

PART 1

Women and the Law



A Ming-Qing Transition in Chinese Women's History? The Perspective from Law

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Abstract

This article challenges Western scholarship that sees the period of the Ming-Qing transition as a significant turning point in Chinese women's history, a time during which gender norms and relations underwent significant changes that were of benefit to women. It argues instead that, seen from the perspective of law, this period represents the culmination of trends in evidence since the end of the Song that together amounted to a contraction in a woman's rights and privileges under the law. Through an examination of changing laws on betrothal, marriage, divorce and property, it demonstrates how codified law gradually absorbed ongoing peasant practices and expectations and the economic calculus on which those were based. The result of this "peasantization of law" was a greater legal incorporation of a woman into her marital family, a concurrent weakening of her legal ties with her natal kin, and an overall decline in her legal status.

Keywords

China – women – peasantization of law – divorce – property – marriage – betrothal

Currently there are two competing images of the position of women from the late Ming through the mid-Qing. One image, the older of the two, portrays this time as Chinese women's darkest hour, the time when many of the repressive features of Song neo-Confucianism, most notably the cult of chastity, received their fullest expression. The other, newer image casts the late Ming through the

* Author's note: This article first appeared in *Remapping China: Fissures in Historical Terrain*. Ed. by Gail Hershatter, Emily Honig, Jonathan N. Lipman, and Randall Stross (Stanford University Press, 1996), pp. 42–58. Used with permission of Stanford University Press, www.sup.org. Some minor revisions have been made for publication in this volume.

mid-Qing in a different light as a period of transition, a turning point when inherited assumptions about gender were severely tested and radically revised. This latter image, in the main, derives from a reconceptualization of the Ming-Qing transition as not just a change in dynasties, but more fundamentally as the beginning of a new era in Chinese history, the advent of an “early modern” period during which China was undergoing the same sort of changes as the early modern West.

The purpose of this article is twofold. It will first address the body of scholarship that argues for a Ming-Qing transition in gender construction and gender relations. The major concern will be how we are to assess the extent of change during that period and the significance of that change for women. The article will then look at the Ming-Qing transition from the standpoint of law. It will demonstrate that from that perspective the late Ming through mid-Qing represented not a turning point in Chinese women’s history, but a crystallization of trends in evidence since the end of the Song. The older, bleaker image of the position of women in the latter imperial period, it will be shown, still has much to recommend it.

Scholarship on Women in the Late Ming and Qing

The reexamination of the older image of Chinese women in the late Ming and Qing began in Western scholarship in the 1970’s. In a seminal article Paul Ropp points to the emergence during that time of a group of “male feminist critics” who questioned widow chastity and suicide, foot-binding, and concubinage and who championed women’s education, a vision of women as capable and strong-willed, and a rudimentary notion of gender equality.¹ In Ropp’s analysis, these feminist critics derived from two sources. Some were scholars of the new school of Han Learning, who looked to the classics to challenge the normative prescriptions for women in Song neo-Confucianism. Others came from what he calls “the emergent culture” of the late Ming through mid-Qing, a culture born of increased urbanization and commercialization, a booming publishing industry, a flowering of popular literature, and the spread of literacy among elite women. With its reformulation of the notions of gender, he concludes, “the emergent culture . . . sowed the seeds of change which, once sprouted, would grow to revolutionary proportions.”²

1 Paul S. Ropp, “The Seeds of Change: Reflections on the Condition of Women in the Early and Mid Ch’ing,” *Signs* 2, 1 (Aug. 1976): 5–23.

2 *Ibid.*, 23.

Many of the themes first suggested in Ropp's article have subsequently been explored by other scholars. In a recent article on the eighteenth-century official Chen Hongmou, for instance, William Rowe argues that Chen's thinking on women reflected "the momentous shifts of consciousness" of the Ming-Qing transition.³ Among the more important "progressive" elements of Chen Hongmou's thought were an emphasis on the importance of "human feelings" or "emotion" (*renqing* 人情) in familial relationships, a "Mencian" belief in essential human equality, an advocacy of companionate marriages, and a valorization of the wife's role as moral guardian of the household and the mother's role in the education of her sons. Rowe explicitly labels these ideas as well as the socioeconomic developments underlying them "early modern" phenomena.

Where Rowe sees great change, Susan Mann sees a more modest reassertion of the "classical conventions governing women's behavior."⁴ She examines what she calls "a new discourse on marriage" in the eighteenth century among scholars of Han Learning. The impetus behind the new discourse, she argues, was the desire to fix more firmly boundaries—gender, class, and occupational—that were becoming ever more fluid in the course of social change. The scholars presented a view of marriage that emphasized complementarity rather than hierarchy, and companionship and shared responsibility rather than blind female submission. The result, Mann concludes, was the greater fixing of the wife within the boundaries of the domestic sphere through a valorization of her role as household manager and moral guardian.

From Dorothy Ko we receive a picture of the place of women in the intellectual and cultural developments of the time. In her study of communities of women writers in the lower Yangzi region in the late Ming and early Qing, she shows how they carved out new spaces for themselves and how by doing so they forced (and participated in) a redefinition of feminine ideals.⁵ In Ko's analysis, that redefinition did not so much represent a shift in gender ideology as an elaboration of certain strains of thought already present in the Confucian tradition. That elaboration had the ironic effect of accentuating male-female distinctions and of reinforcing the doctrine of separate spheres, even as it

3 William T. Rowe, "Women and the Family in Mid-Qing Social Thought: The Case of Chen Hongmou," *Late Imperial China* 13, 2 (Dec. 1992): 1–41.

4 Susan Mann, "Grooming a Daughter for Marriage: Brides and Wives in the Mid-Ch'ing Period," in Rubie S. Watson and Patricia Buckley Ebrey, eds., *Marriage and Inequality in Chinese Society* (Berkeley: University of California Press, 1991), 204–30.

