chapters, and 1596 articles. Between 1910 and 1912, in addition to the version with only articles, the Bureau compiled another version, which included legislators' annotations, comments, rationales, and explanations, intended to aid the review process by non-legal reviewers before promulgation. By 1912, the first

three books - the General Principle, the Law of Obligation, and the Law of Property - were completed with both articles and annotations. However, the final two books, the Law of Family and the Law of Succession, were still left in the final review stage. Unfortunately, the Qing dynasty did not last long enough for the full-book promulgation of the Civil Code, which was halted by its collapse in 1911. As a result, only the first three books of the civil code draft were completed by Qing before its downfall in 1911.

During the preparation phase for codification, the Bureau of Compiling and Editing Law carried out investigations into local customs across China. This was integral to the civil codification process. However, due to the constraint of time, the Bureau concurrently conducted this exploration with the translation and codification process, veering from the Bureau's original plan. This task of investigating local customs, despite its critical role in the codification process, was accorded less emphasis by the Bureau. The challenge of collating a wide array of customs from all regions, with the intention of inductively deriving a singular code applicable everywhere, constituted a primary difficulty that China encountered in its integration of continental European law.

During this phase of legal translation, it was clear that the translation work was in close contact with the codification agenda. Unlike the translation in the 1880s, these translation in the early 20th century was highly institutionalized, organized and steered by the central government of Qing. These translations were purposed as references for codification. Furthermore, the organizers, leaders and translators working in the Bureau were predominantly Chinese, a departure from the foreign-led initiatives.

In the early stages of the Bureau's work, the clerks and translators employed by the organization came from two distinct backgrounds (Chen 2009). One group comprised individuals

who had formerly served in the Ministry of Punishment (*xingbu* 刑部). They possessed deep knowledge of the Great Qing Code and were conversant with the operations of the imperial legal system. The second group consisted of individuals who had procured legal training abroad. They brought expertise in foreign languages and familiarity with European or Japanese law. Although these two groups had different educational and professional backgrounds, Chen (2009) contests the proposition of placing them on a "progressiveness" continuum. He refutes simplistic binary classifications such as old versus new, citing their inability to encompass the varied ways the Bureau's personnel were trained and how they conducted their work. Nonetheless, an undercurrent of tension between these groups was discernible, with some inclined to uphold the structure of the Great Qing Code, while others were advocates of foreign codification.

From 1907 onwards, the Bureau started recruiting new legal experts and personnel from younger generations. While these individuals often adopted more iconoclastic approaches, this did not necessarily reflect foreign training or "progressive" education. Some leaders in the Bureau during this period had been trained through traditional Chinese methods, yet their perspectives were as radical as those trained abroad. For instance, Dong Kang 董康, one of the Bureau's most prominent figures and a future politician in the republican government, explained in his memoir why he was so dedicated to introducing new codes and dismantling the traditional Chinese legal system (Dong 2005:713–14):

In the past, the selection of scholars through the imperial examination system led to the employment of individuals without practical knowledge. Once entrusted with civil responsibilities, they became entangled in a myriad of affairs. The power of adjudication was wielded by subordinates and bureaucratic aides, while higher authorities were responsible for reviewing and rectifying errors, focusing solely on the textual aspects without delving into the content. I deeply lament these longstanding malpractices and embrace the principle of discarding the old and embracing the new. The draft proposals I have prepared, such as the "Law of Court Infrastructure", "Civil Code", "Commercial

Code", "Forced Execution Law", "Criminal Law", and "Civil and Criminal Procedure Law," are all based on the latest systems from various nations. In memorials, official documents, and annotations of debates, the references to various aspects of reform are ostensibly drawn from established records, yet they subtly embody an intention to dismantle the existing system.

[惟從前以科舉取士，用非所學，迨膺民社，叢脞環來，審判之權，操自胥吏幕僚，上級機關負復核之責，不過就文字，稽鉤其瑕隙，內容無從研索也。余痛斯積弊，抱除舊布新主義，所擬草案，如《法院編制法》、《民律》、《商律》、《強制執行法》、《刑律》、《民刑訴訟律》，俱採各國最最新之制。凡奏折公牘及簽注辯論，其中關於改革諸點，陽為徵引載籍，其實隱寓破壞宗旨。]

Dong Kang was a staunch critic of the traditional Chinese legal system. He harbored deep-seated concerns about the corrupt, cursory, and inefficient nature of the law in the imperial era. To this end, he championed the introduction of foreign laws to uproot such corruption and revitalize the legal system with the most up-to-date legal principles and practices from abroad. Drawing on China's experience with justice, he made a strong case for the need to dismantle the existing system and usher in a new era of legal reform. In the later phase of the Bureau, these new members, many of whom shared Dong's radical views, became the driving force behind the drafting of the Qing civil code. They were determined to dismantle the traditional Chinese legal system and replace it with the best practices and principles from foreign legal systems. To advance their agenda, they formed various political cliques and battled against conservative forces within the Bureau and beyond (Chen 2009).

In this way, throughout this project of codification, the project of codification exhibited a new approach, one that relied on the translation and integration of laws from a variety of sources. Instead of relying solely on a single foreign model, the codification of civil justice was a product of multiple sources. During the early stages of the reform, foreign influence played a crucial role, from the codification of laws to the recruitment of legal experts from other countries. This learning process distinguished China from other countries, where the imposition of foreign laws

often encountered diverse, subcultural practices that were incompatible with a single, doctrinal imposition of law. However, in China, reform actors engaged pluralistically with the *multisourced* originals during the codification process. In this context, the pluralistic feature was less of a direct imposition, but rather an imposed motivation to learn, to acknowledge the legitimacy of foreign laws, and to incorporate these texts into the new code that the reform aimed to establish.

After Qing, the newly established republican government (Beiyang) carried on with the civil code draft, focusing particularly on the family and succession law. In 1915, the Committee for Compiling and Investigating Law (*falübianchahui*, 法律編查會) of the Beiyang government drafted a new version of the Family Law, based on the Qing draft of Civil Code. However, in a shift of strategy in 1921, the government suspended its plan to revise the Qing draft for the civil code, opting instead to start the codification process anew. In 1925, the Republican's draft of Civil Code was completed. However, none of these drafts ever achieved nationwide promulgation. As such, from the monarchy's fall to the final promulgation of the Republican Civil Code, a period ensued where Chinese courts relied on various legal bases in their pursuit of justice.

Throughout the early Republican era, the *de jure* legal basis for civil matters was the civil sections of the revised Great Qing Code released in 1910 (Huang 2001:16). However, during the transitional years, while the new civil codes were being developed, the Daliyuan Supreme Court used sample judgments and interpretations of law to function as the *de facto* basis for civil cases. Yet, partly due to the intricacies of local customs, particularly in relation to the application of law, some local courts lacked consistency in applying either the civil portions of the Qing Code or the judgments and interpretations from Daliyuan (Huang 2014; Zhang 2004)

Meanwhile, even though the Qing draft of Civil Code had never been fully promulgated and thus was not legally binding, it was not dismissed either. Instead, it served as a draft for further revisions. In fact, the Qing draft of the Civil Code was published and reprinted 16 times before its final iteration in 1927 (Huang 2001:18). This draft served as instructional material in some Chinese law schools and was also referenced or cited as *équité* (*tiaoli*, 條理) in judgments rendered across different levels of court (Huang 2014; Lu 2004). If a judge couldn't locate an applicable article from the effective Code or a judgment from the Supreme Court, a conclusion could still be drawn from the Qing draft of the Civil Code under the rubric of *tiaoli*. This was a distinctive feature of the emerging legal system in China.

MAKING NEW LAW AND SEEKING LEGAL BASIS FOR CIVIL JUSTICE

Republican Judiciary with Legal Uncertainty

In 1912, following the collapse of the Qing monarchy and the establishment of the Republic of China, Daliyuan underwent a reconfiguration and reopened. From 1912 to 1928, it functioned as the Supreme Court of the Republic of China and served as the highest level of court in the country's legal infrastructure. Given that the new civil code was still under development, Daliyuan used binding judgments (*panli*, 判例) and cases to interpret law (*jieshili*, 解釋例) to establish a basis for judgment across lower-level courts. When cases extended beyond the scope of the *de jure* legal basis for civil matters (specifically, the civil sections of the Revised Qing Code), the judgments and interpretations of Daliyuan acted as the binding legal basis. Meanwhile, the yet-to-be-promulgated draft of the Civil Code by Qing continued to inform and influence the court's decision-making process. In the following sections, this study will show

how this dynamic interplay of legal sources shaped the institutional logic of the Chinese legal system in the early 20th century.

During the nascent years of the Republican era, the legal infrastructure in China established a tripartite framework for legal foundations in local civil cases. This framework comprised the civil portions of the Revised Great Qing Code, binding judgments and interpretations from Daliyuan, and the not-yet-formally-released draft of the Civil Code, which drew inspiration from European models.

This tripartite framework for applying the law was not officially mandated or enforced but serves as a valuable analytic lens to understand the functioning of the Chinese judicial system during this transitional phase. As the old law decayed and the new law was still in its developmental phase, basing judgments on emerging civil disputes on a stable legal foundation became increasingly challenging due to the shifting legal landscape. This framework includes a set of binary pairs reflecting the tension and negotiation between such pairs as old versus new law, code versus customs, and the interplay between developing and practiced law. The triangle encapsulates not only the range of different legal bases but also the inherent tensions and power dynamics during this transformative period. While practitioners of law were forced to shift and negotiate along the edges of the triangle to ground their judgments, they also needed to find the optimal point to anchor their reasoning in a persuasive and legitimate manner.

Even as the foundation for judgments shifted during this transitional phase, a judge's focus during case deliberation remained steadfast on achieving harmony and resolving disputes and tensions between parties. Throughout the legal proceedings, judges sought to justify and legitimate their arguments from various perspectives, striking a balance between the interests of all parties involved. Furthermore, this tripartite legal framework also had significant implications

on the legislative and political stage. It addressed the interests and conflicts between varying political factions, which consequently influenced the trajectory of legal reform through the prism of factional solidarity (Nathan 1976).

Actors from different political factions espoused different reform agendas, each holding distinct intentions and expectations for the reform. This tripartite framework served as a mitigating force among these powers, alleviating tensions over disparate perspectives regarding the legal basis for civil justice. The framework combines several binary pairs, capturing the tension and negotiation within and among these pairs, such as the old law versus the new, codification versus customs, and the dynamic interplay between the law being developed and the law being enacted. In this way, the tripartite framework not only provides a typology of different bases for the application of law but also illustrates the tensions and power struggles during this transitional period. When legal practitioners deliberated on cases and rendered judgments, they needed to pinpoint an optimal grounding point for their reasoning. This position needed to be both persuasive and valid within the shifting landscape.

This tripartite legal framework for civil cases in China offers a prime example of the meso level of judgment within Chinese law. It illustrates how legal practitioners at the local level had to navigate and negotiate among various legal bases to reach a fair and valid judgment. The meso level of judgment refers to the stage where legal decisions are shaped by both the regulations of law and the social context within which they are applied. The continual shifting and negotiation along the vertices of this tripartite framework illustrate the challenges faced by judges in sourcing and balancing old and new laws, traditional customs and foreign codification, and practiced law and developing law. In this intricate process, they strove to achieve a balanced reasoning to lend credibility to their judgments. This meso ground of judgment highlights how

the legal system in China was shaped by a complex interplay of legal, social, and political factors, and how judges had to navigate this complex terrain to make just and legitimate decisions.

Legal Reform amid Political and Military Turbulence

Existing scholarship depicts the early Republican era in China as a time of tremendous upheaval and uncertain progress. The 1911 Revolution ended China's century-long Qing dynasty, but the aftermath was ambiguous. The monarch remained in his palace and received an allowance from the new republican government. Pro forma parliaments and leaders followed but struggled amid postwar chaos, including internal wars, assassinations, and regional autonomy with little central authority. The ideals of democracy and republicanism were compromised and nearly failed. Key terms highlighted in current literature may capture the tumultuous politics of the early Republican era: "warlordism," "republicanism," "ambiguity," and "factionalism." (Sheridan 1983; Young 1983) After the collapse of the Qing dynasty in 1912, bureaucratic factions increasingly dominated the political landscape in China and competed to control resources for their own survival. The fall of the empire plunged the nation into chaos, as warlords and regional militarists rose to fill the power vacuum. In this fractured landscape, networks of officials and local elites - known as bureaucratic factions - emerged around shared regional, familial, and political ties. Bureaucratic factions infiltrated the nascent republican government, using government positions and resources to benefit and strengthen their members (Nathan 1976).

At the same time, central politics and governance of China underwent tumultuous changes in the early Republican era. While the central government remained in Beijing, the parliament experienced frequent reorganizations in structure and leadership, relocating across

China under the pressure and influence of different warlords and political cliques. For example, warlords like Cao Kun 曹錕 exercised control over elections and parliamentary politics, as evident in the Anfu Parliament 安福國會, also known as the Second National Assembly, formed in 1918. During the chaotic early years of the republic, factions and warlords fought for power, generating further political turmoil. Representing the Zhili clique's 直系 power, the Anfu Parliament was established under the control of the Anfu Club led by warlords Cao Kun and Wu Peifu 吳佩孚. Its members were elected through bribery and threats, not a fair democratic process. The Anfu Parliament rubber-stamped the decisions of the Anfu Club under Cao Kun, then gradually became defunct, signaling the failure of representative governance (Nathan 1976, 1983; Nie 2020).

Some scholars link the political chaos and frequent reversals of this era to the ideal of political equality embodied in citizenship (Strand 2011:6). This connects the regime's failure to deliver on political ideals to the challenges of transforming individuals, echoing the ideal-reality divide noted in literature on early Republican politics. It was a time filled with aspirations from both political and public spheres to forge a new path for China as a nascent republic. However, the Republican era's success was limited. Praise was given primarily for ending the monarchy. Thereafter, political arrangements and national development did not proceed as hoped.

In this historical context, legal reform was not a central interest of key political figures. Rather, dedicated legal institutions, such as the Legal Compilation and Review Committee (*falübianchahui*, 法律編查會) in 1914 under the Ministry of Justice, the Bureau of Revising Law (*xiudingfalüguan*, 修訂法律館) in 1918, and the Daliyuan Supreme Court, advanced civil codification process. Despite political upheaval, civil wars, and regional separatism in the 1910s

and 1920s, the codification process remained largely on track, seemingly detached from the political and social cacophony. This was because the direction of codification was certain, modeled after European civil codes. Building on the late Qing dynasty translations and the drafted Civil Code, legislators the Republican era focused on refining the draft. During this period, the Daliyuan also acted as a unifying force to consolidate newly established provincial judiciaries. Leveraging its expertise in law and professional judgment, the Daliyuan guided lower courts in adjudicating complex cases. Relying on its command of legal knowledge, the Daliyuan strengthened China's judiciary despite the political disorder (Zhang 2004:121–22).

The Daliyuan helped make China's judiciary more systematic and professional. Provincial courts consulted and followed the Daliyuan's expertise to decide complex cases, especially on citing and applying the effective civil portions of the revised Qing Code. Although parliament and key political figures were peripheral to legal reform, dedicated legal institutions and professionals advanced the ongoing civil codification process. The clear direction of modeling codes on European civil law and the Daliyuan's professionalism allowed reform to steadily progress despite instability.

FAMILY LAW FROM LATE QING TO EARLY REPUBLICAN ERA

Marriage Ideals in Early Republican Era

In the early 20th century, against a backdrop of rapid social and political change, it was also popular to promote certain marriage ideals for Chinese families as an integral part of wider social reforms to strengthen and modernize China.

It was also a period characterized by social movements calling for individual freedom and social enlightenment. Unlike their European predecessors, who sought truth beyond religious

constraints, Chinese reformers called for liberation from the family order, parental authority, and the Confucian mode of coordinating social identity and relationships. The literature paints a picture of the “May Fourth generation”, comprising students at the vanguard of social revolution, rallying on May 4, 1919, to protest China’s treatment at the Paris Peace Conference. They advocated ending backward, old culture and embracing a new country with modern individuals endowed with equal recognition instead of the hierarchical control of the past (Chow 1960; Glosser 2003; Schwarcz 1986).

In the early republican era, alongside the rise of individual rights in shaping new Chinese citizens, the agenda to renew Chinese family and marriage made it quite apparent that the new generation was reinventing the longstanding Chinese concept of *qing* 情, which could refer to emotions, affection, personality, situation, or simply a warm heart. In this new wave of writing in journals and popular literature, *qing* was rebranded as *aiqing* (love 愛情) and was argued as the foundation and a must-have for couples preparing for marriage. This thus became a powerful weapon to fight against Chinese parents’ authority over their children’s marriage, deciding instead on couples’ own personal consent arising from *aiqing* (Lee 2007). Moreover, the urban young intellectuals launched a new movement to bring down the traditional family practice. Instead, they advocated “free marriage choice, companionate marriage, and economic and emotional independence from the family” (Glosser 2003:1).

Aiqing also entered the legal domain to shape legal scholarship discussing legitimate marriage in Chinese family life. Even though these practices were not codified into law, lecture notes from the Family Law course in a Beijing law school well demonstrate how legal scholarship made sense of and linked *aiqing* and marriage. When defining what a marriage is, the note goes like (Chen 1917:39):

Marriage is an institution that ought to be anticipated to endure for a lifetime. In the matter of matrimony, precedence should not be given to carnal desires; rather, love should be held paramount. The coexistence of men and women thrives through this bond; the inherent imperfections of human nature are assuaged; and for those who bear offspring, the duties of guardianship and education are duly fulfilled. Taking into consideration these multifaceted objectives, love serves as the cohesive element that interconnects them all. If individuals unite and part with ease, only carnal desires can be attributed to such unions, rendering the aforementioned objectives utterly unattainable. Consequently, the adage 'to be in harmony with one's spouse and remain unwavering throughout one's life' may originate with the wife, but it can be a shared maxim for both husband and wife.

[婚姻者，不可不期以終身也。婚姻之事，非情慾之為先，而以愛情為重。蓋男女共同之生活，因之而遂；人類不完全之性，因之而弭；其生有子女者，監護教育之職分，亦因之而盡。綜此諸目的，而無不以愛情聯絡之，使朝合夕離，則只有情慾之可言，而於前述之目的，去之實以千里。故「一與之齊，終身不改」，雖發端於妻，要可為夫婦共同一箴言也。]

Moreover, the author further argues that one of the formal requirements of marriage is consent from the two marrying parties. The author bases this view on the growing social movement promoting individualism and the idea that agreement must be reached to undertake a legally valid act. However, due to the lack of effective civil codes reflecting this individualistic thinking in line with changing social customs, the author infers from a draft of the Qing Civil Code that marriage should require consent between the male and female parties, not parental authority (Chen 1917:44):

Marriage is a legal act that requires the consent of both parties. As the foundation of a shared life between husband and wife, marriage is a lifelong commitment that inherently calls for mutual agreement, which is universally acknowledged as a matter of reason and principle. The law initially does not demand explicit expression of this requirement. However, in our country's longstanding customs, the significant matters of marriage are entrusted to the supervision of the parents, leaving little room for the children to participate in the decision-making process. As individual thought gradually advances in modern times, consent has become a prerequisite for various actions. If there is no stipulation for consent in marriage, there may be instances of incomplete consent or lack thereof, leaving the law without explicit remedies and causing marriage to become a source of lifelong resentment. Thus, based on the intent of Article 1341, Item 1 of the Civil Code, the consent of both parties to marry is indeed the foremost condition for the establishment of a marriage.

[婚姻为法律行为，须有双方之同意。盖婚姻为夫妻间共同生活之起基，终身不改之举动，其须双方合意者，乃公认之情理。法文初无明示之必要。然以我国向来之习惯，婚嫁大事一以委之父母之主持，为子女者断难干与。今日个人思想逐渐发达，凡百行为均以同意为前提。苟于婚姻而无同意之规定，则或有欠缺同意者，亦或为不完全之同意者，法律终无救济之明文，则婚姻乃为人生恨事。故以本律第一三四一条第一项之法意推之，则男女两方有结婚之同意，实为婚姻条件之首端也。]

Some scholars argue that the early 20th century discourse on family in China had a socioeconomic dimension, as evidenced by the advocacy for *xiaojiating* (small nuclear family) reform. Chinese intellectuals at the time idealized a smaller family unit formed by a couple's free choice and free from parental influence or control. They criticized the traditional patriarchal extended family structure, arguing that it stifled individuality, hampered economic progress, and disregarded women's interests. According to Glosser, such an old-style family was “the greatest obstacle to individual freedom, family reform, and national strengthening.” (Glosser 2003:38) The *xiaojiating* promised a companionate relationship and liberation of individuals that would ultimately strengthen China.

Therefore, the envisioned direction in which Chinese marriage should change was toward monogamy, individual freedom, and love—seemingly a trend to iconoclastically destroy the traditional views and regulations on marriage that allowed for concubines, restricted entering and leaving marriage, and embedded parental control over all stages of married life from beginning to end. As Du (2021) argues, following a paradigm connecting state and family, this new legal and social mentality paved a new path for the new Chinese republic to reorganize the Chinese family as a way to strengthen the new republic. The internal perspective in this view of Chinese transformation during this period, regarding state and family, was that a new family and marriage ethic should align with the independent, democratic, and parliamentary governance of the new

country, where social mentality had to be renewed and a new generation of Chinese citizens reborn.

However, there existed a gap between ideal and reality. The freedoms of marriage and love, as well as the ideal of monogamous marriage institutions, were not common practices in China at that time. Instead, taking concubines had become more popular than ever before, without the legal constraints of the past, as new laws were still developing. Some new-style concubines emerged as a new social phenomenon under the guise of freedom of love, which was such an important argument promoted during the New Cultural Movement.

In 1922, a journal titled "Abolishing Concubinage" (*feiqiehao*, 廢妾號) was published in Zhejiang. The opening preface lamented the popular and widespread practice of concubinage, calling for its end and linking the practice to evil and the failed expectations of family reform in China during the early Republican era: (Zhu 1922)

Eleven years after the founding of the Republic, a deeply regrettable phenomenon has gradually emerged in society, namely the widespread contagion of the "concubine craze." In other words, the idea of taking a concubine has become popularized. During the Qing Dynasty, people who had multiple wives and concubines seemed to be primarily limited to a certain class, like wealthy merchants and high-ranking officials. However, this is not the case during the Republic era. The practice has been reinvented, and the seeds of concubinage have been scattered throughout the civilian society, with almost everyone harboring the aspiration to take a concubine. Has this not turned into a world of concubines? Alas! I do not hear our nation's people striving for the universal right to vote, yet the evil of taking concubines is spreading rapidly. The relationship between men and women in today's society is already showing signs of unrest. On one hand, there are calls for freedom in love, marriage, and divorce; on the other hand, divorces are difficult to obtain, free marriages cannot be realized, and open, honest romantic relationships between men and women are desperately lacking due to the lack of public social interactions. As a result, the lamentable consequences of this uneradicated male superiority produce numerous new forms of concubines. With the old-style concubines yet to be abolished, can society withstand the addition of these new forms of concubines?

[民國成立了十一年，社會上逐漸發現一種極可痛惜的壞現象，就是人們多傳染“娶妾狂”的流行病。換一句話說，娶妾的思想已經是通俗化了。前清時代，擁著三妻四妾的泰半是大腹賈和大官僚，倒好像娶妾是限定在某種階級似的；民國時代卻不然，花樣翻新，妾的種子播散在平民社會，隨便什麼人差不多都懷抱一種娶妾

的志願。…… 這豈不是變成了妾的世界麼？唉！我並不聽得我國人民去力爭普及選舉權，但這娶妾的罪惡倒反普及快了。…… 現在社會上男女之間已經顯露出不安的狀態了。一面是大唱自由戀愛，自由結婚，自由離婚；一面卻是離婚離不掉，自由結婚結不成，男女社交未公開也急切得不到光明磊落的戀愛。於是依著這未曾剷除的男子優越地位就產生可憾的結果，製造成不少新式的妾。舊式的妾未能廢去，還經得起再增加新式的妾麼？]

Against the backdrop of rapid social changes in early 20th-century China, Chinese intellectuals launched campaigns to promote new marriage ideals centered around free choice and companionate love. They criticized the traditional patriarchal family system as an obstacle to individual freedom, women's liberation, and China's progress. The ideal modern family they envisioned was nuclear, monogamous, and based on mutual love and consent between spouses rather than parental authority. However, the gap between ideals and reality was vast. Although the rhetoric of free love and marriage was prevalent, the practices of concubinage and arranged marriage persisted. The calls to abolish concubinage highlighted the failed expectations of family reforms that aimed to align family structures with an emerging individualistic and democratic ethos in China.

Drafting Family Law in Qing and Early Republican Era

The Family Law within the newly drafted Civil Code emerged as a hotbed of controversy during the period of its codification. It sparked debates over matrimonial customs and was met with staunch opposition from the conservative faction. The Book of Family and the Book of Succession, which represented the final two components of the Civil Code, and which explicated new norms for families, remained incomplete when presented for monarchical consideration prior to the end of the Qing dynasty in 1911. This lack of completion can be attributed, in part, to the radical reforms they introduced. Throughout the decades of the 1910s and 1920s, the Beiyang government sought to amend and reconstruct these unfinished books. In these efforts, they

attempted to harmonize both traditional perspectives and contemporary viewpoints on familial issues. Nevertheless, these revisions remained provisional and were not officially enacted until 1930.

In 1910, the Qing administration put forward a preliminary version of its Civil Code, a groundbreaking legislative document set to significantly alter China's judicial landscape. However, the last two books in the Code - the Book of Family (*qinshubian*, 親屬編) and the Book of Succession (*jichengbian*, 繼承編) - received significant backlash. This was in part due to the controversial changes proposed in these books, which threatened to upend the traditional family order in China.

