

A Brief Analysis of the Marriage and Family Legislation in the Civil Code of China

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Abstract

In 2021, the *Civil Code of the People's Republic of China* (PRC) was implemented, officially incorporating Marriage and Family law into the civil code as one of its Books. The Marriage and Family Book underwent a series of modifications and innovations. This article outlines the development sequence of Marriage and Family legislation in China, the main targets and content of the Marriage and Family Book adjustments, as well as its modifications and innovations compared to the previous Marriage Law.

Keywords: Civil Code, Marriage and Family, historical development, modifications and innovations

1. The Legislative Development of Marriage and Family Law in China

China's marriage and family legislation has gone through several stages since its founding. From these stages, we can observe the development trajectory of China's marriage and family laws as well as the changing relationship between marriage and family legislation and *Civil Law*.

The first stage was the promulgation and implementation of the first *Marriage Law of the PRC* in 1950. In traditional civil law countries, the Marriage and Family Law is an integral part of the Civil Code and is often listed as a separate book of the Civil Code under the name of the law of relatives, such as the French Civil Code and the German Civil Code. In 1950, shortly after the founding of the PRC and amidst widespread reconstruction efforts, the *Marriage Law* was the first law with the nature of the Basic Law enacted after the founding of the PRC. This law, enacted prior to the Civil Code, was influenced by the former Soviet Union's *Marriage Law*, which was separate from the *Civil Law*, and the *Marriage Law* was not a part of the *Civil Law*. The *Marriage Law* enacted in 1950 had the legislative purpose of "the abolition of the feudalistic marriage system characterized by arranged marriages, coercion, male dominance, and disregard for the interests of children, and the establishment of a new democratic marriage system characterized by freedom of marriage for both men and women, monogamy, gender equality, and the protection of the interests of women and children." It consisted of eight chapters, allowing the legal adjustment of marriage relations to be the main, and the provisions on family relations were relatively brief.

The second stage was the promulgation and implementation of the *Marriage Law of the PRC* in 1980. This *Marriage Law* was formulated in response to new issues emerging in the field of marriage and family at that time, and its development in the realm of marriage and family legislation was primarily manifested in the following aspects. First, it supplemented the basic principles, adding provisions to protect the legitimate rights and interests of the elderly and implement family planning principles. First, it supplemented the basic principles, adding provisions to protect the legitimate rights and interests of the elderly and implement family planning principles. Second, it raised the legal marriage age and defined the scope of prohibited marriages among collateral blood relatives. Third, it expanded the legal regulation of family relationships. Fourth, it made additions to divorce clauses. China's *General Principles of Civil Law* was promulgated later in 1986, so the

marriage and family legislation at that time still remained separate from the *Civil Law*.

The third stage was the amendment of the *Marriage Law* enacted in 1980 in the year 2001. This revision was carried out in response to the significant changes in China's marriage and family field following the reform and opening-up policies. It was primarily reflected in the following aspects: The first was the addition of prohibitive clauses in the general provisions to enhance the enforcement of the principles of the *Marriage Law*; The second was the introduction of provisions regarding void marriages and voidable marriages; The third was to improve the original legal marital property system; Fourthly, the inclusion of enumerative and illustrative provisions concerning the legal grounds for divorce; Fifth, the inclusion of enumerative and illustrative provisions concerning the legal grounds for divorce.

The fourth stage is the promulgation and implementation of the *Civil Code of the PRC* in 2021. The Marriage and Family Book of the Civil Code is revised and improved based on the revisions made to the *Marriage Law* in 2001 and the *Adoption Law of the PRC* amended in 1998 (hereinafter referred to as the *Adoption Law*). Since then, marriage and family legislation has officially returned to *Civil Law* and become an important part of the civil code. At the same time, the return of Adoption Law to Marriage and Family Law has become an important part of Marriage and Family Book, which makes the macro system of Civil Code and the internal micro system of Marriage and Family Book reach a complete unity.