5 Dorothy Ko, *Teachers of the Inner Chambers: Women and Culture in Seventeenth-Century China* (Stanford: Stanford University Press, 1994).

created new opportunities for women. “The gender system as a whole,” she writes, “proved to be resilient enough to survive the onslaught of socio-economic changes.”⁶

The contributions of this body of scholarship have been tremendous.⁷ It has joined women’s history more fully with intellectual, cultural, and socio-economic history. It has given us at least the echoes of women’s own voices. It has undermined many of our assumptions about the existence of a singular and static Confucian view of women and in doing so has injected into the study of Chinese women’s history a sense of fluidity and change.

Evaluating the nature and extent of that change and the impact it may have had on women, however, is not an easy task. As should be apparent, the scholars discussed above present widely divergent views on the matter. Ropp suggests that the intellectual and cultural trends of the Ming-Qing transition formed a counterdiscourse to a dominant neo-Confucian discourse. Rowe argues that they signified a radical shift in consciousness that changed irrevocably the very basis of the discourse on women. More cautious in their assessments, Mann sees those trends as a reassertion and an affirmation of classical womanly ideals among scholars of Han Learning against Song Learning, and Ko as an elaboration of certain aspects of Confucian thought that in the end solidified rather than undermined the existing gender system. But the difference in their assessments notwithstanding, these scholars all convey some

6 Ibid., 67. To give one example from Ko’s study, the valorization of women writers as more sensitive and less corrupted by worldly concerns than male writers reinforced the notion of women as the more intuitive and sentimental sex. It also assigned value to them only so long as they remained untouched by public concerns, thus reinforcing the notion of separate spheres for women and men.

7 For other important studies on women during the Ming-Qing transition, see Katherine Carlitz, “The Social Uses of Female Virtue in Late Ming Editions of *Lienü Zhuan*,” *Late Imperial China* 12, 2 (Dec. 1991): 117–48; Joanna F. Handlin, “Lü K’un’s New Audience: The Influence of Women’s Literacy on Sixteenth-Century Thought,” in Margery Wolf and Roxane Witke, eds., *Women in Chinese Society* (Stanford: Stanford University Press, 1975), 13–38; Dorothy Ko, “Pursuing Talent and Virtue: Education and Women’s Culture in Seventeenth- and Eighteenth-Century China,” *Late Imperial China* 13, 1 (June 1992): 9–39; Susan Mann, “‘Fuxue’ (Women’s Learning) by Zhang Xuecheng (1738–1801): China’s First History of Women’s Culture,” *Late Imperial China* 13, 1 (June 1992): 40–62; Maureen Robertson, “Voicing the Feminine: Constructions of the Gendered Subject in Lyric Poetry by Women of Medieval and Late Imperial China,” *Late Imperial China* 13, 1 (June 1992): 63–110; Ellen Widmer, “The Epistolary World of Female Talent in Seventeenth-Century China,” *Late Imperial China* 10, 2 (Dec. 1989): 1–43; and Ellen Widmer, “Xiaoqing’s Literary Legacy and the Place of the Woman Writer in Late Imperial China,” *Late Imperial China* 13, 1 (June 1992): 111–55.

sense of positive transformation. The Ming-Qing transition represented a significant period of change for Chinese women and in many ways a change for the better.

At bottom, this body of scholarship, either explicitly as with Ropp's "incipient feminism" and Rowe's "early modernism" or implicitly as with Mann and Ko, sees the Ming-Qing transition as the beginning of a new era, one in which gender constructions and gender relations in China came to resemble more closely those in early modern Western Europe. The chain of logic here is that with increasing commercialization and urbanization China became similar to Western Europe, and that this shared socioeconomic change produced (or should have produced) in both places similar sorts of intellectual and cultural developments, including a reconfiguration of gender norms and relations. In no small measure, then, the more positive image of women's position in this scholarship was the result of what we may call a presumed "bourgeoisification" of gender norms and relations.

Whether this was indeed the case, it seems to me, depends upon placing the intellectual and cultural developments of the time into a broader historical context. This would entail, first of all, relating them to the Ming-Qing present and evaluating their impact on a wider social reality; second, relating them to the past and clarifying more precisely what did and did not change; and third, relating them to the future and delineating what impact they may have had on the emergence of feminism in the late-nineteenth and twentieth centuries. As will become apparent below, I have no answers, only questions, but those lead me to favor a more cautious assessment of the nature and extent of the intellectual changes of the late Ming through mid-Qing and their impact on women as well as to question the validity of an "early modern" approach to the subject.

The Ming-Qing Present

As represented in the current literature, the intellectual and cultural developments of the late Ming through mid-Qing appear to have been very limited geographically. Women poets hailed overwhelmingly from the lower Yangzi region (Jiangnan) as did most of the male critics.⁸ The region was not only the most highly commercialized and urbanized part of the country, it was also the intellectual center of the major challenges to orthodox Song neo-Confucianism

8 Ropp, 18–19; and Mary Backus Rankin, "The Emergence of Women at the End of the Ch'ing: The Case of Ch'iu Chin," in Wolf and Witke, eds., 41.

in the late Ming through mid-Qing.⁹ It was this particular constellation of material and intellectual conditions that gave rise to the developments discussed above. It is not at all certain that such self-conscious communities of women writers existed elsewhere in the realm. It is also not certain whether the intellectual questioning that women writers seemed to have provoked enjoyed a currency much beyond the lower Yangzi region.

Even less certain is what impact those intellectual and cultural developments actually had on women. Other than promoting the publication of women's writings (within of course socially acceptable genres and topics) and perhaps encouraging a classical education for elite daughters, the intellectual questioning of the time seems not to have been translated into political policies or social practices that affected women at large, even elite women, let alone peasant women. It seems not to have influenced law, actual (as opposed to idealized) marriage practices, inheritance practices, family structures, or any other realm of experience that mattered the most to most women.

The Past

Even allowing that, as far as we now know, there was little spillover from the world of ideas into the world of action, the ideas of the late Ming through mid-Qing still need to be evaluated on their own terms. Did they represent a change from the past and, if so, how great was that change?

