

CHINESE CUSTOMARY MARRIAGES IN HONG KONG

The validity of a marriage between two Chinese persons in Unlong, New Territories, is in question.^{1/} The marriage is stated to have been effected in 1948 in accordance with Chinese rites and custom, and was not registered.

After Britain acquired Hong Kong by outright cession from China in 1842, English law as existing at that time was introduced as the general law of the Colony. The Supreme Court Ordinance of 1873 stated as follows:

5. Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or its inhabitants, and except so far as they have been modified by laws, passed by the said legislature.^{2/}

The Application of English Law Ordinance, No. 2 of 1966, restates the above in the following way:

3. The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require, save to the extent that such common law or any such rule of equity may from time to time be modified or excluded by

(a) any Order in Council which applies to Hong Kong;

^{1/}The New Territories is the name of the area on the Chinese mainland, north of Kowloon, which was acquired by Britain in 1899 under a 99-year lease from China. It is considered part of the British Crown Colony of Hong Kong.

^{2/}1 Laws of Hong Kong (rev. ed. 1964) ch. 4, p. 3.

(b) any Act which applies to Hong Kong, whether by express provision or by necessary implication; or

(c) any Ordinance.^{3/}

The sphere of family law is one in which English law is deemed to be inapplicable to the Chinese inhabitants of Hong Kong. The Marriage Ordinance, for instance, excepts Chinese customary marriages from its application. Section 38 of this Ordinance says:

38. (1) This Ordinance shall apply to all marriages celebrated in the Colony except non-Christian customary marriages duly celebrated according to the personal law and religion of the parties.

(2) The parties to any such customary marriage may, however, if they so desire and provided they have not living any other undivorced spouse, contract with each other a marriage under this Ordinance. In such cases the marriage under this Ordinance shall not be deemed to prejudice the previous customary marriage.^{4/}

The 1967 Government White Paper on the subject of Chinese marriages in Hong Kong states as below:

Chinese customary marriages are regarded as valid in Hong Kong by virtue of Section 3 of the Application of English Law Ordinance, No. 2 of 1966 which repeats in substance the provisions of the former Section 5 of the Supreme Court Ordinance, Chapter 4. . . . [T]here is no doubt but that a significant minority of Hong Kong people still believe in the celebration of marriage according to traditional Chinese custom and will undoubtedly for some time continue to do so in spite of the fact that registry marriages are becoming increasingly popular and convenient even ~~even~~ in the outlying areas.^{5/}

^{3/4} Laws of Hong Kong (rev. ed. 1970) ch. 88, p. 1.

^{4/} 8 Laws of Hong Kong (rev. ed. 1964), ch. 181, p. 11.

^{5/} The 1967 White Paper on Chinese Marriages in Hong Kong, Hong Kong: J. R. Lee, 1967, p. 6.

As Jamieson points out, under Chinese customary law marriage is a civil contract, and requires no registration or celebration by any public authority, whether civil or religious.^{6/} Thus the fact that the marriage in question was not registered with the authorities should have no effect on the validity thereof.

Since one of the parties to the above marriage, the wife, is alleged to have deserted the other party after three years of marriage and the birth of a daughter, and since the husband has married again, a further question arises as to whether such desertion would have constituted a dissolution of the marriage.

The traditional law on divorce is contained in the Ts'ing Code. Under the provisions of this Code, divorce was a right generally only possessed by the husband, and which he could exercise whenever any one of seven grounds, known as the seven cunts, existed on the part of the wife. These were: failure to produce sons, lascivious conduct, failure to serve the parents-in-law, loquacity (including mischief-making and quarrelsome behavior), larceny, jealousy, and incurable disease. There were also three non-cunts, any of which would, if present, prevent the husband from divorcing the wife. There were: if she had observed three years of mourning for her parents-in-law; if she had

^{6/} G. Jamieson, Chinese Family and Commercial Law, Hong Kong: Vetch and Lee, 1970, p. 44.

no family of her own to receive her back; if the husband's family had been poor before or at the time of the marriage but had now become rich. These exceptions did not however hold in cases of adultery.^{7/}

Under the Ts'ing Code, marriage could also be dissolved by mutual agreement. However, the wife did not have the right to divorce her husband except in rare cases such as when forced by him to commit adultery. Even where the husband left his wife for a long period, it was held that she was not entitled to remarry unless the disappearance was due to such reasons as war, drought, and floods.^{8/}

The 1967 White Paper on Chinese marriages in the Colony, cited above, points out that apart from divorce by mutual consent, the husband in a Chinese customary marriage traditionally has the right to dissolve the marriage unilaterally in certain circumstances.^{9/}

^{7/} Ta Tsing Lou Lee, translated by Sir George Thomas Staunton, London: Cadell and Davies, 1810, p. 120.

^{8/} Le père Guy Boulais, Manuel du Code chinois, Taipei; Ch'eng-Wen Publishing Co., 1966, p. 303.

^{9/} The 1967 White Paper on Chinese Marriages in Hong Kong, p. 16.

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