2. The Adjustment Objectives and Main Contents of the Marriage and Family Book of the Civil Code

Before the promulgation of the Civil Code, China had long used the name Marriage Law for legislation. Emphasis was placed on marital relationships while family relationships were neglected. Coupled with the separate legislation of the *Adoption Law*, the legislation on marriage and family was incomplete in both the name and content. Article 1040 of the Civil Code stipulates: "This Book regulates civil relations arising out of marriage and family." It is evident that the Marriage and Family Book not only regulates the marital relationships but also family relationships. It encompasses the dynamic processes of the formation, alteration, and termination of marital and family relationships, as well as the rights and obligations between the parties involved. The main content includes the following aspects.

2.1 Basic Principles of Marriage and Family Law

The basic principles of Marriage and Family Law refer to the fundamental guidelines that run through the entire framework of marriage and family legislation, judicial processes, and activities. According to Article 1041 of the Civil Code, the basic principles of Marriage and Family Law mainly include the followings: The principle of freedom of marriage; The principle of monogamy; The principle of equality between man and woman; The principle of safeguarding the lawful rights and interests of women, minors, the elderly, and persons with disabilities. In addition, the provisions of Article 1043 of the Civil Code concerning the relationship of family members are generally considered to constitute the basic principle of Marriage and Family Law. The first paragraph of Article 1043 stipulates: "Families shall establish good family values, promote family virtues, and pay close attention to cultural and ethical advancement in families." Paragraph 2 stipulates: "Husband and wife shall be faithful to, respect and care for each other. Family members shall respect the elderly, take good care of children, help each other, and maintain equal, harmonious and civilized marriage and family relations."

2.2 Relatives System

Relatives refers to the social relationships that people form based on marriage, blood ties, and legal regulations. Once regulated by law, relatives relationships give rise to statutory rights and obligations among the relevant parties. According to the first paragraph of Article 1045 of the Civil Code: "Relatives include spouses, blood relations, and relations by marriage."

2.2.1 Spouse

Spouses, meaning husband and wife, during the existence of the marital relationship, both parties are each other's spouse. The spouse holds a special position and plays a significant role in the realm of relatives relationships. It forms the foundation for both blood relations and relations by marriage, serving as a source and bridge for other relatives ties. However, there are two different theoretical viewpoints regarding whether a spouse should be classified as one of the categories of relatives. (Shi Shangkuan, 2000) The negating perspective argues that 1) spouse is the origin of relatives, rather than being a relatives entity itself; 2) there is no kinship or degree of kinship that can be traced between spouses. On the other hand, the affirming viewpoint posits that relatives not only refers to blood relations but also encompasses close relatives who occupy a central position in relatives relationships. Spouses share the most intimate social bond, serving as both the source and an important component of relatives. These two perspectives are not contradictory to each other.

In China, Article 1045 of the Civil Code explicitly includes spouses in the category of relatives. Simultaneously, it stipulates: "Spouses, parents, children, siblings, paternal and maternal grandparents, and paternal and maternal

grandchildren are close relatives.” “Spouses, parents, children and other close relatives living together are family members.”

2.2.2 Kinship and Degree of Kinship

Kinship refers to the system of contact between relatives, based on blood ties and marriage. In addition to spouses, blood relations, and relations by marriage can be traced through Kinship.

Degree of kinship is the basic unit to calculate the closeness and distance of relatives, based on blood relatives, and can be used for in-laws, regardless of degree of kinship between spouses. Contemporary countries mostly adopt the Roman method of degree of kinship calculation, a few countries adopt the monastic method of degree of kinship calculation. China has always used algebraic differences to calculate the closeness of relatives, with one generation as a generation, for example, parents and children are direct blood relatives within two generations.