To assess the nature and extent of change, we need of course to be clear about our standards of comparison. In the scholarship of the 1970's, the intellectual developments of the Ming-Qing transition tended to be juxtaposed against a monolithic "neo-Confucianism" that was thought, among other things, to discourage female literacy and education, emphasize unconditional obedience to the exclusion of reciprocity in hierarchical relationships, and encourage among women a passive compliance to ethical norms. When measured against this standard, the changes in the Ming-Qing transition appeared truly revolutionary indeed.

But as our knowledge of Confucian thought on women has become increasingly sophisticated, the monolith has dissolved and so too has our convenient standard for gauging change. Zhu Xi and other neo-Confucians of the Song period, we now know, defined women's roles in much the same terms as the "progressive" thinkers of the Ming-Qing transition. They too ascribed to women a dominant role in the management of the household; they too envisioned a

9 Benjamin A. Elman, *From Philosophy to Philology: Intellectual and Social Aspects of Change in Late Imperial China* (Cambridge, Mass.: Council on East Asian Studies, Harvard University, 1984).

complementary, companionate sort of marriage; they too believed that women, like men, had to undergo self-cultivation through literary education in order to perform their roles; and they too encouraged women to demonstrate strength and resolve in their fulfillment of ethical norms.¹⁰

The dissolution of the neo-Confucian monolith has made it necessary to find other standards of comparison to evaluate the changes of the Ming-Qing transition. To the extent that this has been done, it seems to me, the result has been a “downgrading” of the scope of those changes. This point can be illustrated with a quick look at the changing understanding in Western scholarship of the famous saying “only an untalented woman is virtuous” (*nüzi wu cai bian shi de* 女子无才便是德). The scholarship of the 1970’s tended to see the phrase as an expression of a neo-Confucian stance against female literacy and education. From this perspective, the developments of the Ming-Qing transition, to quote Paul Ropp, “marked a first step toward the recognition of women’s right to literacy”¹¹ as well as the recognition of women’s literary talents. More recent scholarship has shown that interpretation of the saying to be erroneous. It was not a dictum against female literacy and education per se, but against “frivolous” literary pursuits and the public display of female talents through publication.¹² From this perspective, the debate on women’s education in the Ming-Qing transition was not about whether women could or should be educated, but rather about the content and the purpose of that education (moral training versus aesthetic refinement/literary publication). Thus, the narrowing of our understanding of the dictum’s meaning has brought a narrowing of our assessment of the extent of change in the Ming-Qing transition. With female education rather than female illiteracy as the conceptual starting point, it is a much shorter (though no less significant) intellectual step to an advocacy of the public display of female literary talents.

But outside the area of women’s education, much of the current scholarship does not make explicit the standards that are being used to assess change, even

10 Bettine Birge, “Chu Hsi and Women’s Education,” in Wm. Theodore de Bary and John Chaffee, eds., *Neo-Confucian Education: The Formative Stage* (Berkeley: University of California Press, 1989), 325–67; Bettine Birge, “Women and Property in Sung Dynasty China (960–1279): Neo-Confucianism and Social Change in Chien-chou, Fukien,” Ph.D. diss., Columbia University, 1992; and Patricia Buckley Ebrey, *The Inner Quarters: Marriage and the Lives of Chinese Women in the Sung Period* (Berkeley: University of California Press, 1993).

11 Ropp, 9.

12 Ko, “Pursuing Talent and Virtue,” 16–17; and Charlotte Furth, “Poetry and Women’s Culture in Late Imperial China: Editor’s Introduction,” Symposium on Poetry and Women’s Culture in Late Imperial China, *Late Imperial China* 13, 1 (June 1992): 3–4.

though much comparative evaluation is going on. The intellectual trends of the Ming-Qing transition are variously characterized as being kinder, more sympathetic, more progressive, less restrictive, or less repressive as they related to women. But now that we no longer have the neo-Confucian monolith, the standard of comparison is often not very clear.

As it now stands, sometimes the point of reference is presumed to be a narrow interpretation of Song neo-Confucianism propagated in the early- and mid-Ming period, an interpretation that supposedly emphasized hierarchy over complementarity, blind obedience, and passive conformity (in other words, all those features that we once associated with a monolithic neo-Confucianism). But the problem is that we really do not know enough about the early and mid-Ming to characterize its dominant thinking on women with any certainty. Given the way so many of our easy assumptions have fallen victim to careful research, it remains to be seen whether our current image of the early and mid-Ming would hold up under close scrutiny.

At other times, the standard of comparison is presumed to be the repressive norms of a dominant ideology upheld by the state in the late Ming and Qing and embedded in its laws. This works well enough in certain cases, such as widow chastity, where there is a documentable state stance against which to measure change. But it does not work well in others, such as complementary marriages or valorization of the wife's role in the household, for which we would be very hard put to document any clear state stance that upholds the opposite.

Perhaps for that reason, more often than not, a point of comparison is present only by implication. For instance, when we speak of an emphasis in the Ming-Qing transition on complementary marriages or the role of the wife as moral guardian of the household and when we label that emphasis a major change, we are implying, intentionally or not, that there is something out there, be it a point of view or a popular practice, that embodies something quite different. But what that view or practice might be often goes unstated and unsubstantiated.

To gain a clearer sense of the significance of the ideas of the Ming-Qing transition as ideas, we thus need a clearer sense of our points of reference. Without it, we risk comparing those trends to something no less caricatured than our earlier neo-Confucian monolith and in so doing exaggerate the extent of intellectual change.

The Future

A clearer assessment of the true extent of change is important not only for relating the Ming-Qing transition to the past, but also for relating it to the

future. Had the particular complex of ideas that arose during that time so departed from “tradition” that it provided a fertile ground for the transplantation of Western feminism in the late Qing and in the twentieth century?

