

Women's Choices under the Law: Marriage, Divorce, and Illicit Sex in the Qing and the Republic

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Abstract

This article examines separately Qing and Republican Chinese law's constructions of women's will, and uses each to illuminate the other. Qing law's construction, though differing greatly from the Guomindang's Republican law that modelled itself after the 1900 German Civil Code, nevertheless did not view women simply as passive entities devoid of will and choice, but rather as beings who chose between "consenting to" and resisting abusive treatment—what this article terms "passive agency." That codified construction is most clearly revealed in a series of provisos centering on the word *he*, "consenting to." Guomindang law, by contrast, on the basis of imported Western laws and legal principles, constructed women as completely independent entities possessing an autonomous will. This article also examines actual legal practice on the basis of 193 (what are termed by archivists) "marriage-related" (or "marriage and illicit sex") cases collected by the author. What is surprising is that although Qing law made harsh demands on abused women (they must resist at any cost, lest they be suspected of the criminal offenses of consenting to illicit sex, to being seduced, to being abducted, and the like), it also gave them important protections, whereas the Guomindang's "modern" constructions of women eliminated those protections. On balance, Qing law actually afforded women who were in weak positions more protection than Guomindang law.

Keywords

agency – passive agency – consenting to illicit sex – consenting to being seduced – consenting to being abducted

* Author's note: My thanks to Norma Diamond, Joseph Esherick, Bradly Reed, Matthew Sommer, and, especially, Kathryn Bernhardt for helpful suggestions. This article first appeared in *Modern China* 27, 1 (Jan. 2001); 3–58, and was incorporated into my book *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, 2001). For publication in this volume, some revisions were made and some elaborations added.

Qing law and Guomindang law conceptualized women's choices very differently. In one, women were seen as possessed only of subordinate will, while in the other, they were seen as autonomous agents. This article examines the Qing and Guomindang constructs in succession and uses each to illuminate the other. While the Qing view contrasts sharply with the Guomindang's, which was based on the German Civil Code of 1900, it did not see women simply as passive entities devoid of will or choice. It attributed to them choices between consenting to and resisting abusive treatment—what I term *passive agency*. That codified construction is most clearly revealed in a series of provisos centering on the word *he* 和, “consenting to.”

This article considers also just how the law worked in practice. Court actions often deviated from codified intent, especially under the transplanted laws of the Republic. Many social practices of the Qing persisted into the Republic, despite radical changes in law, and the courts were placed in the position of having to mediate between codified law and popular practice. It was within the framework set by the multiple dimensions of codified law, social custom, and court actions that individual women litigants exercised their choices.

In the large body of literature on women, some have emphasized especially the kinds of choices and control over their lives, or “agency,” they exercised in late imperial China, despite the patriarchal social order (see especially Ko, 1994; Mann, 1997; Bernhardt, 1999; Sommer, 2000). This article attempts to contribute in a small way by focusing on the relatively unexplored question of how Qing and Guomindang law viewed women's choices and how changes in those views affected women's lives. It will come as no surprise that the Qing view of women as subordinate in will and status disadvantaged women, while the Guomindang reconception expanded, at least for some women, the scope of their agency. The surprising finding, for me, has been that the Qing legal formulation also afforded women some important protections, which the Guomindang's modern reformulation took away.

The main sources for this study, in addition to the relevant codes, are first of all local court cases, most especially 193 cases that Chinese archivists categorize as “marriage related” (*hunyin guanxi* 婚姻关系) or “marriage and illicit sex” (*hunyin jianqing* 婚姻奸情). The Qing cases come mainly from the counties of Baxian in Sichuan and Baodi in Zhili, plus a few from Danshui-Xinzhu in Taiwan, and they span the mid-eighteenth century to the first decade of the twentieth century. The Republican cases come from the four counties of Shunyi in Hebei (present-day Beijing Municipality), Yibin in Sichuan, Yueqing in Zhejiang, and Wujiang in Jiangsu, mainly from the 1930s and 1940s, but also, in the case of Shunyi, from the 1910s and 1920s. Qing Board of Punishment cases and judicial explanations, as well as Republican Supreme Court cases

and Supreme Court and Judicial Yuan explanations, help fill out parts of the story (XAH; Guo Wei, [1912–1946]; Fu Bingchang and Zhou Dingyu, 1964).¹ My purpose is not to provide a comprehensive treatment of the subject but rather to focus on those parts of the law that most affected women in everyday life. We begin therefore first with the case records to identify the areas that saw the most frequent litigation before moving on to consider the pertinent laws.

Part I: The Qing

The Legal Categories and Pertinent Laws

Table 2.1 lists the 131 Qing “Marriage and Illicit Sex” cases I culled from the Baxian and Baodi archives.² Because these cases involve not only (what in Republican terms were) civil issues such as marriage and divorce but also criminal ones such as trafficking in women and rape, the discussion will of necessity draw on both areas of the law.

Disparate as these cases were, they were curiously alike in one respect. As is well known, violations of class status hierarchies were a major concern of Qing law.³ We would consequently expect to find that as a core complaint in court actions. My cases, however, show just the opposite. In not one instance was an offense across class lines an issue. Almost all involved relations between equal commoners (and, on occasion, between commoners and lower degree holders, who were treated the same by the courts). This was true even of the few cases pitting agricultural workers against their employers. In one case, for example, a young daughter of the household and her paramour set out to force her parents to agree to their marriage by bringing suit against them, ostensibly for breaching their marriage contract (Baodi, 171, 1894.12 [m-15]). An affair such as this was probably among the most common of “illicit” rural romantic relationships, since hired workers often lived in the same house and ate at the same table as their employer’s family. But by the mid-Qing, the law had come to treat worker-employer relations in the countryside as largely one between equal commoners (Jing Junjian, 1961: 60, 63; see also Huang, 1985: 98). The court’s judgment against the young couple in this case was based not on status violation but on their having gone against the will of the parents. For our purposes here of analyzing women’s choices under the most often applied provisions of the code, then, the issue of class may be simply set aside.⁴

Buying and Selling of Women and Girls

Turning now to the specifics of the cases, we can group the first five categories in Table 2.1 as broadly concerned with the purchase and sale of women

TABLE 2.1 *Marriage-Related Cases in Qing Baxian and Baodi, by Qing Categories*

Crime	Main Applicable Statute	Baxian	Baodi	Total
Buying/selling wives into marriage (<i>maixiu maixiu</i>)	367	11	5	16
Selling services as a prostitute (<i>maichang</i>)	367	7	1	8
Abduction and seduction (<i>lüeyou</i>)	275	17	1	18
Remarriage of widows (<i>shuangfu gaijia</i>)	105-1	10	4	14
Child raised to become daughter-in-law (<i>tongyangxi</i>)	— ^a	6	1	7
Marriage contract (<i>hunyue</i>) disputes	101	2	1	3
Runaway wives (<i>beifu zaitao</i>)	116	6	8	14
“Adultery” (<i>hejian/diaojian</i>)	366	6	3	9
Dissolution of marriage (<i>liyì</i>)	116	2	2	4
False accusations (<i>wugao</i>)	336	11	1	12
Other ^b	—	21	5	26
Total		99	32	131

Note: The classification of crimes here is according to Qing legal categories.

a. Customary practice not formally recognized in the code.

b. Includes disputes between wives and concubines and various sexual offenses such as peeping and groping.

and girls by husbands and families. The buying and selling of wives into marriage or prostitution, the abduction or seduction of females for sale, the forcible remarriage of widows, and the practice of purchasing young girls as future daughters-in-laws accounted for 63 cases, or nearly half the total, a proportion that is not particularly surprising, given the widespread trafficking in women and girls in the eighteenth and nineteenth centuries (see Sommer, 1994: chap. 5).

The most important statutes here were 367, “encouraging/allowing wives and concubines to commit illicit sex” (*zongrong qiqie fanjian* 纵容妻妾犯奸), and 275, “abduction of people and abduction for sale of people” (*lüeren lüemai ren* 略人略卖人). The first covered both the selling of a wife into marriage or concubinage (*maixiu maixiu* 买休卖休) and the selling of a woman into “prostitution” (*maichang* 卖娼). The Qing term *maixiu maixiu* read literally has to do with a husband’s selling or buying the termination (*xiu* 休) of a marriage,

but it clearly meant that the wife was being sold into marriage and not just being sold or hired out for a short period, since the transaction required the termination of her original marriage. (The latter was no less an offense but was covered by a different statute—102, *diangu qiniu* 典雇妻女, “pawning or hiring out of a wife or daughter.”)

As Matthew Sommer has shown, in the course of the eighteenth century, the selling and buying of wives became so prevalent that Qing judicial opinion came to acknowledge and tolerate it, despite the code's prohibition. By 1818, at least, the Board of Punishment took the position that husbands forced by poverty to sell their wives would not be punished for the offense of *maixiu maixiu* (Sommer, 1994: 386–89). In nine of the sixteen cases from Baxian and Baodi, the sale was said to be on account of poverty.

Bad as the situation of these women must have been, they were probably better off than the wives, daughters, and daughters-in-law who were sold into prostitution. Again, as Sommer (1994) has shown, the Qing code, following the earlier imperial codes, had begun with the notion that all prostitutes were people of lower “mean” status, mostly the *yueren* 乐人, or “music people” (entertainers; e.g., Stat. 113). The law at that point recognized the legality of prostitutes only to the extent of placing them in a subcommoner status group. I would point out, in addition, that the code's word for prostitutes, *chang* (娼 with the *nü* 女 [woman] radical), in fact stemmed originally from the word *chang* 倡 with the *ren* (person) radical, which was interchangeable with *chang* 唱, to sing, with the *kou* (mouth) radical. It was an alternative reference to the “music people,” the *yueren*. After the “music people” became legally classified as commoners in 1723, the word for them, *chang*, came increasingly to mean simply prostitutes, without the original meaning of people of subcommoner status.

As Sommer further shows, the effect of this “emancipation” of the music people was to outlaw prostitutes. As “good commoners” 良人, music people who engaged in prostitution violated the laws against any sex outside marriage (Sommer, 1994: chap. 4; see also Sommer, 2000: chap. 6). But the social reality was that prostitution proliferated and thrived, whether the prostitutes were legally classed as commoners or mean people. In this respect, the most directly relevant part of the Qing code is the same Statute 367 under which *maixiu maixiu* was placed—*zongrong qiqie fanjian*, “encouraging/allowing wives and concubines to commit illicit sex.”⁵ Here, as in the selling of wives into marriage, the criminal fault lay not with the women but with the active actors to whom they were subordinated: the husbands, parents, or parents-in-law who encouraged or allowed them to become prostitutes. Four of the eight cases of this type involved the selling of wives and the other four daughters or daughters-in-law.

Statute 275, *lüeren lüemai ren* 略人略卖人, “abduction of people and the abduction for sale of people,” acknowledged that outsiders, as well as family members, frequently tried to snatch women and drag them off for sale or other nefarious purposes. Here again, we find Qing law assigning culpability to the actors who victimized the women, not to the victims themselves. The law even implicitly equated those women with things taken by theft or robbery by placing this statute under its section on *zeidao* 贼盗, “theft and robbery.”⁶

Seduction, in the code’s eyes, fell into the same category as abduction. Though in principle it drew a distinction between women and girls who were abducted by force or fraud (*lüe* 略) and those who were seduced (*you* 诱), by deception or not, it coupled the two acts together so often that *lüeyou* came to be used almost as a single category.

The original abduction statute, dating back to the Ming, spoke only of the selling of women and girls (as well as men and boys) into slavery. But several substatutes were added during the course of the Qing that addressed other aspects of the problem. As a result, what had originally been a statute of narrow application came to cover any kind of buying and selling of women and girls—not just by relatives but also by outsiders, not just into slavery but also into prostitution or marriage, and not just by force or fraud but also by seduction.