After the downfall of the monarchy, the newly established Republican government (Beiyang) recognized the importance of completing the Civil Code in a manner consistent with the country's new political context. In 1914, the government established a legislative committee entrusted with the responsibility of evaluating and amending the unfinished Civil Code, a remnant of the Qing dynasty. The committee produced a second version of the draft, which made some modifications to the original Qing draft. This revision sought to temper the language and minimize disruptions to the familial hierarchy. However, this compromise with conservative elements resulted in a retreat from some of the innovative changes initially proposed. Despite this hindrance, the government remained steadfast in its commitment to finalize the Civil Code.

Towards the end of the Beiyang era, the government organized a third version of the draft in reaction to international pressures in the aftermath of World War I. The objective of this version was to facilitate ongoing diplomatic discussions with the ultimate goal of terminating treaty relations with foreign entities and putting an end to extraterritoriality. It represented a significant departure from the previous versions, signaling the Beiyang government's willingness

to engage with the international community by charting a new course for the country's legal system (Kaufman 2014).

This round of Civil Code draft was also subjected to international pressures, with global powers urging China to modernize its legal system as a precondition for relinquishing their extraterritorial jurisdiction within the country. From 1921 to 1926, an investigative committee was established in Washington D.C. by various countries to investigate the Chinese legal system and evaluate the progress of legal reform. Drafted in 1926, the committee's report advocated for China to formally declare and enact the Civil Code, and also refine the procedural codes for both civil and criminal justice, among other legal stipulations (Anon 1927; Mallory 1931). Against this backdrop, the Republican government worked tirelessly to produce a new version of the Civil Code in 1926. This third version of the Civil Code represented a significant departure from its predecessors, as it adopted new legal thoughts in civil law and reconciled contradictions between existing Chinese law and western civil code with regards to individual rights, contracts, and negligence (Zhang 2004:161–63). Unlike the previous drafts, this 1926 draft was led by prestigious and professionally trained legal scholars in China, and the drafting process was carried out in close collaboration with the Daliyuan to ensure that the draft filled the void between translation and codification, and between legal theory and practice. Despite these advancements, the 1926 draft remained provisional and unenacted. Its primary purpose was to serve as a diplomatic tool to negotiate the removal of extraterritoriality with foreign nations.

The third draft of the Civil Code included a revised section on family law, consisting of 7 chapters and 143 articles. Chapter 3 addressed marital status and divorce. It enumerated six explicit grounds for legally dissolving a marriage: bigamy, adultery, physical and mental incapacity, abuse, abandonment, and disappearance for over three years. In divorce cases, the

wife was entitled to a share of marital property and compensation if the husband was found at fault or liable for the divorce. The draft adopted fault-based divorce and specified situations allowing legal dissolution of marriage. It also introduced the concept of nullity to end claimed marriages that did not legally qualify as such from the outset for failing to meet legal requirements.

The third draft also articulated more specific rules to nullify or void marriages. For example, a marriage was null and void if either party was underage, the parties were too closely related biologically, either party was already married, the woman had divorced less than 10 months earlier, either lacked parental consent, adultery occurred, or fraud or coercion induced the marriage. A marriage was voidable if the parties lacked consensus at the time or failed to register the marriage officially. These conditions still prioritized parental authority to legitimize a marriage. Parents retained power over marital property and authority to act for the couple. The revised draft articulated explicit rules to nullify or void marriages in specified circumstances, such as underage, incestuous or bigamous unions; remarriage too soon after divorce; lack of consent or registration; or fraud. It upheld parental authority over marriages and marital property.

In contrast with the first three books in the Civil Code that focus on individual capacity in determining rights and obligations, the Book of Family confers significant decision-making power to parents with respect to their children's marriages. The lawful formation and dissolution of marriage between two parties still requires parental consent. According to Articles 1338 and 1344, not only is parental consent necessary for a valid marriage, but parents can also annul a marriage that was not approved before being established. These provisions further cement patriarchal and patrilineal dominance, while limiting individual autonomy in shaping a marital contract to parental authority.

Even though the draft allows for a voidable marriage if the parties' intentions do not align, individual will alone cannot legally establish a marriage. The new civil justice draft still upholds certain traditional values related to patriarchal power within the family. For example, fathers are granted greater authority over their children's custody compared to mothers. According to Article 1366, fathers automatically receive custody of their children in marriage, except when the child is under five years old. Furthermore, Article 1367 prioritizes the father's rights in divorce proceedings, although a court may still rule in the children's best interests.

Though imperfect, the draft advanced women's marital rights and equality in some ways. Article 1358 let wives keep property acquired before or during marriage, though husbands managed and used it. Article 1368 entitled wives to recover their dowry and possibly alimony after divorce, especially if the husband's fault caused it. Regarding parental authority, Article 1370 allowed either parent to exercise it. Articles 1372 and 1373 required both to provide accommodation, protection, and education for their children.

The changes introduced in the Civil Code drafts were never enforced, but the legal philosophy underlying these amendments, particularly in the new Civil Code, were incorporated into the practice of law through the Daliyuan Supreme Court's interpretations of the law and guiding judgments, which were legally binding on lower courts. Additionally, in existing court cases, unpromulgated Civil Code drafts were often used as tiaoli 条理 (rules for judicial interpretation). This term, borrowed from Japan and originally associated with the French term *équité*, denotes the concept of balance and equity in seeking a basis for justice where the effective legal basis is unclear. Therefore, courts encapsulated certain principles from the Civil Code drafts in their tiaoli to explain the rationale for their judgments.

These changes also occurred in a context where China was undergoing profound family transformations in structure, organization, and ethical values. Despite the slow and challenging codification process and the continued use of Qing law in civil matters, legal professionals used the court's authority and legal infrastructure to align with changing social norms surrounding the evolving concept of family. One of the key institutions driving these changes was the Daliyuan Supreme Court, which issued binding judgments and legal interpretations for lower courts, using the effective Civil Code as the basis for legal reasoning and judgments.

For example, in 1918, in judgments Shang, No. 665, 909, and 1365, Daliyuan declared that husbands and wives must have separate autonomy over property generated within their marriage, thereby recognizing women's power in property management. The court emphasized the importance of consensus between couples instead of parental will in dealing with marital property. Although parental authority over marriage formation and dissolution persisted, it is evident that the court aimed to diminish parental power in overseeing their children's marriages, narrowing marriage to a matter between the two parties involved. This eventually became a driving force in the family revolution movement, individualizing marital relationships and shifting the focus from parental authority to love.

During this interim period, the revolution of Chinese family law progressed in two directions, as reflected in both the drafts and Daliyuan's work. These directions focused on the relationship between couples and between couples and parents, clarifying the civil rights and obligations of the concerned parties, who were viewed as individual legal persons. In the first direction, the law aimed to equally delineate rights and obligations between spouses, prioritizing

equal recognition of legal persons in marriage. In the second direction, the law grappled with balancing individual will and parental will, opposing and contrasting the two. The new law placed greater value on individual will and rights, but these rights were still limited and subject to parental will, hindering the full realization of individual rights in civil justice.

Institution

The Qing Dynasty implemented several measures in the New Policy reform to effectuate institutional change in the legal system in China. In addition to the new codification for civil justice, the Qing administration introduced a novel court infrastructure and new drafts for criminal and civil procedures. Drawing inspiration from legal models in Japan and Germany, Qing formulated the Law of Court's Infrastructure (*fayuanbianzhifa*, 法院編制法) as part of the New Policy's legal reform.

According to this legislation, Qing aimed to establish a four-tier, three-instance judicial system to replace the old Chinese court system, which combined judicial and administrative powers. The law outlined the respective powers of each court level and procedures for processing cases, litigations, appeals, and review decisions at different legal stages. The project entailed overhauling China's court system, including infrastructure, requisite knowledge, and personnel, and enforcing new laws to govern judiciary operation nationwide. Consequently, it demanded substantial work and funds to construct buildings, train and hire professionals, and oversee the new system's operation. Notably, the promulgated Law of Court's Infrastructure was subsequently adopted by the Republican government to guide court organization nationwide. Based on this, the Beiyang Republican government initiated projects to establish multilevel courts across China, facing numerous challenges including: opposition from local gentry due

to factional politics and financial constraints (Xu 2008); a shortage of legal professionals (Nie 2008); and uneven distribution of legal knowledge across regions. In the 1910s, local governments across China resumed magistrate courts due to a lack of qualified legal professionals when the modern court infrastructure was first introduced.

This section examines the evolving rules governing China's new court infrastructure and the Daliyuan Supreme Court's organizational structure during the late Qing and early Republican eras. Its purpose is to provide institutional context for subsequent chapters analyzing changes in Beijing's legal practice. This section primarily focuses on broader transformations in court infrastructure, including separating powers and dividing courts.

CHANGING COURT'S INFRASTRUCTURE

In 1906, during the Qing New Policy's second year, Qing initiated reconfiguring its judicial system. However, China lacked clear civil and criminal justice distinction for a significant time and did not establish separate court divisions to hear these cases. The judiciary was embedded in the administrative power structure, resulting in unclear separation of power and lack of clarity regarding administration and judiciary obligations (Bodde 1963; Bodde and Morris 1967). Some institutions handled judicial matters, such as the Three Legal Ministries (*sanfasi*, 三法司) in Qing, which included the Ministry of Punishment (*xingbu*, 刑部), the Ministry of Supervision (*duchayuan*, 都察院), and Dalisi (大理寺), each overseeing different judicial aspects. However, these ministries were subject to the emperor's authority and were administrative institutions. Consequently, although China had a hierarchical framework to process judicial matters during the imperial era, its operation was entwined with administration, and judicial independence was not an established principle.

FOUR TIERS WITH THREE INSTANCES: NEW COURT'S INFRASTRUCTURE IN CHINA

The Qing New Policy reform aimed to increase governmental efficiency across sectors, resulting in fewer mandarins (Linzhang Shuju 麟章書局 1910:155–96). As part of this, new job titles were introduced, and others abolished. Within the legal domain, the reform introduced new court infrastructure, procedures, and protocols for handling cases. In 1906, Shen Jiaben and Wu Tingfang began drafting procedural laws incorporating some western principles, e.g. public litigation and jury system. These drafts faced opposition, but new court infrastructure soon became a priority. In the last years of the Qing dynasty, China administered western procedural codes and established new court infrastructure articulating: civil-criminal division; administrative-judicial separation; and infrastructure-procedure correspondence (Huang 2011).

In 1906, aligning with mandarin institution reform, Qing announced regulations to establish Daliyuan 大理院, named after Dalisi 大理寺, previously responsible for correcting local magistrate court judgments. That year, the *Law of Judgment and Organization of Daliyuan* (*daliyuan shenpanbianzhifa* 大理院審判編制法) was promulgated. This legislation articulated a "four-tier," "three-instance" (*sijisanshenzhi* 四級三審制) juridical structure as the foundation for legal proceedings. The "four-tier" refers to four levels of new courts, from highest to lowest: Daliyuan, High Court (*gaodengshenpanting* 高等審判廳), Local Court (*difang shenpanting* 地方審判廳), and County-Level Bureau for Justice and Judgment (*xiangyanju* 鄉讞局). Although titled for Daliyuan's operation, this was the first to introduce a multi-tier, multi-level court infrastructure in China. Consequently, courts had to remain independent of administration, and legal proceedings were conducted independently without administrative interference.

The Regulation promulgated an independent judiciary through definition and organization. Article 6 prescribed that China's new judiciary must operate autonomously from administrative government. This was a pivotal deviation from history where judicial and administrative powers amalgamated, and the judiciary was under administration and government head purview. The Regulation also directed new-style courts consist of separate, specialized courts for criminal and civil cases respectively. Combining criminal and civil courts had long been customary in China.

The judiciary's autonomy also initiated legal profession changes. The Regulation underscored replacing judges with legally trained professionals and law professionalization. Under Articles 11 and 12, judges must be legally trained professionals, and officials will not participate in judicial activities. The Regulation also contemplated monitoring court proceedings by establishing the procuratorate within the court. Throughout its provisions, the Regulation did not confine reform to Daliyuan but envisioned renewing China's court infrastructure with Daliyuan as a pivotal component.

In 1907, Qing officials submitted the draft of the Law of Court's Infrastructure (*fayuan bianzhifa*, 法院編制法) for review. This law established China's new court infrastructure, delineating its hierarchy and jurisdictional powers, establishing a four-tier, three-instance system to replace the outdated system long in place. That year, to operationalize new-style courts, the Ministry of Justice compiled the Provision for Trial Operation of All-Level Courts (*gejishenpanting shibanzhangcheng*, 各級審判廳試辦章程). This established operational procedures and regulations for the new system but was not a complete procedural code. Nonetheless, it provided practical guidance to judges and professionals unfamiliar with the new protocols, enabling a smooth transition to the new system.

The 1907 Provision for Trial Operation of All-Level Courts marked China's initial establishment of a court system with separate criminal and civil divisions. The Provision established basic procedural rules, including those for different levels of instances, jurisdiction, and public litigation. It provided guidelines for procedures to file a lawsuit, appeal a judgment, and present evidence and witnesses in court. Despite introducing a new court structure and reform agenda, the provisional nature of the regulation prevented it from constituting a comprehensive and definitive set of procedural rules.

The Law of Court's Infrastructure (*fayuanbianzhifa* 法院編制法) promulgated in 1910 established China's inaugural comprehensive legal framework for its judiciary. It cemented the four-tier, three-instance court structure and mandated separate criminal and civil courts. The 16 chapters of the Law defined the authority, limits, and hierarchy of the new court system. Chapters 2 through 8 outlined the organization of courts at each level and daily procedures for their operation. Chapters 9 through 16 introduced rules for qualifying and appointing legal professionals and judges to staff the new courts (Linzhang Shuju 麟章書局, 1910, pp. 211–249). The legislators recognized that this enormous infrastructure project required substantial funding, resources, and time to train new professionals to implement the reorganized legal framework. Consequently, all levels of courts across China were afforded an eight-year transition period to fully establish the revamped judiciary.

Additional regulations were established to further institutionalize China's judiciary beyond the late Qing reforms. The Temporary Provisions for Jurisdiction (*sifaquyu fenhua zanxingzhangcheng* 司法區域分劃暫行章程) defined geographical boundaries for each court's purview. The Temporary Provisions for Basic Court Jurisdiction (*chuji ji difangshenpanting guanxia'anjian zanxingzhangcheng* 初級暨地方審判廳管轄案件暫行章程) stipulated the

types of cases first-instance courts could adjudicate based on their level. For instance, basic courts (*chuji shenpanting* 初級審判廳) could hear lesser-value property disputes but not matrimonial cases. Local courts (*difang shenpanting* 地方審判廳) had jurisdiction over marriage cases and ranked higher than basic courts (Linzhang Shuju 麟章書局, 1910, p. 259).

During the New Policy Movement, China's court system underwent substantial reform by drawing on Western legal institutions. This transformation was integral to modernizing China's judiciary and part of broader social and governmental reforms. One key element of this overhaul was the drafting of procedural codes that provided clear guidelines for how cases should be handled and adjudicated. These codes helped to standardize legal procedures and ensure that cases were handled fairly and consistently across different regions. Another important development was the division of criminal and civil courts to streamline the system and allocate cases to the appropriate court based on the dispute type. This division clarified each court's role and improved efficiency. There were also efforts to establish an independent judiciary insulated from political influence to guarantee impartiality and build public trust. An autonomous judiciary was critical for fairness and confidence in the legal system.

While procedural laws and court reforms sought to modernize China's judiciary, implementing them faced considerable challenges. A shortage of legal professionals and the entrenched influence of local elites impeded uniform adoption nationwide (Xu 2008). Moreover, the intermingling of law and politics during the Republican period also obstructed establishing an independent judiciary and impartial case adjudication.

Despite the constraints, reforming China's courts represented pivotal progress toward a modern legal system. Borrowing and adapting Western judicial concepts suited to China's needs

strengthened the judiciary and enhanced fair and consistent case handling nationwide. Though imperfect, these changes established the foundation for future legal developments.

COURT'S INFRASTRUCTURE REFORM IN EARLY REPUBLICAN ERA

Chapter 6 of the 1912 Provisional Constitution of the Republic of China (*zhonghuaminguo linshiyuefa*, 中華民國臨時約法) (Article 48-52) articulated foundational principles for structuring the judiciary under the new republic. Its five articles outlined organizing courts and selecting judges, reflecting political ideals of limiting and separating government power to ensure an independent judiciary as a check against the executive and legislature.

Article 48. The judiciary shall be composed of those judges appointed by the Provisional President and the Chief of the Department of Justice. The organization of the courts and the qualifications of judges shall be determined by law.

Article 49. The judiciary shall try civil and criminal cases but cases involving administrative affairs or arising from other particular causes shall be dealt with according to special laws.

Article 50. The trial of cases in the law courts shall be conducted publicly, but those affecting public safety and order may be *in camera*.

Article 51. Judges shall be independent and shall not be subject to the interference of higher officials.

Article 52. Judges during their continuance in office shall not have their emoluments decreased and shall not be transferred to other offices, nor shall they be removed from office except when they are convicted.

In the same year, China's president selected laws to provisionally adopt until the republic enacted its own legislation. The new government recognized the validity of Qing laws and the recently drafted Criminal Code until it passed replacement statutes (Ministry of Justice, 1912):

As of this moment, the law of the Republic of China has not yet been promulgated. All previously effective laws and the newly enacted Criminal Code shall be granted temporary permission to continue in use unless they contravene the interests of the new republican state.

[現在民國法律未經議定頒布，所有從前施行之法律及新刑律，除與民國國體抵觸各條應失效力外，餘均暫行援用。]

This excerpt highlights the significance of the Daliyuan, the supreme court of China during the early republican era, in shaping China's evolving judiciary. It shows that past laws remained effective legal foundations for judgments and court organization. The Daliyuan played a key role in guiding changes in China's judiciary. Its interpretations and sample judgments instructed lower courts on applying the law amid rapid social changes. However, the Daliyuan's role was temporary and transitional, different from the use of case law in common law. Instead, it helped integrate China's old and new laws. The Daliyuan steered China's laws and judiciary toward their next evolution.

In this context, Chinese legal reform entered a new phase. As new laws were being made and existing laws revised, the Daliyuan guided lower courts through legally binding judgments and interpretations. These enriched and expanded the Qing Code, providing a legal foundation for the evolving judicial system. Beyond the Daliyuan's work, China's republican government (Beiyang) created temporary civil and criminal procedure laws in 1922. These provided references and a basis for judging civil cases then. Implementing these laws marked a new stage in China's legal reform and further cemented the foundations of modern Chinese law.

SUPREME COURT IN EARLY REPUBLICAN ERA

In 1915, China enacted a revised court system law that set the Daliyuan's rules and structure. It authorized the Daliyuan to appoint a President (yuanzhang, 院長) to oversee operations. The President could compile and reconcile interpretations of laws, boosting judicial independence by organizing the internal structure. However, the President lacked authority over judgments and judges, helping uphold the judiciary's impartiality and integrity.

The Daliyuan set up separate courts for civil and criminal cases, each led by an experienced judge who oversaw assigning cases to other judges. To exert central authority and standardize judicial practice nationwide, the Daliyuan established branch courts in remote areas. Provincial high courts housed a Daliyuan branch court to function in its stead. However, if a branch court's views conflicted with the Daliyuan's in Beijing, the Daliyuan reviewed and decided the case.

To uphold separation of powers and judicial independence, the Daliyuan established five-member judicial committees with equal rights and standing. Led by a court leader, committees introduced majority opinions and equal member recognition. However, members' equal authority was limited to preserve judicial independence; higher-ranking members curbed authority and avoided interfering in judgments. These structural, operational, and personnel changes greatly altered China's early Republican legal landscape and supported the Daliyuan as a court of final appeal. Its decisions, judgments, and interpretations were legally binding on lower courts.

The Daliyuan was China's court of final appeal during the early republic. Its rulings on appeals from lower courts were final, with no further review. The Daliyuan heard appeals from high courts nationwide; litigants dissatisfied with high court judgments or decisions could appeal to the Daliyuan. In some cases, the Daliyuan was also a court of first instance, but its judgments were final.

One of the Daliyuan's main early Republican functions was using sample judgments and interpretations to fill gaps left by a developing new civil code. However, legal historians show these cases' de jure legally binding force faced de facto challenges. Applying Daliyuan judgments and interpretations varied in practice, differing across locations and cases.

SOURCE AND ORDER IN APPLICATION OF LAW

The Daliyuan developed innovative approaches and rigorous procedures to review subordinate courts' cases, adeptly applying laws from various sources. For example, research shows the Daliyuan employed an ordered system applying legal principles from multiple sources, as explained in Daliyuan 1914: Shang 64. This approach aligned with systematic codification of civil justice in some European countries, such as Germany and Switzerland:

In adjudicating civil cases, one shall first adhere to the stipulations of the law. In the absence of explicit legal provisions, customary law shall be followed, and in the absence of customary law, principles of reason shall be applied, as is the general practice. Given that the Civil Code of the Republic has not yet been promulgated, the various provisions concerning civil matters in the extant laws of the former Qing Dynasty shall remain in effect and should be relied upon for judgment.

[判斷民事案件，應先依法律所規定，法律無明文者，依習慣法，無習慣法，依條理，蓋通例也。現在民國民法法典尚未頒行，前清《現行律》關於民事各規定繼續有效，自應根據以為判斷。]

This legal interpretation established the order and significance of sources the Daliyuan applied in reviewing cases. As an act of legal interpretation, it had the force of law and was mandatory for lower courts.

Primarily, the Daliyuan based judgments on "laws," including imperial Qing code, late Qing laws modeled on European law, and new Republican laws. However, as China's legal system was reforming and unstable in the 1910s, "law's" exact meaning was fluid. Judges could draw on various legal sources. To distinguish "law," "decree," and "directive," the Daliyuan issued influential judgments prioritizing legal sources (Huang 2011:18), especially if orders or directives from different levels conflicted.

The second level of application of law is custom. Judges cited "custom" if "law" lacked a solid basis for a judgment. In China's imperial code, delegating justice to custom and customary law was common; magistrate courts used ruling customs as a normative basis for judgments. In Europe, customs, and customary norms also founded and sourced modern codification. Codification began systematizing local customs across a sovereignty (Halpérin 2018; Weber 1978). In some fields like family and succession law, custom strongly guided corresponding activities and provided a normative basis for rulings. However, in the 1910s, the Daliyuan did not fully defer to custom if effective law lacked a solid basis for judgment. Instead, it challenged outdated customs and aimed to drive social change.

In 1926, China's president decreed temporary application of civil and some commercial laws until full codification was complete (The President of Republic of China 1926).

Let it be known that the General Principles of the Civil Code, the Civil Code on Obligations, the Commercial Code on Business Transactions, the Bills of Exchange Act, the Maritime Shipping Act, and the Bankruptcy Act shall be published and promulgated by the relevant authorities. These laws shall be provisionally applied and adopted for reference, except in cases where existing laws, judicial precedents, or significantly different customs prevail. Furthermore, the Legal Affairs Bureau is instructed to expeditiously examine, refine, and finalize each of the aforementioned legislative proposals, and to duly announce them for public adherence and observance. By this decree, we command.

[呈悉民律案總則編、民律案債編、商律商行為法案、票據法案、海船法案、破產法案著該部刊印頒行。除已有現行法令判例及有顯著不同之習慣外，均准暫行參酌採用。仍著修訂法律館迅將該項法案分別妥為釐定呈候公佈，以資遵守，此令。]

During the early Republican era, the legal system was developing. Applying law required considering various sources—old and new codes, local customs, Western legal principles—in judgments. Given many, diverse legal sources and a lack of definitive governance, judges at all court levels relied on knowledge and expertise to reconcile differences across sources and issue judgments bridging old and new law, courts and litigants, legal professionals and laypeople.

Selecting Judges for New Courts

Based on a Japanese translation of the German *Gericht Verfassungsrecht*, China promulgated its own Law on the Organization of Courts (法院编制法) in 1910. The newly founded Republican government continued using this law to guide the daily operations of the courts. Pursuant to this law, in 1913, the Ministry of Justice of the Beijing government announced the Interim Rules for the Selection of Judicial Personnel, representing its initial attempt to formalize the process for recruiting legal professionals for the newly established courts across China. In 1915, the Rules underwent major modifications regarding the selection procedures for judges. That same year, the incumbent president of the Beijing government issued a new decree mandating regular examinations for selecting legal professionals. This decree was revised in 1916, and the following year, in 1917, the Ministry of Justice promulgated the revised version, which included four sections and an appendix: "General Principles," "Examination Committee," "Selection and Primary Examination," and "Secondary Examination." (Bi 2016)

QUALIFICATION FOR JUDGES

The 1913 version of the Rules clearly defined the qualifications for selection. It stipulated three legitimate backgrounds for selection:

1. Graduates of domestic or foreign law schools who had received at least three years of legal training;
2. Law professors who taught subjects listed in the curriculum for the Examination for Selecting Judges;

3. Those who had received accelerated legal education from foreign universities for at least one and a half years and served as judges, prosecutors, or professors teaching subjects listed in the curriculum for the Examination for Selecting Judges.

Throughout the multiple versions of the decree, a major issue of contention was the legitimate background (both educational and professional) required to qualify for the examination. Soon after the 1915 decree was issued, a supplementary document was released to specifically clarify Article 3 by delineating who qualified to take the selection test. In general, individuals needed to demonstrate legal training or experience practicing law during the Qing dynasty to be permitted to take the test. They were required to submit supporting documents to the Ministry of Justice for review.