In the current literature, Paul Ropp and William Rowe are the most forthright in positing a link between the intellectual developments of the late Ming through mid-Qing and feminism in the late-nineteenth and twentieth centuries—Ropp with his suggestion of the emergence of an indigenous feminism and Rowe with his identification of the developments as “early modern.” As such, their arguments carry a heavy load of teleological assumptions. In their view, China’s thinking on gender during this time came to resemble Western Europe’s, thereby paving the way for the introduction of Western feminist ideas in the late-nineteenth and twentieth centuries.¹³

Part of the problem with this “early modern” approach is that superficial similarities are taken to imply deeper underlying connections. This presumes as given or natural certain connections that instead should be demonstrated. The structure and dynamics of the early modern family and Victorian family were after all rooted in concepts of property rights and individual rights that were truly foreign to the Chinese experience. Conversely, the relationships within the Confucian family were grounded in the idea of cosmically ordained social roles. Within each, surface phenomena such as companionate marriage and the domestic/public split had radically different meanings and radically different consequences. Abstracting such phenomena from their specific cultural and historical contexts only serves to mask this greater realm of difference.

As important, such comparisons with the West often go hand in hand with a tendency to label anything in China that looked “Western” as “progressive” and hence as beneficial to women—for example, the valorization of the wife’s role as moral guardian of the family or the idealization of the wife as helpmate to her husband. This of course overlooks the fact that in the West itself those same phenomena were associated with a decline and not an improvement in the position of women as they came to be relegated to the domestic confines of the bourgeois family. It also obscures, rather than illuminates, what those phenomena actually meant for Chinese women.

Finally, when we turn to the scholarship on women in the late-nineteenth and twentieth centuries, we find little evidence of any crucial, enduring continuity between these presumed earlier impulses toward gender equality and

13 For a critique of this sort of comparative/teleological approach see Philip C. C. Huang, “The Paradigmatic Crisis in Chinese Studies: Paradoxes in Social and Economic History,” *Modern China* 17, 3 (July 1991): 299–341.

the emergence of feminism in China. To be sure, some scholars have suggested a link between mid-Qing writers and late-Qing reformers through the school of Han Learning, but the precise nature of that link has yet to be systematically explored.¹⁴ In any event, the ideas of the late-Qing reformers were swiftly overtaken by the wholesale condemnation of the Confucian tradition by the May Fourth radicals, a condemnation that precluded the selective borrowing from that tradition of elements that could be moulded into a feminist critique.

Partly for that reason, the scholarship on gender in the twentieth century tends to emphasize discontinuity, rather than continuity. Tani Barlow, for instance, argues that gender categories as they had come to be constructed in China were not suitable as a basis for the importation of Western feminism.¹⁵ Gender in imperial China was not conceptualized as a “property of bodies or something originally existent in human beings,”¹⁶ but rather was produced within the context of “differential kin linkages.” Women were defined in kinship-specific, relational terms as daughters, mothers, wives, and daughters-in-law. This construction had two important implications: first that there was no transcendent category of “woman,” the foundation upon which Western feminism was built, and second that the structure of subordination of women in China was grounded in their assigned kinship roles as inferiors in hierarchical relationships (e.g., wife/husband) and not, as in the modern West, in any ideas about innate “natural” differences between women and men.

In Barlow’s view, the importation of Western notions of gender equality thus necessarily involved the importation of the Western female/male binary as well and the construction in China of the new category of *nüxing* (女性, literally, female sex), a “foundational womanhood beyond kin categories” rooted, as it was in the West, in perceived biological/sexual differences. The introduction of this Western-derived *nüxing* brought in its wake a host of notions about the “natural” attributes of women, including “female passivity, biological inferiority, intellectual inability, sexuality, and social absence.” In Barlow’s analysis, then, the introduction of Western feminism involved not a building onto the past, but a complete rupture with it.

But her work also suggests another way in which a link might be established between the twentieth century and the past. Scholars of the Ming-Qing transi-

14 Rankin, 40–43; and Ono Kazuko, *Chinese Women in a Century of Revolution, 1850–1950*, trans. and ed. Joshua A. Fogel (Stanford: Stanford University Press, 1989).

15 Tani Barlow, “Theorizing Woman: *Funü, Guojia, Jiating* [Chinese women, Chinese state, Chinese family],” *Genders* 10 (Spring 1991): 132–60.

16 Barlow, quoting Teresa de Lauretis, “The Technology of Gender,” in *The Technology of Gender* (Bloomington: Indiana University Press, 1987), 3.

tion have tended to concentrate their efforts on seeking out signs of incipient gender equality—hence, the emphasis in the literature on equal education, equal recognition of female literary talents, and complementarity rather than hierarchy in the marital relationship. This “agenda” seems to have been set in part because of the prevailing belief that feminism in the twentieth century was about gender equality. But if, as Barlow suggests, that feminism was as much about gender difference, or the construction of a biological/sexual and culturally perceived inferior *nüxing*, an equally fruitful area of inquiry would be to ask whether that construction had any roots in the past or whether, as she maintains, it was wholly of Western origin.

The scholarship on the Ming-Qing transition suggests that Barlow's distinction between the Chinese and the Western construction of gender might be too starkly drawn. For instance, William Rowe, though emphasizing that Chen Hongmou primarily saw “woman” in kin-specific terms, also points to a strain in Chen's writings that endowed women with “a natural instinct for compassion” and an intellectual ability “cruder and less capable of nuanced understanding than that of men.”¹⁷ In Dorothy Ko's study as well, we see evidence of women being conceived as different from men in their “natural” capacity for intuition and emotion.¹⁸

This notion of essential “natural” differences between the sexes was nothing unique to the late Ming through mid-Qing. It had a long lineage in the yin/yang bipolarity, which, whatever its cosmological complexities and fluidities, had acquired in practice its own ordered hierarchy: yin came to be associated with female and with emotions and yang with male and with rational faculties.¹⁹ But it is possible that the notion of inherent differences was reinforced during that time insofar as socioeconomic changes and female literary attainments compelled a conceptualization of women outside the familiar kinship roles. If that was indeed the case, the relevance of the intellectual and cultural developments of the Ming-Qing transition for the late-nineteenth and twentieth centuries might lie not so much in any incipient gender equality, but in an enhanced gender differentiation.