The scope of the statute came to be broad enough, in fact, to overlap with Statute 367’s *maixiu maixiu* stipulation, which strictly speaking had to do with the actions of husbands. Thus, Substatute 275–12 spoke of trading in women or girls to be resold to others as slaves or wives/concubines. It was even broad enough to overlap to a considerable extent with adultery, which was covered as such by Statutes 366 and 367. It spoke, for example, of an “adulterous man” (*jianfu* 奸夫) “seducing by deception” (*youguai* 诱拐) an “adulterous woman” (*jianfu* 奸妇) and of a husband who knowingly (*zhiqing* 知情) encouraged or allowed his wife to commit illicit sex with another, as opposed to one who did not intend to do so (*fei youxin zongrong zhe* 非有心纵容者) and one who forced his wife (*yile* 抑勒) to do so. With eighteen cases in all, “abduction and seduction” is the largest single category in my collection.

The next item in Table 2.1 must be lumped under the buying and selling rubric because in the peasant society of Qing China, once a woman’s husband died, she became vulnerable to abusive treatment by her marital family, the more so if she had no heir or was young and attractive (and therefore could fetch a higher price on the market for women). If a widow (*shuangfu* 孀妇) did not have the recourse of returning to her natal family, she could find herself under great pressure to be remarried (*gaijia* 改嫁) for the betrothal gift

price (*caili* 彩礼, 财礼) she could bring or, worse, be sold into concubinage or prostitution. Eight of our fourteen widow cases concerned disputes over the woman's remarriage, some between her and those bent on remarrying her for what they could get and some between competing claimants to the financial benefits of her remarriage. One involved the selling of a widow into prostitution.

The Qing code lent its weight to the widow who resisted these pressures by acclaiming a bereaved wife for wanting to maintain her "chastity" (*shouzhi* 守志) and making it a crime (punishable by 80 blows with the heavy stick) for the marital or natal family to force her to remarry against her will (*bi shuangfu gaijia* 逼孀妇改嫁). This provision, in Substatute 105-1 ("marrying in mourning"), was a consistent follow-on to the overarching statute, which stipulated that a woman who had carried out the prescribed mourning for her marital parents had a legitimate claim to remain in the household. By praising the virtuous widow, the law gave women who had the stomach for it the space to make a choice.

A child who was sold to be raised to become a daughter-in-law was not so fortunate.⁷ The code itself never formally acknowledged the practice, but the Board of Punishment came during the course of the Qing to acknowledge and tolerate it, thereby lending it a certain legitimacy. In the words of the board, "Among the people, when a family lacks clothing and food and is not able to support a daughter, sometimes they have no choice but to resort to sending the girl to the family of her intended before actual marriage. It is called *tongyang* 童养. The law does not forbid it, but rather follows what is convenient for the people [*tingcong minbian* 听从民便]" (cited in Chen Peng, 1990: 767). (But the jurists made clear, in an 1822 case, that they considered the *tongyangxi* 童养媳 contract equivalent to a betrothal, *dinghun* 定婚, not a marriage, and that sex between the girl and her intended was to be dealt with in the same way as sex between a couple who were not yet formally married, *guomen* 过门 [XIAHL, 2: 634; see also the Qing code's "Analogic Statutes," no. 4, in Xue Yunsheng, [1905] 1970: 5/1311].)

In allowing the selling of young daughters as *tongyangxi*, the board took much the same position it held toward impoverished men who sold their wives into marriage. It acknowledged the reality of a widespread social practice, on one hand, and found a rationale for its action in the plight of the poor, on the other. Those who sold their wives or daughters to survive were to be treated with sympathy, not punished by law. That rationale was consistent with the law's self-representation as an instrument guided by compassion and humaneness toward the poor.

Illicit Sex

The second largest group of cases had to do with what Qing jurists called “illicit sex,” a category that included “runaway wives.” The two main statutes were 116, “expelling a wife” (*chuqi* 出妻), and 336, “committing illicit sex” (*fanjian* 犯奸).

An unhappy or abused wife in Qing society had little recourse other than to “run away” from home. Suing for divorce was not a genuine option, as we will see. So it was often a matter of either putting up with the situation or violating the law. Under Statute 116, a woman found guilty of *beifu zaitao* 背夫在逃, or “[running] away in desertion of the husband,” could be sentenced to 100 blows with the heavy bamboo.

In the eyes of the law, running away included the possibility that a woman was “consenting to being seduced” (*heyou* 和诱) by a would-be seller, in which event the applicable statute would be the one on abduction and seduction, 275, especially Substatutes 2, 13, and 14. If she gave her consent to being seduced into eloping with a paramour, she could be prosecuted under any of three laws: the aforementioned Substatute 275–15 (on the charge of *heyou*); Statute 366, for consenting to be abducted (*helüe* 和略); or Statute 367, for consenting to illicit sex (*hejian* 和奸).

The very term *beifu zaitao* makes clear where the law stood. A wife was expected to remain with her husband. To run away from him was desertion, a criminal offense. This was part and parcel of the Qing’s conception of a marriage as the acquisition of a woman by the patrilineal family. By contrast, a husband was never seen as deserting a wife. If he left her for a period of years without returning home, the code merely assumed (Substat. 116-2) that he was a criminal who had fled from the law (*taowang* 逃亡). Abandonment by a husband for more than three years was one of the two acceptable grounds (the other was injuring her seriously) for a woman to seek to have her marriage dissolved. That stipulation, it is clear, was in theory to apply only to women married to criminals sought by the authorities and on the run for long periods. In practice, however, women who did not know their husbands’ whereabouts and had not heard from them for more than three years sometimes petitioned the courts to dissolve their marriages.

As it happened, many of the wives involved in these cases had simply gone back to their natal families. That was clearly a principal resort of the unhappy or abused wife. Since the code did not forbid her from staying away as long as she wished, the only way her husband could use the law to retrieve her was to represent her act as “running away in desertion of the husband.” Such cases accounted for no fewer than half of the fourteen runaway cases. By not

explicitly prohibiting such actions, the law was implicitly granting wives room for this limited exercise of choice.

The key offenses in the nine “adultery” lawsuits, a matter treated mainly under Statute 366, *fanjian* (犯奸 “committing illicit sex”), were *hejian* (和奸 “consenting to illicit sex”) and *diaojian* (刁奸 “being tricked into illicit sex”).⁸ But what needs to be emphasized here is the crucial difference between *hejian* and adultery in our own sense of the term, with its connotation of coequal agency by both parties. To confuse the one with the other would be a serious misreading of the Qing legal provisions, indeed of the entire conceptual structure of the Qing code with respect to the will of women.

Qing Constructions

When we compare the Qing code to the Guomindang civil and criminal codes, what stands out are not its legal categories as such, which remained in use under Guomindang law, but the set of derivative constructions that Qing law employed specifically for women, which were rejected by Guomindang law. Those involved the use of the word *he* 和, which was coupled with all of the categories discussed above.

When referring to the woman, the *he* meant to consent to the following: *helüe* 和略, consenting to being abducted; *hemai* 和卖, consenting to being sold; *heyou* 和诱, consenting to being seduced; and *hejian* 和奸, consenting to illicit sex. When applied to the man, it meant literally doing something to a woman with her consent—thus, *helüe*, abducting a woman with her consent; *hemai*, selling a woman with her consent; and so forth. Note that this usage was gender specific. The man did the *lüe*, *mai*, *you*, and *jian*. He did not *he*; the woman was the one who *he-ed*.

What these *he* categories reveal, in fact, is the way Qing law saw the nature of choice or will exercised by the woman. In all of these categories, the man was assumed to be the active agent; her choice consisted of consenting or resisting. By way of illustration, consider the Qing conception of the woman's place in marriage. To begin with, she had no say in the selection of a partner (nor, for that matter, did the prospective groom). The language of the code could not have been plainer. Statute 101 stipulated that a written marriage agreement (*hunshu* 婚书)—or, absent a written document, a “private agreement” (*siyue* 私约)—was to be entered into on the basis of “the free consent of two families” (*liangjia...gecong suoyuan* 两家...各从所愿), and the immediately following substatute went on to stipulate that “the grandparents or the parents,” as the heads of the families, were to “preside over a marriage” (*zhuhun* 主婚).

The notion of marriage as an agreement between patrilineal families was extended to qualifications for marriage. Thus, one could not marry any patrilineal relative (i.e., an agnate, or relative through male descent). In fact, by Statute 107, one could not even marry someone of the same surname, the assumption being that the two families would have originated from the same patriline.⁹

Under the patrilineal principle, a woman who married was seen as leaving one patrilineal family for another. Thus, her mourning obligations changed with marriage to focus on the marital family, with three years of required mourning for her parents-in-law, compared with just one year for her own parents (Wu Tan, [c. 1780] 1992: 178–79). Her claims to maintenance, similarly, shifted with marriage to her husband's family. Furthermore, as a widow, if she remarried, she gave up her property claims, such as her custodial powers on behalf of minor sons, in her first marital family. Even her dowry remained her property only if she remained a widow in that family; a widow who remarried forfeited any claim to the dowry she had brought into her marriage (Substat. 78-2).

Within the family, a wife was wholly subordinate to her husband. That gender hierarchy was reflected, among other things, in the way Qing law treated divorce. The woman's husband could "expel" her (*chu* 出) or "terminate his marriage to her" (*xiu* 休) on several grounds: barrenness, wanton conduct, neglect of husband's parents, loquacity, theft, jealousy, and chronic illness. The wife's legal protection against these so-called "seven [reasons for] expelling(s) [a wife]" (*qichu* 七出) consisted merely in the "three limitations" (*san buqu* 三不去), derived first from the claims to full membership in her marital family after observing three years of mourning for her parents-in-law, and, second and third, from the humanitarian face of the law, which forbade a man to expel a wife who had gone through adversity with him (from rags to riches, as it were) or a wife who had no natal home to return to (Stat. 116).¹⁰

For the wife's part, she could not divorce her husband in any true sense of the word. She could, as we saw earlier, apply to the courts for the dissolution of her marriage on a very limited list of grounds: if her husband had deserted her for a prolonged period, seriously injured her (to the extent, say, of breaking a tooth or a bone), forced her into illicit sex, or tried to sell her to another man (see Bernhardt, 1994: 189). But she could never terminate the marriage on her own in the manner her husband could. There was in fact no word in the Qing code to express the notion of a marital breakup in which the active agency rested with the woman. The nearest equivalent was the term *liyi* 离异, "dissolving a marriage," but that was something done by the magistrate, not the woman (see, for example, Stats. 101, 115, 117).¹¹

The same logic applies to the term *hequ* 和娶, used when a man bought the termination of another man's marriage in order to marry his wife. It means "acquiring a wife (by purchase) with her consent" (Stat. 367) and could not mean the reverse.

That was true of all the other parallel constructions involving *he*. Thus, *hejian* could not mean a woman "doing illicit sex to a man with his consent" but only a man "doing illicit sex to a woman with her consent" or a woman "consenting to having illicit sex done to her by a man." The same was true of *helüe*, *heyòu*, and *hemai*. From this point of view, rendering *hejian* as "consensual illicit sex" would be to attribute to it a degree of coequal agency on the part of the woman that went against the entire conceptual structure of the Qing code.

It is for this reason that if we employ the modern terms of "divorce" or "adultery" in reference to Qing law, we need to place them in quotations. Those terms, at least in their contemporary English usage, suggest immediately coequal agency on the part of the man and the woman. Thus, a woman may divorce a man, no less than the reverse. And a woman may actively initiate adultery, no less than the man. By extension, a woman may *you* or *lüe*, "seduce" or "abduct," a man no less than the reverse. But not so in Qing law.

The actions *lüe*, *mai*, *you*, and *jian* were all seen by Qing law as actions done by men to women. For the Qing code, the man was the active agent in all of these offenses and the woman the passive entity, though not a will-less one. He, the law presumed, was the leader (*weishou* 为首) and she the follower (*weiconq* 为从). She had a measure of choice, to be sure, but it was limited to what we might term a "passive agency": she could resist or she could submit.

The law stipulated punishments accordingly. If a man forced a woman into sex (*qiangjian* 强奸), he would be strangled. If he tricked her into it (*diaojian* 刁奸), he would be beaten 100 times with the heavy stick. If he got her to willingly submit or consent to it (*hejian*), he would get 90 blows with the heavy stick if she was married and 80 blows if she was not (unless the victim was a girl under twelve *sui*, in which case the charge would be forcible rape and the sentence strangulation). For the woman's part, if she was forcibly raped, she was not punished. Otherwise, she would be punished along with the man for consenting to the sex act (Stat. 366).