2.3 Conditions and Procedures for Marriage

Marriage, also known as the establishment of marriage, refers to the civil legal act of both men and women to establish the marriage relationship. Marriage in a broad sense includes engagement and marriage. Engagement refers to a prior agreement between a man and a woman for the purpose of establishing marriage in the future. The establishment of marriage in a narrow sense refers to marriage. In modern times, the marriage and family legislation mainly adopts the narrow concept. Marriage must meet the legal conditions and procedures. The conditions of marriage include necessary conditions and prohibited conditions. The parties must have the consent to marry, have reached the legal age for marriage and meet the requirements for monogamy. Compulsion used by either party on the other and interference by any organization or individual shall be prohibited. The marriage between lineal relatives by blood or between collateral relatives by blood up to the third degree of kinship is prohibited. There are legal procedures to get married. Both the man and the woman desiring to marry shall apply for marriage registration in person at the marriage registration authority. If the proposed marriage is found to conform to the provisions of this Code, the couple shall be granted registration and issued marriage certificates. The marital relationship shall be established as soon as the marriage registration is completed. A couple shall go through marriage registration if it has not done so.

A union without the essential conditions for the formation of marriage constitutes a void marriage or a voidable marriage. After a marriage is declared invalid or revoked, it shall be invalid from the beginning, and the parties shall not have the rights and obligations of husband and wife. A man or woman who violates the procedural requirements for marriage and fails to register for marriage and lives together in the name of husband and wife shall be treated as a de facto marriage and a cohabitation relationship respectively. In case of reregistration of marriage, the validity of marriage shall be counted from the time when both parties meet the substantive requirements for marriage as prescribed by law.

2.4 Personal Relationship and Property Relationship Between Husband and Wife

A legal and valid marriage produces a legal relationship between husband and wife between a man and a woman, including personal relationship and property relationship. Husband and wife have equal legal status in personal matters, and enjoy equal civil rights such as the rights of name, the right of personal freedom, the right to decide on marital residence, and the power of daily family affairs agency. The property relationship between husband and wife is mainly embodied in the marital property system. The marital property system is a legal system specifically regulating and adjusting the marital property relationship, including the establishment, alteration and abolition of various marital property systems, the ownership, management, use, income and disposition of marital property before and after marriage, as well as the burden of family living expenses, the repayment of marital debt, the liquidation and division of marital property when the marriage is terminated. The marital property system of our country adopts the coexisting form of legal property system and agreed property system. The legal property system is the combination of the common ownership system and the individual special property system.

Joint property of husband and wife includes community property and community debt. The debts incurred by the husband and wife through a common declaration of will such as the joint signatures of husband and wife or the subsequent ratification by the other spouse and the debts incurred by the husband or wife in his or her own name to meet the needs of the family's daily life during the marriage shall be considered as community debts. The debt incurred by the husband or wife in his or her own name beyond the needs of the family's daily life during the marriage shall not be considered as community debt, except if the creditor can prove that the debt is used to meet the joint needs of life or production or operation of husband and wife, or based on common declaration of will of husband and wife.

2.5 Conditions and Procedures for Divorce

Divorce is a legal means to dissolve the legal and valid marriage, and it is a civil legal act to dissolve the marriage relationship during the life of the husband and wife. Divorce must comply with the conditions and procedures prescribed by law. The guiding ideology of our country's divorce system is to protect the freedom of divorce and oppose hasty divorce. The Civil Code stipulates the divorce method of the double track system of agreement registration divorce and lawsuit divorce. Divorce by agreement, also known as divorce by mutual consent, refers to the husband and wife voluntarily divorce and reach an agreement on the legal consequences of divorce, and the marriage registration authority recognizes the dissolution of the marriage relationship. Article 1076 of the Civil Code: "Where husband and wife both desire divorce, they shall sign a written divorce agreement and apply for divorce registration in person at the marriage registration authority for divorce registration. The divorce agreement shall specify the declaration of will that divorce is desired by both parties and the consensus reached through consultation on matters such as support of children, disposition of property, and debt settlement." Divorce by litigation, also known as divorce by judgment, refers to the divorce filed by one of the husband and wife, the People's Court hears the case, and the marriage that meets the conditions for divorce is dissolved by judgment or mediation. Article 1079 of the Civil Code stipulates: "Where one spouse alone desires a divorce, the organization concerned may carry out mediation, or the spouse may directly file a divorce action with the People's Court. The People's Court shall carry out mediation when trying a divorce case. Where mediation fails because mutual affection no longer exists, a divorce shall be granted. A divorce shall be granted if mediation fails under any of the following circumstances: (1) Either spouse commits bigamy or cohabits with any third party; (2) There is domestic violence, or maltreatment or desertion of any family member; (3) Either spouse has vicious habits of gambling or drug abuse, and remains incorrigible despite repeated admonition; (4) The spouses have been living separate and apart for up to two years due to incompatibility; (5) Other circumstances causing alienation of mutual affection. A divorce shall be granted if one spouse is declared absent and the other spouse thereby files an action for divorce. Where the spouses have been living separate and apart for another year after the People's Court has ruled that a divorce is not granted, a divorce shall be granted if either spouse files a divorce action again."