17 Rowe, 25.

18 Ko, *Teachers of the Inner Chambers*.

19 Ann Anagnost, “Transformations of Gender in Modern China,” in *Gender and Anthropology: Critical Reviews for Research and Teaching* (Washington, D.C.: American Anthropological Association, 1989).

The Perspective from Law

When we shift the focus of analysis from developments in the cultural and intellectual realm to those in law, the late Ming through mid-Qing appears quite different. It appears not as a time of widespread questioning of inherited gender assumptions and roles, but as a time of the consolidation in the legal codes of those very same assumptions and roles.

To date, scholarship on the transformation of women's legal status after the Song has concentrated almost exclusively on the change in the law on women's dowry and the role it played in discouraging widow remarriage (on which more below).²⁰ I suggest here that that change, while of course highly significant, was just one of a host of post-Song legal revisions that affected women. Taken together, those revisions signified a greater legal incorporation of a woman into her marital family and a concurrent weakening of her legal ties with her natal kin. In concrete terms this meant that a married woman came to be legally seen less as a daughter and more as a wife and daughter-in-law.

Below I will first outline some of the major changes in law from the Tang-Song to the Ming-Qing in the areas of betrothal, marriage, divorce, and property rights, and then turn to an analysis of the reasons and significance of those changes.

Betrothal

In later imperial times, a woman's fuller incorporation into her marital family began even before the couple was formally wed. In the Tang and Song, betrothal had not altered the legal relationship between a woman and a man. In the eyes of the law, a betrothed woman was still seen as a daughter and not yet as a wife. Any crimes she committed against her husband-to-be were judged as crimes among unrelated people of equal legal standing (*fanren* 凡人) and not as crimes by a legal inferior (a wife) against a legal superior (her husband).

By Qing times, however, betrothal had become in certain respects tantamount to marriage, and a betrothed woman was to be punished for certain

²⁰ For example, Birge, "Women and Property in Sung Dynasty China"; Patricia Buckley Ebrey, "Shifts in Marriage Finance from the Sixth to the Thirteenth Century," in Watson and Ebrey, eds., 97–132; Jennifer Holmgren, "The Economic Foundations of Virtue: Widow-Remarriage in Early and Modern China," *Australian Journal of Chinese Affairs* 13 (Jan. 1993): 1–27; and Jennifer Holmgren, "Observations on Marriage and Inheritance Practices in Early Mongol and Yuan Society, with Particular Reference to the Levirate," *Journal of Asian History* 20, 2 (1986): 127–92.

crimes just as if she were a wife. For instance, to give just one example, Qing law deemed a woman's murder of her fiancé to be the equivalent of a wife's murder of her husband and as such placed it within the category of the fourth abomination, "abominable unfiliality" (*e'ni* 恶逆), the penalty for which was death by slicing.²¹ Tang and Song law, in contrast, had explicitly excluded betrothed couples from the fourth abomination, noting that since the couple had not yet been formally married, the crime should be handled as one between unrelated people of equal standing.²²

This redefinition of the legal status of a betrothed woman in the later imperial period was accompanied by a greater emphasis on the inviolability of betrothal in general, as can be seen in the changing penalties for broken engagements. Up through the Yuan, a man's family could renege on a betrothal with impunity. The family head who had arranged the engagement was not held criminally liable even if the young man was subsequently betrothed or married to another woman. At most his family was legally required only to forfeit the betrothal gifts (*caili* 彩礼, 财礼) that had been delivered to the woman's family.²³

In stark contrast, should the woman's family break the engagement, the responsible party faced criminal penalties: for instance, in the Tang and Song codes 60 blows of the heavy bamboo for simply breaking the engagement, 100 blows if the daughter had been pledged to someone else, and one and a half years of penal servitude (*tu* 徒) if she had actually married that other man. Moreover, should the man's family still desire it, the original marriage was to take place, even if the daughter had already been married off to another.²⁴

Beginning in the Ming, betrothal became much more legally binding on the man and his family. No longer could they break an engagement and face just the forfeiture of the betrothal gifts. Instead, they faced the same penalties as the woman's family. Moreover, the originally contracted marriage was

21 Shen Jiaben, *Lidai xingfa kao* (Examination of the criminal law of successive dynasties), reprint ed. (Beijing: Zhonghua shuju, 1985), 2162.

22 *Song xingtong* (The Song penal code), reprint ed., punctuated and edited by Wu Yiru (Beijing: Zhonghua shuju, 1984), 8–9.

23 Dai Yanhui, *Tanglü gelun* (Individual discussions on the Tang statutes) (Taoyuan: Hongde yinshuachang, 1965), 82–83; *Song xingtong*, 212–13; and *Shen ke Yuan dianzhang* (Mr. Shen's edition of the "Compendium of Yuan Laws") (Beijing: Zhongguo shudian, 1931), 18: 18a–19a.