The Qing code, in other words, pictured the woman as subordinate to the man in both status and will. But to the extent that it allowed her even a passive role—the choice, as a woman, of saying "no" to being raped, as a wife to being sold, and as a widow to being remarried—it would be wrong to hold that she wielded no agency at all. Those choices, however limited, were what the law both protected and punished.

Variant Concepts in Legal and Social Practice

We earlier encountered another term for adultery—*tongjian* 通奸, perhaps best rendered as “engaging in illicit sex.” It crops up frequently in court records but appears only once in the code itself, in Statute 367, which spoke of “[husbands] encouraging/allowing wives and concubines to commit illicit sex with others” (*zongrong qiqie yu ren tongjian* 纵容妻妾与人通奸). Because the implied subject of the “tong” is both the man and the woman, *tongjian* suggests more active choice on the part of the woman than the *he* compounds do. Applied to women involved in extramarital relations (i.e., women who *tongjian*-ed with a paramour), it comes fairly close in meaning to the English word *adultery*. *Tongjian* would in fact come to be used in the later Guomindang code to mean adultery.

What this boils down to is that the code provisions notwithstanding, even the highest Qing judicial authorities could not ignore that in real life, women were willing participants in extramarital affairs. A particularly telling example is a case that came before the Fujian branch of the Board of Punishment in 1816. The widow Mrs. Ding (née Huang) had been involved in an affair with Wang Dulai for some time. Later, when the affair came to be known to others, Mrs. Ding regretted it and tried to end the relationship. There was no doubt about Mrs. Ding’s active agency in the affair, a fact that the board’s regional department acknowledged when it chose to refer to her behavior as *tongjian* (“engaging in illicit sex”) in its memorandum (*shuotie* 说帖) on the case (X AHL, 7: 3275). This was not the first or last time the board officials saw fit to use that word when the woman was plainly as involved as the man (X AHL, 7: 3263, 3273, 3275).

But the jurists stopped well short of characterizing Mrs. Ding’s actions as something separate and apart from *hejian*. They in fact used that term interchangeably with *tongjian* in their memo, saying in one passage that Mrs. Ding had “engaged in illicit sex” (*tongjian*) with Wang and, in another, that she had “consented to illicit sex” (*hejian*) with him. Furthermore, in a case that they had considered several years earlier, in 1788, they spoke of sentencing a Mrs. Fang (née Wang), who had “engaged in illicit sex” with a Wang Di, under the “consenting to illicit sex” substatute (X AHL, 7: 3273).

To complicate matters further, the Fujian department proposed to sentence Mrs. Ding under a newer substatute, 366-1, added in 1725, titled “Soldiers and Civilians Doing Illicit Sex to One Another” (*junmin xiangjian* 军民相奸). As Sommer (2000) suggests, once this 1725 law was available, the central-level jurists came increasingly to employ it in cases of what he terms “consensual illicit sex” among commoners (despite the application specified in the title).

The punishment involved was heavier than under the “consenting” law: instead of 80 blows with the heavy bamboo for an unmarried woman and 90 for a married one, it called for 100 blows plus one month in the cangue (Sommer, 2000: 25, 326–27). That was the price Mrs. Ding paid for her “crime,” and likewise a Mrs. Liu (née Xiao; XAHL, 7: 3275).

With the introduction of this statute, yet another term for adultery came into play: *xiangjian* or “doing illicit sex to each other.” As with *tongjian*, the subject of *xiangjian* was both parties, in fact explicitly so. *Xiangjian* therefore also conveyed or acknowledged a more active role for women than was envisioned in the original main legal category of “[a woman] consenting to [having] illicit sex [done to her].” We might speculate that jurists groped for new terms to fit the facts of the cases that came before them. But they never went so far as to spell out a legal formula that would acknowledge women as active agents in illicit sex. That they instead turned to an apparently irrelevant statute for soldiers and civilians to adjudicate such cases suggests that they could not find any other way to overcome the constraints of the existing discursive structure of the law.

When it came to women who were sold, however, the jurists felt no such constraints. They went much further than they did with respect to women involved in illicit sex. As noted earlier, by the early nineteenth century, Qing courts had adopted the position that impoverished people forced to sell themselves for survival should be treated sympathetically and not be punished. That attitude of sympathetic compassion, in turn, allowed contemporary jurists to acknowledge explicitly that women sometimes chose to be sold. Thus, in the lengthy discussions within the Board of Punishment in 1828 (Daoguang 8) about a case involving the sale (and subsequent suicide) of a woman named Li Sanniu, the board’s Statutes and Substatutes Commission (Lüli guan 律例館) wrote,

If the parents . . . sell a [grown-up] son or daughter . . . out of mutual willingness [*liangxiang qingyuan* 两相情愿; that is, on the part of both the parents and the son or daughter], it must be because they have such difficulty surviving that they have no choice. Their situation calls for sympathy. The statute of the law distinguishes only between selling a woman by abducting her [*lüemai* 略卖] and selling a woman by seducing her with her consent [*hemai* 和卖], and does not mention a situation of mutual willingness because it intends not to punish the latter. . . . It should be clear that when a sale occurs with the willingness [*qingyuan* 情愿] of the person being sold, it does not involve seduction [*you* 诱] on the part of the parents and should not be punished. [XAHL, 3: 1391–92]

The commission went on to say in summary,

When parents sell a child . . . there is a distinction between when seduction is involved and when it is not. If they do it for gain, whether by abduction or by seduction . . . they should be punished. But if people who are dirt poor and can otherwise only await death from starvation or cold, who have no other choice but to sell themselves in order to survive, that cannot be considered seduction and should not be punished. [X AHL, 3: 1395]

In short, when poor women elected (*qingyuan*) to be sold to survive, neither they nor their parents should be punished.

Basically, the courts took the same position when wives agreed to be sold by their husbands for reasons of survival. In an 1818 case from Henan, Hu Shi was sold by her husband, Wang Heigou, to Li Cunjing to become his wife. Wang was impoverished and ill, and Hu Shi had no relatives she could go to. The court took the circumstances into account, and instead of requiring that the new marriage be nullified and that Hu Shi be returned to Wang, as the *maixiu maixiu* stipulation of the code called for, it allowed the marriage to Li to stand. If Hu Shi were returned to her original husband, the court noted, she would merely be sold again and would lose her chastity anyway (X AHL, 7: 3287; see also Sommer, 1994: 389).

In the commentaries on the Li Sanniu case, the jurists showed that they in fact were thinking in terms of and applying a three-tiered view of women's agency: being abducted to be sold, being seduced into being sold, and willingly/actively electing to be sold: *lüemai*, *hemai*/ *heyou*, and *qingyuan*. Had a parallel three-tiered view been explicitly formulated with respect to illicit sex, it might have looked something like this: *qiangjian*, *diaojian*/*hejian*, and *tongjian*/*xiangjian*. But where, after all, was the need to push the law that far? Having reached the position that no guilt was attached to the woman who elected or agreed to be sold for lack of any alternative, the jurists found it essential to be explicit and exact in distinguishing between *heyou*, a punishable crime, and *qingyuan*. That was a position they never reached on women involved in illicit sex. Those women were surely guilty in some way, whatever the circumstances, short of clearly forced rape. Hence, there was not the same imperative to distinguish clearly and explicitly between *hejian*, a woman who had illicit sex done to her with her consent, and *tongjian* or *xiangjian*, a woman who elected to engage in it on her own.

Besides, the jurists' worldview may not have allowed them to believe or at least openly say that a "good commoner" woman might actually choose to carry

on an affair of her own volition. To do so would run counter to a fundamental element of the ruling ideology of the Qing: the insistence on the morality of those who were deemed “good.” It was perhaps the constraint of that kind of idealization that pressed them to adjudicate adultery cases involving deliberate choice on the part of the woman under the unrelated 1725 statute. But that insistence on retaining the idealization of the “good commoner” woman, it will be seen, would come with the implicit suspicion that she might not live up to the law’s expectations.

Women as Victims

That some women exercised active agency to an extent not envisioned by the Qing code cannot be ignored. But the main story contained in the case records seems to me actually that of victimization. Bluntly put, women and girls were widely treated as chattel, to be bought and sold for what they might fetch. Almost half of all the marriage-related cases that came before the Baodi and Baxian courts, it will be recalled, involved such transactions.

Unfortunately for many of the women, the late Qing courts routinely tolerated such sales. We have two examples from Baodi County in which the judges held the transaction to be just another contractual sale. In one case in 1865, Zhang Qingtai was impoverished and sold his wife in marriage to Geng Dewang for 90 diao cash, with a go-between and with a written document. But Zhang was apparently not paid in full and brought suit to get the rest of his money, fabricating a charge that Geng had forcibly taken his wife (*bazhan qiqi* 霸占其妻) while he was away. The court treated the matter as a legitimate sale. Despite the legal injunction against buying and selling women into marriage, the court ordered Geng to pay the 10 diao outstanding and commanded both men to file pledges accepting the judgment (Baodi, 169, 1865.5 [m-12]).

In the second case, from 1850, the impoverished Zhang Guoqi had to go off to hire out. Before he left, he sold his wife into marriage to his nephew Zhang Han, with written documentation. When he found, on his return, that Zhang Han had not treated the children well, he brought suit against Han and his father, Zhang Liu, alleging that they had forcibly taken his wife in his absence. During the court session, the facts came out. But the judge did not pay attention to either of the two evident offenses: the buying and selling of a wife into marriage and the violation of the laws against incest (the more severe for violating also generational hierarchy) in a nephew’s marrying a paternal uncle’s wife. Instead, he allowed the contractual sale to stand and the matter to be mediated outside of court (Baodi, 164, 1850.9.25 [m-19]).

Other women had the even sadder fate of being sold into prostitution. A couple of examples from the eight cases of this sort illustrate this. In Baxian in

1821, Zhou Xueru married Li Changgu and then forced her to engage in prostitution (*maichang*). When Changgu's mother complained, Zhou threatened to take Changgu away and simply sell her off as a prostitute. Changgu, as it happened, was fortunate enough to have a mother with the strength of will to bring suit against Zhou for "forcing his wife to be a prostitute" (*bi qi wei chang* 逼妻为娼) and get a court order to have her daughter returned to her (Baxian, 6.3: 8628, 1821.4.16 [m-20]). More typical, no doubt, was the other case, from 1784. Shen Boxi took Zhao Tengyou's widowed aunt as a concubine and then forced her to engage in prostitution. Zhao brought suit, but Shen was able to deflect the charges by claiming that Zhao's allegations were baseless—he had simply mistaken Shen's relatives for customers. The record stops there (Baxian, 6.1: 1764, 1784.8.18 [m-76]).

Young girls were the most vulnerable to being sold. In *tongyangxi* arrangements, the intended groom and bride, growing up together as children, often did not get along or were not sexually attracted to each other, and the family might decide not to go through with the marriage. When that happened, the boy's family was likely to want to sell the girl to recoup its expenses. In one 1788 Baxian case, the *tongyangxi* girl was doubly victimized because she had been abducted from her intended's home. Young Xu Ergu, betrothed as a child to Qu Rong's son, was found and returned to the Qus, but they now saw her as soiled and no longer wanted her. The prospective father-in-law intended to sell her but first came to court to establish legally that she could not now make a proper wife (Baxian, 6.1: 1781, 1788.5.15 [m-82]). In all seven of the *tongyangxi* cases from Baxian and Baodi counties, the girls or women had been victimized in one way or another: mistreated by their betrothal families, abducted to be sold, resold to someone else in marriage, or forced into prostitution.