The 1917 version of the decree explicitly specified in Article 3 the qualifications for examination candidates, unlike the 1915 version, which cited the decree for selecting official servants. Throughout the seven qualifications for taking the examination, the decree considered legal backgrounds from both domestic and foreign schools, as well as from both the Qing dynasty and the Republic, to be acceptable (Bi 2016).

JUDGES IN BEIJING HIGH COURT

In compliance with these established rules and regulations, Beijing High Court operated under the expertise of judges who received dedicated training from late Qing new-style law teaching institutions or studied law abroad in Japan or European countries. They provided solid support and professionalism in directing and overseeing judgments in Beijing throughout the early Republican era. Furthermore, their professional legal knowledge was further honed during the Republican era. Under the leadership of the Minister of Justice, China established institutions dedicated to training judges and improving their legal knowledge and adjudication skills. For

example, the Judicial Training Institute (*sifajiangxisuo* 司法講習所) was founded in 1914 and the Judicial Talent Reserve Institute (*sifachucaiguan* 司法儲才館) in 1926. These facilities trained legal professionals, refined the skills of judges, and contributed to the judiciary's professionalism in China.

A significant number of judges in Beijing received legal training in new-style schools established after the abolition of the imperial examination system in 1905. However, their training sometimes lagged behind the evolving trends in civil codification. The additional training institutions played a crucial role in maintaining the judiciary's professionalism. For many judges, serving on the Beijing High Court greatly advanced their careers, with Sha Yankai as a prime example.

Born in 1875, Sha Yankai completed his traditional Chinese education and earned the "outstanding talent" degree (*xiucai* 秀才) in 1900 after passing the entry-level examination. With the discontinuation of the imperial examination system in 1905, he studied at the Capital Law School (*jingshifalixuetang* 京師法律學堂) and graduated in 1910. Prior to joining the Beijing High Court, he served as the Chief Judge of the Civil Division in the Jiangsu High Court. In 1922, Sha Yankai began his political career as a senator. Politically, he aligned closely with the Communist Party. After 1949, he assumed the position of an advisor to the Supreme People's Court of the Central People's Government, a representative for both Chinese People's Political Consultative Conference and National People's Congress (Shanghai Local Chronicles Compilation Committee n.d.)

An analysis of the career trajectories of various judges who served at the Beijing High Court elucidates the transitional nature of the legal profession, education, and judicial system during that time. As the imperial examination system, which had long dictated access to

public sector employment, came to an end, Chinese students were forced to explore alternative avenues for obtaining the skills and qualifications needed for civil service positions.

During this period of change, the study of law gained prominence as a practical and strategically advantageous major. Aspiring legal professionals and future politicians recognized the benefits of a legal education, which provided them with the knowledge and expertise necessary for success in the public sector. Consequently, many students chose to pursue law as a means of establishing a solid foundation for their careers in legal and political spheres (Cai 2016; Sun 2012)

Court Infrastructure in Beijing

As part of legal reforms in Beijing, the development of new civil codes went hand in hand with significant changes to the judicial structure. Specifically, the introduction of procedural laws and changes to court infrastructure led to the implementation of a new "four-level, three-trial" system (*siji sanshen zhi*, 四級三審制) within Beijing.¹ This restructuring of Beijing's courts stems from reforms from the late Qing dynasty and has been a complex process. Though ambitious, some facets of the reforms have overlooked the difference between the ideal vision and practical realities on the ground.

In 1906, Shen Jiaben (沈家本), as part of the late Qing dynasty's New Policies reform, submitted the "Charter for Determining Trial Authority" (*shenpan quanxian liding banfa zhe*, 審判權限釐定辦法摺) to establish clear boundaries of judicial power in

¹ For example, in the jurisdiction of Beijing, courts were organized in 4 tiers: Basic (*chuji*, 初級), Local (*difang*, 地方), High (*gaoji*, 高級), and the Supreme Court (*zuigao*, 最高). A case can appeal up to 3 instances before arriving at the court of last resort.

China. His proposal aimed to create a four-level, three-instance court system with clear hierarchy, job titles, and separation of powers between the independent judiciary and other government branches. This new philosophy of governance was Shen's attempt to reform China's judicial system (Daliyuan 大理院 1907b:118):

In China, the administration and judiciary have been united as one. However, in accordance with Your Majesty's directive, it is now incumbent upon our Ministry to assume exclusive jurisdiction over adjudication, thereby establishing a clear demarcation between our esteemed office and the Ministry of Justice. In order to conform to the constitutional systems of various nations, it is essential that we delineate the scope and hierarchy of adjudicative authority, systematically arranging it in proper order.

[中國行政、司法二權向合為一，今者仰承明詔，以臣院專司審判，與法部截然分立，自應將裁判之權限、等級，區劃分明，次第建設，方合各國憲政之制度。]

One year after submitting his first charter, in 1907 Shen Jiaben proposed a new charter titled the "Charter of Daliyuan's Trial and Infrastructure" (*daliyuan shenpanbianzhifa*, 大理院審判編制法). This charter is widely recognized as China's first law to organize the operation of a modern and independent judiciary. It paved the way for the Qing government's promulgation of the "Law of Court Infrastructure" (*daqing fayuan bianzhifa*, 大清法院編制法) in 1910.

The Charter consists of five chapters and 45 articles. One chapter focuses on organizing the Beijing High Court. It specifies how this court should work with the Daliyuan Supreme Court and communicate with other levels of courts within the proposed four-tier, three-instance system. After the Charter's adoption, the Beijing High Court was established in December 1907. As a third-level court, the Beijing High Court was responsible for hearing appeals from both Basic (*chuji*, 初級) and Local (*difang*, 地方) courts in Beijing (Daliyuan 大理院 1907a).

According to the Charter, the Beijing High Court should consist of four departments - civil, criminal, administrative and judicial departments. The President of the Beijing High Court

would be nominated by the Ministry of Justice and appointed by the emperor. The court's vice presidents, heads of each department, judges and clerks should also meet certain qualifications regarding age, knowledge, and clean records. The Beijing High Court's jurisdiction covered Beijing city and its vicinity. It reviewed judgments from lower courts on issues of law and procedure. If finding errors or inappropriate applications of law, the High Court had the authority to remand cases for retrial or revise the original judgments. After retrial, the revised judgments were final. However, for death penalty cases, the Beijing High Court was required to submit case records to the Daliyuan Supreme Court for approval before execution.

When Beijing adopted the new court system outlined in Shen's Charter, the Ministry of Justice initially established five Basic Courts, two Local Courts, and one High Court to handle cases from different regions of Beijing. However, this structure proved short-lived due to a lack of legal professionals to manage the caseload. In 1913, Beijing placed Summary Courts within the two Local Courts to handle minor cases using simplified procedures. One year later, in 1914, Beijing abolished all Basic Courts, the first-instance courts. Instead, the Local Courts established Summary Courts and Branch Courts to conduct first-instance trials.

Due to the shortage of qualified judges, the same judge sometimes served at two levels of courts. This became problematic when a Local Court judge presided over both a second-instance trial and the final judgment at the High Court. As a result, Beijing's court system was effectively reduced to two levels: Local Courts for first-instance trials and the High Court for appeals. The intended four-tier, three-instance structure was compromised (Nie 2010:250).

Beijing's county-level courts underwent several changes during the transitional period. In 1914, local magistrates initially assumed some judicial functions (Sun, Zhu, and Zhang 1914). However, in the 1920s, counties established dedicated County Judicial Offices (*sifa gongshu*,

司法公署) to hear cases. Later, some counties created County-Level Local Branch Courts (*difang fenting*, 地方分庭) to conduct first-instance trials. Though local magistrates retained some judicial roles, compromising judicial independence from the administration, Beijing's three-instance court structure was still implemented at the county level.

Between 1912 and 1928, the Beijing High Court played a crucial role as either the second or third level court within the city's judicial system. It was responsible for adjudicating appeals and reviewing judgments from Beijing's lower courts, serving as an indispensable link in the court infrastructure.

In-depth research into cases handled by the Beijing High Court offers a unique perspective into its role as a connecting node within the judicial system. Such analysis can provide valuable insights into how the High Court developed a consistent logic and approach to judicial practice, drawing on multiple legal bases to logically reason about and evaluate cases and evidence.

Furthermore, analyzing the High Court's cases can illuminate how this logic and approach were applied across different levels of courts within Beijing's evolving and sometimes struggling judicial infrastructure. As a higher court, the Beijing High Court reviewed a diverse range of cases from lower courts, including civil, criminal and administrative matters. Its judgments shaped an integrated system for interpreting and applying new laws, aligning legal standards and procedures across local institutions.

Trying Cases Along the Triangle of Legal Basis

In this chapter's final section, I will provide a detailed analysis of the tripartite "triangle" framework of legal basis for the new courts across China after the implementation of the new

court's infrastructure law. To facilitate this discussion, it is necessary to define key terms, including "old law" and "new law."

"Old law" specifically refers to the revised Great Qing Code, which was primarily a modified version of the Great Qing Code, put into force in 1910. After the Qing dynasty fell, the Republican government continued using the Code's civil sections as the legal basis for civil trials until new civil codes were developed (Huang 2001:16–19). In this research, "old law" refers to the 1910 revised Qing Code as the *de jure* legal basis for civil cases. Though "old" does not necessarily mean invalid, it contrasts with new civil codes under development. It is worth noting that "old law" is not solely an analytical term used for research purposes. The term has historical and archival roots, as evidenced by judges at the Beijing High Court using the term "old law" (*jiulü*, 舊律) to describe the revised Great Qing Code, as opposed to the new western-derived codes. By understanding these terms and their nuances, it is possible to grasp how legal practitioners, judges, and litigants navigated the complex interplay of legal authority sources during the transitional years of legal reform in China.

In theory, the Qing Code and new Republican laws provided the legal basis for civil matters after 1912. However, the reality was far more complex. Scholars emphasize the intricacies of legal bases for civil cases during this transitional era (Huang 2001:16–18). This complexity highlights the fact that translated new laws and binding legal philosophies were in dialogue and conflict with not just long-held norms but also each other. Multiple sources of new laws, translated from foreign countries, could lead to drastic unintended effects, and lack context for local customs. Moreover, multiple drafts of new civil codes by the Qing and Republicans added more complexity atop the evolving mix of laws. Such complexity translated to uncertainty and ambiguity in legal practice. Judges had to find balance across diverse, multilayered laws.

Navigating this required nuanced understanding to apply the law. Judges had to reason through how these intertwined, address conflicts, and determine priorities. Their logic had to be explained in judgments to build credibility. Courts sought balance by continuing to apply the Code yet referencing new laws as persuasive authority.

The term "new law" designates a fluid and evolving process of drafting. Specifically, it refers to the Great Qing draft of Civil Code (*daqing minlücao'an*, 大清民律草案) that was developed during the New Policy reform of the late Qing dynasty, based on European civil law models. The draft was submitted for monarchical review in 1911, with the first three books covering the "General Part" and "Law of Obligation" sections. However, the last two books on family and inheritance were left for further revision. With the fall of the monarchy, the second half of the draft remained unfinished. Despite this, some publishers in the early Republican era compiled all parts of the draft, resulting in the publication of the "New Compilation of Chinese Six Codes" (*xinbian zhonghua liufaquanshu*, 新編中華六法全書) and "Great Qing Draft of Civil Code" (*daqing minlücao'an*, 大清民律草案) (Zhang 2004:81).

Since the draft was unfinished, "new law" also refers to an ongoing, complex drafting process, including multiple revisions and unfinished, unpromulgated drafts until the final version in 1930.

After 1912, Beijing's Republican government revised the Qing draft, issuing a Draft Book of Family Law in 1915, revising the Qing version. But they abolished it in 1925 to draft a new version in 1926, incorporating Daliyuan interpretations. In 1928, the Nationalists established a new government and accelerated codification. The Qing and Republican drafts provided references, but the 1930 Civil Code began anew, influenced by German and Swiss civil law on family and marriage (Zhang 2004:260). Therefore, "new law" refers not to a static code but a

changing, intricate process of drafting and revising, influenced by diverse sources. This process spanned decades, reflecting gradual development of modern civil law in China through transitions in government and law.

In some instances, the use of the term "new law" in this chapter highlights what it is not, specifically in reference to a set of drafts based on the European models. This stands in contrast to the current effective law (*xianxingli*, 現行律), the "old law", and the revised Qing Code. Using "new law" to analyze legal practice illuminates transitioning to modern law and reconciling this with local customs, e.g. in marriage. New law did not have to be codified; it included Daliyuan interpretations when old laws could not address emerging civil disputes and new codes were still developing.

These drafts of "new law" were never officially enacted and therefore could not be used as binding legal authority. Judges could not rely on these "new laws" in deciding civil cases. Therefore, when using the term "new law" in this chapter, it also refers to the process of incorporating these non-effective drafts of the Civil Code into legal practice and giving them legitimacy for application. Research indicates that interpretations of the law and judicial opinions from higher courts played a validating role in this process, making certain principles in the Civil Code drafts applicable in lower-level courts (Huang 2014).

This research analyzes how the Beijing High Court reviewed lower court judgments related to marriage, specifically examining how the court applied civil portions of the revised Qing Code, interpretations and judgments made by Daliyuan, and long-standing marriage customs in Beijing. By focusing on this area of law, we can observe how different legal sources, including old and new law, interacted and sometimes conflicted. The term "new law" was used as a symbolic reference point to support the reasoning of each judgment. Specific terms, such as

tiaoli 條理, *fali* 法理, *fayi* 法意, and *fayi* 法釋, served as fundamental legal principles that transcended codification and were instrumental in legitimizing the application of "new law" in practice.

One of the key characteristics of "new law" is the role of Daliyuan's interpretations of law and their binding judgments in connecting and consolidating legal frameworks. Despite this function, the Chinese legal system during this period was not entirely dictated by caselaw. Scholars have expressed differing opinions on the function and standing of these binding interpretations and judgments. Were they regarded as legally binding like the effective civil portions of the revised Qing Code? Did Daliyuan hold dual roles as both a judicial and legislative authority? Huang (2011:174) argues that these "interpretations" and "judgments" from Daliyuan were more akin to the concept of *équité* in the continental legal system and that Daliyuan held some "quasi-legislative" functions during this time.

Hence, my conclusion is that the precedents of the Daliyuan, in theoretical terms, should be considered as having the nature of "*équité*" within the codified system of the continental European legal tradition. Although, from a practical perspective, these precedents possess innovative normative functions, such as interpreting laws and patching legal loopholes, which could be described as having a "quasi-legislative function" or a tendency toward "judicial engagement in legislation," this is a reflexive effect shaped under a unique context and cannot be equated to the case law of the Anglo-American legal system.

[所以，我的結論是，大理院的判例，從理論上言，宜屬歐陸法成文體系下的「條理」性質；雖從實際面看，它具有創新規範、闡釋法律及漏洞補充等準立法機能，或者可以說，有「司法兼營立法」的「準立法功能」傾向，但這是特殊環境下所形塑而成的反射作用，並不能說它就是等同於英美法系的判例法。]

In this regard, the dimension of "new law" closely intertwined with the codification process and its various stages. At the same time, Daliyuan's interpretations and judgments also represented the future of the law, pointing towards the direction of legal reform. This explains why Daliyuan went on to translate their work into the 1926 draft of Civil Code and even the

promulgated Civil Code for the Republic of China in 1930. The diverse forms, uses, and organization of "new law" in the context of modern legal system renewal in China highlight the institutional logic of transferring, translating, and transplanting the law, and the multiple sourcing of legitimacy in China.

Throughout this chapter, I have explored the complex history of the civil codification in China during the early 20th century, as well as the development of new courts and legal infrastructure. We have seen how the process of codification was not simply a matter of adopting European models wholesale, but rather a nuanced process of adaptation and negotiation that incorporated a variety of legal sources and traditions. We have also seen how the concept of "new law" emerged to describe this process of legal adaptation, encompassing both the codification work itself and the interpretive work of institutions like Daliyuan. We have explored the diverse forms, uses, and organizations of "new law" in the context of China's modern legal system, emphasizing the importance of institutional logic and multisourcing legitimacy in this complex legal landscape.

In the next chapter, I will turn attention to the Beijing High Court and the ways in which the changing logic of judgment was situated within this motley of legal bases. I will examine how the court navigated the tension between the old and the new law, as well as the diverse legal sources and traditions that shaped the court's decision-making process. By analyzing the cases from this court, we will gain a deeper understanding of the complexities of legal adaptation in China during this period, and the ways in which this process shaped the modern legal system that we see today.

CHAPTER 3. PERFORMING JUSTICE AND CITING THE LAW: MULTISOURCING AS A WAY OF LEGAL CITATION

This chapter examines the trial of marriage-related cases by the newly established court in Beijing. During the period from 1912 to 1928, the court in China was in a transitional phase, especially with regard to the handling of civil cases. Following the establishment of the Republic of China, the government decided to continue using the civil section of the Great Qing Code for civil justice. At the same time, the Daliyuan Supreme Court and the unfinished draft of the Qing Civil Code provided a foundation and reference for judges when trying civil cases.

This chapter explores how judges selected and wove the legal basis for civil cases. To address this question, the chapter analyzes 263 marriage-related cases from the Beijing High Court, which were appealed from first-instance courts and were petitioning for the High Court to review. By focusing on the period from 1912 to 1928, the chapter situates its investigation in a time when the basis for civil justice was ambiguous and derived from various sources. The empirical evidence from the 263 court cases reveals that, while navigating the triangle of legal bases, judges employed a logical approach to apply the law and reconcile differences between different versions of Civil Code drafts and local customary practices.

In addition to exploring the selection and weaving of legal basis for civil cases, this chapter also investigates the hierarchy of law invocation across different levels of court in the evolving logic of legal practice. Specifically, the chapter examines how subordinate courts derived the legal foundation for cases related to marriage while adhering to the rulings of higher-level courts. When referring to "sourcing" the legal basis, this chapter is concerned with the judge's agency in connecting the past and present to contextualize a case within the complex web of normativity in order to identify the legal basis and reason for a judgment at the appellate court

level. Situated within a period and context where the ruling code was in flux, this chapter also examines how such agency was utilized in applying this logic to specific cases while controlling for the typically stable codification that governed similar cases.

To gain a deeper understanding of the changing institutional logic of legal practice during the modernization process of the Chinese legal system, this chapter identifies two types of practices in the multisourcing of bases for judgment: *oscillatory* and *omissive* judgment. Both practices reflect the evolving institutional logic of practicing law during a time when the law was still being developed and explained the inconsistencies and imbalances in judgments of similar cases. Given that judgments are expected to incorporate and balance bases from different sources, the agency of judges deserves more attention to comprehend the direction and content of the changing jurisprudence during this period. As demonstrated in this chapter, while the practices of oscillatory and omissive judgment may imply a certain level of uncertainty and inconsistency, the agency of judgment prioritizes achieving local harmony in each case by weaving together different fragments of law from various sources, including past and present, foreign and domestic, and codified and customary law.

This chapter aims to provide a sociological exploration of the judgments made by the newly established court in Beijing within the historical context of legal transition in China. While there is a wide range of extra-legal factors that can impact the Chinese judiciary, these explanations often overlook the formation of such multiplicity within the domain of law, which is perceived as an objective rule of law governing judicial judgments on different cases.

In this chapter, the examination focuses on the judge's agency in selecting the relevant laws to ground judgments on marriage-related cases by leveraging court cases from a time when modern Chinese law was still being developed. By observing law in the courtroom, this chapter

argues that the modernization of Chinese law, with inputs and encounters with normativity from various sources, involves a sociological process of building a legal basis for judgment, which takes place within the domain of law. Furthermore, the formation of such a sociological base for ruling civil cases also initiated and maintained a constant negotiation and dialogue with customary normativity, whereby the laws adapted to accommodate and understand the social reality presented in the courtroom.

This chapter analyzes 263 court cases, which are named as "judgment" (panjue, 判決), representing the conclusion of a review of a judgment from lower courts. These cases were originally archived in the Beijing Municipality Archive and were collected from the special collection of Chinese Legal History hosted by the East Asia Library at Stanford University. While the cases were not systematically sampled from a well-documented population of cases, they still provide valuable insights into the changes and developments of the Chinese legal system during the period of legal transition.

According to procedural law and the law on court infrastructure, litigants have the right to appeal a case to the Beijing High Court if it falls under its jurisdiction. As such, the cases used in this study were appeals brought before the Beijing High Court from lower-level courts within its jurisdiction. These cases serve as important sources for studying the evolving legal practice in China during this period, particularly with regards to the agency of judges and their role in shaping the legal system.

Multisourced Legal Basis

MOTLEY OF LEGAL BASIS FOR CIVIL JUDGMENT

In the previous chapters, it was shown that the legal basis for legal practice in China during the period of legal transition was sourced along a triangle with three poles: the old imperial code, the new draft of Civil Code, and Daliyuan's interpretations and judgments. While each of these components had power over the lower-level courts, they had divergent legitimacy.

Although the draft of the Civil Code was unpromulgated and could not be directly invoked by the courts, some judges still used some articles from the draft in the name of equity while ruling certain cases. The context in which judges were more inclined to cite the new or old code depended on several factors, such as the specifics of the case and the level of legitimacy given to each legal source. The multisourced legal basis for legal practice played a crucial role in transforming legal practice in China during this period. Despite pressure from both inside and outside, the early Republican government made slow progress in making the civil codification, resulting in the preparation of two additional drafts of the Civil Code that were never put into force. As a result, the Daliyuan Supreme Court made interpretations of law (*jieshili*, 解釋例) and sample judgments (*panli*, 判例) to assist lower-level courts in rendering judgments, which were critical components of the legal basis for civil justice.

While there may be divergent viewpoints on the function, legal binding, and role of Daliyuan's interpretations and judgments, Daliyuan connected the civil effective portions of the revised Qing Code with the changing social reality in China during the 1910s and 20s, when the Civil Code was still being developed. Huang's argument (2001) suggests that the newly established Republican government used the effective civil portions of the revised Great Qing

Code promulgated in 1910, which largely remained the content and structure of the Great Qing Code. However, he contends that the position of the Qing Code as the governing legal basis for civil justice was overlooked by the public in the early Republican era, leading to confusion regarding the legal basis for civil justice. Many believed that the never-promulgated draft of the Civil Code (*minlücao'an*, 民律草案) was the de facto effective law to regulate civil matters, which was unfortunately not the case. Huang cites evidence from the publication of China Six Codes by Commercial Press (*shangwu yinshuguan*, 商務印書館) in 1913. The following picture, taken from an issue of the Eastern Miscellany (*Dongfang Zazhi*, 東方雜誌) in 1913, advertised this publication.

The advertisement for the China Six Codes publication not only conveyed the content of the book but also included some promotional language that addressed the needs of its intended audience. It was advertised as a comprehensive reference for lawyers, judges, and law school students, providing easy access to important legal materials. However, the advertisement also contributed to the confusion and misunderstandings surrounding the legal basis for civil justice during the early Republican era in China. In regards to civil justice, the annotation stated that the new publication of the compilation of "six codes" only included the draft of the Civil Code, rather than the effective, revised Qing Code. This exemplifies the pervasive confusion surrounding the legal basis for civil justice during the early Republican era in China. Despite the revised Qing Code being the effective law for civil justice, many believed that the draft of the Civil Code was the de facto valuable law as reference for regulating civil matters.

During the early establishment of the Republic of China, various codes had not yet been revised, and therefore, the laws enacted or drafted by the former Qing Dynasty, such as the Law of Court's Infrastructure, were fully applicable, including the Criminal Law, which was governed by the new Criminal Law of the former Qing Dynasty after the

deletion and revision of articles that do not conform to the national system. Commercial law also applied the General Provisions and the two parts of the Company Law, while the Procedural Law applied the Civil and Criminal Procedural Codes compiled by the Bureau for Revising and Compiling Law of the former Qing Dynasty, in addition to the Trial Regulations of the Trial Court. In China, there was no designated, separate law for civil justice. Nowadays, the judiciary is independent, and civil and criminal matters are dealt with separately, so it cannot be without substantive law as a basis. Therefore, the five parts of the draft Civil Code are also allowed to be used. This book combines six laws into one, and the criminal and commercial laws are each appended with a draft, which is edited and reviewed carefully. It is also small and makes it convenient to carry. This book is a must-have for law school students, judges, and lawyers. It is also a must-read for the public if they want to know the current effective laws of our country. The prices of these volumes are listed on the left.

[民國初建，各種法典未遑修訂，暫行適用前清所頒法律或草案，如法院編制法，完全適用前清所頒。刑法則以前清新刑律刪改不合國體各條。商律亦適用總則及公司律兩編。訴訟律除適用審判廳試辦章程外，亦准援用前清法律館所編訂民刑訴訟律。民法在吾國本無專書，今司法獨立、民刑分理，不可無實體法以為根據。故民律草案五編，亦在准其援用之列。本書將六法合為一編。刑商法又各附以草案。校訂精審，取攜最便。誠法律學校學生及法官律師等必備之書。一般國民，欲知本國現行法典內容，亦不可不人手一編也。茲將分冊出售價目列左。]

The literature suggests a nuanced approach to the application of law during this transitional period in China, which is characterized by conflicting and compromising perspectives. It is worth noting that the revised Qing Code remained the only *de jure* basis for civil justice. As such, citing official orders from the government may involve a certain degree of selection bias when using evidence, despite the formality and authority attached to such documents. In this context, the inclusion of the aforementioned advertisement serves more as an illustration of the multisourced nature of legal practice during this time, rather than an argument in favor of the *de facto* use of the draft of the Civil Code for civil cases.