2.6 The Raising of Children After Divorce and the Division of Property Between Husband and Wife

Divorce will produce a series of legal consequences between the parties of marriage and between the parties, their children and the third party, mainly embodied in the raising of children after divorce and the division of property between husband and wife. According to the provisions of the Civil Code, the relationship between parents and children shall not come to an end with the parents' divorce. After divorce, regardless of whether the children are directly put in the custody of the father or the mother, they shall remain the children of both parents. After divorce, both parents shall still have the right and duty to support, educate and protect their children. In principle, the mother shall have the custody of the children under two years of age after divorce. If the father and the mother fail to reach an agreement on the custody of their child who has reached two years of age, the People's Court shall, in light of the specific circumstances of both parties, make a judgment in the best interest of the minor child. If the child has reached eight years of age, his or her true will shall be respected. The party who does not have custody of his or her child shall have the right to visit the child. In the case of divorce, the community property shall be disposed of by the two parties upon agreement. If they fail to reach an agreement, the People's Court shall make a judgment in light of the actual circumstance of the property and under the principle of caring for the rights and interests of the child or children, the wife, and the no-fault party. The community debts incurred by the husband and wife shall be paid off jointly by them. If the community property is insufficient to pay off the debts or the items of the property are in their separate possession, the two parties shall work out an agreement on repayment. If they fail to reach an agreement, the People's Court shall make a judgment.

Where one of the spouses performs more duties in bringing up children, taking care of the elderly or assisting the other spouse in his or her work, that spouse shall have the right to claim compensation from the other spouse in the case of divorce, and the other spouse shall make compensation. The specific arrangements shall be agreed upon by both parties. If they fail to reach an agreement, the People's Court shall make a judgment. In the case of divorce, the community debts incurred by the husband and wife shall be paid off jointly by them. If the community property is insufficient to pay off the debts or the items of the property are in their separate possession, the two parties shall work out an agreement on repayment. If they fail to reach an agreement, the People's Court shall make a judgment. Where, at the time of divorce, one party has difficulty in supporting himself or herself, the other party who can afford it shall render appropriate assistance. The specific arrangements shall be agreed upon by both parties. If they fail to reach an agreement, the People's Court shall make a judgment. If a divorce is caused by a legal fault of one party, the no-fault party shall have the right to claim damages.

2.7 Parent-Child Relationship

Parent-child relationship, also known as relationships between parents and children, refers to the rights and obligations between parents and children. According to the provisions of the Civil Code, the relationship between parents and children is divided into two categories: one is the relationship between parents and children of natural blood relatives, including the relationship between parents and legitimate children and the relationship between parents and children born out of wedlock; The second is the relationship between parents and children as fiction in law, including the relationship between adoptive parents and adopted children and the relationship between stepparents and children who form a relationship of support. The rights and obligations between parents and children mainly include: parents have the rights and obligations to raise, educate and protect their minor children; Adult children have the obligation to support and support their parents; Parents and children have the right to inherit from each other.