The trafficking in women and girls seems to have been particularly widespread in eighteenth-century Baxian. We have multiple instances of yamen officials arresting men on suspicion of that charge. One 1783 record shows the arrest and trial of four suspected *renfan* 人贩, or "dealers in humans," with details on how many each had sold for how much (Baxian, 6.1: 1751, 1783.3.1 [m-68]). Another shows the arrest of a Xiang Hong in 1786 on suspicion of having abducted the two young girls he was with. Court investigations revealed that two other men were involved. The girls, unclaimed, were then housed and sold by the yamen, one as a wife for 6,000 wen and the other as an adopted daughter (*yinü* 义女) (Baxian, 6.1: 1768, 1786.2.6 [m-11]). In two other cases, however, the yamen did not punish the offenders. In one, from 1779, a lower degree holder (*jiansheng* 监生) named Wang Xixian was able to "prove," with the connivance of his mother, that one of the two girls he was found with was intended to be his own concubine and the second his mother's maid. He got off

with just a light warning for attempting to purchase the termination of marriage (maixiu) (Baxian, 6.1: 1731, 1779.11.29 [m-1]).

The point here is simply the widespread abuse of women and girls in the Qing. Still, we might do well to keep in mind those women who, because of special strength of character or personality, were able to assert themselves even in the face of their victimization. My county cases contain one such example. The widow Feng Shi of Baxian town had been purchased as a wife by a man from Fujian named Guan Zhongshen, for a price that she and her mother set at sixteen taels of silver. But when her new husband wanted to take her back to Fujian, Feng Shi refused unless she was paid an additional twenty taels. Arguments between the two came to a head, and Feng apparently wielded a chopping knife as she yelled and screamed. Guan had no sooner managed to overpower her and tie her up when the neighbors came rushing to her aid against the outsider and hauled him off to the county yamen. At the same time, Feng's mother, Chen Shi, filed suit against Guan, charging that he intended to take her daughter out of the county to sell her. The magistrate found for Guan, since he had married Feng legitimately and evidently had no intention of selling her. Guan was to be allowed to take her to Fujian. But to mollify the aging mother, the court ordered Guan to pay her five taels. In the end, then, the two women, though they lost the case, still managed to extract from the husband some measure of payment in return for their compliance with his wishes (Baxian, 6.2: 4131, 1797.8.12 [m-13]).

Other women who took matters into their own hands had even better success at finding some protection under the law. In an 1853 Baxian case, for example, Liu Shi's husband, Ren Yangyu, sold her against her will into marriage to a certain Wang for 6,000 wen. Liu Shi was able to get the transaction nullified by charging that her husband had violated the proscription against selling the termination of marriage and by getting her natal father to repay Wang. The court ordered the dissolution of both her marriage to Ren and her marriage to Wang (Baxian, 6.4: 5048, 1853.7 [m-35]).

In another Baxian case, from 1788, an ailing husband, Li Desheng, who felt unable to support his beloved wife, Hu Shi, contracted with a written document to sell her in marriage to a Zhang Shun. Hu Shi, however, apparently because of her commitment to Li, brought suit to annul the arrangement on the grounds that she was willing to bear the poverty and continue to live with her husband. She wished, she said, to remain faithful to her husband (*shouzhen* 守贞). That representation gave her the moral high ground, whether in court or out. The case was resolved by mediators, who arranged for her to remain married to Li and for Zhang Shun to willingly withdraw from the contract to marry her. The court was pleased to go along (Baxian, 6.1: 1786, 1788.1.25 [m-42]).

An 1845 Baodi case has another woman, in this instance a widow, fruitfully resorting to the state-sponsored ideal of chastity. This was still another Hu Shi, who was sued by her dead husband's brother Zhang Mo. He charged that the widow had committed adultery, as evidenced by her bearing a daughter, and he wished to expel her from the family and deny her any claim to property or support. But Hu Shi managed to turn the fact that she had remained unwed, and hence "chaste" in that sense, to her advantage. She insisted that she had not committed adultery and had no idea how she came to bear a daughter, who in any event had died at birth. In the end, this case too was settled by community mediators, who arranged for a six-way division of the deceased husband's property: one share to each of his five sons (two from his first marriage and three by Hu Shi) and one to Hu Shi for her old-age maintenance. Once again, the court went along (Baodi, 162: 1845.3 [m-8]; see also Huang, 1996: 104; Sommer, 1996: 114–16).

Another way in which women were able to exploit the law was touched on earlier: "temporarily" leaving their husbands and/or in-laws to return to their natal homes. Though our Baxian records do not contain any cases of the sort, the Baodi group contains 7, a stunningly large number in a total of 32 "marriage-related" cases. Such representation suggests that this might have been quite a common phenomenon.

Consider the following two examples. In an 1825 case, Mrs. Tian had frequently gone back to her natal uncle's home for extended periods because she was mistreated by her mother-in-law, Zhou Shi. On one occasion, Zhou went to the uncle's house to get her daughter-in-law, wielding a chopping knife, and the uncle brought suit against her (Baodi, 182, 1825.2.19 [m-18]). In the other case, from 1814, Mrs. Liu had frequently returned to her natal home. Her husband brought suit, on the grounds that he and his brother had now undergone household division and he needed her at home. A fight ensued between the husband and the wife's father, Zhang Qi (Baodi, 170, 1814.6 [m-16]). In both of these cases, the court made no clear-cut ruling, since the law did not forbid a wife from going back to her natal home, and left things for mediators to settle. In the first, though the mediated settlement required Mrs. Tian to return to her marital home, we can surmise that as with any mediated case, there was room for negotiation and compromise and that this was not an unequivocal victory for the husband. In the second case, the mediators made no mention at all of the "runaway" issue and only addressed the fight.

A third Baodi example, from 1837, demonstrates how the law typically tilted toward the husband but also shows how a mistreated wife could exert some leverage on him and her in-laws. Mrs. Chen, née Li, a slip of a girl of just sixteen sui, returned to her natal home claiming that her husband, Chen Liu, and

his mother mistreated her, making her do heavy work and then beating and scolding her when she could not. Her father-in-law, Chen He, brought suit for her return, representing to the court that a “bandit” had seduced the girl away. The court, after learning the facts of the matter, ordered Mrs. Chen to return to her marital home and to pledge that she would obey her mother-in-law and her husband. That was consistent with the official ideology of the law. But at the same time, the court also ordered the young man and his father to file a pledge that they would not mistreat the young woman. That, presumably, would have served as some deterrent in the future (Baodi, 166: 1837.5.22 [m-3]).

In these cases, the agency exercised by the women, to be sure, fell well short of the active agency later envisioned by Guomindang law. Women could not seek to improve their relationship with their husbands by asserting themselves from a position of equality, nor could they seek a divorce. What they could do was truly in the nature of passive agency: to say no to being sold or remarried and to gain temporary reprieve and escape from their condition. Qing law, as the cases make clear, allowed and protected those legal spaces.

The Burdens of Passive Agency

Women paid a dear price for the protection that they got under the Qing code. The law protected their “right” to say no, to be sure, but it also made them criminally liable when they did not. In a Shaanxi case of 1826, for example, the Board of Punishment made some allowance for the fact that Mrs. Guo (née Yuan), who had run off with her lover, Wang Yongwa, later regretted her action and turned herself in. She was deemed not to have committed the more serious offense of heyou, consenting to being seduced (into running away), but was still found guilty of hejian, consenting to illicit sex, and was sentenced to the prescribed punishment: 90 blows with the heavy bamboo (Stat. 366). As for Wang, he was guilty of both charges and was sentenced to the more severe punishment for heyou: 90 blows with the heavy bamboo plus two and a half years’ penal servitude (X AHL, 3: 1383). In an 1810 case from Anhui, the court completely exonerated Mrs. Jin (née Wu), who was duped by her brother-in-law Jin Cai in a scheme to sell her into (re)marriage. On the way, she found out what the real purpose of her journey was (the ostensible purpose is not mentioned in the case record) and ran off. The court ruled that since Wu Shi was “abducted/ seduced by fraud” (lüeyou) and did not know the truth (*bu zhiqing* 不知情), she was not guilty of any offense and would simply be returned to her husband (X AHL, 3: 1397).

But Mrs. Jin would have been liable and punishable had she known what was up and agreed to go along. In Zhili in 1820, a Mrs. Yang (née Liu) allowed her uncle Liu Wu to sell her into an illegal (re)marriage. The court found her

guilty of hemai, consenting to being sold into an illegal marriage. He got the maximum sentence, 90 blows of the heavy bamboo, plus two and a half years' penal servitude, and Liu Shi herself drew a sentence one grade lower in severity, 80 blows and two years (X AHL, 3: 1389). In the eyes of the court, Mrs. Yang may have been exercising only limited choice, but it was agency enough to warrant her the severe sentence.

Nevertheless, even though there was no question whatsoever about Mrs. Yang's willing involvement, she still got off more lightly than her uncle because as a woman she was not entirely free to act on her own free will. What that stance of the law meant in practice, among other things, was a great deal of leverage for the husband to use against a wife who might be willing to breach the law to get away from him. He could bring the wrath of the law down not only on her but also on the man involved. In addition, some magistrates may have allowed husbands a good deal of leeway in determining whether and how their wives would be punished. In Baxian in 1853, for example, Pang Shuangtai's wife loathed the poverty that she had to endure with her husband and ran off with one of their neighbors, Xie Er. Her husband later found her and brought her and her lover to court. Pang apparently still wanted her as his wife, and the court obliged by simply returning her to him. It did not impose on her the punishment for heyou that the code prescribed (Baxian, 6.4: 5046, 1853.8.8 [m-34]). The wife's paramour, perhaps because of the court's leniency toward Mrs. Pang, got off with just a rebuke. Another runaway wife, Li Shi, had a less forgiving husband. Because he did not want her back, the Baxian yamen sold her into marriage with the help of an official go-between and turned the betrothal price of 7,000 wen over to her mother-in-law (Baxian, 6.1 1778, 1778.3.7 [m-119]). Such latitude on the part of the husband could only have increased his power over his wife.¹²

It was in matters of illicit sex that the legal system placed the most stringent demands on women. With cases of abduction and seduction, the line between the woman's being forced or deceived and her willing consent was relatively easy to draw, if only because the parties involved would be traveling in public and there would often be witnesses. With illicit sex, however, the line between forced rape, qiangjian, and consenting to illicit sex, hejian, was much harder to establish. Perhaps for that reason, women could find themselves subjected to demands to prove their virtue or else be suspected of complicity. They were, as has been seen, idealized by the law as virtuous "good commoners" who would not of their own free will elect to commit illicit sex; husbands who forced them to do so were to be punished (Stat. 367). The other side of that coin, in that same statute, was the suspicion that they might not live up to the high standards set for them.

In a Shandong case in 1827, for example, Wang Tingkui tried to rape Mrs. Ju (née Huang) while an accomplice, Jia, stood watch outside the house. Mrs. Ju resisted, and before Wang could overpower her, someone walked by the house. Jia warned Wang and then ran off. Wang too tried to run away, but Mrs. Ju grabbed him by his clothing. When Wang managed to wrestle himself free, he stabbed Mrs. Ju in the arm and the back and fled the scene. There seemed little question that the case was a matter of attempted forcible rape. But Wang's brother, Tingmei, filed a charge with the county yamen that Mrs. Ju had been a woman of questionable virtue before she married. He named his neighbor Mrs. Jia (née Chen) as a witness. By the stipulations of the Qing code, if Tingmei could succeed in tarnishing Mrs. Ju's reputation, then his brother Tingkui would not be punished with the same degree of severity as if he had attempted to rape a "virtuous" woman. That was his intent.

Before the court could hear the Wang Tingmei case, Mrs. Ju's uncle died, and she wanted to go to her natal village for the funeral. But her husband objected, turning his anger on her for wanting to leave home before her name had been cleared before the county court. In her frustration and fury, she went to Jia's house and there, just inside the front gate, slit her throat. Before her suicide, she declared that she regretted that she had not died resisting the rapist. The county yamen's later investigation showed Wang Tingmei's charge to be completely groundless, denied by the very witness he had named. The decision came too late to change the tragic outcome (X AHL, 7: 3277–3279).

This case shows well the burden placed on the woman by Qing law and Qing society. As Sommer has shown, Ming and Qing courts set a high standard of proof for cases of forcible rape: the woman needed physical evidence of violent force, such as injury or torn clothing, and ideally also a witness (Sommer, 1994: 79–81; see also Sommer, 2000; Ng, 1987). In this case, Mrs. Ju certainly had injuries to show for her efforts to repel and capture the attempted rapist. She was nevertheless vulnerable to the suspicion that she had somehow been a party to his actions. That her past life could be put on trial through a fraudulent charge only underscored the burdens placed on victims like her. Her final act was itself a powerful statement against the system into which she was trapped: she could be above suspicion of complicity only if she had died resisting.