Huang also addresses the same publication of China Six Codes in his book, but he argues that such announcement and the recognition of the unpromulgated draft of the Civil Code as the legal basis for civil justice would be a preposterous and grand error (Huang 2001:18). However, this argument may further add confusion to the already complicated issue. If it were simply a

matter of errors, why would the editors of the Commercial Press continue making the same mistake in the subsequent 16 reprints up to 1927? Moreover, if it were a hard fact that the civil portions of the 1910 revised Qing Code were the exclusive legal basis for civil cases, why would the editors rather "present" some irrelevant "new civil law" which was radically different from the books actually in use (Huang 2001:19)? With the quest for legal basis positioned in this context, it raises the question of how such confusion about the legal basis for civil justice was applied in the courtroom and how it manifested across judgments.

This chapter thoroughly explores how the Beijing High Court examined and ruled on marriage disputes from lower courts. It investigates how the court adjudicated these cases, applying the civil portions of the revised Qing Code, the Civil Code draft, and the decisions, interpretations, and guidance from the Daliyuan. The goal is to elucidate how China's judiciary, during the Republican era's transitional years (1912-1927), assimilated newly adopted legal knowledge into the reinstitutionalized legal system, together with knowledge from legal scholars, in its decision-making.

The synchronization of knowledge transfer showed an ambiguous and fluctuating attitude toward old law (*jiulü*, 舊律). The High Court applied different laws for different cases. As the amended Qing Code remained the unchanging basis for civil suits, the court had to strike a balance between, and sometimes compromise between, new social tempo after the Republic's establishment and centuries-old civil law. Conversely, this could show ongoing, persistent incorporation of new legal knowledge from the German-modeled Civil Code draft. However, in adjudicating marriage disputes, judges considered not just law application but also social implications. They aimed to protect families and marriage from dissolution, greatly valuing male heads of households while downplaying women's petitions.

This section comprises two parts, focusing on court's disposition towards the old, effective laws. It scrutinizes how judges from a particular appellate court approached marriage-related cases after the release of Daliyuan's No. 576 interpretation, which applied preexisting laws to such cases. In this process, judges weighed the applicability of the revised Qing Code, the Daliyuan interpretations, and the Civil Code draft against the specific local circumstances of each case. Their rulings endeavored to mitigate any potential harm to the marriage or family involved, as well as to society at large.

The second part of this chapter examines judgment rendered without citing any laws, Daliyuan's interpretations, or the principles in the Civil Code draft. I first examine a decision by the Beijing High Court, tracing the court's decision-making process back to several Daliyuan interpretations that would have served as a solid foundation for the ruling. However, the court dismissed these potential options and instead chose to focus on resolving the unique tensions between the litigants in the case. I also incorporate another interpretation by Daliyuan that emerged several years later, demonstrating how the organization altered its interpretations to balance the code with customs. This modification increased the autonomy of lower courts in adjudicating disputes.

TWO MODES OF SEEKING BASIS FOR JUDGMENT

This chapter explores two distinct types of judicial practice during the transitional years, a time when the legal basis was uncertain, and judges required a set of principles to guide their judgments. The two types presented here are more conceptual in nature, emphasizing the key features expected to be shared by the contents of each category, rather than a more systematic and structuralist approach focused on exclusive inclusion and membership of elements in each categorical box. The chapter acknowledges the presence of "common features" in judicial

practice under each type, but it does not assume that the underlying forces shaping this commonality were necessarily homogeneous.

The first category of judicial practice identified in this chapter is *oscillatory* judgment. The term "oscillatory" here emphasizes the dynamic, unpredictable nature of judicial practice during the transitional years, in which the legal basis for civil cases was a complex amalgamation of codes, cases, constitutional principles, and interpretations from various sources. This category is not concerned solely with the individual judges' shifting knowledge or reliance on particular philosophical frameworks, but rather with the practice of balancing and harmonizing the imported legal principles with long-standing customs and social norms related to marriage. Oscillatory judgment reflects both the transitional nature of the legal system during this period and a consistent quest for harmony and balance between law and society, even amidst ongoing legal reform. This approach is also a hallmark of the distinctive pluralistic landscape of the early 20th century Chinese legal system. It is not intended to centralize the law from a particular source or cater to different sub-cultural segments of the population, but rather seeks ad hoc balance and harmony to create more convincing legal argumentation and practice in specific cases.

The second type of judgment is characterized as omissive. By utilizing this term, I acknowledge the existence of a legal basis for certain cases, which serves as the foundation for the judgments and decisions rendered by the court. However, instead of explicitly citing this basis to justify a particular judgment or decision, the court chooses to omit such references and instead employs extra-legal arguments to support its reasoning. In this section, I will demonstrate how the court practiced omissive judgment while adjudicating disputes concerning the forms of marital contracts, particularly as it pertained to the court's need to consolidate such contracts as

formal conditions (*xingshi yaojian*, 形式要件) for marriages under the "new law." I argue that this type of judgment was not a result of an implicit or convoluted legal basis for the practice of marriage law during the transitional period, but rather it represents the court's proactive effort to bridge the gap between the "old" and "new" laws during this time of transition.

The early 20th century's ambiguous legal context and complex multisourcing of laws added a philosophical layer regarding the relationship between certainty and flexibility in the law's predictability. In applying and interpreting multiple, potentially applicable laws, judges consciously or unconsciously developed an meso ground that incorporated various legal bases and continually adapted to changes in society. Rather than mechanically matching words to crimes and punishments, this meso ground allowed for flexibility in the law without compromising it, thereby strengthening the law's ability to regulate. In the early 20th century, the still-developing legal system included many ambiguous or inapplicable laws. Judges thus relied on their judgments themselves to establish the courts' legitimacy, which was still contending with local customs and the entrenched power of extended families and local rulers.

In general, predictability suggests a causal relationship that links a phenomenon and certain outcomes in a quantitative manner. In other words, if certain conditions occur, we would expect certain outcomes. However, such causal links are probabilistic, meaning the connection between conditions and outcomes is not always present. At times, the conditions are met but the outcomes do not occur. In short, predictability does not suggest 100% certainty; rather, it suggests a pattern, tendency, or norm where a particular action is likely to lead to certain outcomes based on past knowledge. It is therefore a generalization technique, functioning like divination. If we calculate the probability underlying the predictability of law, it is inevitable we consider all extra-legal social factors as potential conditions or causes of a particular legal

outcome, which the law aims to regulate. Such predictability, therefore, should not proceed directly from codified laws to judgment, or as a mechanical process of finding the appropriate articles for a specific action that leads to a judicial outcome. Rather, the predictability of law involves considering the changing social context, reality, and specificity of each case—all of which could influence the predictability of a legal system, for better or worse (Holmes 1897).

In a multi-sourced legal system, judgments that oscillate or omit applying certain laws (i.e., “oscillatory” and “omissive” judgments) represent a pattern of judicial phenomena produced by a “meso zone” where codes from various sources and social factors converge and are evaluated. Within this framework, oscillatory and omissive judgments occur when judges must find appropriate codes to rule on a case to achieve justice or weigh judgments by considering social realities. The changing social movements of the 1910s and 1920s, along with entrenched marriage customs, created a complex reality featuring transition and change. In this context, maintaining the meso ground and adopting flexibility from multi-sourced judgments-built conditions that could potentially impact judicial outcomes and lead to increased predictability of law as fulfillment of justice.

Furthermore, the professionalization of law, legal education, codification of law, and Daliyuan's judgments and interpretations all functioned as particular legal conditions for drawing such causal links. In the 1910s and 1920s, the republic's efforts to establish the legal profession, set criteria to recruit judges, and systematize legal knowledge through education and codification allowed legal professionals to handle cases with increasing similarity. Moreover, as shown in the preceding chapter, the constant, professional correspondence between the Daliyuan and local courts, and the exemplary judgments rendered by Daliyuan, functioned similarly to improve predictions of conditions on judicial outcomes. To incorporate these laws from different sources,

as well as codes from certain examples in Europe, judges in courtrooms needed to practice in a multi-sourced manner to better link law to case. Thus, improved predictability could be expected.

Finding Basis: Modes of Multisourcing for Judgment

Before examining the cases, this section provides an overview of the structure of the written judgments during the early Republican era in China. The written judgment *per curiam* issued by the Beijing High Court during this period consists of three main components: the Tenor (*zhuwen*, 主文), the Fact (*shishi*, 事實), and the Reason (*liyou*, 理由). The written judgment begins by identifying the names and home addresses of the litigants, together with the names and work addresses of their legal representatives (*dailiren*, 代理人).

The Tenor articulates the court's concise summary ruling and decision in a case. For complex cases involving multiple issues, this section may be longer to address different aspects under appeal. The Fact component outlines the issue in the case, the evidence presented, and the procedures used by the lower court to reach its decision. This section also notes whether the prosecutor was present during the trial (*liting*, 蒞庭), and details the lower court's procedures. The Reasoning explicates the court's analysis, legal rationale and logic that justify its judgment. It communicates the court's evidentiary evaluation and application of laws and precedents. The Reasoning section also conveys the court's review of the lower court's judgment to both higher and lower courts. A written judgment concludes with the names of the judges who participated in the judicial panel, the name of the secretary, and the date on which the judgment was rendered.

OSCILLATION: BETWEEN DIFFERENT LEGAL BASES

This section illustrates how the Beijing High Court adopted a decision-making methodology through dialoguing among potential sources of law to render convincing judgments that accommodated the specifics of each case. The judges selected and applied legal bases that oscillated between old and new codes as well as Daliyuan's interpretations and judgments, resulting in reasoning that fluctuated and omitted. Such judgments also reflected the changing social tempo and symbolized social progress.

The court exhibited divergent attitudes toward different legal bases and augmented them with a narrative on codes, provisions, and protocols. Some attitudes upheld the revised Great Qing Code as the base and rejected adopting the foreign-derived Civil Code draft. Others supported the new code as it represented the future and an ideal to which the law and legal reform would eventually converge.

This chapter shows that the institutional logic of law during the early modern Chinese law aimed for vertical transfer of knowledge from higher to lower courts, focusing on minimizing friction within the legal infrastructure and between courts and litigants. This vertical transfer strengthened when the judgment matched social change, intending to lead not just to legal changes but also societal progress. This embodies the vertical and institutional logic of multisourced law in practice.

This section uses two cases from the sample to exemplify Beijing High Court's oscillatory mode of practice, fluctuating along triangles of legal bases. Without this oscillation, the court would adopt a single legal basis to ground each judgment. In other words, if oscillation did not exist, the court would issue consistent judgments based on the same legal foundation.

This section analyzes how Beijing High Court applied the Tong No.576 interpretation from the Daliyuan Supreme Court when adjudicating divorce cases. Specifically, two cases are selected where Beijing High Court referenced this interpretation. If the legal basis was the same but the judgments differed, it suggests an oscillatory mode of judgment. The Tong No.576 interpretation states that Chinese courts should rule on divorce cases according to the old law. However, in some cases, courts may need to balance the interests of the parties to avoid injustice:

In accordance with ancient laws and rites, the matters of mourning, marriage, divorce, and severing ties of kinship are established to maintain social order. When encountering such cases, it is fitting to apply the relevant laws while prudently balancing emotions and legal principles to achieve fairness. One must not adhere rigidly to the letter of the law, lest it leads to exacerbating the situation by deviating from the original intent.

[居喪嫁娶及出妻義絕，皆舊律為禮教設立防閒。遇有此種案件，適用該律，仍宜權衡情法，以劑其平。不得拘遷文義，致蹈變本加厲之弊。]

No.576 provides lower courts flexibility in marriage-related cases. It orders them to rule based on the old law but avoid relying solely on it, which could lead to injustice. The interpretation says judgment justice would suffer without considering the dispute context when trying or reviewing a case. The revised Qing Code's limits, particularly narrow textual reading, further restrict this. However, No.576 does not clarify what qualifies as a "circumstance," how reading could be "confined," or how "weighing" situation and law works. Thus, it confuses and imbalances lower courts in applying the law.

Presumably, with No.576, lower courts needed to consider case specifics and source possible bases to balance "circumstance" and "law" in adjudicating disputes or reviewing lower court appeals. In other words, No.576 allows sourcing other laws to ground convincing judgments for litigants in each case. It acknowledges the imperial code as the de jure basis for judgment but no longer the exclusive source or way to make judgments. Accordingly, No.576

enables lower courts to focus more on specifics in each case and render judgments accommodating extra-legal factors.

In the archives of the Beijing High Court, we can find evidence of how No.576 was applied in practice. In case #239-4194, the court used No.576 to offer flexibility in judgment when seeking the appropriate legal basis. No.576 was used as the grounds to invoke the more progressive new law, rather than the de jure effective old law. However, in case #239-3994, the court utilized No.576 as a tool to correct a lower-level court's mistake, which had originally relied on the new draft of the Civil Code. As a result, the court developed divergent attitudes toward the old and the new law in this context, despite dealing with a similar piece of judgment.

Case #239-4194 was appealed to the High Court in 1918. In this case, the female party was subjected to abuse from her mother-in-law and fled to her parents' place with some belongings. The male party requested a divorce, arguing that her actions constituted a basis for divorce. However, the court stated that stealing within a family was different from general stealing, and subsequently dismissed the appeal. The High Court contended that the lower court had not considered recent social progress (*shehui jinbu qingxing*, 社會進步情形) before rendering the judgment, thereby highlighting the importance of situational context in legal decision-making.

CASE 239-4194

May 20, 1918

TENOR (*zhuwen*, 主文)

The appeal is dismissed and the judgment of the lower court is affirmed. The appellant is ordered to pay the costs of the appeal hearing.

FACT (*shishi*, 事實)

In the initial trial, Tian Wenkun, the appellant, claimed that he and Mrs. Tian (Heng) were married in 1916 and had been living in harmony until Mrs. Tian was influenced by her mother, Mrs. Heng (Quan), to steal clothes and flee to her parents' home. Mrs. Heng (Quan) was subsequently convicted and sentenced to imprisonment. Based on Mrs. Tian's conviction for stealing and absconding, the plaintiff sought a divorce through the court. The first instance verdict denied Tian Wenkun's request, prompting him to appeal the decision.

REASON (*liyou*, 理由)

The appellant appealed the appellee's case on the grounds that the appellee had stolen property from the appellant's family and fled. While the appellee admitted to the theft, she claimed that she was forced to flee due to the maltreatment of her mother-in-law. The appellee denied any intent to elope or abscond. The applicable law in this matter derives from the chapter on marriage in the current criminal law of the former Qing Dynasty. Pursuant to this law, if a wife commits any of the seven acts for repudiation (*qichu*, 七出) and is not exempted by one of the three exceptions (*sanbuqu*, 三不去) (Jones 1994:134), her husband has the right to seek a divorce. However, this provision from the old law was intended to safeguard traditional customs, which is markedly different from the spirit of law (*fayi*, 法意). At present, the Civil Code of the Republic of China has not been promulgated, although the civil portion of the effective law is still applicable. In handling such cases, the local courts must also consider the latest social developments and strike a balance between sentiment and law to reach a just decision. Therefore, it is not advisable to limit ourselves to the text of the effective law and adhere to the old law without exceptions (cf. Interpretation Tong No. 576, 1917, Daliyuan).

Under current law, the appellant's theft of property from the husband's family falls under the seven grounds for repudiation, without demonstrating any of the three exceptions for staying married. Upon review of the first-instance docket and the local court's record of an abduction case involving Mrs. Heng (Quan) and Heng Lu, it is apparent that the reason for the divorce is well-founded, and it would be erroneous to label the request as unfounded. While the aforementioned law does not distinguish between theft from a spouse or parents and theft from unrelated parties, extant criminal justice regulations make this differentiation clear, with stealing property from a person's spouse or next of kin exempt from punishment. The intention behind this law appears to be avoiding increased penalties for minor disputes over family property that could damage relationships between family members. Consequently, theft of property from one's spouse or next of kin differs from ordinary theft cases.

In this case, the appellee argued that she stole her husband's property because her mother-in-law was abusive to her. However, after reviewing the circumstances leading up to the incident, there is no evidence to suggest that the stealing was premeditated or part of an elopement plan. Therefore, taking into account the emotional ties between the couple, the stealing may not be considered an unforgivable act. Moreover, the couple had lived harmoniously for several years, and it would be neither acceptable under the law nor permitted based on ethical principles to end their marriage over material possessions.

In light of these considerations, it is questionable why the old law's seven acts for repudiation should be applied in this case. As for the claim of elopement, after reviewing the criminal judgment in the original court's abduction case involving Heng Lu and Mrs. Heng (Quan), it was found that both Heng Lu and Mrs. Heng (Quan) had admitted to sending Mrs. Tian (Heng) to a friend's place to stay for a few days due to concerns that her mother-in-law would chase after her. Thus, the appellant had stayed at his parents' house at their behest, which is clearly distinct from a planned elopement between a man and a woman.

Therefore, the original trial's decision not to establish a divorce was appropriate, and the appeal is dismissed. Costs will be awarded based on the order indicated above, and the judgment is hereby ordered as on the left.

In this case, the court's reasoning highlights two key points. First, the court critiques the current effective law, arguing the lower court failed to adequately consider the case "situation." Although the appellee committed theft justifying the husband's divorce claim, the court dismissed it, establishing that ongoing social progress must be considered, and such stealing was not as harmful traditionally. Second, in distinguishing "situation" from "law," the court did not use customs or customary law to contrast code or law. Instead, clarifying theft forms diminished the gravity of taking lesser property from immediate family, bolstering family, and mitigating the offense. This safeguarded the marital relationship, though the husband's divorce plea may be valid under the prevailing law. The court challenged the lower court's narrow legalistic judgment, prioritizing the case situation and social context. Critiquing the effective law's inadequacy, the court looked beyond it in interpreting the situation, not relying on customs. Distinguishing situation from law, the court diminishing the wife's offense mitigated prevailing law to preserve the family.

In some cases, even in Beijing High Court, attitudes toward the old law (*jiulü*, 舊律) differed significantly in applying the law. In case 239-3994, the court criticized the lower court using *tiaoli* 條理 as the legal basis, questioning why the old law's divorce rule was not applied. This contrasted markedly with the previous case. Despite referencing No.576 in both cases, the

court's attitudes oscillated between upholding the old law and critiquing its inadequacy. In the first case, the court looked beyond the old law in considering the situation and social progress. In 239-3994, the court insisted on applying the old law, rebuking the lower court for not following it.

These conflicting attitudes show Beijing High Court's complex perspective in navigating between tradition and modernity in law. Its judgments aimed for fairness and stability, but the means oscillated between modernizing interpretations of the law and upholding tradition. The court was progressive yet sought to prevent "radical" changes that could disrupt social order.

CASE 239-3994

August 30, 1917

TENOR (zhuwen, 主文)

The original judgment has been reverted. The plaintiff's motion is dismissed. The appellee shall bear the costs of the proceedings.

FACT (*shishi*, 事實)

In August of the third year of the Republic of China (August 1914), the appellant and the appellee were married. The appellee alleged that the appellant had engaged in misconduct in the home, had attempted suicide by throwing herself into a well, had kicked the appellee, and had ingested matches. As a result, the appellee filed a petition for divorce. Following the initial judgment, the appellant appealed to the court.

During the hearing, the appellant argued that she had been forthcoming with the appellee and had not concealed anything. The appellant acknowledged that she had accidentally kicked the appellee the previous year, but maintained that it was not intentional. With regards to the match ingestion, the appellant claimed that she was concerned about future pregnancies and ingested the matches while the appellee was in a separate room of the home. The other accusations made by the appellee, such as the appellant running away and attempting suicide by throwing herself into a well, were denied by the appellant.

In response, the appellee alleged that the appellant had engaged in misconduct at home and had kicked and injured the appellee the previous year. The appellee requested that the original judgment be upheld and the divorce be granted.

REASON (*liyou*, 理由)

In the present case, the appellant sought a divorce in the original trial on the basis of allegations that she had run away, thrown herself into a well, swallowed matches, and kicked the appellee. However, the appellant denied running away or throwing herself into the well, and the appellee failed to provide any evidence to support these claims. The appellee merely stated that the appellant had intended to throw herself into the well last June but was dissuaded from doing so. In regards to the incident where the appellant swallowed matches and kicked the appellee, the appellant claimed that they lived in separate rooms and that she had only swallowed the matches because the appellee came to her room and was scolded by his aunt. The appellant also maintained that kicking the appellee was an inadvertent act. The appellee's parents testified in court, claiming that the incident had taken place in the previous August.

Upon consideration of the above circumstances, the Court concluded that the appellant's reasons for divorce were either fabricated or caused by the strained relationship between the appellee's aunt and the appellant. Therefore, the claim could not be substantiated, and the appellee's claim of being kicked and injured by the appellant was the result of the appellant's mistake. Furthermore, given that the incident had occurred a considerable time ago, it could not serve as a valid reason for divorce in this case.

Under the current effective law, a husband may only file for divorce from his wife if he can prove that the wife has committed one of the seven acts of divorce (*qichuzhitiao*, 七出之條), and that the righteousness of the relationship no longer exists (*yijuezhizhuang*, 義絕之狀). Thus, neither party can request a divorce based on fictitious or fabricated facts. After examining the relevant laws, the Court concluded that the reasons put forward by the appellee could not demonstrate how the wife had violated the seven acts of divorce, nor could they prove that the righteousness of the couple's relationship no longer existed. As such, the appellee's claim and request for divorce could not be considered valid, either in accordance with the law or principles. The original judgment identified the appellant as having mistreated and abused the appellee and granted a divorce, which is surprising as the first-instance court ignored the existing laws and regulations and instead applied the *tiaoli* 條理 from the draft Civil Code. This was an error.

Based on the foregoing, the appeal is deemed meritorious. The original judgment is hereby reversed and the decision is remanded for further proceedings. The appellee is ordered to pay the costs of this litigation.

In the second case, the husband sought divorce, alleging the wife physically attacked him, attempted to run away and suicide. The wife swallowed matches after scolding by his aunt. The first-instance court granted divorce, invoking the Civil Code draft under *tiaoli*, believing the attack justified divorce. It supported the husband and rejected the wife's defense. It believed the

wife's actions expressed wanting to end the marriage. The wife appealed, disputing the husband's claims, and denying the incidents. Reviewing this, Beijing High Court ruled courts must carefully examine if a case meets the old law's seven conditions for divorce, not the new law. The husband's reasons were insufficient under the old law, so divorce was unjustified as the wife's actions did not violate it.

Unlike the first case, here Beijing High Court invoked No. 576 to correct a judgment based on the Civil Code draft. It ruled divorce improper as the marriage did not meet the old law's seven conditions, despite the alleged unhappy incidents. This contradicted the first-instance court citing the Civil Code draft under *tiaoli* to grant divorce for the husband. No. 576 governs old and new laws' relationship but seemed mechanical or "confined to the wording" sometimes. This questions the court's consistency, especially for cases supposedly under No. 576's formula.

In the first case, Beijing High Court cited *Daliyuan* to rule disregarding old laws contrary to social progress. But here, it corrected ignoring old laws to apply the Civil Code draft, calling that mistaken. No. 576's unclear wording and definitions partly explain the inconsistent outcomes. No. 576 was clear to use the old Qing Code but also balance it by considering case specifics, avoiding rigid application. Despite this, the interpretations and applications of the same principle diverged.

The additional case and analysis further demonstrate Beijing High Court's conflicting judgments in navigating tradition and modernity. In applying No. 576, its decisions oscillated between upholding old law and favoring new law to satisfy aims of fairness and progress. These oscillations reflect the challenges in China's legal transition, caught between new demands and continuity. The unclear guidance in No. 576 allowed variable interpretations, resulting in inconsistent judgments.

Looking beyond the "legal" dimension, consistency emerges in seeking legal basis despite variable approaches. In both cases, the courts relied on Daliyuan's interpretation to decide the course of action. In the first case, the court rejected the old law, citing addressing social progress. This aligned with No. 576 calling for stopgap measures balancing situation and law. In contrast, in the second case the court sought to balance situation and law, concluding the old law was more appropriate to protect the wife from hardship if divorced. It invoked the draft Civil Code's unpromulgated status, questioning applying it to the judgment.

Despite differing attitudes toward the old law, both Beijing High Court aimed to preserve the marriages. In the first case, it rejected the old law, invoking social progress to uphold the marriage. In the second, it upheld the old law as better protecting the marriage then. Though the legal bases and reasons diverged, the court's underlying goal was consistent: to preserve marital stability. The means simply varied based on interpreting what would most persuasively achieve this goal for each case situation. The court's aims reflected its concern with promoting social harmony and stability during a period of significant change. Preserving marriages was consistent with traditional familial structures and social ideals. But the court's chosen legal bases oscillated between new and old law in determining what would legitimize and persuade litigants of its equitable judgments in complex, divergent cases.

Thus, despite divergence between old and new laws, Beijing High Court's multisourced legal practice exemplified well-coordinated hierarchical transfer of Daliyuan's interpretations. It reviewed and corrected trial courts' law application. But this institutional logic also consistently aimed to use multisourcing to achieve consistency despite variable judgment outcomes.

Multisourcing multisourced bases to vertically rule each case maintained jurisprudence flow in

the new court infrastructure. But it required the judiciary operate by extra-legal norms outside courtrooms, not limited to "customs" or "customary law."

This section uses two cases from the Beijing High Court that rely on the same Daliyuan interpretations but yield divergent outcomes. It reveals the "oscillatory" dimension of the institutional logic and the vertical flow of multisourced legal reform.