24 Dai Yanhui, 82–83; and *Song xingtong*, 212–13.

to take place, even if the son had subsequently become formally engaged to another woman.²⁵

Marriage

In marriage, the fuller incorporation of a wife into her husband's family can be seen, first of all, in the changing laws on incest. In Tang and Song times, for instance, marriage between a widowed wife and one of her deceased husband's agnatic relatives was banned as incestuous only if the relationship between the two men lay within the mourning system. If it lay outside, the marriage would be legally valid.²⁶ In the Ming and Qing, however, the range of incestuous marriages expanded beyond the mourning system, and a widow could not legally marry *any* man of her husband's lineage (*tongzong* 同宗), no matter how distantly the two might be related.²⁷

In a similar way, the line separating incest from simple adultery extended to include all members of a husband's lineage. Thus, in the Tang and Song a wife would be guilty of the crime of incest only if she had sexual intercourse with an agnate of her husband with whom he shared a mourning relationship. If the two bore no mourning obligations for each other, she would be guilty only of the lesser crime of adultery.²⁸ But in the Ming and Qing a wife would be guilty of incest if she had an illicit relationship with any man of her husband's lineage, again regardless of how distantly the two might be related.²⁹

The greater incorporation of a married woman into her husband's family is also demonstrated by the changing laws on widow remarriage, specifically those concerning the respective rights of a woman's natal and marital families in her second marriage. Up until the Qing dynasty the right to negotiate a marriage (*zhuhun* 主婚) for a widow rested with her natal family. The Tang, Song, and Ming codes all state that only a widow's parents or grandparents had the right to force her to remarry (*qiangjia* 强嫁). Anyone else who did so, her parents-in-law included, would be punished, and the remarriage declared legally

25 Xue Yunsheng, *Duli cunyi* (Doubts remaining after perusing the substututes), punctuated and edited by Huang Tsing-chia, 5 vols. (Taipei: Chinese Materials and Research Aids Service Center, 1970 [1905]), 291 (statute 101).

26 Dai Yanhui, 88–89; and *Song xingtong*, 220.

27 Xue Yunsheng, *Tang Ming li hebian* (A joint edition of the Tang and Ming codes) (Taipei: Taiwan shangwu yinshuguan, 1977), 293–94; and Xue Yunsheng, *Duli cunyi*, 299 (statute 109).

28 Dai Yanhui, 260; and *Song xingtong*, 422.

29 Xue Yunsheng, *Tang Ming li hebian*, 605; and Xue Yunsheng, *Duli cunyi*, 1087–88 (statute 368).

void.³⁰ By implication, as legal commentators understood it, the law provided that should a widow be willing to remarry, her parents (or grandparents), and not her parents-in-law, would have the right to negotiate the marriage and receive the betrothal gifts (*zhuhun shoucai* 主婚受财).³¹ The law thus upheld the claims of a natal family to a daughter over the claims of a marital family to a daughter-in-law.

The Qing code radically altered previous law. In keeping with the dynasty's increasingly strident emphasis on widow chastity, it forbade anyone from forcing a widow to remarry against her will, her own parents and grandparents included.³² More importantly for the discussion here, it also transferred first rights to arrange a marriage and collect the betrothal gifts for a willing widow from her natal family to her marital one. As specified in the code, the following members of her deceased husband's family had the right to contract her remarriage: paternal grandparents, parents, paternal uncles and their wives, paternal aunts, elder brothers, elder sisters, and maternal grandparents. Only if none of these relatives existed would the right then go to members of her natal family.³³ In this manner, the claims of a marital family to a daughter-in-law were accorded legal precedence over the claims of a natal family to a daughter.

Interestingly, in later imperial times a widow's remarriage did not necessarily alter her legal status vis-à-vis her former parents-in-law and grandparents-in-law. In Tang-Song times, if a remarried widow scolded, beat, or killed a former parent- or grandparent-in-law, her punishment would be more severe than the penalties for the commission of such crimes against an unrelated person of equal legal standing, but still considerably lighter than those prescribed for a daughter-in-law. For instance, a daughter-in-law who hit a parent- or grandparent-in-law was subject to strangulation, while a remarried widow who hit a former parent- or grandparent-in-law was subject to the much lighter punishment of penal servitude for three years.³⁴

In Ming-Qing times, the penalty for the daughter-in-law and the remarried widow was exactly the same: strangulation for scolding, decapitation for beating, and execution by slicing for murder.³⁵ The reason for the equal punishments,

30 Dai Yanhui, 89–90; *Song xingtong*, 220–21; and Xue Yunsheng, *Tang Ming lü hebian*, 284–85.

31 Shen Jiaben, 2115–18.

32 Xue Yunsheng, *Duli cunyi*, 294–95 (statute 105).

33 *Ibid.*, 295 (substatute 105-01), 313 (statute 117); and Shen Jiaben, 2117.

34 Dai Yanhui, 138, 199; and *Song xingtong*, 274, 350–51.

35 Xue Yunsheng, *Tang Ming lü hebian*, 406, 523, 537; and Xue Yunsheng, *Duli cunyi*, 811 (statute 286), 961 (statute 322), 973 (statute 331).

one commentary to the Qing code explained, was that even when a woman remarries upon the death of her husband, “the bond [with her husband’s family] is not broken (*qi yi wei jue* 其义未绝).”³⁶

Divorce

In imperial law, divorce was divided into two distinct categories: the “seven conditions” (*qichu* 七出) and “the breaking of the bond” (*yijue* 义绝). The former constituted the grounds upon which a husband could divorce his wife if he so chose. It thus represented voluntary divorce. The latter, however, represented compulsory divorce. If one of the situations defined as a “breaking of the bond” obtained, divorce was mandatory, and anyone failing to comply was subject to legal penalties and state-enforced dissolution of the marriage.

The seven conditions remained constant from the Tang up through the Qing, but the “breaking of the bond” underwent significant revision. For our purposes here, the important changes concerned the relationship between the wife’s family and the husband’s family and that between the husband and his wife’s family. In Tang and Song law, the breaking of the bond included acts committed between the two families, specifically the mutual killing between the wife’s and husband’s parents, paternal and maternal grandparents, paternal uncles and their wives, paternal aunts, and brothers and sisters. It also included acts committed by a husband against members of his wife’s natal family, such as beating her parents or grandparents, killing other members of her family, and engaging in adultery with her mother.³⁷ Tang and Song divorce law thus emphasized bilateral kinship ties and a married woman’s dual status as both daughter and wife/daughter-in-law.

In subsequent dynasties the bilateral emphasis of this earlier law gradually disappeared. The Qing code, for instance, completely excluded a married woman’s natal family from the breaking of the bond. It did not mandate divorce for the mutual killing among a married couple’s family members, nor did it mandate divorce for any acts committed by a husband against members of his wife’s family. Instead, it limited the breaking of the bond solely to acts committed by a husband and his family against the wife and acts committed by her against them.³⁸ Thus, in divorce law as well, a married woman came to be constructed less as a daughter and more as a daughter-in-law and wife.