And even this was sometimes not enough. In 1825 in Zhili, Mrs. Wang (née He) was killed by a man named Wang Suiqing. According to Wang, he had first flirted with her the day before and then made arrangements to meet her the next night. While he was carrying on with her in her room, her brother-in-law heard the sounds and came to the room, whereupon Wang stabbed him in the cheek and chest. He claimed that Mrs. Wang, thinking that he had killed her brother-in-law and fearing that she would be implicated in the murder, then

grabbed him by his clothes, screamed, and held on for dear life. Wang, unable to get away, stabbed her several times, and when she still hung on to him, he stabbed her three more times. Mrs. Wang, he testified, then tried to ram him with her head, and he finally drove his knife into her chest and killed her.

The governor of Zhili swallowed Wang Suiqing's story that the two had had a prearranged meeting and that he had only killed the woman in an attempt to get away from her, with the result that Wang was convicted of a lesser charge than attempted rape and murder. The pertinent department of the Board of Punishment, however, observed in its review of the case that the account was highly suspect. How could a weak woman like Mrs. Wang have hung on to the perpetrator Wang Suiqing after all those stabs and wounds? Was it not a case of Wang Suiqing thinking he had killed the brother-in-law and wanting to silence Mrs. Wang, the lone witness? And if it were true that he met her by prior arrangement, why would he carry a knife with him? On those grounds, the department recommended that the case be sent back to the governor for clarification.

Though the board limited its comments to questions, it is clear that at least on the face of the evidence, this was most likely a case of attempted rape, rather than a prearranged tryst, and of intentional killing, rather than accidental manslaughter. But the governor apparently stuck to his original report, insisting that no new evidence could be uncovered, and the case was closed as originally reported and adjudged (X AHL, 7: 3279–3281). Mrs. Wang's virtue, in the end, remained forever suspect even though she had died struggling with Wang Suiqing.

In short, Qing law saw women as possessed of little will of their own, consistent with its view of women as subordinate in status to men. They were seen as exercising what I term the passive agency of choosing between consenting to and resisting abuses against them. That view of women led to legislation to protect their "right" to make such a choice, especially in the matter of being forced into marriage by their husbands and into remarriage by their in-laws. That was one side of the story. At the same time, that view led to the suspicion that women could easily be induced to consent to various abuses. The same legislation that protected their limited agency, therefore, also punished them severely for the failure to put up strong enough resistance. Applied to seduction, the law imposed harsh punishments on women who did not resist. Applied to rape, that same logic demanded of women that they prove their virtue or else be suspected of complicity through consent. That was the other side of the story. Women in the Qing, in other words, were at once protected and burdened by the law's view of them as possessed only of subordinate will.

Part 2: The Republic

Turning now to the Republic: just what did the Guomindang's vision of women as autonomous active agents mean in codified law, and how did it affect court actions? Here we look first at the general principles and specific provisions of the laws on marriage, divorce, and adultery. That discussion covers not only the 1929–1930 civil code but also the 1928 criminal code and the revised 1935 criminal code. We then examine how those laws translated into action, as seen through Judicial Yuan explanations and cases from the Supreme Court and the local courts.

Women's Agency in Guomindang Law

In contrast to the Qing code, Guomindang law rejected hierarchical relations in favor of the equality of all citizens before the law. As a “natural person,” a woman possessed the same rights and obligations as a man (Book I, “General Principles,” chap. 2, “Persons”), including making her own choice of a marriage partner. Parental permission was not required unless she or the man was a minor (Art. 981). Otherwise, a marriage agreement was to be made “by the male and female parties of their own accord,” not by two families, as before (Art. 972). Those rights also meant that daughters were able to inherit land and other things as “lineal descendants by blood,” the same as sons (Art. 1138). And the property she inherited and the dowry she brought to marriage remained hers alone under whatever circumstances, in the event of remarriage in widowhood, for example (Arts. 1058, 1138). Not least, a wife no longer had to stay in an abusive relationship. She, no less than her husband, could “apply to a court for a divorce” on such grounds as adultery, ill treatment, abandonment “in bad faith,” and “loathsome” and “incurable disease” (Art. 1052).¹³

Underlying these provisions was the notion that all social relations were at bottom matters of voluntary contracts between equal parties. That was how economic relations were seen, with contracts giving rise to rights and obligations. It was also how social relations were seen. The marriage agreement was a contract between two equal individuals in which the couple might, for example, elect by contract the matrimonial property regime they wished, whether the “community property regime,” “unity of property regime,” or “separation of property regime” (Art. 1004). It was the woman acting as an independent contracting unit that best expressed the autonomous agency the Guomindang lawmakers envisioned for her.

The Selling of Women and Girls and the Remarriage of Widows

Guomindang law, as one would expect, was as firmly set as Qing law on punishing anyone who sold women against their will into marriage or prostitution.

The penalties, as laid out in Article 315 of the 1928 criminal code, were severe: “Whoever with intent to cause a woman to enter into a married state with the offender himself or with another person, thereby abducting her, shall be punished with imprisonment for a term of not less than one year or more than seven years,” and “Whoever, for lucrative purposes, or with intent to cause a woman to commit an indecent act or adultery, thereby abducting her, shall be punished with imprisonment for a term of not less than three years or more than ten years, and a fine of not more than one thousand dollars may also be sentenced” (slightly altered from the English translation of the 1928 code). Importantly, though the Qing terminology was picked up in this article (“abduction” was still *lüeyou*), the offense now qualified as “interference with personal liberty” (*fanghai zìyóu zuì* 妨害自由罪), not as an act of “theft and robbery,” where the Qing code had positioned it. The placement was consistent with the rights approach to legislation: abduction was an offense because it violated the right of a person to liberty, not because it was a theft or robbery of a possession.

The big change in the Guomindang law’s approach to the buying and selling of women and girls was the total rejection of the Qing view of women as consenting parties to their own victimization. It did not use any of the *he* terms for adult women and retained only *heyóu* for minors. Thus, Article 257 of the 1928 code provided the following: “Whoever [seduces with consent, *heyóu*, and] kidnaps or abducts [*lüeyóu*] any male or female person under twenty years of age to break off the relationship from his legal relatives, supervisor, or guardian, shall be punished with imprisonment for a term of not less than six months nor more than five years.”¹⁴ As an independent agent, a woman of adult age could not be a victim of seduction, only of forcible abduction. A mature woman who voluntarily agreed to be sold to someone as a wife, concubine, or prostitute was generally not liable to punishment. Nor was the buyer or seller. In the case of a married woman, though, the choice was not entirely hers. As Article 256 of the 1928 code put it, “Whoever, being a woman, whose husband is living, commits adultery with any person, shall be punished with imprisonment for a term of not more than two years.” A married woman who allowed herself to be sold into marriage or prostitution, in other words, certainly at least stood the risk of being prosecuted for adultery. But the charges could only be brought by the husband, as the Supreme Court had made clear as early as 1913 (Fu Bingchang and Zhou Dingyu, 1964: 3/660). If the husband went along with the action (if he, that is, “connived [*zongrong*] at the adultery of his wife”), then “no complaint would be allowed” (Art. 259).¹⁵ That is to say, if the husband and wife both agreed to sell her, then neither would be punishable. That was in clear contrast to Qing law, which held both to be criminally liable.

Another legal caveat was set out in Article 246: anyone who “for lucrative purposes induces [*yinyou* 引诱] a woman belonging to a respectable family [*liangjia funü* 良家妇女] to have indecent behavior or illicit intercourse with any person” risked up to three years’ imprisonment and a fine of 500 dollars. The following article, 247, applied this provision specifically to the husband: “Whoever, being the husband of a woman, commits the offense specified under the preceding Article against his own wife. . . .” But the law’s intent was made clear by the Supreme Court, which ruled in a decision in 1932 that neither article would apply “if the woman acted of her own will” (Fu Bingchang and Zhou Dingyu, 1964: 3/617). Once again, if the woman was willing, then the husband would not be held criminally liable.

Under Guomindang law, engaging in prostitution was not illegal, as it had been under Qing law. If an adult woman wished to take up that line of work, that was her choice. A man who sold a prostitute’s services was not liable either, unless he forced her into the act or she was a minor under sixteen (Art. 249). And the aforementioned Article 246, about “inducing” a respectable woman into “indecent behavior” or “illicit intercourse,” was to apply only if she was induced against her will.¹⁶

So far as women were concerned, in short, the Guomindang legal system narrowed the scope of both punishability and protection under the law. In the Qing, the code’s *he* category of offenses encompassed a broad range of actions that did not qualify as abduction by either force or fraud. Because a woman was not a free agent, the law provided both protection for her if she resisted and punishment for her if she did not. Guomindang law, by contrast, placed those actions entirely under the woman’s own agency and responsibility, neither punishable nor protected by the legal system.

Guomindang law also considerably narrowed the protection given to widows. The criminal code did forbid, in Article 315, anyone “abducting” a woman into marriage against her will. But beyond that, Guomindang law left matters strictly up to the woman herself. It discarded the Qing code’s stricture, on the grounds of chastity, against compelling widows to remarry against their will. Chastity was no longer an ideal upheld by the state. And since a widow now had the right to determine her own fate, there was no need to protect the little agency that Qing law had granted her. The result was to wedge the door open for families eager to rid themselves of a financial responsibility.

But even as Guomindang law took away this small measure of protection with one hand, it gave a widow a potentially larger one with the other. For she was now entitled to a share of her husband’s estate, equal to that of her children if she had any and equal to one-half of the total otherwise (the other half going to the husband’s parents or brothers and sisters) (Art. 1144; see also

Art. 1138). Under the Qing code, her property claims were merely derivative from those of her sons or husband: she had custodial rights on behalf of minor sons, and she had the right to old-age maintenance by her sons. But she was not an heir to her husband's property in her own right.

Moreover, under the Qing code, as already discussed, all her property and property-related claims ceased with remarriage. Since her claims were derivative of the males in the patrilineal family, once she remarried, those claims on the first marital family ended, to be replaced by her derivative claims in her new marital family. Even her dowry was to remain with her first husband's family. But for a widow, no less than a wife or daughter, property rights now attached to her person. She held the same rights to her deceased husband's properties whether she remarried or not. And her dowry, as well as any property she might have inherited from her natal family, remained hers throughout.

These expanded property rights no doubt gave a widow some leverage against her marital relatives by removing an incentive for expelling her (in order, for example, to take over her dowry) and by imposing a constraint against expelling her (because she would get to take her property with her). The question is, did she win enough to outweigh the legal and moral claim that she could wield in the Qing under the state-sponsored ideal of chastity?

As for the *tongyangxi*, they now simply became legal nonpersons. The Guomintang code was hardly likely to endorse a practice that even the Qing code never formally acknowledged. But the Qing courts, we have seen, did accord some degree of legitimacy to the custom of selling girls as future daughters-in-law by tolerating it in the name of compassion for the poor and also by treating it as tantamount to a betrothal. That the Guomintang judges refused to do. They acted strictly by the letter of the law, with consequences that were not always those intended by the lawmakers.

Runaway Wives, Divorce, and Adultery

The Qing code had made a wife's desertion of her husband a punishable crime (by 100 blows with the heavy bamboo). But it had no comparable conception for the husband, only the assumption that a missing husband must be a criminal on the run from the law. The Guomintang code, by contrast, employed the new concept of *yiqi* 遗弃, perhaps best rendered as "abandon," to distinguish it from "desertion" or *zaitao* 在逃.¹⁷ The full expression was *yi eyi yiqi* 以恶意遗弃, or "abandon in bad faith," and it applied to either the husband or the wife. Though not criminally punishable, abandoning a spouse constituted legal grounds for divorce (Art. 1052–5).