First, as the name suggests, the court adhered to the hierarchical flow of the interpretations of law from Daliyuan Supreme Court. It invoked these interpretations in its own judgment and propagated them down the court's infrastructure to sustain the newly established judiciary. Also, the High Court used these interpretations to evaluate and critique the lower court's work. Second, the institutional logic leveraged the nebulous wording of legally binding interpretation of law to institutionalize extra-legal considerations, including normative factors that bind interpersonal ties in family and marriage. The court demonstrated an oscillatory attitude toward the old law while largely protecting the institution of marriage by preventing it from falling apart.

However, the operation of the institutional logic was not always articulated in the courtroom. In some cases, the court employed the mode of "omission" by leaving out important Daliyuan interpretations and judgments when reviewing cases from lower-level courts. This approach aimed to mitigate possible tension in the courtroom by delivering a more convincing judgment for the litigants. In the next section, I will further examine the mode of "omission" and its implications for the practice of law in the Beijing High Court.

OMISSION: SELECTIVE SOURCING OF THE LEGAL BASIS

Sometimes Beijing High Court judgments lacked citations of specific articles or codes. Without these, how did it construct reasoning reviewing case facts? Did this mean legal basis

was insignificant then for appeals? Did it imply judges relied more on extra-legal factors in judgments?

These questions have no easy answers but highlight an important issue in Beijing High Court's practice. Some judgments lacked clear citations, obscuring exact reasoning. But this does not necessarily mean legal basis was unimportant. The court may have relied on general legal principles or extra-legal factors like social norms or morality. Lacking specific citations may reflect law's complexity and judges weighing various factors in decisions. We must approach these cases with nuance, considering legal and extra-legal factors.

This section examines how Beijing High Court reviewed cases involving disputes over "small notes" (*xiaotiao* 小條), which supposedly records birth dates to contract marriage. In early Republican China, couples often used *xiaotiao* to calculate compatibility via the eight characters (*bazi* 八字) from year, month, date and time of birth before families agreed to marry. However, *xiaotiao* did not include the explicit wording on intention for engagement or marriage..

While the presentation of the birth dates on the *xiaotiao* was considered an initial move to prepare for a marriage, such notes were not legally binding. If a family changed its mind and decided not to move forward with the marriage, the unilateral act of terminating the engagement could lead to legal proceedings. Despite the lack of legal binding, people still cited the *xiaotiao* as evidence to prove the presence of a reservation for marriage. The Beijing High Court reviewed cases involving disputes over the validity of these notes and how they could be used as evidence in court. These cases required the court to navigate the intricacies of Chinese custom and the formal requirements of legal evidence. The judicial practice around *xiaotiao* reveals dynamics at work in the period's legal culture. *Xiaotiao* represented a customary practice, not a

formally codified legal procedure. But as a social and cultural tradition, they still carried persuasive authority and implications for individuals' lives.

The court thus had to interpret *xiaotiao's* legal significance and weight relative to the changing legal system. Judges navigated custom and modern codified law, social expectations, and new rationalized procedures. Court's decisions around *xiaotiao* provide insight into tensions between cultural tradition as a basis for legal authority and judgement versus establishing law's authority. The court's task was complex. It required balancing a customary tradition and means of forging social bonds with law's demarcated procedures and logic. The new laws aimed to establish transparent, consistent rules where tradition was variable, discretionary, or based on moral authority. But tradition still shaped lived realities, normative expectations and was foundation for societal functioning.

This legal quandary presents a challenge requiring the court's erudition and discernment. It had to scrutinize the legal foundation for admitting or rejecting evidence attesting to prenuptial engagement. Though the period between engagement and marriage lacked legal binding as a conjugal union, it held significant weight due to binding customary norms. These norms, exchanging bride wealth and signing documents articulating intent to wed, establish a quasi-formal bond between the engaged and families. But this arrangement was not immune to problems, and breaching the promise could instigate disputes and tensions between parties.

Compounding complexity, the court had to clarify engagement's legal definition and degree of legally binding force versus formal marriage. The revised Qing Code lacked clarity on this. It said engagement was established by exchanging written marriage documents per established rituals, expressed in eight characters: "Writing a marriage contract according to the customary rites to seek a bride and complete the marriage." (*xielihunshu yilipinjia*, 寫立婚

書依禮聘嫁) But it omitted which documents qualified as legitimate marriage contract or enforcing the eight-character provisions. Lacking governmental institutions managing contracts meant local customs specified engagement practices, exacerbating intricacy.

The 1910 Qing Civil Code draft lacked articles defining or regulating engagement stages. But the 1925 draft added provisions clarifying engagement's legal force. Article 1092 said engagement's force started from exchanging a marriage document or receiving the bridegroom's money gift. Article 1093 elaborated, saying engagement should not be conflated with marriage's bond. It stated: "Litigation should not be instigated even if a man and woman are engaged. However, this article does not preclude cases where two parties are still resolved to get married despite the rejection from parents or guardians."

In this section, I analyze the reasoning behind the High Court's rulings on marriage-related appeals where references to established law were noticeably absent from the decisions. In some cases, the rulings should have relied on the civil statutes of the revised Qing Code or the interpretations and judgments of the Daliyuan Supreme Court. However, the High Court chose to omit any citation of these legal precedents. Instead, the court concentrated on the facts of the cases and the evidence presented by the litigants.

The issue that arises is whether a judgment can be viewed as legitimate and persuasive without explicitly citing the authority of law. The omission of legal bases as a mode of judgment is an apt exemplification of the multisourcing application of law and the pervasive influence of customary normativity on the judgment. Judges are not just obliged to calibrate the judgment based on law, but also to meaningfully engage with litigants in each specific case to ensure that the judgment is compelling. In so doing, judgments should address not only the public interest but also the concerns of the disputing parties. Omission may be used as a cost-effective approach

to avoid addressing contentious issues in existing laws or uncertainties in effective laws.

However, this does not imply that judges rule against the existing law. The presence of omission as a mode of judgment is indicative of the multisourced application of law at the practical level.

Mode #1: Skipping to Avoid Certain Laws

The first case dates to 1916, where the male party presented a note indicating the date of birth, a note with basic family information, and a chart of clothing sizes to establish an intent to marry. Furthermore, the female party's family had expressed willingness to proceed with wedding preparations. However, despite the presented evidence, the court deemed it irrelevant and insufficient to prove intent. Rather than citing particular articles, the court focused on evaluating the evidence's relevance while reviewing facts from the first-instance trial. To reason its judgment, the court invoked the concept of "conditions" derived from Daliyuan's interpretations of law. Although the court did not cite these interpretations explicitly, it relied on them as guiding principles in its reasoning. In practical terms, the court utilized them to inform its decision making.

CASE 239-2891

April 3, 1916

TENOR (zhuwen, 主文)

Upon due consideration of the matter, the appeal is hereby dismissed. The appellant is ordered to bear the costs associated with the appeal.

FACT (shishi, 事實)

In this case, the appellant argued that the daughter of Mrs. Yu (Wen) had become engaged to the appellant through a matchmaker, and that the appellant had paid six taels of silver as a bride price. The Yu family also provided a note containing the daughter's date of birth and a list of clothing sizes. However, Mrs. Yu (Wen) later regretted the engagement, leading to the appellant filing a lawsuit against her. Following the trial's conclusion, the appellant filed an appeal.

Upon review, this court finds that the appellant's argument relies on the customs in the north (*beifang xiguan*, 北方習慣), which hold that a marriage is formed solely based on

a party's date-of-birth note (*gengtiao*, 庚條). The appellant notes that the Yu family provided a note containing their daughter's date of birth, as well as family information and a list of clothing sizes, and that the appellant paid six taels of silver as a bride price. This court finds that the evidence provided by the appellant is extremely clear, and that the marriage is undoubtedly valid.

However, the original judgment dismissed the appellant's request, which the appellant found dissatisfying. The appellee's agent countered by arguing that although Mrs. Yu (Wen)'s daughter and Rong Xi (the appellant) had discussed the possibility of marriage, the intention behind providing the date-of-birth and family notes was merely to expedite the male party's family's investigation into whether the two parties were a good match. Upon completing the investigation, Mrs. Yu (Wen) discovered that Rong Xi (the appellant) had previously been divorced, leading her to call off the marriage. The bride price paid by the appellant was not accepted, and the clothing size list was not provided by Mrs. Yu (Wen). Therefore, this court upholds the original judgment and rejects the appellant's appeal.

The appellant stated that the daughter of Mrs. Yu (Wen) was engaged with the appellant through a matchmaker. The appellant paid six taels of silver as bride price. The Yu family also gave a note with the date of birth and a list of clothing sizes. Later, because Mrs. Yu (Wen) repented the engagement, the appellant filed a lawsuit against Mrs. Yu (Wen) in the original trial. After this case was decided, the appellant appealed to the court. The two parties were summoned by this court and arguments were heard. The appellant said that, according to the customs in the north (*beifang xiguan*, 北方習慣), a marriage is formed solely on the basis of a piece of note with the date of birth from a party. Mrs. Yu (Wen)'s daughter, who got engaged with the male party through a matchmaker. At that time, Yu family not only gave the date-of-birth note, the note with family basic info and clothing size list, but the appellant also paid the bride price of six silver. The evidence is extremely clear, and the marriage is certainly valid. The original judgment dismissed the request, and it was dissatisfied. According to the argument by the appellee's agent, although the daughter of the Mrs. Yu (Wen) and Rong Xi (the appellant) talked about the potential of marriage before, the very intention of delivering the date-of-birth and family note was to speed up the male party's family's investigation to see whether the two parties is a good match. After the investigation, Mrs. Yu (Wen) found out Rong Xi (the appellant) had divorced before, so they stopped further processing with this marriage. The bride price paid by the appellant was not accepted. The clothing size list was not submitted by Mrs. Yu (Wen). The appellant requested that the appeal be denied.

REASON (*liyóu*, 理由)

After conducting an investigation into the matter, the appellant presented two pieces of evidence to support their claim that a contract of marriage had been established with the daughter of Mrs. Yu (Wen) family. Specifically, the appellant paid six taels of silver to Mrs. Yu (Wen) as the bride price and the Yu family provided a note containing the daughter's date of birth, a note with the detailed information of family members

(*menhutie*, 門戶帖) (i.e., a list with three generations of family members' names and places of origin), and a chart of clothing sizes.

Upon summoning both parties for further investigation, the court considered the arguments presented by the appellant's representative, Ming Rui. The representative argued that the notes from Mrs. Yu (Wen) were intended solely for the male party's family to proceed with the matching investigation and should not be considered as evidence of engagement. Moreover, Mrs. Yu (Wen) had neither opened the clothing size chart nor accepted the bride wealth.

During the course of the investigation, the court also interrogated Mrs. Chen (Zhang), the representative of Chen Jisheng (who was the matchmaker while discussing the marriage). Despite Jisheng's assertion of personally handing over the bride wealth to Yu family, a further reading of the trial case docket showed that Jisheng went together with Liu Fushun when handing the six taels of silver bride price to Yu's. However, according to Liu Fushun, the silver was returned to Chen Jisheng because Mrs. Yu (Wen) was not home when they visited the family. Apparently, although the appellant delegated Chen Jisheng to hand over the bride price, Yu family did not accept this money.

As per legal requirements, a reservation (*yuyue*, 預約) of marriage must meet specific conditions. The reservation will only take effect when one of the two conditions are satisfied: an established written document or accepted bride wealth. In this particular case, the two parties did not establish a written document when they discussed getting married, and the bride wealth was not accepted. The conditions for reserving the marriage were thus completely unsatisfied. The court considered the other pieces of written evidence, including the note with family info, which was intended for evaluating the matching in terms of family backgrounds, and the chart of clothing size, which was non-existent. In regard to the note with date of birth, it only recorded the dates, and did not come with any words to prove the intention for marriage. Upon researching the customs in Beijing, the court determined that a marital reservation requires a written document for marriage, and such *xiaotiao* is not sufficient to prove such reservation.

As a result of the foregoing, the appellant's claims have been found to be without merit, and the appeal is ruled groundless and rejected. The court further orders the appellant to pay for the litigation fee as per the relevant stipulations.

In this case, the appellant's defense rested on evidence that was notably weak, consisting of two notes with scant indication of any intention to marry, and a chart detailing clothing sizes.

One possible explanation for the appellant's use of such evidence in their appeal could be that they believed it to be sufficient to establish the presence of an intention to reserve the marriage.

However, the new legal system did not recognize such weak evidence as adequate for this

purpose. Consequently, the court may have found it unnecessary to cite a specific legal basis, as the evidence was so lacking in probative value that it could be easily rejected. Another possible explanation for the appellant's reliance on such weak evidence is that it constituted the best evidence available to them. Given that the parties disputed the reservation of the marriage, which was still in the engagement stage, it is likely that there was not much written evidence available to prove the existence of such a reservation. In this case, the court may have felt it necessary to lecture the litigants on the imbecility of relying on such weak evidence in court to support their claims.

At the time of this case, in 1916, the Qing draft of Civil Code was seen as emblematic of the new law. However, this version of the code did not contain any provisions on the reservation of marriage and engagement. As a result, the sources available for legal interpretation were limited to the interpretations of law by Daliyuan and the civil portions of the revised Qing Code. This meant that there would be no debate between the old and new law, and any conflicts therein would not be explicitly presented in court. Nevertheless, there were interpretations by Daliyuan that could have been used to strengthen the court's reasoning, but the court did not cite them. The High Court chose instead to focus on the guiding principles upon which the judgment rested and the evidentiary weakness of the appellant's evidence. It is possible that the court's decision was motivated by a desire to maintain consistency with existing legal precedent or to avoid the creation of conflicting interpretations of the law.

In this case, the court applied "formal condition" (*xingshi yaojian*, 形式要件) principle to justify rejecting the appellant's evidence for proving a marriage reservation. The court stated that to be formal, a reservation must meet two requirements: a written marriage contract and the payment and acceptance of bride wealth. If either requirement is satisfied, the reservation is

considered formal and legally valid. However, the appellant failed to provide evidence for either requirement.

During the time this case was adjudicated, from 1913 to 1915, Daliyuan issued two relevant interpretations on the requirements for a valid marriage reservation and a formal marriage. These interpretations could have provided a strong legal basis for the court's decision. The initial interpretation elaborated on the preconditions for marriage. It stipulated that an engagement could be legally valid if it met either requirement in the revised Qing Code [1913. Shang. No. 215] (Daliyuanbianjichu 大理院編輯處 1919:129):

According to current legal provisions, there are two formal conditions for the establishment of an engagement: First, there must be a written document demonstrating the intention of marriage, which may be established by a matchmaker or through a private arrangement, regardless of whether it is registered with the government or not. Second, there must be a betrothal gift. If either of these two conditions is present, the engagement will take effect.

[現行律載，定婚之形式要件有二：一、有婚書即謂有媒妁通報寫立者，無論報官有案或僅系私約皆可；二、聘財。此二要件苟具備其一，即發生定婚之效力。]

In 1915, Daliyuan issued another interpretation. It elaborated on the formal condition concept to govern de facto marriages based on customs or informal family agreements. The interpretation clarified that a marriage would not be legally binding unless one or both formal requirements were met at some point. This argument on fulfilling the marriage requirements relates to the legal validity of marital relationships, as implied in the first sentence of the interpretation [1915. Shang. No.1514] (Daliyuanbianjichu 大理院編輯處 1919:139):

An engagement constitutes an essential precondition for the formation of a marital union. In accordance with the extant and operative Qing Code, the establishment of an engagement between a man and a woman is contingent upon the drafting of marriage documents and adherence to the customary practices of betrothal and matrimony. The Code further stipulates that, even in the absence of marital documents, the acceptance of betrothal gifts shall be deemed sufficient to confer validity upon the engagement. As such, it is incumbent upon the parties to fulfill at least one of these fundamental criteria in order to secure the lawful recognition of a marriage contract. In the event that neither

prerequisite is satisfied, the marriage, notwithstanding its consummation, shall be devoid of legal standing under the purview of the law.

[定婚為成婚之前提。據現在繼續有效之前清現行律載，男女定婚寫立婚書依禮聘娶。又載，雖無婚書，但曾受聘財者，亦是等語。是婚約必備此要件之一始能認為有效成立。苟無一具備，雖已成婚，於法律上仍不生婚姻之效力。]

The second interpretation by Daliyuan in 1915 further explained the formal condition concept to regulate marriages based on customs or informal agreements. It stressed that marriages that did not satisfy any formal requirement throughout the duration of the marriage would not be legally binding. This reinforced that fulfilling these requirements was necessary for a formal marriage. Therefore, both interpretations could have provided a strong legal foundation for this case. However, the High Court did not cite them. Rather, the court concentrated on the persuasiveness of the appellant's evidence to support their argument.

However, the High Court of Beijing did follow a syllogistic logic in its argumentation. First, it stated generally that an engagement must be based on certain requirements. Without citation, the court then listed two major requirements for legally recognizing an engagement. Next, it explained how this case specifically fit the general statement by classifying it as a contract dispute over a marriage reservation. The court deduced its argument from the general theory of requirements to the specifics of this case by focusing on the different procedures of sending, delivering and accepting the marriage documents and bridewealth. Finally, the court concluded the appeal was groundless due to the weakness and irrelevance of the evidence. Although the case did not cite any laws or provisions, the court still applied deductive logic to reason and argue its conclusion. Thus, even though the court omitted citing Daliyuan's interpretations, it transferred the jurisprudence from Daliyuan and enriched the flow of institutional logic within the newly established court's infrastructure.

When considering "custom," deductive reasoning would not effectively lead to a conclusion from a general statement. Therefore, the court proceeded to break down the case and argument layer by layer. In doing so, the court also addressed the "custom of Beijing". In this case, the appellant relied on the normative force of "custom" persuade the court that the xiaotiao notes were sufficient to prove a valid reservation. To determine a ruling on "custom," the court examined the Beijing custom. The court held that xiaotiao alone would not establish a marriage reservation or prove it in court; rather, the court needed to see a clear intention to marry. Although customs required marriage preparation to start with exchanging xiaotiao, the court believed customs also required a clear message for marriage to be recorded in writing. In this way, the court did not oppose customs to law. Instead, by analyzing the case in layers, the court first applied law and customs to different layers, then used customs to adjudicate the custom-based claims in this case.

Mode #2. Skipping to Bypass Uncertainty

The use of omission as a mode of judgment was closely linked to the uncertainty of law during the period when the legal system was still being established. The High Court refrained from citing legal articles because neither the effective law nor the Daliyuan's interpretations were stable. It was unclear and uncertain how to define and establish the legal conditions for transactions related to reserving, engaging, and initiating a marriage. Instead of relying on articles that could become obsolete or incorrect in the future, the court chose to practice law in the omissive mode while drawing on interpretations from Daliyuan. Such uncertainty allowed the High Court to focus on the specific situations and circumstances of a case while avoiding the search for and citation of a proper basis for ruling a case.

If the ruling principles themselves were "uncertain," changes might be observed in the interpretations from Daliyuan. Therefore, to explore this issue regarding "xiaotiao," I rely on the published interpretations of law by Daliyuan from 1915 to 1919, which were presumably the source of law for the judges in Beijing High Court. An examination of these interpretations of law will reveal how the uncertainty of law application was at work in the lower-level courts.

In the case discussed earlier, a written "note" was used by both parties to document marriage-related information as a means of contracting the reservation. It was customary for such documentation to suggest that both parties intended to get married and had initiated the process toward marriage. However, the process was abruptly halted due to the will of one of the parties. The court, when handling such cases, initially assessed the validity of the causal link between the evidence used to determine the intention for marriage and the disputes over the cessation of marriage.

One of the pieces of evidence presented by the party to defend their argument was *xiaotiao*, which contained the date of birth of one of the parties (usually the female party) and was considered a token of marriage commitment between the two parties. The party strongly believed that this note served as proof of their continuing expression of the intention to get married in the future while they were going through the necessary steps toward this end. This was claimed to be part of the local customs in Beijing, which reinforced the legitimacy of such a practice.

However, the court did not accept this argument. The court believed that the absence of a clear message on engagement or entering marriage on this piece of *xiaotiao* would render such evidence legally invalid in vindicating a contractual promise for the reservation of marriage. Although the use of *xiaotiao* to justify and prove the legal status of such a reservation or the

intention to marry was also labeled as a custom in Beijing to emphasize its commonality and legitimacy, the court contended that such proof was weak and insufficient in proving the establishment of such a reservation even by the customs of Beijing. The court asserted that a clear contractual document documenting the intention to marry was still necessary in this case.

According to Daliyuan's interpretation, one of the formal conditions for establishing a legally binding marriage is a written document for marriage, which was in accordance with the Great Qing Code to recognize the status of a marital relationship (Jones, 1994, p. 123). However, the Qing Code did not specify a dedicated requirement for the format or content of a valid document as evidence for a valid marriage before the law. Neither did the interpretations by Daliyuan provide clear guidelines regarding the content, structure, or format of a qualified written document for marriage. Some interpretations even acknowledged that local customs could have the binding force to ask for the binding forms or formats for such a document. For instance, in the following interpretation by Daliyuan in 1915, it was made clear that a written document containing only the date of birth of the two parties without recording the intention to marriage would not be considered as evidence of a contracted intention to marriage

(Daliyuanbianjichu 大理院編輯處 1919:130):

Although the "hunshu" (婚書) has no fixed format in the eyes of the law, it shall be deemed lawful if it can be ascertained that the document itself establishes a matrimonial relationship between the parties (for example, when following the custom of listing the age of the man and woman on a single slip of paper or indicating the intention to marry either directly or indirectly within the document). However, if a solitary piece of paper containing only the age of one of the parties is presented, and the reason for its inscription cannot be definitively proven, it would be arduous to recognize it as a lawful "hunshu," and it cannot be cited as evidence to support the establishment of a matrimonial contract.

[婚書於法律上雖無一定之方式，然必就書據自身可認為有婚約關係者（如習慣上通行之方式以男女兩造年庚並列一柬或於柬內直接或間接表示允婚之意旨者

是)，始為適法。若僅以片紙開列一造年庚而於其開列之原因如何，並不能有確切之證明者，自難認為合法之婚書，即不能持此以主張定婚契約之成立。]

The foregoing interpretation could have served as a strong basis for resolving disputes in Case 239-2891. However, like previous interpretations by Daliyuan, it was not referenced. In comparison to previous interpretations, this interpretation is particularly focused on the custom of exchanging xiaotiao as a means of initiating an engagement. Daliyuan maintained that a written note must explicitly express the intention to marry in order to be considered as evidence of an engagement in court, regardless of any customs or practices to the contrary. Despite Daliyuan's interpretation being legally binding, there were still disagreements regarding the validity of such interpretations. In fact, in a case sample from Daliyuan, four years later in 1919, there was a slight but significant shift in the accepted forms of documentary proof [1919. Shang. No. 792] (Daliyuanbianjichu 大理院編輯處 1924:31):

The "hun tie" (婚帖), [which refers to the written invitation to a wedding], is one of the essential components of a matrimonial contract, but there are no express provisions regarding its format in the current laws. Therefore, whether the "nian geng" (年庚) slip of paper, [which contains the ages of the bride and groom], qualifies as a "dinghun" (訂婚) "hun tie," or if a "luan jian" (鸞箋) or "feng jian" (鳳簡), [which are formal marriage certificates with specific content], is required, should be determined in accordance with the customs of each locality.

[婚帖為定婚要件之一，而婚帖之方式，現行律無明文規定。則年庚字條是否即為訂婚婚帖，抑須鸞箋鳳簡之屬始為婚帖，自應依各地之習慣以為斷定。

In the interpretation issued in 1919 (Shang, No. 792), Daliyuan adopted a more accommodating approach in regards to the requirement of clear intention between parties in written documents for engagements. This was a notable shift, and Daliyuan eventually succumbed to the customs in some cases where a note containing only the birth dates of the parties was considered sufficient evidence of a reservation of marriage and commitment to marry thereafter. While Daliyuan's interpretations were legally binding, they were not impervious to

changes in the social context of China during the 1910s. As such, Daliyuan needed to position its interpretations and judgments accordingly to address the evolving mentality surrounding justice, order, and law among the Chinese population. At times, Daliyuan was required to make compromises and retreat from cases where customs had previously held sway.

However, the extent to which Daliyuan was willing to surrender was not absolute, and the No. 792 interpretation serves as a good example of this. The opening sentence of the interpretation outlines the unyielding principle that Daliyuan upheld as the base and bottom line for customs to ground their home rule: a written document was required for marriage. This meant that Daliyuan would not recognize practices that lacked a written document proclaiming the establishment of a marital relationship. However, the interpretation was more lenient towards notes with no explicit expression of intent to marry, given that local customs may have strong insistence on this matter.

Consistent with the principle adopted in Case 239-2891 by Beijing High Court, Daliyuan continued to avoid direct confrontation with local customs. In certain cases, Daliyuan upheld governing rules and principles, while in others, it left ample room for lower-level courts to adjust their judgments to accommodate entrenched local customs. For example, Daliyuan retained the supreme power to uphold principles while allowing customs to determine the nitty-gritty details of proving documents for marriage. Through this division of functions, China's burgeoning judiciary found a way to reconcile differences between foreign codes and local customs.

Thus, the omission mode of judgment served as a means for courts to bridge the gap between code and custom, with minimal loss in translating interpretations from Daliyuan to lower-level courts within the newly established court infrastructure. Through this approach,

courts were able to reach consensus with litigants without necessarily citing specific articles or interpretations of the law.

In conclusion, this chapter has conducted a thorough examination of Beijing High Court's review of marriage-related cases in Beijing during the period of legal transition in China. Drawing upon 263 court cases, this study has investigated the judge's agency in selecting and weaving the legal basis for civil cases, and has also analyzed the hierarchy of law invocation across different levels of court in the evolving logic of legal practice.