³⁶ Xue Yunsheng, *Duli cunyi*, 973.

³⁷ Dai Yanhui, 92; and *Song xingtong*, 223–24.

³⁸ For a fuller discussion of divorce law in the Qing, see Kathryn Bernhardt, “Women and the Law: Divorce in the Republican Period,” in Kathryn Bernhardt and Philip C. C. Huang,

Property

In the area of women's property rights, the most visible post-Song change, as well as the most widely discussed in the secondary literature, concerned dowry. The relevant law, promulgated first in the Yuan dynasty and then retained in the Ming and Qing codes, ruled that when a widow remarried, her original dowry was to remain with her first husband's family. As analyzed in the existing scholarship, the new dowry law went hand in hand with the growing emphasis in the post-Song period on widow chastity. Though imperial law did not prohibit widow remarriage, it nevertheless greatly discouraged it by depriving the errant widow of her property.³⁹

The connection drawn between dowry and widow chastity is of course demonstrably true, but it does not tell the entire story. For, at bottom, a remarried widow's loss of her original dowry also represented a woman's greater incorporation into her marital family. As discussed above, another major legal change in the later imperial period was the transfer of the right to negotiate a willing widow's remarriage from her natal to her marital family. With the right to negotiate that remarriage came other rights and obligations as well: namely the right to receive the betrothal gifts and the responsibility of paying the widow's marriage expenses, including, if her marital kin saw fit, the provision of a new dowry for her to take into her new marriage. A widow's loss of her original dowry, in other words, did not necessarily mean that she was to go to her second marriage penniless. Rather, the obligation to endow her belonged first and foremost to her deceased husband's family.⁴⁰

Aside from a widow's control of her original dowry, there was another important change in the women's property complex in post-Song times. Throughout Chinese imperial history, daughters possessed only what I have elsewhere called a conditional right to inherit by default.⁴¹ A daughter inherited by default in that she stood to receive family property only in the absence of any brothers (either biological or adopted) and of a widowed mother. At the same time her right to inherit in those circumstances was dependent on the

eds., *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994), 187–214 passim.

39 For the relevant literature, see note 20.

40 Shen Jiaben, 2115–18.

41 See Kathryn Bernhardt, "The Inheritance Rights of Daughters: The Song Anomaly?" *Modern China* (forthcoming, 1995). See this article as well for a discussion of the so-called half-share law of the Song, which supposedly granted an unmarried daughter a set share of family property half the size of a son's share at the time of household division. The article argues that such a law most likely never existed.

wishes of her father, who could legally arrange for a different disposition of the property in a will.

After the Song dynasty there was no change in the fundamental nature of daughters' inheritance rights: daughters of later dynasties still had merely the conditional right to inherit by default. What changed after the Song was that that right became even more conditional. Tang and Song law, for instance, did not require that a male heir be established for a couple who died without a biological or adopted son. In such circumstances, a daughter could succeed to the family property directly. Ming and Qing law, however, stipulated that an heir for the son-less couple had to be appointed from among the father's male agnates within the five grades of mourning. A daughter could inherit only if no such possible heir existed.⁴² In this fashion, a daughter's legal claim to family property became subordinated to the claims of all of her male cousins out to fourth cousins (*zu xiongdi* 族兄弟).

The Peasantization of Law

A useful way to set the above findings in a larger framework is to draw on Jack Goody's recent comparative analysis of marriage and the family in Europe, Africa, and Asia.⁴³ Goody sets up two general models: the African model, the major characteristics of which are bridewealth, the complete incorporation of a woman into her husband's lineage, and the severance of all ties with her natal family; and the Eurasian model, the major characteristics of which are dowry, an emphasis on bilateral kinship ties between a woman's natal and marital families, and the maintenance of direct ties between the woman herself and her natal family. For Goody, the fundamental distinguishing characteristic of each model was the relative emphasis placed on a woman's role as wife/daughter-in-law and her role as daughter. The African model emphasizes the former and the Eurasian model emphasizes the latter. As is well known, Goody places China squarely in the Eurasian category.

Here is not the place to critique Goody's analysis other than to note that his models are static ones that obscure any sense of change over time. But if we take his two models as polar opposites and apply them to the changes in law under discussion, it should be apparent that China in the Tang-Song came

⁴² Xue Yunsheng, *Duli cunyi*, 260 (substatute 88-02).

⁴³ Jack Goody, *The Oriental, the Ancient and the Primitive: Systems of Marriage and the Family in the Pre-industrial Societies of Eurasia* (Cambridge, Eng.: Cambridge University Press, 1990).

closer to his Eurasian model with its emphasis on bilateral kinship relations and a woman's role as daughter, whereas China in the post-Song period came to resemble his African model with its emphasis on patrilineality and a woman's dual role as wife/daughter-in-law.

The difference of course was more a matter of degree than kind, and China was never completely the one or the other. Even in the Tang-Song, women were more incorporated into their marital families than allowed for in Goody's Eurasian model. And conversely, even in later imperial times, women retained more ties, legal and otherwise, to their natal families than allowed for in his African model. But the direction of change in post-Song law was nevertheless clear: a greater emphasis on patrilineal as opposed to bilateral kinship ties and on a woman's role as wife/daughter-in-law as opposed to her role as daughter.

Overall, the transformation in the post-Song era brought about a decline in women's legal status. Specifically, a daughter could no longer inherit her father's property so long as there existed a suitable heir within the five grades of mourning; a widow could no longer take her original dowry with her upon remarriage; a wife had fewer grounds upon which to divorce her husband; a widow had to depend upon her marital family rather than her natal one to arrange a remarriage; and a betrothed daughter came to be treated as a wife in certain criminal matters and thus subject to the harsher punishments reserved for crimes committed by legal inferiors against their superiors. More generally, the post-Song changes removed much of the latitude that the law had once provided for a natal family to intervene on a daughter's behalf and placed her more fully under the legal control of her marital family.