As for wives who returned to their natal homes for extended periods, husbands got some measure of legal recourse in the law's position on "cohabitation"

(*tongju* 同居). Under the civil code, spouses had the mutual obligation to live together (*fuqi hufu tongju zhi yiwu* 夫妻互负同居之义务; Art. 1001). This represented in theory somewhat expanded rights for husbands; in the Qing, they could only resort to trumped-up charges of desertion since the law did not contain any stipulation against a woman's returning to her natal home for long periods. Now husbands could appeal to the courts on the grounds of their wives' obligation to live with them.

We earlier noted how, under Guomindang law, adultery came to take on the modern sense of the word and to be given a new name—*tongjian*. Unlike the Qing code's "hejian," with its relegation of the woman's role to either complying with or resisting what was being done to her by a man, "*tongjian*" imputed equally active agency to both parties. And it applied only to married people. The new law rejected the Qing view of "illicit sex" as any kind of sex outside of marriage. Unmarried consensual sex was not illegal. As the lawmakers explained in connection with the article on adultery in the revised criminal code of 1935 (Art. 239), though one opinion held that sex between unmarried adults should be made a criminal offense, the drafters of the law had decided that such actions should be deterred by education, not punishment (Fu Bingchang and Zhou Dingyu, 1964: 3/628). But adultery was something else because, in the 1928 criminal code's words, it consisted of "offenses against marriage and family" (*fanghai hunyin ji jiating zui* 妨害婚姻及家庭罪).

Still, for all the Guomindang's avowed commitment to gender equality, the 1928 code made adultery a crime only for a wife (punishable by up to two years' imprisonment; Art. 256). But the lawmakers must have been quick to recognize the inconsistency between the party's stance and the law since the 1929–1930 civil code made adultery on the part of either party acceptable grounds for divorce. At any rate, we find a quite different version in the 1935 criminal code: "Whoever, being married, commits adultery with a person, shall be punished with imprisonment for not more than one year" (Art. 239). Adultery was now a criminal offense for a husband as well as a wife (though for both at a lighter punishment than before). In the social context of the time, that was quite a radical position for the law to take. We will need to look closely at how it translated into practice.

As with adultery, it is possible to speak of divorce at this stage without putting the English word in quotation marks, for the Guomindang civil code's conception was fundamentally a modern Western one. The law now allowed men and women equal rights to divorce, most conspicuously in making adultery on the part of either spouse legal grounds for separating (Art. 1052). Extending the right to seek divorce to women on a broad range of grounds made up possibly the part of Guomindang civil law that was the most radically different

from the Qing. Divorce, in fact, would become the big new area of litigation in Republican China; it would eventually come after 1949 to tower over all other categories of civil cases.

Women's Agency in Practice

How did the radical conceptual changes introduced by the Guomintang laws translate into practice? The record is a mixed one, we will see, as we turn now to look at the interpretation that the Judicial Yuan and the courts put on those laws.

The Buying and Selling of Women

Under the Guomintang codes, wives could no longer appeal to the law to prevent their husbands from selling them in marriage because of the narrowing of the scope of punishability. Guomintang law rejected the *he* concept and, with it, the notion that the man involved was always partly responsible, even if the woman gave her passive consent.

The implications of that new position are made clear in the responses of the Supreme Court and the Judicial Yuan to lower court inquiries. In August 1928, for example, just on the eve of the enactment of the new criminal code (on September 1), the Jiangxi Superior Court (*gaodeng fayuan* 高等法院) asked the Supreme Court whether the selling of a wife was still a punishable offense under the new code. The Supreme Court responded by referring the Jiangxi justices to Articles 257 and 315 of the new criminal code. Article 257, we have seen, made it a crime to sell minors under twenty years old by “seduction with consent” and “abduction,” and Article 315 extended the coverage to adult women in respect to abduction but did not criminalize their seduction with consent (Guo Wei, [1927–1928]: 102–3).

The intent and implications of those articles were clarified shortly after by the Judicial Yuan. In a query on May 3, 1929, the Hubei Superior Court wanted to know whether someone who “seduced with consent” a woman over twenty sui into being sold was liable for criminal punishment. The Judicial Yuan’s answer was a simple and unequivocal “no” (Guo Wei, [1929–1946]: 1/65). In 1931, the Liaoning Superior Court asked, What about the “seduction” (*youguai* 诱拐) of a woman under twenty sui who was married? The jurists responded that since a married woman was considered of legal age even if under twenty sui, the action could not constitute a crime (Guo Wei, [1929–1946]: 1/446). And what of the seduction of a concubine under twenty? queried the Anhui Superior Court in 1932. Well, said the yuan, since a concubine was not considered legally married under Republican law, she should be treated as a minor, and the man ought to be punished (Guo Wei, [1929–1946]: 1/517). Did that

mean, then, that the “seduction with consent” of a woman of legal age was not punishable at all? the Anhui court wanted to know. That was correct, the Judicial Yuan replied, unless the act fit under the criminal code’s Articles 315 and 316 (Guo Wei, [1929–1946]: 11517). (Article 315, it will be recalled, had to do with abduction, and 316 concerned “private imprisonment,” *sijin* 私禁, also a matter of abduction.)

Under the new criminal laws, in other words, what the courts did was to put an end not only to the Qing category of *maixiu*, the selling of a wife to another in marriage, but also more generally to *heyou*, or any kind of selling of women that did not resort to force. *Heyou* could obtain only if the woman was not yet of legal age. Adult women were presumed to be active agents who could not be made to do what they did not want to do. They had to have been forced against their will; otherwise, they were assumed to be acting on their own volition. There was no intermediate gray area of seduction with consent. If the men involved had not resorted to force, they were not in any way criminally liable.

The problem with such a formulation was, first of all, that as a resort for women who resisted being sold, abduction or private imprisonment could only be proved after the fact. Gone was the protection of Qing law, which had allowed women to bring suit against not only those who had sold them but also those who intended to sell them. Or so it seemed. In real life, many women were still positioned in the intermediate space covered by the Qing conception and were still what we have termed passive agents.

There were pressures for revising this part of the law, but they did not come, as one might expect, from women seeking to regain the protection afforded by the old *he* provisions. They came rather from husbands and parents who wished to regain the leverage against “third-party” men that the *heyou* category had given them. The 1928 code did not allow them, as Qing law did, to bring criminal action against a man for seducing a wife or daughter-in-law, whether with her consent or not. Lower courts, we have seen, had queried both the Supreme Court and the Judicial Yuan on this point and had been so informed.

By the time the lawmakers started work on revising the criminal code, a formal proposal had been made to extend the prohibition in Article 257 against the *heyou* of women under twenty to all women. What the lawmakers did in response was, first, to hold fast to the position that such a revision would be illogical. As they put it, “A woman who is more than twenty years old has the capacity to act independently. She can be the victim of interference with personal liberty. But she cannot be the victim of seduction” (Fu Bingchang and Zhou Dingyu, 1964: 3/631–32). They therefore left the original age limit intact in the first part of the revised article (240). But then, as a concession to those who

were pressing to have the seduction of a married woman criminalized, they added the following stipulation: “Whoever, with his or her consent, induces a married person to leave home shall be liable to the same punishment” (i.e., up to three years’ imprisonment). The term used in the Chinese original was the old “seduce with consent,” or heyou, which the translator chose to render as induced with consent.

Subsequent Supreme Court decisions and Judicial Yuan explanations spelled out the intent of the new provision. Thus, in a 1937 decision, the court wrote, “The crime of heyou of a married person to leave home is intended to protect family order, for the sake of the spouse of the person seduced.” And the Judicial Yuan opined, in a separate explanation, “There is no age limit in the stipulation of Article 240, item 2, about a married person” (Fu Bingchang and Zhou Dingyu, 1964: 3/643). There were no fewer than four Supreme Court cases in the next three years involving litigation by husbands and relatives of a seduced adult wife under the new provision (Fu Bingchang and Zhou Dingyu, 1964: 3/644, 646). In all of them, the court held that a man who seduced a wife of adult age was criminally liable under Article 240.

This law may have accommodated the husbands and relatives of wronged women, but it did nothing for the women themselves. Courts never applied heyou to cases in which a wife sued to make a would-be abuser desist. Moreover, the old Qing prohibitions against selling a wife into marriage or prostitution were gone. For women facing this prospect, the only legal out was to sue for divorce.

That was the resort of Zhang Shi of Shunyi in 1932. She had been sold into prostitution by her husband, Geng Deyuan, and his two brothers. She managed to get away and returned to the village, only to have the three men force her into prostitution there. She appealed to the local *xiangfu* (乡副, deputy xiang head), who ordered them to stop, but the Geng brothers then turned on him, alleging that he had raped Zhang Shi. She finally took matters into her own hands and filed for divorce. The court verified that the husband had indeed sold his wife into prostitution and ordered the marriage dissolved on the grounds of ill treatment (Shunyi, 3: 432, 1932.1.25 [m-15]).

In this case, things worked pretty much as the lawmakers intended: a wife could refuse to be sold by her husband by seeking divorce. But we must ask how often this was really a viable option for a wife in her predicament. What if she had no way to support herself? Suppose she only sought to stop her husband from selling her without a divorce. Was there anything she could do under the Guomindang codes? Another case from Shunyi shows that she could not do much. In 1931, Mrs. Ding (née Li) petitioned the Shunyi mediation court for help, charging that her husband had tried to force her into prostitution

and that he had recently sold a woman whom he had seduced by deception (*youguai*). Because she apparently did not want or could not afford to divorce him, she sought to compel him to desist by filing a “petition for civil mediation” (*minshi tiaojie shengqing shu* 民事调解申请书) with the court. Her husband, however, simply ignored her and did not show up at the hearing. And that was the end of it. The mediation court had no real adjudicatory powers and could only note that “mediation failed” (*tiaojie bucheng* 调解不成; Shunyi, 3: 432, 1931.11.21 [m-16]).

When the would-be seller was a parent or an in-law, the intended victim had no legal recourse at all unless she could prove that abduction was involved, and “for the crime of abduction to apply,” the Supreme Court said in 1931, “there must be force [*qiangbao* 强暴], coercion [*xiepo* 胁迫], or fraud [*zhashu* 诈术]” (Fu Bingchang and Zhou Dingyu, 1964: 3/639).

The other side of the coin here is that the women were no longer criminally liable themselves. As independent agents, it was their right to leave home if they wished, even to be sold, so long as they did not at the same time commit a criminal offense, such as adultery or bigamy. All of the Supreme Court cases pertaining to the new *heyou* provision in Article 240 of the 1935 code had to do with the prosecution of third-party men by husbands and parents, in which the main issue was the appropriate sentence for the man involved; there was not one case involving punishment of a woman for consenting to abuse. But neither was there any case of a woman seeking the protection of the law against a would-be abuser (Fu Bingchang and Zhou Dingyu, 1964: 3/642–49). What Guomintang law did was to narrow the scope of both punishability and of protection for women.

Widows and Tongyangxi

Guomintang law did away also with the Qing prohibition against compelling a widow to remarry (*bi shuangfu gajia*). A free agent to act as she wished as a wife, she was no less so after her husband died. By way of illustration, let us take a 1931 case from Qimen County, Anhui Province. A woman widowed for some years wanted to remarry because she was impoverished and did not get along with her parents-in-law. Fearful that they would object, she petitioned (*shengqing* 声请) the court for support. When the case reached the Anhui Superior Court, the justices seemingly felt that there were two conflicting laws on the matter. By the “civil portions in use” (*minshi youxiao bufen* 民事有效部分) in the code currently in effect, the widow’s marital or natal parents should preside over her remarriage. But by the new civil code, she was a free agent to marry as she wished. Queried on the issue, the Judicial Yuan responded simply that of course it was entirely up to her to decide (Guo Wei, [1929–1946]: 1/436–37).

That was all well and good, provided there was some kind of match between the law and the true conditions of women's lives. The following case, however, suggests that there was a considerable gap between the two. In a 1931 case in Rizhao County, Shandong Province, a girl of sixteen sui had been betrothed to a boy of fourteen who had died before the wedding took place. "In accordance with local custom," she had elected to "maintain her chastity" (*shoujie* 守节) and had continued to live with his family for sixteen years. But his parents now wanted, after all that long while, to terminate their relations with the "widow." The woman, it was clear, wished to remain in the household and to continue to be supported by her "in-laws." What she was doing was appealing to the old Qing ideal of chastity to prevent the family from expelling her.

