Spousal Abuse: Divorce Litigation and the Emergence of Rights Consciousness in Republican China*

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The Republican Civil Code of 1929–1930, modeled after Swiss and German civil codes, featured a modern liberal marriage regime that elevated the conjugal family model and promoted the principle of gender equality. Studies have praised the code as an important Guomindang (GMD) accomplishment and noted its pathbreaking nature but downplayed its ultimate significance. Like the rest of the GMD modernization agenda, the code supposedly failed to exert much influence because of the short duration of GMD rule, the turmoil caused by the War of Resistance and Civil War, the foreign origins of many of its concepts, and the upheaval of the 1949 Revolution.¹ Developments dating from the late 1980s have obliged historians to revise initial evaluations of the code’s significance. First and foremost, archival records of Republican court cases became available, which have made it possible to examine the social impact of Republican law through actual litigation. Archives-based studies have investigated the relationship between changes in black letter law and changes in legal practice, finding that the code enjoyed its greatest influence in urban areas and noting ways that for women the code’s formal provisions may have undercut the informal protections of late imperial law (Bernhardt, 1994, 1999; Huang, 2001). Studies of criminal law have found substantial continuity between the Qing and Republic (Bourgon, 2003; Neighbors, 2009). Yet another group of studies has approached the code from the perspective of the new professional

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¹ For example, Michael notes a new modern legal and judicial system “began to function and grew in importance, and, if given time, might well have led to the establishment of a society based upon the rule of law” (1962: 133–34). Bernice J. Lee did not have access to court records, but completed a fine study of the ideological changes embedded in the Code (1975).

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class of lawyers and judges (Conner, 1994; Xu, 2008). The Republican Civil Code has also come to serve as a source of inspiration for contemporary Chinese lawmakers who since the 1990s have shifted the overall direction of Chinese law from the “socialist legality” model of the 1950s to 1980s to the Continental European civil law tradition first adopted during the late Qing and early Republic (Chen, 1996; Liang, 2010).

Building upon the archives-based research, this article investigates the interaction between the Civil Code and legal practice in order to evaluate the law’s social impact, extending research on the law’s impact to changes in individual consciousness. By examining “intolerable cruelty” lawsuits filed in the two decades after the code went into effect, it outlines the ways legal change contributed to changes in people’s consciousness about physical abuse in marriage. To analyze popular attitudes and perceptions is an extremely difficult task, but it is possible to at least begin to delineate the major changes through close readings of the court records. Archival case records from local-level courts (difang fayuan), provincial-level superior courts (sheng gaodeng fayuan), and the national Supreme Court (Zuigao fayuan) point to an emerging “legal consciousness” or “rights consciousness” by which the framework of individual rights and duties enshrined in the Civil Code helped to effect a change in popular expectations of marriage. Rights consciousness refers to the way people came to view themselves as “rights-bearing” beings and to view conflicts in terms of a clash of rights. Case records show that despite the tenuous place of rights-thinking in Republican China, in the 1930s and 1940s litigants began to interpret their marriages through the lens of rights and liabilities and drew upon Republican legal mechanisms to forge various meanings of rights. This article will illuminate how litigants grounded their understandings of rights in light of socioeconomic realities, everyday experiences of injustice, and grievances against family tyranny, wittingly or not within the frame supplied by liberal modernity. These changing perceptions marked an important break in consciousness associated with liberal modernity.

The rights consciousness revealed in the legal actions taken in the 1930s and 1940s suggests an approach to understanding rights in China that focuses on the way ordinary individuals deployed rights to promote their interests, rather than the debates among intellectuals and politicians over the meaning of rights. Past studies have debated the origins of Chinese conceptions of rights and compared Chinese conceptions to European and American ones (Angle, 2002; Angle and Svensson, 2001; Bourgon, 2004; Diamant, Lubman, and O’Brien, 2005; Gallagher, 2005, 2006; Nathan, 1986; O’Brien and Li, 2006; Perry, 2008; Svensson, 2002; Weatherley, 1999; and Zarrow, 2008). Unlike these studies of Chinese rights, my research mostly pertains to legal rights rather than