The court's judgment was not simply a matter of applying the law in the book, especially when the law came from various sources. Judges resorted to their own agency to connect and intertwine the laws from diverse sources to construct a legal basis for rendering a ruling. Therefore, a single piece of law could produce different outcomes, depending on the judge's interpretation and application and some case-specific circumstances, but they could all comply with the same laws.

This finding suggests that there exists a vague middle ground between the conventional dichotomy of "law" and "society," where laws from different sources are fused, processed, and reappeared as a legal basis throughout the judicial judgment-making process. The integration of foreign legal codes and local customary practices into Chinese legal practice added to the complexity of this middle ground, resulting in the emergence of practices such as oscillatory and omissive judgment.

Beyond the traditional divide between law and society, future research should explore the multisourcing and meso ground in court's action, especially in China, where the law is a modern import from Western countries. Understanding the judge's agency in selecting and weaving the

legal basis for civil cases during the period of legal transition provides valuable insights into the evolution of Chinese legal practice and illuminates the role of culture and society in shaping legal systems. At the heart of the judge's balancing deliberation in constructing such a middle ground is the need to maintain communication between law and society and achieve local harmony while minimizing the cost of maintaining stability and facilitating a smooth transition. Judges needed to reconcile different sources of law and customary practices in a way that made sense for the local context, while also respecting the emerging legal framework. This delicate balancing act demanded a deep understanding of local customs and social dynamics, as well as a sensitivity to the ongoing process of legal transition.

This chapter highlights the importance of recognizing the judge's agency in shaping legal systems during times of transition and the need for a sociological understanding of the judgment-making process. It also emphasizes the critical role of culture and society in shaping legal systems and the importance of a nuanced approach to legal transition that incorporates local customs and practices. In conclusion, this chapter provides valuable insights into the development of Chinese legal practice during a time of legal transition and lays the groundwork for further research in this area.

CHAPTER 4. CONTRIVING CONCUBINAL CONTRACT

At the dawn of the 20th century, China underwent a comprehensive legal reform that had far-reaching implications for the nation's legal system. The imperial legal system, which had been entrenched for over a century, was supplanted by legal structures from the West. The reform constituted a watershed moment in Chinese legal history and brought about sweeping changes in substantive and procedural law, as well as court infrastructure. In particular, the reform aimed to abolish extraterritoriality for foreign powers and modernize the Chinese legal system. Despite the reform's broad and transformative impact, some legal practices remained unaltered, including the continued recognition of concubinage in China during the early Republican era (1912-1928). In this chapter, situated within this historical context of transition, I investigate how Chinese courts defined concubinage relationships and incorporated this custom within a reinvigorated legal framework.

To this end, this chapter examines court cases from the Beijing High Court and binding judgments from the Supreme Court to scrutinize how the courts addressed legal issues pertaining to concubinage relationships during this period. By analyzing the legal treatment of concubinage in the early 20th century, our research seeks to elucidate the legal and social transformations that unfolded in China during this era.

Throughout Chinese history, it was common for men to have multiple female partners, in accordance with patrilineal and patriarchal norms. However, the law was ambiguous about these women's status within the family or under the law. Although the law prohibited and restricted men from having multiple wives (*qi*, 妻), it was more tolerant of men taking concubines (*qie*, 妾) as partners in marriage (Hua 2014; Katkov 1997). Nonetheless, this leniency did not necessarily clarify concubines' definition, status, and rights within the family (Watson and Ebrey

1991). The position of concubines was complex, as they were situated somewhere between a maid, a sexual partner, and a family member, distinct from wives. While concubines were not considered wives, they still received treatment resembling that of family members, particularly as they bore children with their husband-masters (Bernhardt 1999a; Tran 2009).²

Concubinage was a common but restricted practice in Chinese society. In certain dynasties, acquiring a concubine was limited to childless men from specific social classes. In other periods, concubinage was distinct from marriage and family, representing an emotional attachment and love (Hua 2014). Women were procured from human markets to become concubines, and transactions often resembled property exchange contracts (Hua 2008, 2014; Sommer 2015). This "transactional" feature of Chinese family life underscored the unique nature of concubinage relationships (Hua 2008; Ransmeier 2017; Sommer 2015). This "transactional" feature of Chinese family life underscored the unique nature of concubinage relationships.

The legal reforms and social movements of the 1910s, which called for individual freedom and autonomous legal personality, sought to completely abolish concubinage in China. This development brought the issue of concubinage to the forefront of the clash between modernity and tradition in both social and legal fields (Glosser 2003). The demand to abolish concubinage echoed broader changes in Chinese society, as well as efforts to reform the legal system to contain the new values and norms.

This chapter examines how the newly established modern court in Beijing applied the law on concubinage and adjudicated concubine-related cases. By analyzing court cases from the Daliyuan Supreme Court and Beijing High Court (1912-1928), I study the formation of modern judicial logic within the new, independent courts as they negotiated between the Western ideal of

monogamy and the long-standing Chinese norms regarding concubinage. This chapter investigates how the courts addressed and defined concubinage relationships and accommodated the power and protection of women within a renewed outlook of women as autonomous individuals. Moreover, this research explores how the court regulated and policed the changing marital order in Chinese family life during the legal reform of the early 20th century.

By situating concubinage relationships within a broader historical context, this research also delves into the *mélange* of concubinal contracts with both a contract for human-selling transactions and a contract between two equal contracting parties. The legal changes of the 1910s, which emphasized the "autonomous agency" of women, transformed women from passive property in exchange as consideration in a contractual commitment to individual persons with legal capacity for contracting. This transformation was arguably a fundamental change in Chinese law and society.

This research makes several significant contributions to the existing literature on Chinese family law and legal history. Firstly, it examines how the emerging modern Chinese legal system in the 1910s policed and restructured gender relations within Chinese family life. In doing so, it sheds new light on the legal and social changes that took place during this period, and the complex interplay between legal reform and social transformation. Although some binding judgments and interpretations of law lost their binding authority, the theory and methodology they created would help us understand contemporary marriage and family law in China.

Secondly, this research examines the changing "autonomous agency" of Chinese women as perceived by the Republican justice system (Huang 2001). It explores how the courts grappled with the concept of women's legal autonomy and how such agency was mediated, managed, and constrained by the logic of the court. By analyzing court cases and legal documents from the era,

this chapter illuminates the challenges and complexities of defining and protecting women's legal rights within a rapidly changing legal and social landscape.

Finally, this research highlights the lasting impact of the judicial logic established by the courts in the 1910s and 1920s. Although concubinage was completely abolished and banned after the promulgation of the Marriage Law of the People's Republic of China in 1950, the impact of the courts' legal reasoning and the broader social changes of the era continue to be felt today. As Huang (2001) contends, legal reform in China over the past century, including in the 1970s and 1980s, has continued to address unfinished projects left by the Qing pioneers in the early 20th century. By studying the legal treatment of concubinage and the broader social and legal transformations of the early 20th century in China, this research contributes to a deeper understanding of the relationship between legal reform and social change in China.

Concubinage at Crossroad in Early Republican China

In Imperial China, men were allowed to have multiple female partners. Besides the only wife in marriage, a Chinese man can have multiple concubines to bear them children, especially if they were childless. The law and restriction were varied from time to time, but the customs allowed more leniency on this matter. After a woman entered the marital family as concubine, her role and function shifted along the triangle of sexual partner, wife, and maid. After she gave birth, as the mother of her husband master's child, she will be more included in the greater family structure as one of their members (Katkov 1997).

A sine qua non of status as wife in a marriage is a set of strictly defined marital rituals, the exchange of bride price, and well-expressed commitment when two families start discussing a marriage between two younger family members (Vermier 1966). But getting a concubine is not

necessary to follow these procedures. Correspondingly, concubines may not get the similar positions as the wife in a marriage. In some cases, concubines were purchased on a human-selling market (Ebrey 1986; Hua 2014). One of the major differences, therefore, existed between wife and concubines depended on the ways in which they entered marital family.

Besides the rank-wise difference, concubinage was not always legal. In Ming dynasty, for example, concubines were only reserved for childless men over forty, which remained in place until the time of Qianlong in the early Qing dynasty (Waltner 1996:71). Resembling but different from wife, concubines occupied a unique position in Chinese family over time and their presence in family fulfilled the need of reproduction, continuing the patrilineal heredity. In some cases, furthermore, getting a concubine represented wealth and status. However, neither did concubines nor their children could share the same or equal recognition as those from wives, which corresponds to the Confucian logic of hierarchical order between family members across generations.

In defense of the "one-wife, multiple-concubines" system known as *yifuyiqi duoqiezhi* (一夫一妻多妾制) as a form of monogamous marriage, the imperial Chinese legal code enforced strict boundaries between wives and concubines. For instance, in the final Chinese imperial code, the *Daqing Lüli* (大清律例), severe penalties were imposed on those who neglected to maintain the proper order between wives and concubines (Jones 1994:125):

“Article 103. *Failing to Observe the Order Between Wives and Concubines*. Everyone who makes his wife a concubine will receive 100 strokes of the heavy bamboo. If, while the wife is living, he makes his concubine a wife, he will receive 90 strokes of the heavy bamboo. Moreover, his action will be corrected. If, while he has a wife, he marries another wife, he will also receive 90 strokes of the heavy bamboo. (The woman who is married subsequently) will be divorced (and returned to her clan).”

[凡以妻為妾者杖一百，妻在以妾為妻者杖九十並改正。若有妻更娶妻者亦杖九十。 (後娶之妻) 離異 (歸宗) 。]

In certain criminal cases unrelated to marital relations, the Qing Code sometimes groups together wives and concubines in determining the punishment (*qiqie*, 妻妾). For instance, according to Article 286, whether a female partner of a husband is a wife or a concubine, if she conspires to murder "the paternal grandparents or parents of her deceased husband," she will receive the same punishment for plotting to kill her parents-in-law (beheading) (Jones 1994:271). However, in other parts of the Code, being a concubine often results in a lesser punishment due to their lower and distinct position within the family compared to wives. For example, Article 116 specifies varying degrees of punishment for cases in which a wife or a concubine leaves a family. If a wife leaves after her husband disappears (or abandons) and remarries without notifying the local government, she will receive 100 strokes of the heavy bamboo. However, "if she is a concubine, the punishment will be reduced by two degrees" (Jones 1994:134). This recording is consistent with the Tang and Sung dynasties' codes, in which concubines are also subject to lesser punishment in some criminal cases, but they are still considered as family members of the husband within the family (Ebrey 1986).

The definition of concubinage was not fixed in China. The status, roles, and functions of concubines within the family shifted along a spectrum ranging from servitude to being treated as family members and sexual partners (Hua 2014). Concubinage combined the social and legal expectations of a female family member who bore children for her husband. This shifting yet combined definition, blending the roles of sexual partner, maid, and family member, was used to defend the monogamous institution of marriage in China. However, this construction rendered the rights and obligations of concubines vague, uncertain, and varied over time.

During the Ming and Qing periods, neo-Confucian beliefs and ideals concerning female chastity and filial piety informed the legal treatment of concubines. A concubine who exhibited good behavior and fulfilled certain moral obligations, such as caring for her husband's parents and maintaining her chastity after his death, was entitled to greater legal protection.³ This moral obligation was financially and symbolically rewarding, as it granted concubines more positive recognition and secured status within the family (Bernhardt 1999a). In matters of property succession, agnates from concubines were also entitled to a portion of the estate in addition to the major parts allocated to the first son of the wife.⁴ Concubines were not merely considered as domestic servants; rather, they were also the mothers of agnates who would eventually inherit a share of their master husband's property.

The early 20th century represented a pivotal moment for China, as it embarked on its first round of legal reform. During the final decade of the Qing Dynasty, the central government initiated political, social, and economic reforms with the aim of modernizing the country. Among these reforms was a round of legal reform, intended to replace the long-standing imperial legal system. This process lasted for approximately 30 years, spanning the late Qing and early Republican eras, and involved the replacement of traditional Chinese legal systems with European codes, courts, and legal education.

³ For example, in Qing Code, even though it allowed a husband to repudiate his wife based on seven acts, there were still 3 impediments: “Even if she has committed one of the seven acts that constitute grounds for repudiation: (she has no son; she is wanton; she does not serve her parents-in-law; she talks too much; she steals; she is jealous and envious; she has a malignant disease), if there is one of the three impediments to repudiation: (she has carried on three years of mourning [for the husband's parents]; the husband was previously poor and they have become rich; the home from which she was married no longer exists), but he repudiates her, [the punishment] will be reduced two degrees, and he will be forced to take her back as his wife.” (Jones 1994:134)

⁴ The rules governing the right of succession between agnates from wives and concubines varied over time (Bernhardt 1999a; Birge 2002). During the Qing Dynasty, for example, after the eldest son from the wife received his share of the succeeded property, other sons in the lineage were entitled to an equal share, irrespective of the identity of their biological mother (whether wife or concubine) (Qing Code).

One of the most significant aspects of this legal reform concerned the laws governing family and marriage. Throughout the process, the new Civil Code and Supreme Court's interpretations of the law clarified the individual nature of marital relationships, established greater equality between husbands and wives, and decreased the involvement of parental will. These legal changes decoupled marriage from the Confucian model of family, resulting in a more autonomous approach to marriage that allowed Chinese women greater freedom to practice their will independently of their husbands, parents, and other family members (Hershatter 2007; Mann 2011; Zhao 2020). As a result, Chinese women received more individual rights, including the right to divorce and inherit property (Bernhardt 1999a). Existing literature suggests that the impact of this legal reform extended well beyond the legal field, supporting broader social changes in China through the introduction of Western-derived legal systems.

The establishment of modern courts in China also brought about significant changes in the regulation of family and marriage, including the issue of concubinage. Prior to the promulgation of the Civil Code of the Republic of China in 1931,⁵ Chinese men were permitted to have multiple female partners in the context of a concubinage relationship. However, this arrangement was still considered to be monogamous, as only one woman could hold the status of wife. The law strictly policed the boundaries between wives and concubines, and those who crossed these boundaries and threatened the order between wife and concubine faced harsh penalties. This differentiated status as wife or concubine formed the basis for other legal issues in marriage, including matters of succession, divorce, alimony, and property rights.

⁵ The ROC's Civil Code did not stop concubinage in China until the Communist Party's Marriage Law in 1950. According to the subsequent interpretations of law by the Supreme Court in 1931 and 32, the men with concubines in family would not be accused of bigamy or adultery.

Throughout the legal reform in the early 20th century, a series of drafts for the Civil Code were produced between the 1910s and 1930s. However, the Book of Family of the Civil Code remained silent on the topic of concubinage. The Code failed to provide a clear definition of concubinage or offer any indication of its legal status, leaving the relationship's legal rights and obligations unclear. The absence of relevant legal provisions led to ambiguity regarding whether concubinage constituted a contractual or conjugal relationship along a bloodline, and whether concubines were recognized by law as wives, civil partners, or family members.

The delineation of rights and obligations between concubines and their husband's families was also undefined, raising questions about the nature of the relationship's legal framework. Despite this ambiguity, the legal status of concubinage could be inferred from the articles that differentiated between the children of wives and concubines (*shuchuzi*, 庶出子). Nevertheless, this but-for inference only placed the concubinage relationship in the penumbra of their children's rights of succession, which was insufficient for courts to adjudicate relevant cases. The absence of clear legal definitions or provisions pertaining to concubinage complicated matters surrounding the relationship's legal status and treatment under the law.

During the drafting of the new Civil Code, the transitioning legal system in China relied heavily on interpretations of law and guiding judgments issued by the Daliyuan Supreme Court to adjudicate cases related to concubinage, particularly those that lacked clear legal grounds for civil justice. In 1912, the first year of the Republican era, the Republican government ordered that the civil portions of the Great Qing Code (revised in 1910) continue to be effective for civil justice. In the meantime, the Law of Court Infrastructure (*fayuanbianzhifa* 法院編制法), codified and promulgated by the Qing Dynasty in 1910, remained in effect and granted the Daliyuan Supreme Court the power to issue legally binding judgments and interpretations of law

for lower-level courts (Huang 2001:16). These judgments established the definition of the concubinage relationship and laid out fundamental principles for protecting concubines during the early Republican era, taking into account their shifting and multiple roles within Chinese families.

The existing literature on this part of history of Chinese legal practice addresses the gap between codification in book and practice in court. They interpret such gap as the yawning difference between code and custom (Huang 2001), ideal and reality, and expression and practice (Huang 1996). Going beyond the narrative of incongruency and inconsistency between the systematized codification at central and the long standing rules at local, the literature also sees this process of change resonating with other parts within the shifting logic and power of governance (Xu 2008) or the painstaking process traversing the clash between the imperial and the western codes. When it comes to the changing family law, the literature captures the overdue, excruciating process at the legislative level from late Qing to early Republican era (Zhang 2002), given the sweeping changes the new Civil Code would bring to uproot some entrenched belief as to the fundamental principles in Chinese society (Lu 2004; Wang and Xu 2014). Central to this line of literature is the debate over the clash between tradition and modernity (Barlow 2012; Bendix 1967; Cohen 1974; Gusfield 1967), transplantation and reception (Legrand 1997; Watson 1985), corresponding to the discussion surrounding the roles of foreign knowledge in China since the late 19th century (Cohen 2010; Teng and Fairbank 1979). My empirical exploration on Daliyuan Supreme Court's cases find that the Supreme Court did not just mechanically defend either the old Qing Code or the new legal imports from the foreign countries, but it also constituted a whole set of basic principles and concepts for the application of law across lower-

level courts, which maintained a good balance and flow of justice between the de jure effective law and the de facto changing social reality (Lu 2004; Wang and Xu 2014).

Making Sense of Concubinal Contract in Transition

During the Republican era, the definition of a concubine in legal terms posed a significant challenge for the Chinese judiciary. To define concubinage, Daliyuan, the Supreme Court of China at the time, relied on multiple rounds of judgments and interpretations of law, ultimately establishing that it was a form of contract that could be dissolved under certain circumstances. Despite the connotation of the term "contract" being Western, the application of the term in defining concubinage relationship echoed historical practices in which concubines entered a Chinese family through human-selling markets. However, Daliyuan's assertion adroitly repositioned women as one of the contracting parties, rather than commodities in a contractual transaction.

Through several judgments, Daliyuan clarified that concubinage was a contractual relationship between the head of the family, usually the concubine's husband or master. Despite the ongoing social movements calling for the end of concubinage in China during the 1910s (Glosser 2003), Daliyuan maintained the status quo and employed the term "contract" to define such relationships. Daliyuan's reign ended in 1928, after which it was replaced by the Supreme Court of the Republic of China. The Civil Code of the Republic of China, promulgated in 1931, made concubinage a de jure forbidden practice. However, subsequent judgments and interpretations of law from the Supreme Court effectively decriminalized concubinage by asserting that having concubines would not invoke criminal charges such as bigamy or adultery.

In 1934, the Supreme Court clarified that concubines could leave a relationship "freely" and that a concubine relationship could be ended with a "just cause" (*zhengdangliyou*, 正當理由).

The use of archival materials in this research also demonstrates that during the era of Daliyuan, lower-level courts may have had differing opinions about what constituted a "just cause" to cancel a concubine contract. For example, Bernhardt (1999b:210) found that while courts regarded "forcing someone to be a prostitute" or "intolerable mistreatment" as valid just causes, they did not view "excessive sexual demands" as sufficient grounds for dissolution. However, in the 1930s and 40s, the lower-level courts placed greater emphasis on the "just cause" as a legitimate reason for ending a concubine relationship. The reasoning behind this shift resonated with the ideas of "freedom," "gender equality," and "emancipation" (Bernhardt 1999b:210–12).

CONCUBINAL CONTRACT AS ANALOGY AND VESSEL

During the 1910s and 1920s, with the old law still in force and the new Civil Code in the process of being drafted, the Daliyuan Supreme Court utilized several interpretations of law and guiding judgments to establish the legal fiction that concubinage constituted a contract-based civil relationship between a concubine and her husband master, rather than a marital relationship between a wife and husband. In doing so, the Court sought to address the issue of defining the legal status of concubinage by grounding it in contract law. Based on this legal foundation, the Court granted greater flexibility to both courts and concubines in dissolving the relationship. As a concubinage relationship did not entail a formal marriage, dissolution only required proof of "imperative causes", rather than the filing of a divorce petition.

In 1916, the Daliyuan Supreme Court issued a significant guiding judgment (Shang No. 840), contending that the relationship between the "head of family" (i.e. the concubine's husband

master) and the concubine could be considered as a contractual relationship. Consequently, the dissolution of such a relationship could not be subject to the same rules as divorce cases.

The relationship between a head of family and a concubine is different from that of a husband and wife. Although this kind of relationship also arises from a contract, its nature and effectiveness are different from marriage. Therefore, the provisions for divorce cannot be applied to the termination of this contract. It should be recognized that the contract can be dissolved at any time if either the head of family or the woman has an unavoidable reason for doing so.

[家長與妾之關係與夫妻不同，此種關係雖亦發生於一種契約而其性質及效力既與婚姻有別，則關於此種契約之解除，自不能適用離婚之規定，應認為無論何時如該家長或該女有不得已之事由發生即可解除契約。]

In this guiding judgment, the Supreme Court defined concubinage as a relationship that exists between a concubine and the "head of family," which is the husband master. The Court held that concubines were equal to their husband masters in making the decision to dissolve a concubinage relationship. The judgment also viewed concubinage as a negative concept of wife in the family context. Accordingly, many legal accommodations that arise from such concubine status in a family, such as divorce and division of property, would treat concubines differently. As a result, in this case, because concubinage is "not" a marriage, there is no marriage to dissolve. The Court instead applied the dissolution of concubinage to a set of vague but malleable conditions: "imperative causes" (*budeyizhishiyou* 不得已之事由).

The use of "contract" in defining concubinage relationship is more like an analogy. However, how robust is it? To constitute a legally enforceable contract, certain promises need to be voluntarily made with the intention of forming a commitment for an exchange binding two parties. Despite different theories shifting from party-based to standard-, and process-based

perspectives (Barnett 1986), , a contract should include some key elements to make it enforceable in court, such as the consent and autonomy of agreeing minds, the capacity to make transactions, the promise to fulfill and exchange some purposes after accepting a contract-oriented offer, etc. (Bix 2012; Blum 2017). A legally binding contract should also include bargained consideration (Dunlop v Selfridge 1915), whereby a performance or a return promise is in exchange (Restatement §71). Such consideration is also key to interpreting the fairness of a contract (Atiyah 1988:175), deciding the cost and loss when a contract goes wrong. When a contract is formed, one should expect these elements to be clearly specified and articulated in order to fulfill an equally and reciprocally identified promise for and in exchange. However, this definition and regulation surrounding a contractual relationship enforceable in court did not manifest itself in the same way while it was translated into the law regarding concubinage relationship in China in the early 20th century.

Quite different from the theories and textbook teaching on contract in the west, the court in China in the early 20th century applied the concept of contract to concubinage relationship as a loosely coupled analogy, strategizing the modernization of marriage law while dealing with some pressing challenges from the legacy of the past, entrenched practice as to marriage in China. To examine the robustness of such analogy, the empirical probe needs to go lower-level courts and see how such analogy by the Supreme Court was applied.

In the 1910s and 20s, when adjudicating cases related to concubinage, the High Court in Beijing adhered closely to the judgments issued by Daliyuan (Daliyuan 1916. Shang. 840), repeatedly citing the assertion that "concubinage is a form of contract and can be terminated with imperative reasons" (*qiedeshenfen shi yizhongqiyue*, 妾的身分是一种契約，有不得已之事由得以解除。) as a standard refrain, typically as the opening statement in the reasoning section of

each judgment. However, the High Court offered little guidance on the terms and conditions required for entering such a concubinal contract, focusing instead on the possibility of ending such a contract when "imperative reasons" were present and proven.

In this context, in addition to serving as an "analogy," the concept of a "contract" in concubinage can also be viewed as a vessel. The court used this analogy as a vessel to transport the historically entrenched and widely practiced custom of concubinage into a new legal context, where Chinese law was undergoing reform and concubinage was supposed to be outlawed. This vessel was intended to merge the past customs of contracting concubinage with the ongoing legal reform, which assumed that the contracting parties must be direct persons who share equal personality in a civil relationship.

To accomplish this, Daliyuan extracted "promise" as one of the key common elements shared between the contract in the past and present, which would facilitate the application of concubinal contract to practice. Contract was viewed as a promise between two families, and it was proportional to the difference between a wife and a concubine when applying and mobilizing such a concept. On the male side, his family should ensure the livelihood of a concubine, and a concubine is expected to cohabit and have children with the contracted male party. However, an unfulfilled promise was not considered a breach of contract that would incur remedies. Instead, the court viewed a concubine as a family member, rather than a contract promisee, allowing them to remain in their husband master's family and maintain their livelihood. At the same time, by making concubinage a contractual relationship, the court also maintained the hierarchical and ritual difference between a wife and a concubine (Hua 2008; Tran 2009, 2015; Vermier 1966), proportional to the distance between status and contract.

CONCUBINAGE AS MEMBERSHIP IN MARITAL FAMILY

To apply the analogy of contract to practice, the courts at different levels, from Daliyuan to local courts, also sought practical accommodations to account for the unique position of concubines in the family structure. If a concubine was more than just a maid or a partner and her status transcended the marital tie with her husband master, then her position would be more embedded in a greater family network.

In 1917, Daliyuan delivered a guiding judgment that concubines would not be expelled after their husband masters passed away because their "status" as family members would not be forfeited in such a situation. This recognition of the concubine's status as a family member was an important accommodation that helped to clarify and establish the legal position of concubines in the family structure.