The Shandong Superior Court queried the Judicial Yuan for its opinion. For the yuan, the issue was not the woman's chastity but the new law's provisions about obligations for maintenance. Since the woman had remained in the family with the intention of "living together forever," she should be considered a full-fledged member of the household, and as such, her fiancé's parents should not be allowed to terminate the relationship and expel her (Guo Wei, [1929–1946]: 1/442).

In this instance, the woman had a strong case in the eyes of the law because she had spent sixteen years of her youth living as a member of the household, but most daughters- and sisters-in-law stood on shakier legal ground. For one thing, the law's provision on the obligation of a head of household to provide support for its members placed them lowest in priority among those who could claim support, coming after brothers and sisters (Arts. 1114, 1116) and only if they had "no means of maintenance and no ability to earn a living" (Art. 1117). Furthermore, the household head was entitled to expel them if he or she had "good reason for doing so" (Art. 1128).

What these provisions meant in practice can be seen from a couple of concrete examples. In a 1940 case before the Supreme Court, a woman who was the head of the household wished to expel her widowed daughter-in-law on the grounds that she was engaged in an adulterous relationship with a married man. The court ruled that that was reason enough for her to do so (Fu Bingchang and Zhou Dingyu, 1964: 211150). In the other case, from 1937, it was a widowed concubine who faced expulsion by her "husband's" son. His justification was that the widow was engaged in the improper behavior (*pinxing bujian* 品行不檢) of exchanging amorous letters with a man. The court found that "this cannot be considered lacking in good reason" (Fu Bingchang and Zhou Dingyu, 1964: 211149).¹⁸

For all the Republican widow's new rights, then, when it came to staying on in her marital household, she was in a weaker position than her predecessors.

In the Qing, the law sided with her unequivocally, making it a punishable crime for her in-laws to expel her. Moreover, the cultural value of chastity, upheld by law, gave her the moral high ground against those who would get rid of her. Now she could appeal only to the limited protection that the law granted under the provisions about the maintenance of household members.

On the other hand, the expanded property claims that Guomintang law granted women might have helped some widows to assert themselves. In one Shunyi County case from 1935, for example, a widow and her brother-in-law came to blows when he wanted to sell the deceased man's property without her consent (Shunyi, 3: 1029, 1935.10 [m-32]). In another, also from Shunyi, a widow prevented her brother-in-law from taking over her dowry when she remarried (Shunyi, 3: 468, 1931.8.21 [m-20]). In both cases, the widow could argue that Guomintang law granted her new property rights. In the first, the court ordered that neither party could sell the property without the consent of the other. In the second, it ordered the dowry returned to the widow.

The new laws assuredly served in some instances to deter in-laws from expelling widows. Nevertheless, a widow could no longer appeal to a legal stipulation against forced remarriage or to the ideal of chastity. On balance, in this area too, Guomintang law probably narrowed the scope of protection for women even while it expanded their rights in other ways.

The same applied to tongyangxi girls, only more so. To be sure, the new laws made a dramatic difference in some cases. In one 1948 case from Wujiang, Du Chunzhen, educated and strong-willed, went to court to win her "freedom" from her marital obligation. She had been engaged to Liang Jinkuan in 1937, when she was just 11 sui. Now, as a 22-year-old, she sued to dissolve her betrothal against the wishes of her own mother as well as of Jinkuan's father, Liang Guangtai. But if the betrothal contract was dissolved, Liang argued, then at least he should be compensated for Chungzhen's maintenance, which he estimated at 5 shi of rice a year, or 55 shi for eleven years. The young woman countered that she had repaid the family fully by the work she had done for them for free all those years. The court ruled as follows. An agreement to marry must be based on the free will of the man and the woman of legal age for such purpose (17 sui for the man and 15 for the woman; Art. 973). Absent that, any contract to marry was perforce illegitimate. There was in fact no question here of dissolving a contract to marry since no legitimate contract existed. The young woman was free to leave her betrothal family (Wujiang, 206.1: 473, 1948.1.30 [m-6]).

The Yueqing court had reached the same conclusion two years earlier, in 1946, when Lu Shimei sued for the dissolution of her betrothal to Cai Zhongding. She apparently had been betrothed to Cai as a tongyangxi by her

father when she was eleven sui. But Cai had gone away and had not been heard from for eight years. For Lu, the basis of her suit was her fiancé's disappearance. But for the judge, that was not the issue. As in all tongyangxi arrangements, the marriage agreement was not a valid contract, and there was consequently no need to dissolve the betrothal. The court simply reaffirmed Lu's right to marry as she pleased (Yueqing, 2-2-6, 1946.1.8 [m-1]).

In these two cases, the law was clearly working in the manner that the law-makers had intended: to further the cause of free choice for women. But as with widows, we need to question whether a fully independent life was among the realistic options for the young women concerned. What if the choice meant total destitution? We know from Qing cases that when things did not work out, the tongyangxi who could call on the support of their natal parents fared best. In Danshui-Xinzhu, for example, Lin Chouliang had been betrothed to Zheng Bao's son when she was eight sui. But then, for whatever reason, it looked like the planned marriage was not going to go forward. Chouliang's father, Lin Shitou, took her back, and offered to return the betrothal price and marry his daughter to someone else. (Zheng Bao brought suit for the return of the girl, even charging that her father intended to sell her into prostitution "on the mainland." But his suit was not successful; Dan-Xin, 21202, 1881.11.8 [m-2].) Young Guo Shi was also fortunate to have a father who was willing to come to her rescue. In this instance, she had actually married the son of Mrs. Wu (née Lin), who had raised her from early childhood. But the young couple did not get along, and on the plea of the mother-in-law, Mrs. Wu, Guo Shi's father redeemed her for 40 yuan and married her to another man (Dan-Xin, 21207, 1890.11.28 [m-7]; see also 21204, 1886.6.18 [m-4]).

The majority of tongyangxi did not enjoy such options. A girl whose natal family was so poor as to sell her in the first place was not likely to be able to give her much help if things did not pan out. Raised as a child in another home, her only security was a viable marriage. If the arrangement broke down, she was really at the mercy of the betrothal family. Of the seven tongyangxi cases of the Qing period from Baxian and Baodi, as has been seen, all involved the women's victimization—in being abducted to be sold, being sold to another man in marriage, and being forced into prostitution. For many failed tongyangxi arrangements, it is clear, the issue for the woman was not how she could gain independence from her betrothal family but how she might get them to continue to support her and not drive her out or sell her.

From that point of view, the new rights afforded her by the Guomindang laws were quite limited. As with the widows who appealed to the ideal of chastity, what these young women needed was the support of the law for their passive agency: to not be driven out or sold. But the new laws denied them what

little legitimacy they could claim under Qing law as betrothed brides-to-be. Now considered neither betrothed nor adopted, they were in effect of the same legal status as a concubine, which is to say that they had no standing at all under the law. The only protection they could claim was as a member of the household. But in that they fared no better than concubines, coming in priority after brothers and sisters and entitled to support only if they could not make a living. They could be expelled for a “good reason,” including a liaison (or the allegation of one) with a man.

Separation, Adultery, and Divorce

Though Qing law did not give abused or unhappy wives the wherewithal to assert themselves actively against their husbands or to seek divorce, we have seen how the courts tended to close an eye to the common resort of taking refuge with their natal families. That avenue was largely shut off to them by the Guomindang civil code's stipulation that husbands and wives had a “mutual obligation” to live together. Husbands now had a new legal tool to force their wives back home. And the courts sometimes obliged. For example, in 1940, Zhang Guangqin, a villager of Wangping County (Beijing Municipality), sued to make his wife, Zhang Shi, come back to live with him. She had gone home to live with her father, Zhang Lianyuan, half a year earlier. Zhang Shi countered that her husband and in-laws had mistreated her, beating and injuring her. The Beijing Local Court, taking note that she had sued her husband for mistreatment the year before and that the suit had been found groundless, ruled that she had no legitimate reason for not living with her husband and ordered her to return to him, in accordance with Articles 1001 and 1002 on cohabitation (Beijing shi, 1942–4094, 1940.4.8).

In another case, Wang Weicheng, a villager of the same county, sued in 1942 to make his wife, Dong Shi, come home. She countered that he had beaten her, causing injury. The same Beijing court found that if a couple “on occasion engages in a spat, and [the husband] beats the [wife] defendant and causes very minor injury, that does not quite qualify as ‘intolerable.’” It ordered Dong Shi to return home to her husband (Beijing shi, 1942–3311, 1942.5.12; see also 1942–7893, 1942.5.4; 1942–196, 1941.3.22).

Case records also show, however, the difficulties that some husbands encountered in using this cohabitation law to make their wives return. In a Sichuan case, for example, a husband had first sued for divorce on the grounds that his wife had returned to her natal home for a protracted period. Apparently, the couple had lived together just one year, and then the wife had gone back home to live for almost ten years by the time of the lawsuit. But the court ruled that that was not sufficient grounds for divorce. The husband then appealed, this

time maintaining that his wife should be required under Article 1001 (of the new civil code yet to come) to live with him. The court found in his favor, but still the wife did not comply. The husband then sued for a third time, seeking enforcement of the second ruling. The Chengdu Superior Court turned to the Judicial Yuan for help, asking whether it could summon the wife to court to enforce the decision. The yuan's reply was a firm no. The civil stipulation for "living together" (*tongju*) could not be forcibly imposed; it could only be effected through persuasion or mediation (Guo Wei, [1929–1946]: ln5).

Nevertheless, it seems fair to say that on balance, a husband who objected to his wife's living away from home had the best of it under Guomindang law, certainly better than he had had in the Qing, when the law said nothing at all about a wife's obligation to live with him; she, by contrast, lost some of the latitude she had once had. But it is also fair to say that wives did not lose out entirely. Another intention of the law was to protect them from being discarded without cause. Article 1001 was successfully cited, for example, by Mrs. Zhou (née Xie), who sued her husband, Fangchun, in 1946 for not living with her and supporting her. He apparently claimed as his reason for not doing so that she had "incurable mental illness" (*buzhi zhi jingshenbing* 不治之精神病). But the court noted that she showed no evidence of mental illness, and agreeing with her argument that Zhou was obligated by law "to live together" with her, it ordered him to do so (Yueqing, 1946.5.7 [m-2]).

Husbands also had the best of it under the provisions in the 1928 code that allowed them to bring a criminal complaint against an adulterous wife, as well as her lover (Arts. 256, 259). Those articles gave the husband considerable leverage against his wife. He could threaten her or her paramour (or both) with legal punishment or spare either or both by withdrawing his complaint. For example, in 1924 in Shunyi, even before the formal promulgation of the 1928 code, Wang Shaofu sued Wang Jinrui for adultery with his wife, Li Shi. The court found Jinrui guilty and sentenced him to two months' imprisonment. Shaofu's wife was not mentioned, presumably because he did not charge her (Shunyi, 2: 488, 1924.5.28 [m-5]). In 1931, for another example, Shi Yucai of Shunyi sued both his wife and her paramour (his neighbor Zhang Qi). The simple filing of the suit was enough for him to obtain through informal mediators what he wanted, whereupon he withdrew his suit (Shunyi, 3: 426, 1931.6.17 [m-11]).

In their revisions of the criminal code, we have seen, Guomindang lawmakers tried to legislate greater equality in this area by making adultery a crime for a husband as well as a wife (Art. 239). In theory, a wife could use the law against an adulterous husband no less than the reverse. In practice, however, the new provision seems to have made no difference. To judge by the queries sent to

the Judicial Yuan in the succeeding years, husbands remained the only users of the adultery law. In 1938, for example, the Guangxi Superior Court asked how a man charged by a husband for having committed adultery with his wife and then seducing her into running away with him should be punished. The yuan responded that he should be punished for both crimes (Guo Wei, [1929–1946]: 2/1394; Fu Bingchang and Zhou Dingyu, 1964: 3/630). The Military Affairs Commission put the same query to the yuan in 1941 and got the same answer (Guo Wei, [1929–1946]: 3/1724; Fu Bingchang and Zhou Dingyu, 1964: 3/630).¹⁹ A different problem was posed by the Shandong Superior Court in 1936. A husband had apparently first allowed or encouraged his wife to commit adultery with someone and then changed his mind and brought suit against her and her lover. The yuan pointed out that by Article 245, a husband who had “connived” at his wife’s adultery lost his right to bring suit against her (Guo Wei, [1929–1946]: 211267–1268; Fu Bingchang and Zhou Dingyu, 1964: 3/630).