2.8 Adoption

Adoption refers to a civil legal act in which a natural person takes another person's child as his own in accordance with the conditions and procedures prescribed by law, so that a legally fictional parent-child relationship arises between parties who do not have a parent-child relationship. Adoption shall follow the principle of the best interests of the adoptee and safeguard the lawful rights and interests of the adoptee and the adopter. The Civil Code lays down the conditions to be met for adoption and stipulates that adoption must be registered. Once the adoption relationship is established, it has a series of legal consequences between the parties, including the effect of fiction and the effect of dissolution. Article 1111 of the Civil Code stipulates: "As of the date of establishment of the adoptive relationship, the provisions governing the relationship between parents and children as set out in this Code shall apply to the rights and duties between adoptive parents and adopted children; the provisions governing the relationship between children and close relatives of their parents as set out in this Code shall apply to the rights and duties between adopted children and close relatives of the adoptive parents. The rights and duties between an adopted child and his or her natural parents and other close relatives shall terminate with the establishment of the adoptive relationship." The adoptive relationship may be dissolved in accordance with the conditions and procedures established by law. After the adoptive relationship is dissolved, the legal relationship between the adoptee and the adopter and the adopter's close relatives is extinguished.

3. Major Changes and Innovations in the Marriage and Family Book

(1) Addition of a provision on the protection of the marriage and family by the State.

"Marriage and family are under the protection of the State" has been established as the basic principle of the "Marriage and Family" Book. Similar provisions are found in other books of the Civil Code, and for the sake of uniformity, this provision has also been added to the Marriage and Family Book.

(2) The addition of a provision advocating that "families should establish good family customs, promote family virtues, and attach importance to the construction of family civilisation" reinforces the guiding role of socialist core values in marriage and the family, focuses on the cultural characteristics and concepts of Chinese marriages and families, and embodies the ethical values and objectives of China's Marriage and Family Law.

(3) Definitive provisions on relatives, close relatives and family members have been added.

For a long time, China has lacked general provisions on the kinship system from the first "Marriage Law" in 1950, to the second "Marriage Law" in 1980, to the revised "Marriage Law" in 2001. In most of the traditional civil law countries, a general provision on kinship is set up at the beginning of the kinship section, which governs the entire law of kinship. The Civil Code has made great progress by adding the content of kinship.

(4) The conditions under which marriage is prohibited have been revised. Sick marriages have been deleted and replaced by revocable marriages, which better respects and protects the parties' rights to marital autonomy and informed consent.

The Civil Code deleted the prohibition of marriage due to illnesses that are considered medically unfit for marriage, and replaced it with the provision that if one of the parties conceals a major illness, the other party may request the People's Court to annul the marriage, and has the right to request for compensation for damages.

(5) Provisions on the right of representation in daily family affairs have been added. It is emphasised that both spouses have equal rights to deal with common property.

The right of representation in everyday family affairs refers to the right of spouses to act as agents for each other in certain legal acts with third parties in connection with everyday family affairs. The represented party is jointly and severally liable for debts incurred by the acting party in the performance of daily family affairs.

Article 1060 of the Civil Code stipulates: "A juridical act performed by one of the spouses to meet the needs of the family's daily life shall be binding on both of them, except as otherwise agreed between one spouse and an opposite party. The restrictions agreed upon by the spouses on the scope of juridical acts that one spouse may perform shall not be set up against bona fide opposite parties."

(6) The rules for determining joint debts of husband and wife have been clarified.

The determination of conjugal debt has long been a problem for the judicial practice department. On the one hand, it is necessary to protect the interests of creditors, and on the other hand, it is necessary to protect the spouse who has no knowledge of the marriage. If the determination of joint debts of husband and wife is too harsh, it may harm the bona fide creditors, resulting in the creditors not being able to claim debts from both spouses jointly. If the determination of joint marital debt is too lenient, it may harm the interests of the unknowing spouse in the marriage.

The Civil Code clarifies the criteria for recognising joint debts of spouses on the basis of the “2018 Interpretation of the Supreme People’s Court on Relevant Issues Concerning the Application of Law to the Trial of Cases Involving Debt Disputes between Husbands and Wives.” Article 1064 stipulates: “The debts incurred by the husband and wife through a common declaration of will such as the joint signatures of husband and wife or the subsequent ratification by the other spouse and the debts incurred by the husband or wife in his or her own name to meet the needs of the family’s daily life during the marriage shall be considered as community debts. The debt incurred by the husband or wife in his or her own name beyond the needs of the family’s daily life during the marriage shall not be considered as community debt, except if the creditor can prove that the debt is used to meet the joint needs of life or production or operation of husband and wife, or based on common declaration of will of husband and wife.”