The status of a concubine's family members is derived from the contract. Although such a relationship can be terminated during the lifetime of the head of family (such as when there are imperative reasons for either the head of family or the concubine), after the death of the head of family, as long as the concubine does not commit any acts that would justify being disowned by the family (such as committing adultery), she shall not lose her status as a family member and cannot be expelled.

[妾之家屬身分係由契約而生，家長生前雖有時得以解除（如家長或妾有不得已事由時），然家長故後，若妾於夫家無義絕之情狀者（如犯姦之類），即不致喪失家屬身分，斷不容藉故驅逐。]

In this case, building on previous judgments, the court granted the dissolution of a concubinal contract due to "imperative reasons." However, the court believed that such dissolution should come with certain conditions, leaving room for difficult situations, especially those that may impoverish women. The court maintained that, despite the dissolution of the

concubinal contract, the status of concubines as part of the family would remain. Thus, the scope of the contract extended beyond just the relationship between the concubine and her husband master to include the concubine as a family member of the marital family.

However, in doing so, the court recognized that the concubinal contract was not merely a matter between two individuals but was embedded in a wider family structure. Therefore, the court had to introduce new solutions to change the nature of the concubinage relationship and concubinal contract, while simultaneously addressing the potential negative consequences for concubines. This approach is in line with the "three limitations" (*sanbuqu* 三不去) in divorce under Chinese tradition, which constitute clauses that recognize the full membership of a female partner in her marital family (Huang 2001:164).

CONCUBINE AND WIFE

In cases where a dissolution of a concubinage relationship was sought, the High Court applied Daliyuan's judgment to ground the request for dissolution in "imperative cause", rather than the conditions for divorce, which thus differentiated concubinage from marital relationships. The court faced the practical challenge of defining a concubinal contract when a concubine is not a wife and a concubinage relationship is not a marriage. The High Court therefore ceased applying the conditions for divorce to concubinage relationships. In Case 239-8433, the court held that the conditions necessary for divorce did not apply to cases where the female party was a concubine. Despite conflicting statements from both parties, the court determined the female party's status as a concubine. This judgment not only altered the legal interpretation of the woman's status, but also shifted the focus of the case from a bigamous accusation to an examination of whether any "imperative reasons" existed to justify a dissolution judgment.

The appellant testified that "she (referring to the appellee) was a concubine, whom I married to have children with." At the same time, according to the testimony of the appellee, "he called me his wife at first, but later I found out that he (referring to the appellant) already had a wife, so I became his concubine." It is undisputed that the appellant was already married and thus, even if he married the appellee later, he could not have the status of a husband with two wives according to the law. After carefully examining the meaning of the appellee's testimony, it is evident that she was never considered or referred to as a wife. In accordance with the aforementioned precedent, when the appellee requested a divorce, it should be determined whether there were any imperative reasons to dissolve the relationship, and the provisions of divorce should not apply, leaving no doubt about this matter.

[上訴人據供，“他（指被上訴人言）是妾，我為是生子娶的他。”同時訊據被上訴人供稱，“說我時是妻，後來知他（指上訴人言）有妻，我就是妾了。”等語。是上訴人早已娶有妻室，為雙方所不爭，無論依律後娶之妻，絕不能更有妻之名分。即細擇被上訴人供詞意旨，亦未嘗以妻之名分***。照上開判例，被上訴人請求離異，祇應審究其是有不得已之事由，不能適用離婚之規定，自無容疑。]

The court declined to dissolve the concubinage relationship, recognizing that concubinage is not equivalent to marriage. The court acknowledged that concubinage is a contractual relationship, but enforceability by law is not apparent until a dispute arises over the binding relationship of concubinage. Unlike a typical contract, concubinage need not involve an exchange or the potential for a return. The enforceability of the contract by law constitutes the binding tie between a husband and concubine to remain in family and marriage, but it is not the same as a contract with identifiable and enforceable goods or services. Nonetheless, the court sought to provide economic assistance to the vulnerable party when a concubinage contract ends. However, despite the contractual nature of ending the contract, the court determined the amount of relief based on the livelihood of the departing concubine and the income of her husband. In this context, the court's assessment and consideration were based on the dual nature of concubinage in the family, as both a servant and a family member, which goes beyond the definition of a contract. However, in some cases, the court refused such assistance when a female party was charged with excessive violence against elderly members of the family. The decision

in these cases is not based solely on the formation and breach of a contract but engages in moral evaluation and allegations while seeking and confirming the moral offense committed by the party.

In Contract: The Reality of Human Trafficking

Daliyuan contends that the notion of concubinage as a contract was not a novel concept, nor a borrowing from Western law. Instead, it persisted and amalgamated with the longstanding "concubinal contract" in Chinese history. Historically, the "contract" used to define concubinage relationships was predominantly transactional in nature.

Under the transactional "contract" governing concubinage relationships, women were viewed as mere property, serving as a consideration in a contractual agreement that mirrored the terms of a human trafficking transaction. This stands in stark contrast to the legal status of concubines in the wake of early 20th century legal reforms, which granted them the capacity to contract with their husband masters as legal persons with autonomous agency. As a result, concubines gained the rights and obligations that came with being recognized as free "persons" under the law. This legal capacity afforded them the same freedom of will and equal opportunity to initiate, manage, and terminate contractual agreements as their husband masters. The two types of contracts illustrate the transition of Chinese law from its imperial past to a more modern future.

The extant literature on the issue of human trafficking in China prior to 1949 provides valuable insights into the historical depth of the use of contracts in settling transactions involving concubinage, a practice that had been prevalent throughout Chinese history for the purpose of selling women. Trading of human beings was widespread in China before 1949, and according to Watson (1980:223), "China had one of the largest and most comprehensive markets for the

exchange of human beings in the world". These markets catered to the needs of wealthy Chinese families who required labor and facilitated the trade of women for concubinage and prostitution. Such human trafficking was a common occurrence, normalized as an everyday encounter, and Ransmeier notes that "everyone from all walks of life knew of someone who had once had reason to call upon this market." (Ransmeier 2017:6) These markets were organized not only by custom and local demand, but also by the state, which licensed their operation from Beijing to rural areas in the south (Hua 2014:14). The widespread, normalized, and organized nature of human trafficking made it an "embedded" practice in Chinese society before 1949 (Ransmeier 2017:4). These markets were the primary source and venue for Chinese families to acquire women for concubinage before 1949.

While the literature attributes human trafficking in China to social or economic hardship (Ransmeier 2017; Sommer 2015; M. Zhao 2020), the exact nature of this hardship varies among scholars. Some scholars argue that poverty and economic decline were the driving forces behind the selling of women (Sommer 2015:121), with selling a wife being a last resort in a difficult life. However, Ransmeier argues that treating people selling as a symptom of broader social problems would restrict the scope and explanation of such an engrained issue in China and eventually obscure its "true nature as a deeply embedded practice" (Ransmeier 2017:4), reducing explanation to a "survival defense" argument when it comes to the analysis of the disputes of such practice in court.

From the Emperor's edict, the magistrate's judgments, and the defense of litigants before court, it was not uncommon to reason and justify selling people out of poverty, which gave such practices a green light and added an emotional, subjective dimension to disputes involving the selling of people. Trading women to become concubines was different from other forms of

trafficking, as being a concubine was seemingly better than ending up in a brothel or as a maid. After entering a family, especially after bearing a child to their husband masters, concubines were often treated as family members (Katkov 1997). Such inclusion and membership in a greater family network further extended the emotional accommodation in court to resolve disputes related to concubines.

In order to consummate and safeguard a transaction entailing the sale of human beings, the involved parties, including sellers, buyers, and brokers, are required to engage in the drafting and execution of a contract. Extant literature provides documentation of several key types of these contracts, which exhibit considerable uniformity and standardization. Somme (2015) posits that these contracts typically derive from those employed in land sales. Additionally, other scholars note the tendency to employ pre-established templates in order to preclude the likelihood of disputes (Hua 2014).

The available literature reveals that in the process of contracting transactions involving the sale of women to serve as concubines, women were regarded as commodities that constituted the "consideration" in the contract. In this type of contract, women were traded for money, and this exchange of "things" served to make the contract legally enforceable. The binding effects of such contracts, however, were only applicable to the male sellers and buyers of women, who typically represented "two families." In many instances, the approval of the woman involved in the transaction was not necessary, but rather, the agreement and consultation of both families and the voluntary intention to enter into the contract were required beforehand (Sommer 2015:129–37). Women's agency was thus limited, while their value as commodities was emphasized and appreciated. Sommer (2015) notes the importance of the "taking a look" step in the settlement of such contracts, whereby the age, health, appearance, and fertility of women were deemed as

factors that could enhance or undermine the value of the transaction. Hua (2014) further finds that better-looking girls would typically command higher prices, especially in transactions that involved the sale of concubines and prostitutes. These details illustrate how women were not accorded much legal capacity in these contracts, but rather were treated primarily as considerations to make the contract valid and enforceable.

In the early 20th century, the legal landscape in China underwent significant changes as a result of the introduction of Western law and legal thought. One of the most important changes was the recognition of women's "autonomous agency" (Huang 2001) and their equal standing with men in contracting marital relationships. This shift from women being treated as considerations to being recognized as contracting parties granted Chinese women the autonomy and free will to determine their own status and relationships within their families. For instance, Wang and Xu (2014) demonstrate that courts began prioritizing women's individual will in establishing legally binding marital relationships, thereby severing the long-standing parental authority over contracting marriages. Bernhardt (1999b) also notes that women gained greater freedom in marriage and divorce, and that their legal capacity to contract was recognized based on their own will rather than their value as commodities in exchange. However, the extant literature examining the practice of law by the courts in this period paints a more nuanced picture of the transition between Qing and Republican law, and such transitions were not always linear. Huang (2001) argues that although the new laws introduced by the Guomindang recognized women as "fully autonomous and active agents," they de facto deprived them of power and protection that they had previously enjoyed under Qing courts (Huang 2001:11). The existing literature consistently suggests that transitional courts sought to strike a balance between equity

and efficiency. Although they recognized women's rights in marriage, the literature also acknowledges that women still lacked social and economic independence.

The changing contracts governing concubinage in China presented new challenges to courts at various levels, given the deeply entrenched and embedded practice of concubinage in Chinese society. These challenges included determining whether concubinage should continue to be recognized as a part of marriage despite the monogamous ideal promoted by marriage reform efforts. Also, courts had to address the varied ways in which concubines entered into marital families, ranging from transactional arrangements to voluntary commitments, and how these differences should be accommodated in resolving disputes. Furthermore, given that concubines were often treated as family members, courts had to consider how to address the dissolution of such relationships in the context of a contract.

Applying Concubinal Contract in Practice

GRANTING AGENCY TO CONCUBINES FROM PURCHASE

One of the significant changes in concubinal contracts during this transitional period was the recognition of women as equal contracting parties, rather than merely considerations to fulfill a contract established between two families. This shift was particularly evident in cases where a marital family purchased a woman to serve as a concubine, which presented new challenges for the courts in determining how to treat such transactional contracts in light of the new emphasis on equality and individual will.

In Case 239-10059, the court moved away from a focus solely on the terms of the contract and instead considered the individual will and autonomy of the parties involved when reviewing the lower court's judgment. The case involved a male party who had paid 1400 yuan to

purchase a female party from a brothel where she had been residing. The female party's mother believed that it would be in her daughter's best interest to start a new life with the male party. However, the female party claimed that the male party had forced her to continue working as a prostitute in another brothel and had taken some of her earnings. Consequently, she sought to end the relationship and filed a lawsuit.

The first-instance court treated the transaction as a concubinage relationship and rejected the female party's request for dissolution. However, the female party believed that this was unjust and appealed the case to the High Court for review.

Upon reviewing the aforementioned case, the High Court opined that the female party had expressed a desire for "continuous cohabitation" (yongxutongju 永續同居) and to become a member of the male's family (jiashu yiyuan 家屬一員), indicating an intention to establish a relationship akin to that between a husband and wife, as opposed to a purely sexual arrangement. Accordingly, the court upheld the first-instance judgment, which had determined that a legally binding relationship existed between the two parties.

The appellant argued that the intention behind "continuous cohabitation" was to establish a relationship akin to that of a spouse and not comparable to a relationship characterized by sexual cohabitation between a man and a woman. Therefore, regardless of whether the appellee had taken the appellant out and spent 1,400 silver yuan on her, the appellant's claim that such actions constituted a concubinage relationship with the appellee was unfounded.

[上訴人以永續同居為被上訴人家屬一員之意思，發生夫婦類同之關係，而非男女曖昧同居者可比。無論被上訴人接出上訴人時，是否曾用銀一千四百元而上訴人謂為係與被上訴人姘度，究非有理由。]

In this case, the court placed greater emphasis on the individual will and autonomy of both parties in the relationship. The male party had expressed a willingness to relocate with the female party to his hometown and begin a new life together. Additionally, the female party, despite seeking dissolution of the relationship, had indicated a desire to live with the man based on evidence presented in dock files from the first-instance court and the local police station pertaining to disputes over forced prostitution. In light of these factors, the High Court rejected the appeal and affirmed the first-instance judgment.

While the relationship in question was established through a purchase transaction between the male party and a brothel, the case primarily pertained to the contested relationship between the male party and the woman he had originally purchased. Although it is unclear whether there was a written contract, the parties had reached a consensus on the payment and transaction. However, in hearing and ruling on the dissolution of the relationship, the court promptly translated the "transactional" relationship between the two parties into a bond between two individual persons. Rather than focusing extensively on the transactional dimension of the case, the court emphasized the parties' declarations of their will (*yisi* 意思) in relation to the relationship and their autonomous actions in accordance with those declarations, which served as the basis for the final judgment. This approach reflects the court's efforts to transition from a transactional model to a status-based model in concubinage contracts.

CARING VULNERABLE PARTY: CONCUBINAGE, TWO WIVES AND BIGAMY

However, not all concubinage relationships were established through purchase. Some cases, such as 239-5106 and 239-5112, involved concubinage relationships that were established with similar arrangements, accommodations, and expectations as those of a wife, but lacked the legal "status of wife" (239-5106, 239-6492). Despite the apparent bigamy involved in such

relationships, the notion of "as equal as wife" was a recurring theme in court cases. The disputes in these cases centered on the validity of marriage with a second wife, where the line between a live-in wife and a concubine was often unclear. These cases demonstrate that, in real life, the concubinage relationship was often similar to that of a marriage, despite the differences in legal definition. The initial commitments established in such relationships also often resembled those of a marriage, frequently involving a matchmaker and a written contract.

According to Daliyuan's interpretations and judgments, concubinage was not considered a marital relationship and could be dissolved with "imperative cause" (*budeyideliyou*). While the Qing Code banned multiple wives in a marriage, this rule did not apply to concubines. In the early Republican era, several guiding judgments by Daliyuan continued to recognize concubinage in families by defining the concubinage relationship as a contract and the concubines as one of the contracting parties. This *de jure* acceptance of concubinage as a status effectively allowed for the inclusion of multiple female partners in a marriage. However, bigamy remained illegal and sufficient ground for voiding a marital relationship.

In some cases, the distinction between being a concubine or a wife for litigants was unclear. The High Court judges in concubine-related cases adopted an objective assignment of concubine status, dismissing litigants' subjective identification. The court automatically decided that the second female partner was a concubine and could only be granted a "status of concubine" (*qiedeshenfen* 妾的身分) by law (239-8433, 239-8362, 239-8345). Throughout these cases, the court relied on procedures and documents as evidence to determine if the female litigants were aware that they had entered a concubinage rather than a marriage. However, this did not change the principle that "the second is a concubine." In cases where the female party claimed she was not initially informed that there was already a wife in the marriage, the court

argued that the female party must have known that she entered into a concubinage relationship instead of a marital one, as necessary procedures for constituting a marriage were apparently missing, such as the negotiation of matchmakers, the establishment of marital documents, and the presentation or exchange of a bride price. In other cases, the court only looked at the time order and inferred that the women who entered the marriage later were concubines (239-8362, 239-8480). The court considered the contested relationship a concubinage, instead of pursuing a bigamy charge to further escalate the case. In this way, the court invoked provisions from the Qing Code and judgments by Daluyuan to find a low-cost argument to resolve the "status issue" (*shenfenwenti* 身分問題) in a disputed relationship.

According to the civil portions of the Qing Code, which was still effective, the relationship established with the "second wife" must be dissolved instantly and the husband must receive 90 strikes by heavy bamboo. However, the High Court did not adjudicate the relevant cases in this way. The court used concubinage relationship to include the female partners in marriage other than wife. Sometimes, this was also what litigants wanted. For those women who had already been in a family on an undefined status, they did not want to leave this marriage and sent back to their parents' family, if the effective, civil portions of the Qing Code were applied here. They would rather use concubinage as a solution or an alternative option to remain their stay in marital family (239-7322, 7974, 8345). For example, in the following cases, the female party stated that she willingly serves as a concubine.

According to the civil provisions of the Qing Code, which remained in effect during the early Republican era, the relationship established with a "second wife" was required to be dissolved immediately, with the husband subject to receiving 90 strikes by heavy bamboo. However, the High Court did not adjudicate relevant cases in this way. Instead, the court used

the concubinage relationship to include female partners in a marital relationship, other than as a legal wife. In some instances, this was also what litigants wanted. For women who had already been in a family with an undefined status, they did not want to be sent back to their parents' family if the effective, civil portions of the Qing Code were applied. Rather, they preferred to use concubinage as a solution or an alternative option to remain in their marital family (Jingshi 239-7322, 7974, 8345). In certain cases, the female party explicitly stated that they willingly served as a concubine.

“In the initial trial, the plaintiff alleged that the defendant had married her and she requested a divorce from him, citing the intolerable abuse she suffered during cohabitation. However, during the arguments in this court, she confessed to voluntarily serving as the defendant's concubine and stated that she no longer wished to pursue a divorce.” (Jingshi 239-7322)

[本案控訴人在第一審起訴，雖主張被控訴人係娶控訴人為妻，並以其有妻更娶妻及不堪同居之虐待等情請求與被控訴人離異。惟於本廳言詞辯論中，既據供稱甘願為被訴人之妾，並聲明不願離異。]

It is plausible that women in a concubinage relationship may receive better financial and life support from their husband master's family than if they were to divorce. If they were to leave the family they have stayed with for a long time and return to their parents' home, these “divorced” women may still need to re-enter the match-making market for remarriage, and having been married before, they may not be as competitive as those who have not been previously married. This may result in them ending up in another concubinage relationship in another family. In the broader context of rampant human trafficking in China, many litigating concubines may have entered the marital family out of economic reasons. While some concubines may have the option to return to their natal family, many do not have that luxury. These factors play into the reasoning behind the women's willingness to continue their stay by

accepting their status as a concubine, despite it suggesting a lower rank and more precarious status in the family.

In some other cases, concubines used the freedom and autonomy granted by the new concubinal contract to terminate an unhappy relationship without satisfying the conditions for divorce. This contract also protects women from undesirable consequences resulting from physical or emotional breakdowns. In cases where concubinage is debated or concubines petition for the termination of the relationship, the court first cites Daliyuan's judgments to set the groundwork by asserting that concubinage is a contract. As a result, the petition for divorce is deemed groundless because concubinage is not a legally accepted institution of marriage. The court then invokes another of Daliyuan's judgments, arguing that such a contract only requires "just" or "imperative" causes to end, without needing to satisfy the conditions for divorce. The definition of what constitutes "just" or "imperative" causes, however, is highly variable and is dependent on case-specific contexts. This fluidity has enabled litigants to use concubinage as a means of escaping from dangerous husband masters.

In case 239-8433 (1922), the court used concubinage to safeguard the female litigant from further physical harm, harnessing the loosely coupled analogy of concubinage relationship as contract. The parties to this case are the husband master, or appellant, and the concubine, or appellee. The appellant married the appellee in 1918 after discovering that his first wife was unable to conceive. During the marriage, the appellee was given the title of "wife." In the year prior to the litigation, the appellant discovered that the appellee had worked as a prostitute with the assistance of her parental family. The appellant, unable to control his temper, viciously wounded the appellee with a chopping knife. The first instance court granted the divorce, but the appellant appealed the decision to the appellate court for a second instance review, claiming that

his violence was an act of passion and that he had a strong attachment to the appellee. During the appeal, given the contentious debates surrounding the conditions for divorce, the court first maintained that the appellee's title as wife was unsupported by law and that she could only be regarded as a concubine. Therefore, as concubinage is not a recognized form of marriage, the conditions for divorce would not apply in this case. The court then cited Daliyuan's judgment to justify the application of "imperative causes" in this case, arguing that the appellant's violent behavior provided sufficient grounds to disqualify cohabitation between the parties.

Despite the low status and unequal treatment that concubines may receive within the family, Chinese women in the early 20th century often chose to remain in these relationships, weighing the cost of leaving against the potential stigma and financial hardship they could face if expelled from the marital family. Thus, being a concubine represented more than just a social status; it was a stopgap solution to safeguard the women's livelihood and financial support. The court employed concubinage as a legal accommodation to protect female partners in marriage, even those who entered these relationships without legal recognition.

In case 239-7974 (1922), the female litigant alleged that she was unaware of the fact that her husband master had an existing wife when she entered the relationship. She petitioned for divorce on the grounds of bigamy. However, the court dismissed her claim by citing evidence that the female litigant and her mother were fully aware of the existing wife at the time of negotiations for the marriage. The judge referenced the complaint to bolster this argument:

“After passing through the marriage gate, I saw that there was already a woman there. Upon careful investigation, I realized she was his ex-wife. At this point, what more could be said? I could only endure in silence and secretly lament my unfortunate fate. I originally had no intention of separation.”

[過門後，見其已有婦人，詳細調查，始知系伊前妻。事已至此，夫復何言？氏祇隱忍暗嘆命薄。本無離異之念。]

The court could have ruled the marriage void based on getting married with a second wife, which well committed bigamy. However, the judge argued that if the female party and her family knew the presence of the existing wife, they would accept the status as concubine. Not only did the judge impose the status of concubinage in this case, but he also translated a non-denial response to willing acceptance. The concubinage became a status, therefore, to exonerate bigamy by man. The accusation of bigamy was thus weakened by such confession in court and the court instead switched to “contract” to discard the rigid conditions for dissolving a marriage.

In contrast to the protective attitude that the court often showed towards concubines in cases involving their marital rights and status, the same level of care and protection was not always extended in cases where conflicts arose between concubines and wives. A case in point is 239-2639 (1916), where the female party, after getting married to the male party, discovered that he was already married to another woman. Despite this, she chose to stay in the family but was subjected to physical abuse from the wife. The female party eventually filed for divorce, but the High Court ruled against the dissolution and rejected the appeal. In another similar case (239-8362), however, the court approved the dissolution request, after discovering that the concubine was the source of the trouble in the household, committing violence against the wife. It is possible that the court's inconsistent rulings in these cases were due to its weighing the potential harm caused by concubines remaining in a household versus the harm that a concubine might inflict on the family or the wife. Despite these inconsistencies, it is clear that the court generally used concubinage as a legal accommodation to protect female partners in marriages, even in cases where the women initially entered into the relationship with little legal recognition.

The court's inconsistent approach to concubinage is further exemplified in its lack of consideration for women's subjective understanding of their status in the family. In case 239-5016, the female party sought the legal recognition of her "status of wife" (*qideshenfen* 妻的身分) after discovering the existence of another wife in the male party's hometown. She claimed to have only known herself as the wife when she started the relationship with the man, who had previously served as a local government magistrate in Henan and Hubei before bringing her home. Shortly after arriving, the female party discovered the existence of the first wife, leading to the escalation of the double-wife issue to the court. However, the High Court of Beijing, serving as the second-instance court, upheld the first-instance court's verdict that the second wife must be recognized as a concubine, with no recognition of the female party's subjective understanding or any allegation of bigamous offense. During the hearing, the court initially resorted to mediation, with the male party proposing to provide financial support for relocating the secondary wife to her natal hometown. However, the court quickly rejected the female party's request and criticized her for undermining the order between wife and concubine. This case demonstrates how the court prioritized social order over the subjective status of women in a concubinage relationship, without addressing the male party's bigamous offense. The female party's request for legal recognition of her status as a wife was rejected, and the court emphasized the importance of maintaining the hierarchical relationship between wives and concubines.

In some other cases, the court took a different approach, deeming the marriage between the second wife and her husband master void ab initio. While the first and second female partners of a male party were still alive in some cases, the first wife had passed away in these instances, leaving the second wife as a "succeeding wife." Despite the justifiability of this

reasoning, the court believed that in some cases, the relationship was invalid as a "second wife" from the start, rendering the marital relationship nonexistent. This created a legal avenue for women to escape unhappy marriages and potential harm from domestic violence.

Case 239-5103 serves as an example of this approach. The male party was reported to have "wantonly bullied and humiliated" the female party, yet the first-instance verdict rejected her request for a divorce. However, after reviewing the case, the High Court vacated the judgment and allowed the female party to leave the relationship. The court contended that the contested relationship between the second wife and her husband master was only established after the commission of bigamy and could not be identified as non-bigamy when initially established. Therefore, the court concluded that the relationship was void ab initio, rendering the marital relationship nonexistent and therefore not subject to divorce.

In addition to the court's imposition and recognition of concubinage, many women exercised their agency and actively sought to dissolve a marriage upon discovering the existence of a first wife. Such dissolution was often due to the perceived inferiority and lack of recognition of concubinage as compared to the status of a first wife. Case 239-5112 (1919) involves a bigamy accusation where the female party sought to terminate the relationship with the male party. She initiated a criminal charge against him at the Beijing Local Procuratorate, and after the first-instance court rejected her divorce request, she appealed the case to the Beijing High Court.