Now, how are we to understand the reasons for the post-Song transformation in codified law? The discussions in the literature on the laws on dowry and widow chastity locate the source of that transformation in changing ideology, most particularly the ascendancy of neo-Confucianism and the attendant pronounced emphasis on patrilineality.⁴⁴ In doing so, they tend to depict imperial law exclusively as an expression (and an enforcer) of ideology and, by extension, tend to see changes in that law principally as the products of change in ideology. But, as Philip Huang has shown, significant revisions in law also came about as adaptations over time to practical reality. Codified law, in other words, reflected not just state ideology, but also popular social practices.⁴⁵

44 Birge, "Women and Property in Sung Dynasty China"; Ebrey, "Shifts in Marriage Finance from the Sixth to the Thirteenth Century"; and Holmgren, "The Economic Foundations of Virtue."

45 Philip C. C. Huang, "Codified Law and Magisterial Adjudication in the Qing," in Bernhardt and Huang, eds., 174–79.

What this suggests is that, apart from ideology, there was another important dynamic at work in the post-Song legal changes relating to women. A number of those changes represented the gradual absorption into codified law of ongoing popular practices and expectations. That process, which can be called the “peasantization of law” (*fali de xiaononghua* 法律的小农化), had the effect of narrowing the gap between codified law and customary practice. Most importantly, in the case of women, the law came to recognize and reflect the economic calculus that underlay the transfer of women from natal families to marital families in peasant society.

The peasantization of law as it concerned women can be illustrated with several examples. As noted above, one of the major changes after the Song was the narrowing of the legal distance between betrothal and formal marriage. By the Qing, betrothal came to be seen as tantamount to marriage in certain respects, and an engaged woman came to be seen more as a daughter-in-law and wife than as a daughter. In this, imperial law came to reflect long-standing peasant practice in which the distinction between betrothal and marriage was not so sharply drawn as in scholarly discourses or indeed as in elite practice. And that peasant practice, I would argue, in turn derived from the large role that betrothal gifts and brideprice (as opposed to dowry) played among peasant families. Through the payment of an oftentimes financially crippling brideprice, the husband’s family acquired strong proprietary claims over the person of the prospective daughter-in-law. Over time imperial law came to reflect that fact.

The same sort of economic consideration also led to the law’s eventual recognition of a marital family’s superior claim to a widowed daughter-in-law’s remarriage. A Qing commentary on the 1740 statute granting such recognition explained that “when a daughter marries out, her natal family (*mujia* 母家) has already received the betrothal gifts (*caili* 财礼). And once a daughter marries, she becomes the daughter-in-law of another family. If perchance her husband dies and she remarries, then of course her marital family (*fujia* 夫家) is to negotiate the contract and receive the betrothal gifts.”⁴⁶ Another commentary noted that the statute was established in recognition of the simple fact that “grandparents and parents are able to dominate completely the wives of sons and grandsons” in the matter of remarriage and to legislate

46 Quoted in Shen Jiaben, 2115. The economic calculus informing the 1740 statute was presaged in a 1673 regulation in the *Qing huidian* (Collected laws of the Qing) which specified that if a widow’s parents or other natal relatives wished to arrange her remarriage, they first had to compensate her husband’s family for the initial brideprice. See Shen Jiaben, 2116.

otherwise would only provoke all sorts of conflict.⁴⁷ As with betrothal, the law on widow remarriage also came to absorb ongoing popular practice and the economic calculus on which it was at least partly based.

In a similar vein, the peasantization of law is also evident in the contraction of women's property rights in post-Song times. In law, a wife's dowry ceased to be seen as her own individual property that she could take into a new marriage should she be widowed. Instead, that property was to remain with her first husband's family. Moreover, as discussed above, another major change in codified law after the Song was the introduction of the provision that daughters could inherit the property of parents who died without any male progeny (biological or adopted) only if there were no suitable candidates among the five grades of mourning who could be appointed as heir. Tang and Song law, in contrast, had contained no such qualification. Yet, as cases from the Song case-book *Collection of Lucid Decisions by Celebrated Judges* (*Minggong shupan qingmingji* 名公書判清明集) make clear, the claims of male cousins to the property of a couple who died heirless did in fact take precedence over the claims of daughters in actual social practice.⁴⁸ The legal revision in the post-Song period thus again represented the incorporation of an ongoing customary practice into codified law as well as the economic considerations that underlay that practice.

None of this, of course, is to suggest that state ideology little mattered or that codified law came to be nothing more than a faithful representation of common social practices. After all, the Ming and Qing codes are full of laws that had far more to do with ideological changes than with popular practices: for example, the discouragement of widow remarriage and the ban on marriage between a widow and any man of her husband's lineage, to name just a couple. The point here is simply that changes in imperial law derived from different sources and that by concentrating on ideology alone, we are missing an important dynamic behind the transformation in women's legal status after the Song.

From the perspective of law, then, the big transition in Chinese women's history occurred not between the Ming and the Qing, but between the Tang-Song and the Ming-Qing. And the process at work was not any "bourgeoisification" of gender norms and gender relations, as the proponents of the "early modern" approach would have it, but rather the peasantization of law that

47 Quoted in *ibid.*, 2115.

48 *Minggong shupan qingmingji* (Collection of lucid decisions by celebrated judges), reprint ed. (Beijing: Zhonghua shuju, 1987), 107–8, 110–11, 253, 265–68, 287–89. See also Bernhardt, "The Inheritance Rights of Daughters."

more firmly fixed a woman legally as the “possession” of her marital family. And far from being a positive change for women, that transition brought a decline in their legal status. The challenge before us is to set the intellectual and cultural developments of the late Ming through mid-Qing within the context of the longer-term transformation from the Song and to uncover and analyze the possible linkages between them.