(7) Added the basic rule of paternity objection.

There have long been cases in judicial practice regarding the confirmation and denial of paternity, but there is a lack of clear provisions in the law. The Civil Code formally establishes the rules for paternity objections in legal provisions. Article 1073 of the Civil Code stipulates that: “Where an objection to maternity or paternity is justifiably raised, the father or mother may institute an action in the People’s Court for affirmation or denial of the maternity or paternity. Where an objection to maternity or paternity is justifiably raised, a child of full age may institute an action in the People’s Court for determination of the maternity or paternity.”

(8) Adding a cooling-off period for divorce.

In response to today’s divorce rate, especially the increase in the rate of divorce registered by agreement, as well as the existence of a large number of flash marriages and flash divorces of the social phenomenon. The Civil Code establishes a cooling-off period for divorce. Article 1077 stipulates: “Where either spouse is unwilling to divorce, he or she may, within 30 days from the day on which the marriage registration authority receives the application for divorce registration, withdraw the application for divorce registration from the marriage registration authority. Within 30 days after the expiration of the period as prescribed in the preceding paragraph, both parties shall apply for divorce certificates in person at the marriage registration authority. If no application is filed, the divorce registration application shall be deemed to have been withdrawn.”

(9) Addition of grounds for granting divorce.

In order to safeguard the freedom of divorce and to prevent prolonged divorce, the Civil Code adds a new paragraph on “divorce shall be granted”, i.e., if a man and a woman who have been separated for one year after the first court judgement of not granting a divorce file a second lawsuit for divorce, the court shall grant a divorce. This provides a path for those who have been deliberately delayed in obtaining a divorce and are unable to extricate themselves from their unfortunate marriages.

(10) Removal of the precondition of financial compensation for housework.

Compensation for housework during divorce has always existed as a divorce relief system in China’s marriage and family legislation, but with the restrictive condition that it is only applicable to families with separate property systems. The vast majority of families in China have adopted the joint property system, which has resulted in the provision of financial compensation for divorce rarely being applied in judicial practice and not playing its due role. The Civil Code removes the restriction that the compensation for household chores in case of divorce can only be requested by families adopting the separate property system, thus expanding the scope of application of the system and realising the relief function it should have.

(11) Addition of a provision to cover damages in the event of divorce.

The system of divorce damages established by the “Marriage Law” of 2001 strictly limits the scope of application of the system of divorce damages, resulting in the conditions of application being too narrow and unable to truly fulfil its relief function. The Civil Code has expanded the scope of application of the system by adding the proviso of “other major faults” to the conditions for application of the system of compensation for divorce damages.

(12) Improved the conditions for adoption.

The Civil Code incorporates the content of the former *Adoption Law* into the Marriage and Family Book, and revises and improves the specific provisions on adoption, safeguarding the legitimate rights and interests of both the adoptee and the adopter. Firstly, the principle of favouring the adoptee in the best interests of the adoptee has been established. Secondly, the age limit for the adoption of minors has been relaxed. Whereas the previous *Adoption Law* had restricted the number of minors who could be adopted to those “under 14 years of age”, the Civil Code deleted this provision, so that all minors under 18 years of age are included in the scope of adoption. Thirdly, in response to changes in family planning policies, the Civil Code allows childless adopters to adopt two children. At the same time, there is no longer any restriction on whether or not the adopter already has a child, and an adopter with one child may also adopt another child. Fourthly, in order to further strengthen the protection of the interests of the adoptee, the requirement that the adopter must not have a criminal record that is detrimental to the healthy development of the adoptee has been added to the requirements for adopters. Fifth, an “adoption assessment” system has been added. Civil affairs departments of people’s governments at or above the county level shall conduct adoption assessments in accordance with the law.

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