In support of her divorce request, the female party argued that the second wife would not share the same status as the first wife and that the second wife was unfairly treated and had to be subservient to the first wife. The male party defended himself by stating that the female party's father had been notified and agreed to the arrangement. The male initially sought the second wife

because the first wife had not borne him a child. On the bigamy charge, the male party argued that both wives were treated equally, and he did not differentiate between a wife and a concubine (*liangtouweida* 兩頭為大). This was a compromise, as the father of the female party did not want his daughter to be designated as a concubine. However, the judge was not swayed by the male party's arguments and was appalled by the first-instance court's verdict, which overlooked relevant laws governing this matter. The judge recognized the inherent power imbalance between the two parties and held that a second marriage entered without the knowledge or consent of the first wife was void ab initio. Thus, the relationship between the male party and the second wife was non-existent and could not be considered bigamous.

According to the current legal provisions, this Court adopts the one-husband-one-wife system. Therefore, even if a man has two marriages due to some reasons, it cannot be punished as a crime or subject to criminal penalties. However, if the wife of a subsequent marriage requests a divorce on the grounds of bigamy, the court should immediately grant the request and revoke the previous verdict. This is the established principle.

[本廳按現行法例，採取一夫一妻制度。故一夫為二個之婚姻，縱因或種原因，不能論罪科刑，而後娶之妻若以重婚為理由，請求離異，審判衙門應即准其請求，予以撤銷，此定則也。]

Therefore, the court vacated the initial judgment that rejected the request and declared the marriage void. In this particular case, the second wife was purportedly a concubine, but such a designation was deemed unacceptable by the female party's family. Consequently, the male party and the female's father reached an agreement to treat both the existing and new wives equally. The notion of "equal treatment" and the concept of a "second wife" were repeatedly cited as justifications for bigamy in some other cases (239-5112, 239-7974).

As the court's accommodation of vulnerable parties in concubinage relationships expanded to lower-level courts, it became a tool for both litigants and judges to protect women's interests and prevent further violence in marriages. For female litigants, concubinage provided an alternative accommodation to remain in the family rather than declaring a marriage void and non-existent, which could result in bigamy charges. Meanwhile, by imposing the status of concubinage on a second wife, the court could effectively nullify bigamy charge and preserve marital relationship, providing a legal accommodation that could protect the interests of women while simultaneously avoiding the need to declare a marriage void ab initio. This not only served to benefit the vulnerable party but also helped to reduce the severity of the offense for the male party.

In some cases, the court adopted an objective standard, rather than a subjective identification of status, and automatically applied the appellation of concubine to all female partners after the first wife. In other cases, however, concubinage became an easy exit for both courts and litigants to end violent and dangerous relationships. This could be attributed to the court's intention to avoid further damage in marriages or protect the weaker party in a litigation.

Discussion

In this chapter, I examine how the Beijing High Court in the 1910s and 1920s adjudicated concubine-related cases. By analyzing court cases from the Beijing High Court, this paper investigates how local-level judicial decisions grappled with disputes over concubinage relationships in order to develop and refine legal practices and the rationale for judicial decisions on concubinage matters. In the first decade of the Republican era in China, the Daliyuan

Supreme Court categorized concubinage as a form of contract, which perpetuated concubinage as an ingrained marital practice into the era of new laws.

However, viewing concubinage as a contract was not an innovation of the Daliyuan Supreme Court. China had a long, entrenched, and normalized history of human trafficking. As evidenced by the existing literature on this subject, numerous women were purchased from human trafficking markets to become concubines. These transactions were often settled and secured by written contracts. When the Daliyuan Supreme Court delivered its judgment characterizing concubinage as a contract, it conflated and integrated a contract for a transaction with a contract binding two equal legal persons.

This research yields three key findings. First, the Daliyuan Supreme Court asserted that concubinage constituted a form of contract, and the parties involved could terminate this contract upon the emergence of compelling reasons. In this contractual relationship, concubines were considered contracting parties, enjoying equal standing with their husband masters in this civil relation. In the early Republican era, "contract" as a defining feature of concubinage relationships encompassed a wide range of meanings. Initially, it referred to a contract settling a human trafficking transaction in which women could be purchased by a marital family and become concubines. In such contracts, women were regarded as chattel, serving as consideration in the contract. The concubinal contract also signified an extended commitment and membership, incorporating concubines into a broader family structure, particularly when a concubine bore a child for her husband master. Furthermore, the concubinal contract denoted that concubinage itself was a negative counterpart of the concept of a wife. The contract as an independent notion distinctly separated concubines from wives in marriage. However, the Daliyuan Supreme Court's

new judgment on concubinal contracts diverged from this understanding, repositioning women in the contract as contracting parties rather than consideration.

To apply and perpetuate the multifaceted but nebulous concept of "contract" in adjudicating concubine-related cases, judges in the Beijing High Court employed the concept and rules of "contract" as an analogy and a vessel. They aligned the concubinage relationship with the contract and used it to carry forward past, normative practices into the modernizing Chinese legal system. The court sought case-specific solutions, blending the various elements of concubinal contracts from the past and present, as well as the old and new laws, to alleviate the tension arising from legal reform itself. This approach also opened up possibilities for better accommodating the vulnerable party in a case. In transitioning contracts from the past to the future, the court developed a methodology focusing on individual personalities and discerning the independent will of persons in a case to determine how a concubinal contract should be interpreted before the court.

Secondly, grounded in the new definition and application of contracts, concubinage also secured concubines' membership in the family, and the court extended the binding force of such contracts to a wider family structure. The court viewed the concubinage relationship as a lower-ranking female partner of a male family member, a relationship that was proportionally distinct from that of a wife. By defining this relationship as a "contract," the court differentiated it from marital relationships and allowed for dissolution if "compelling reasons" were proven. While this made dissolution easier in theory, in practice, "compelling reasons" were translated into the flexible use of contracts by the court. Conversely, the court was also cognizant of the potential harm that gender-blind freedom and equality could inflict upon concubines, given their vulnerable and dependent economic situations. In this context, the court also viewed concubines

as family members. Some rulings from both the Daliyuan Supreme Court and Beijing High Court cases upheld this principle, explicitly prohibiting a husband master's family from exploiting the contract definition of concubinage to evict a concubine, even when some compelling reasons were validated and agreed upon. The rationale for this prohibition was the court's belief that a concubine, in addition to her role in relation to her husband master, was also a family member within a more extended network. This status became more evident after concubines bore children for their husband masters.

Thirdly, the research finds that, while leveraging the concept of contract, the court flexibly accommodated different scenarios in bigamy-related cases, particularly in balancing the power discrepancy between genders. In comparison to wives, concubines occupied a lower position within a family, often with little or no dowry from their natal families. In some cases, these concubines entered marital families through human trafficking transactions. Dissolution of such relationships could further exacerbate a concubine's livelihood. In other instances, the court skillfully employed new marriage law concepts, such as void ab initio, to terminate detrimental marriages in which concubines suffered greatly from domestic violence, abuse, bullying, or humiliation. In this regard, the conflicting situations and the historical dilemma of concubine issues posed significant challenges to the nascent civil courts in China.

The literature presents a mixed picture of "contract" in defining concubinage relationships during the transition from imperial times to the republic. The court needed to address one of the profound changes in concubinal contracts during this period. On one hand, concubines were purchased from markets or even brothels. The court needed to address the transactional dimension of concubinal contracts, balancing economic interests and social justice when rendering judgments. On the other hand, in the Republican era, after the judgments and

interpretations of law by the Daliyuan Supreme Court, the court seemingly endorsed a new concubinal contract to define concubinage relationships and recognize the equal legal standing between concubines and husband masters. Both men and women in such relationships were expected to possess the capacity for entering into civil contracts. However, this recognition was often constrained by entrenched gender norms and the unyielding, patriarchal stance of men in concubinage relationships.

After the establishment of the People's Republic of China in 1949, concubinage was abolished. Nevertheless, the legal challenges the Chinese legal system faced in addressing concubinage can still provide valuable insights for understanding evolving gender relations, family issues, and marital conflicts in modern Chinese families. By examining legal practices in handling concubine-related cases beyond the concept of concubinage as a female partner or wife-like family member, this paper explores how judicial logic reconciles disparate fragments of justice in custom and law, from the past to the present. As contemporary legal scholars investigate extra-legal factors explaining the logic of law to uncover the embeddedness of law in a broader social context, the missing component of explanation may be the continuity of historical formation of Chinese judicial logic, spanning imperial codification, German-inspired modern codes, and Soviet-sourced laws in the communist era (Chen 1998, 2016; Potter 2005). The modernization of legal relations in Chinese families, from the past to the present, may still represent the transformation and transition from the pecuniary, transactional implications of establishing marital relationships rooted in China's imperial past, to the equal-personal, status-oriented contracts that consolidate commitment in forming marital relationships. Moreover, the transactional history of marriage, especially regarding women as chattel in contracts for sale, continues to cast a shadow over modern Chinese families. The sense of ethics, justice, and local

harmony might be lessons we can learn from the past to elucidate the shifting jurisprudence and judicial actions in China today.

CHAPTER 5. CONCLUSION

Throughout the 20th century, the Chinese legal system experienced significant growth, development, conflict, and integration, as it contended with the influence of foreign legal systems. The normative framework in China engaged in a dynamic interplay with foreign laws, ultimately adopting and incorporating elements of these systems to establish its contemporary legal order. Simultaneously, China had to reconcile with its own well-established legal system, which had persisted for millennia before undergoing transformative changes in the early 20th century. While no single description or framework can succinctly capture the profound metamorphosis the Chinese legal system has undergone, a sociological examination of the processes, power dynamics, and actors involved in these changes offers valuable insights into the emergence of modern Chinese judicial thought.

The narrative of Chinese legal reform in the 20th century began at a time when China was under siege, and its sense of normativity faced challenges from foreign powers. In the latter half of the 19th century, these powers pressured the Qing government to open Chinese coastal ports for trade and the dissemination of Christianity. Since the 1860s, several influential legal works were translated into Chinese, including groundbreaking texts such as *The Elements of International Law* (*wan'guo gongfa*, 萬國公法) and the *Six Codes of France* (*faguoliudian*, 法國六典). These translations provided Chinese readers with an introduction to Western legal scholarship in their native language, established a modern legal vocabulary in Chinese, and offered the Qing government valuable references for diplomatic negotiations with foreign powers.

However, during this period, the impact of these translations was primarily confined to the realm of knowledge transfer. The core institutions of the Qing government did not employ

these works as catalysts for legal reform until the 1910s, following the Boxer Rebellion and China's subsequent signing of the Boxer Protocol in 1901.

During the final decade of the Qing Dynasty, China embarked on a project to modernize its legal system. The government outlined a comprehensive plan, strategy, and division of labor among various institutions responsible for translating, drafting, and legislating. This effort involved translating a broad array of established civil and criminal codes, procedural and administrative laws, as well as corporate and business laws from Europe and the United States. These translations ultimately served as the foundation for the Qing legislators to draft their own codes. In an unprecedented move, China established separate criminal and civil divisions, implemented modern courts based on new infrastructure laws, and incorporated procedural laws to elucidate the structure and procedures of litigation. However, this massive undertaking remained incomplete when the Qing government fell in 1911. The subsequent Republican regime continued the project, advancing it to new heights while grappling with the political turmoil that characterized the first decade of Republican rule in China.

Before the establishment of the Nationalist government in Nanking in 1928, the nascent Republic of China had its de jure headquarters in Beijing. The government inherited the unfinished legal reform project and implemented new revisions, drafts, and additions to better align the law and court operations with Chinese society. Nonetheless, troubling inconsistencies persisted. In the realm of civil justice, the Republican government continued to rely on the civil portions of the Great Qing Code, and the new Civil Code underwent numerous revisions and redrafting before its ultimate promulgation in 1930. To address these legal gaps, the Supreme Court of China (Daliyuan) issued interpretations of the law and guiding judgments for lower-level courts. Although these interpretations and judgments exerted binding effects on relevant

cases, lower-level courts maintained autonomy in interpreting and applying the law. By leveraging these interpretations and judgments, Daliyuan managed to reconcile the centuries-old Great Qing Code with the evolving social realities of the 1910s. Furthermore, the logic and methodology employed to bridge the gap between the code and societal customs, as well as to facilitate the operation of foreign law in China, would continue to shape the functioning of Chinese courts in subsequent years.

This dissertation is situated within this period of transition, aiming to elucidate the emergence of judgment and adjudication logic within the modern Chinese judicial system. To investigate the modernization of the judiciary's underlying logic, the dissertation examines the evolving Chinese marriage and family law during the Daliyuan era, a time when China lacked a proper legal foundation for adjudicating marriage cases. This analysis serves to uncover how the logic of judicial judgment developed and navigated the complex interplay between a diverse array of foreign legal models and the deeply ingrained, normative rules of local customs.

It is indisputable that the transformation, reform, and evolution of the Chinese legal system were marked by inconsistencies, and the pace of these changes varied across different regions. In this study, I focus on Beijing, the epicenter of both government and legal reform in China. Spanning the late Qing to the early Republican period, legal reforms primarily took place in Beijing, which also served as the headquarters for the newly designed court infrastructure. As the hub for legal training, bar examinations for professional qualifications, and the appointment of judges at various court levels, Beijing was central to the major shifts within the Chinese legal system. Consequently, it is reasonable to assume that, among all Chinese cities, Beijing would exhibit legal reforms most closely aligned with professional ideals, with minimal concessions to local customs. By examining Beijing's legal system, this research will yield valuable insights into

the broader implications of legal reform, as well as the tension between the codification of law and the influence of local customs. If the analysis reveals a departure from professional ideals or a more significant influence of reform, it will contribute to a more generalizable understanding of the operation of legal reform and the contrasting forces at play between codification and custom.

The selection of marriage-related cases for this study is similarly driven by specific reasoning. This research posits that marriage-related cases may be more susceptible to the influence of local customs than other civil matters. The strong grip of kinship clans could significantly impact such disputes, potentially undermining the authority of centrally issued laws. Additionally, local power dynamics, including struggles for financial support and intricate networks with landed gentries, may further embed the administration of justice within a broader, more context-dependent power structure at the local level. By examining marriage-related cases, which may not always be considered justifiable grounds for litigation, this study aims to shed light on how the nascent Chinese justice system had to contend not only with the enduring imperial justice framework but also with the contested and complex relationship between codification and customs. Furthermore, the reform of marriage law faced considerable challenges and obstacles throughout the process. Political leaders from both the Qing and Republican governments engaged in intense debates over the modification and codification of family and marriage laws. Many perceived the proposed changes derived from foreign codes as a fundamental reorientation of Chinese rituals, threatening to uproot long-standing values and traditions governing marriage and societal order. Consequently, between 1910 and 1930, the new Civil Code underwent multiple drafts and revisions, with the core debate centering on how to address the Books of Family and Succession.

In light of these factors, this dissertation focuses on this contentious and polemical domain of legal change as a means to explore how the court system navigated the vast, uncharted territory between evolving laws and a changing society.

The first part of the dissertation examines the historical development of the modernization project of Chinese law, spanning from the late Qing dynasty to the early Republican era (1902-1930). This period of Chinese legal history began with the New Policy reform in the late Qing dynasty, following the signing of the Boxer Protocol. The project's primary objective was to integrate the continental legal system into China, which encompassed the codification of civil and criminal justice, the establishment of an independent judicial system at various levels, and the training of new legal professionals. Over a concise 30-year period, China entirely replaced its centuries-old legal system with laws from foreign countries, resulting in incompatibilities and inconsistencies that necessitated adaptation and negotiation between past and present practices. By situating this historical segment within an international context, the dissertation explores China's response to foreign powers' skepticism regarding its civilization and the operation of its longstanding legal system, while simultaneously transitioning its own historical burdens into a new era.

The dissertation argues that the legal reforms undertaken during this period represent an intersection of theories from two distinct bodies of Chinese historical literature. On one hand, the changes were a response to foreign pressure, prompting China to embark on a modernization project that uprooted its existing legal system and transplanted a new one from foreign countries. On the other hand, this chapter delves into the internal dynamics of historical changes within the Chinese legal system. Contrary to the "blank sheet of paper" concept in legal transplantation theory, which characterizes the pre-transplantation status of a receiving society, China already

possessed a unique, longstanding legal system that differed from other parts of the world.

Throughout the reform process, China also grappled with its own issues related to the entrenched legal system. Many political elites at the time believed that the existing legal and political system was corrupt and inefficient. This introspection was not a reaction to external influences but rather a self-reflective moment concerning China's own political and legal system, which involved a combination of administrative power and judicial authority.

In this section, I emphasize two primary areas of transformation throughout the process: codification and the court system's infrastructure. By examining both domains, I explore how the marriage provisions in the new Civil Code were drafted and articulated in various iterations, investigating the negotiation between new and old normative systems in establishing the updated marriage order, and how decisions and compromises were reached in this process. Through such examination, I identify the challenges in legislating a new set of family norms, as well as the significance of this area of law, given that the revisions introduced by the new drafts of the Civil Code were perceived to undermine the foundation of Chinese society and erode the moral fabric established by Confucian rituals. In the meantime, the court system in China underwent fundamental changes. Firstly, throughout the reform, China established an independent legal system for the first time in its history, separating judicial functions from administrative power. Corresponding to the evolving civil and criminal divisions in codification, distinct civil and criminal courts were also instituted. The establishment of new courts and the introduction of new procedural codes provided a fresh platform for observing the conflicting and negotiating processes during this period of legal reform in China.

In the second part of the dissertation, I conduct an empirical examination of the judicial operations in the Beijing High Court, a newly established appellate court in Beijing in 1908.

Within the new "four-tier, three-instance" system, following a judgment rendered in the first-instance court, a case can be appealed through two additional instances, with the Daliyuan Supreme Court serving as the highest-level court in the new system. The Beijing High Court, situated at the third tier, functioned as an appellate court responsible for hearing appeals from lower-level courts.

Within Beijing's jurisdiction, there was a single appellate court that oversees both Beijing Local Courts and Beijing Basic Courts. Consequently, the Beijing High Court operated as the third-tier, second-instance court within the new court infrastructure. This court is charged with reviewing case judgments from lower-level courts and evaluating the application of the law. In the meantime, the Beijing High Court was situated just one tier below the Daliyuan Supreme Court, necessitating the transfer of decisions, interpretations, and judgments from the Daliyuan to relevant cases. As such, the Beijing High Court served as an ideal setting to contextualize the debates and negotiations between past and present legal systems, as well as between the new and old codes. The court connected the upper and lower courts by bridging the judgments from the Supreme Court and the lower-level first-instance courts.

In conducting this research, it is assumed that the Daliyuan Supreme Court was closer to the professional core of this elite-led legal reform, while the lower-level courts (both Local and Basic Courts) were more closely aligned with customs, society, and local peculiarities. Thus, the Beijing High Court acted as an institutional connecting code, linking judgments from both ends of the court's infrastructure and bridging the gap between the new codes and old customs.

The analysis yields results demonstrating that the court aimed to close the gap between the prevailing law, operational customs, and the relatively inadequate legal basis for family and

marriage disputes in court. By examining each individual case, the court sought to find a locally contingent and meaningful solution to resolve conflicts and tensions between litigants, thereby addressing issues at the local level.

In the context of applying the law, the court adopted a strategy I refer to as a "multisourcing" mode of application of law. Confronted with legal codification from various sources and differing voices of justice, the court needed to strike a balance between law and society in the judgments it rendered. During this transitional period, the specific legal basis for civil justice was in a nebulous and uncertain state; the *de jure* legal basis for the application of law on relevant cases was clear, but outdated. The application in practice was caught between law and society. As a result, the courts invoked justice, the rules of equity, and the draft of the as-yet-unpromulgated Civil Code when rendering judgments for each case. Simultaneously, the court was required to transfer the rulings, decisions, and interpretations of law from the Daliyuan, which theoretically held binding authority over the Beijing High Court. However, an examination of the court cases revealed that the court's stance on this principle varied from case to case.

In pursuing this approach, the court developed specific methods for multisourcing law. I identified two major types of multisourcing in the third chapter. The first type is oscillatory multisourcing. By employing this method, the court demonstrates a tendency to utilize laws more flexibly. Notably, while transferring a judgment across different levels of courts, judgments on a single case may conflict with one another over a legally binding basis. Within the same court, the court may also display varying perspectives on applying a piece of law, and judgments on similar cases may yield different outcomes. The court's practice echoed the changing societal tempo, and

judges expected the application of law to be in sync with such changes. This orientation became more pronounced in cases where traditional family values held significant influence. Judgments explicitly stated that some "outdated" laws from the past would no longer be employed, despite being legally binding. In this vein, the "oscillation" of multisourcing also revealed that judges ventured beyond the legal domain to seek justification for selecting the basis for judgment while pursuing a modern practice of law for civil justice.

In the second type of multisourcing, judges focused more on the case itself and omitted the citation of law, even when the effective laws might have provided a solid and persuasive foundation for such judgment. This omission is consistent across the court cases in my sample. Using the case of "xiaotiao" as evidence to prove the existence of a marital contract, this part examines both the changing Supreme Court's cases on this issue and Beijing High Court's judgments. The validity of xiaotiao as evidence of a declaration of intent to marry was a contested topic for both courts and litigants. Xiaotiao is a piece of paper recording only the date of birth of two parties for divinatory calculation of compatibility to prove a marriage. However, since some local customs regarded such paper as the inception of expressing an intention for marriage, xiaotiao carried the same weight as an official marital document. It contradicted some local customs by stating that a contract for engagement or marriage could be void after xiaotiao was exchanged between two parties. The prevalence of such cases increased in the 1910s, and the Daliyuan issued interpretations of the law to regulate the matter, claiming evidence to prove marriage without clear wording on contracting intent would not be considered valid. This stance evidently challenged many local customs and norms, presenting a formidable task for lower-level courts. In the Beijing High Court, the court tended to avoid mentioning the law as the basis

for justice but instead focused on other types of reasoning and argumentation to emphasize the insufficiency of *xiaotiao* to prove a marriage. However, such reasoning did not endure, as the Daliyuan eventually issued another interpretation recognizing this practice if local customs permitted.

In addition to examining the basis for the application of law from various sources and perspectives, I also explore how the court bridged the past and present, as well as long-standing marriage practices that continued to impact Chinese society in the early 1910s. I analyzed the case of concubinage and investigated how the court handled this practice, which appeared to conflict with the monogamous institution of marriage promoted by the new law but had long been practiced and accepted under imperial law. I found that the courts, from the Daliyuan to the Beijing High Court, devised a new legal status to incorporate concubines into Chinese families, alongside the new law. The court argued that concubinage was a type of contract between the concubine and her husband. As such, concubinage could be dissolved if "imperative reasons" arose within their relationship.

Considering the early Republican era context, when concubinage was still a legacy of the past with new emerging patterns, the court was aware of the potential social cost of outrightly banning concubinage. Many concubines might have struggled to survive if their ties were completely severed. Applying a monogamous pattern would have penalized numerous Chinese men with multiple concubines in marriage. Consequently, there was a significant gap between law and society, code and custom, due to the inconsistency between the law's aims and the long-established customs.

The court identified concubinage as a contract, framing it as a negative concept relative to the status of a wife. In doing so, the court viewed marriage as morally superior to

concubinage, deviating from Western marriage law scholarship that typically defines marriage as a civil contract. When adjudicating various cases, the court adopted an objective standard to identify the concubinage status in marriage, rather than relying on the subjective identification of the litigants themselves. The court explicitly ruled that a man's second female partner in marriage would be classified as a concubine, thus eliminating the possibility of a bigamous charge, which could elevate a case to criminal punishment.

By employing this concept of contract, the court utilized an analogous approach, likening concubinage to a contractual bond that could be established and dissolved through mutual agreement. In doing so, the court protected concubines and acknowledged their legal presence as their husband's partners, mothers of their children, and family members within a broader family network. This construction of concubinage maintained the status of a considerable number of concubines in China, striking a balance with less cost while the new law was being developed. In this specific case of redefining concubinage as a contractual bond, the court substituted the notion of "contract" with equal contracting parties, while retaining the term "contract" for human trafficking. This case exemplifies the judge's pre-judgment consideration of extra-legal factors when sourcing the basis for law and formulating the foundation for rendering a judgment.

In this dissertation, I examine cases from a time when China was at the inception of its legal modernization project, focusing on how the court applied a set of methodologies to bridge the gap between traditional and modern laws. From the creation of new codifications and court institutions to the practice of new laws, the dissertation unveils the modern beginnings of "pre-judgment" considerations, providing a formalistic vehicle to guide cases from trial to judgment.

It explores the operation of a "meso zone" that sits between sources of justice and the act of judgment. The meso zone is where the multisourced "tools" from both law and culture are processed and integrated to establish a foundation for legal practice.

The meso zone was especially apparent during the legal transition in early 20th-century China when civil codification was still in development, and the legal toolbox was filled with uncertainty. It is also a zone for communicating with pressing social issues, maintaining an ongoing conversation between law and society in each specific case. In the dissertation, I employ examples from the practice of marriage law to demonstrate the dynamics and fluidity of this zone. A constant pattern emerges: the meso zone connects the agency of the judge, the institutional transfer of justice within the new court infrastructure, and laws from both the past and future.

In the case of concubinal contracts, the meso zone also encompasses the invention and reinvention of the concept of "contract," linking the inheritance of "contract" from the past with the new translation of "contract" from Western traditions. Consequently, the meso zone becomes a space for China's burgeoning legal system to incorporate the global impact of legal transfer and translation throughout the globalization and localization of law in the 19th and 20th centuries. This dissertation, therefore, offers valuable insights into the complex interactions between law, society, and culture during a pivotal period of legal transformation in China.

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