Though the intent of the 1935 revision of Article 239 was evidently for gender equality, society, at least in the countryside, was obviously not ready to accept adultery by a husband as a criminal offense. Not one of the nine Judicial Yuan explanations collected by Fu Bingchang and Zhou Dingyu (1964: 3/630–31) for the period from 1935 to 1949 involved a wife’s complaint on that ground. We have noted that same reluctance in connection with the attempt to eliminate the crime of *heyou*. The lawmakers were forced to back off, in the words of the Supreme Court, “to protect family order, for the sake of the spouse of the person seduced” (Fu Bingchang and Zhou Dingyu, 1964: 3/643). For all practical purposes, as we just noted, the “wronged” spouse was always the husband, not the wife.

None of this is to belittle the important advances that the new Guomintang codes brought for some women. They undoubtedly gave the strong and the relatively well-off the opportunity to assert themselves to a degree impossible under Qing law, especially in the area of divorce. A few examples from Shunyi illustrate the point. We have seen how the courts treated attempts to sell a wife into prostitution as sufficient grounds for divorce. That had been the case even in the Qing. But Guomintang law defined ill treatment to cover a much broader range of abuses. In 1935, Mrs. Kong (née Mei) sued for divorce on the grounds that her husband mistreated, whipped, and even tortured her with a hot iron. The court granted the divorce, citing Article 1052, section 3: “Where the spouse receives such ill-treatment from the other spouse as to render it intolerable to live together” (Shunyi, 3: 840, 1935.5.8 [m-23]). Two years earlier, Mrs. Wang (née Liu), 22 sui, sued for a divorce from her teenage husband (17 sui), maintaining that his stepmother and grandmother pinched and

slapped her. It was clear that she did not like her husband and in fact was spending most of her time with one of her maternal cousins, Zhang Qing. The case was settled by mediators. Mrs. Wang's family was to pay the husband's family 40 yuan, the marriage would be dissolved, and the boy and girl would be free to remarry (Shunyi, 3: 671, 1933.6.23 [m-21]). Cases such as these tell about the expanded agency of women.

The most dramatic example I found of women's new autonomy in marriage decisions was a relatively early case, from 1934, in which a 21-year-old schoolteacher named Hu Aide sued her father for betrothing her to a policeman without her say, for a betrothal gift of 20 yuan and a ring. She wrote, in her plaint, that she was "a liberated woman . . . and a teacher of students, who would never marry a mere slave." She swore that she would "rather die than suffer a marriage not based on free love." She managed to prevail; the betrothal was annulled by mediators (Shunyi, 3: 671, 1934.n.d. [m-30]).

This case illustrates another ramification of the new marriage laws: the diminished role of parents in their children's affairs. We have another example in a Wujiang case, in which a father had gone to court to seek compensation when the bride's family changed its mind late in the betrothal process. His family, he argued, had already laid out cash for three pieces of gold jewelry and four suits of clothing, plus 28 shi of rice for other expenses. At the trial, however, the young man, evidently in an emotional outburst over his rejection, asked to have the suit withdrawn. Since marriage was by law a contract between two independent adults, he was the principal in the suit, and the court honored his wish. There was apparently nothing his father could do—something unheard of in the Qing (Wujiang, 206.1: 45, 1949.1.10 [m-3]).

The young schoolteacher Hu Aide exemplifies the type of women who benefited most from the new laws. They were more likely to be from the cities and large towns than from villages and hamlets (she lived in the Shunyi County seat) and to be more financially independent than most women. The Mantetsu data on the three North China villages of Shajing, Sibeichai, and Houjiaying contain not one example of dramatic change in marriage and divorce, whereas the Beijing and Shanghai records that Kathryn Bernhardt used for her study of urban divorce abound with examples of women exercising their newfound rights and powers (Huang, 1996: 22, 28–30; Bernhardt, 1994).

County records confirm the persistence of old ways outside the larger urban areas. In one case, from Wujiang in 1946, a townswoman, Lu Afeng, brought suit for divorce on the grounds that her husband mistreated her, drove her from their home, and beat her so badly as to cause a miscarriage. The court sent her first to mediation court. Her husband, however, simply ignored her and did not show up. She persisted in her plaint. At the trial, he again did not show up. She stated once more her reasons for wanting a divorce. But the court

found against her on the grounds that she was not able to document any of her charges (Wujiang, 206.1: 149, 1946.3.18 [m-2]).

In another similar case from Wujiang in 1948, Chen Shunbao sought divorce from her husband on the grounds that he beat her and did not maintain her. She had the matchmaker as a witness, as well as her husband's uncle, who testified that his nephew was a ne'er-do-well, apparently an opium addict. Once again, the Wujiang court sent the woman first to mediation, and once again the process failed because the husband did not appear. Then, at the trial, even though he again did not show up, the court still found it possible to reach the judgment that "abandonment" (yiqi) applied only to those unable to support themselves; since Chen Shunbao was just in her early twenties and could support herself, abandonment was in her case not sufficient grounds for divorce (Wujiang, 206.1: 59, 1948.11.10 [m-4]).

To cite still another example, this one from Yibin, Zeng Shuxian sued for divorce in 1937 on the grounds that her husband, Luo Huanwen, was an opium addict and beat her and that he had married her under false pretenses about his wealth. The court ordered an investigation, but the judicial police reported back that the supposed husband Luo denied that he even knew the woman. And the case rested there (Yibin, 1937.10.16 [m-1]). From these examples and other evidence, it seems pretty clear that despite the dramatic provisions of the new code, legal practice often still hewed to old ways. There were significant changes, to be sure, but their extent should not be exaggerated.

The Qing courts, we have seen, showed two faces to abused women. Wives whose husbands wanted to sell them could call on the courts for support to pressure their husbands to desist. Widows whose relatives wanted to get rid of them or to profit from their remarriage could also use the courts to force them to desist in the name of chastity. In these respects, the Qing courts provided the women involved some measure of protection. But the courts also had a punitive side. If a woman failed to live up to the standards of virtue set for her by law, then the courts could turn quite harsh. The woman who elected or consented to being seduced away from her husband faced the prospect of severe punishment if her husband pressed charges, as did the woman who committed adultery. And women who were sexually assaulted faced the suspicion of complicity in illicit sex, unless they could demonstrate their virtue by resisting, even at great personal risk.

Guomintang law did away with both of those faces, traceable to the legal construction of women as possessed of subordinate will. By reconstructing women as autonomous agents, Guomintang law most certainly furthered the cause of some women. Especially in the cities, educated and relatively well-off women found new scope for free choice in marriage and divorce. And

independent property rights lent a material basis for their expanded agency. But for the many poor women who were bought and sold or in danger of being bought and sold, the new legal system did not quite deliver what it promised. They were supposedly free agents, but they could no longer use the courts to pressure those who were trying to sell them. The law offered protection only if those people abducted them; otherwise, it assumed they were capable of controlling their own fates. From that point of view, the Guomindang legal system gave them less protection than the Qing system did, despite the good intentions of the lawmakers.

Notes

- 1 The Supreme Court was known as the Daliyuan 大理院 from its establishment in 1906 until 1927, when it came to be called the Zuigao fayuan 最高法院. The court had the power both to hear appeals and to interpret the law until 1929, when the newly founded Judicial Yuan (Sifa yuan 司法院) took over the latter function.
- 2 Danshui-Xinzhu has not been counted for this quantification because it contains just nine marriage-related cases by the categorization of Dai Yanhui.
- 3 The classic study is Ch'ü T'ung-tsu (1961). On different status groups, see Jing Junjian (1993).
- 4 In this connection, we are reminded again that the Qing code was a multilayered document that comprised not only the official ideology of the state but also practical adaptations over time to changing social realities. The exterior ideological packaging remained even as the state adapted itself to popular customs, sometimes in direct contravention of the ideological ideal. The upholding of an ideal (usually in a statute), while accommodating popular practice (usually in a statute), was in fact one of the basic characteristics of the Qing code.
- 5 *Zongrong* 纵容 is a difficult term to translate, especially since the term, by the wonders of classical Chinese, can be read either as two separate words or as a single compound expression. The basic meaning of *zong* is to “let go,” as of an arrow or a horse (by loosening the reins). As applied in the statute, it can be read as implying that somehow women as sexual beings were disposed toward illicit sex, and the husband must therefore not “let go” or indulge them in following such impulses. But the second word, *rong*, needs to be taken into consideration, for it means simply “allow,” without the connotations of “indulge.” More important, the statute puts *zongrong* together with *yile* 抑勒, or “to force,” in the same sentence. The context suggests that the lawmakers were thinking mainly in terms of graduated differences from allow and encourage to force, hence my translation here. To render *zong* as “connive,” as the English version of the 1928 Guomindang Criminal Code did, or as “abet,” as Sommer (2000: 54–57) does, seems to me to attribute to those women more of an autonomous agency than the Qing code envisioned.
- 6 One early-nineteenth-century jurist, however, vouchsafed that “the mental state [*xinqing* 心情] of the person committing ‘abduction and seduction’ and ‘seduction by consent’ is the same as that of the thief and robber, [and] that is why [the code] puts it under ‘theft and robbery’” (X AHL, 3: 1393).

- 7 Neither of the two English terms commonly used in the literature for a *tongyangxi*—“child bride” and “adopted daughter-in-law”—is quite accurate. “Child bride” suggests that the girl was married to the boy early on, which was not the case; the two were usually not formally wed until they reached marrying age. “Adopted daughter-in-law” is equally misleading. The *tongyangxi* were raised for a specific purpose; they were not adopted daughters (*yangnü* 养女) in the Qing sense of the term. For these reasons, I use either the Chinese term or some paraphrase of the cumbersome literal rendering: “child raised to become daughter-in-law.” The definitive studies on *tongyangxi* are Wolf and Huang (1980) and Wolf (1995).
- 8 Charges could also be brought against a wife under Statute 116, which made “wanton conduct” (*yinyi* 淫佚) one of the seven grounds for her husband to expel her. But *hejian* and *diaojian* were the main legal formulations.
- 9 Though Statute 108 forbade the marrying of first cousins, the restrictions were relaxed over time. The prohibition against marrying maternal first cousins was abolished as early as 1384 (Hongwu 17). Much later, in 1725, a statute was added specifying that in the matter of marriage between the offspring of a man and his sister, “the law would go along with what was convenient for the people” (*tingcong minbian* 听从民便; Substat. 108-1 and Xue Yunsheng’s commentary). Perhaps the law was concerned in part with the practical matter of preserving family harmony among those who might live in the same house. Since daughters generally married out, they were not likely to live with first cousins from the mother’s side or from the father’s sisters, and so the restrictions on marrying those kin were relaxed. In the end, the Guomindang Civil Code specifically allowed a person to marry a matrilineal (*biao* 表) relative (Art. 983).
- 10 In the event a marriage crossed class lines, the woman was to follow the husband’s status, consistent with the Qing code’s view of her subordinate position. The law considered it acceptable for her to marry up but not down. If a slave woman (*bi* 婢) married a commoner, the law granted her his higher class status. But a commoner woman could not marry a slave (*nu* 奴) and move downward in status because the law forbade that kind of change (Stat. 115). By the same logic, it was illegal for a commoner woman to be sold into slavery or into any of the other “mean” groups, such as “music people” or “boat people” (*danmin* 蛋民).
- 11 Statute 116 did speak of “when both parties wish to have the marriage dissolved” (*liangyuan li* 两愿离), which is closer in meaning to our term “divorce by mutual consent,” but the main construction in legal discourse was *heli* 和离 which, depending on whom it was applied to, meant divorcing the wife with her consent or consenting to be divorced by the husband.
- 12 But in two of my Baxian cases, the women appear to have made good their escape: Mrs. Wang (née Yuan), who in 1779 took her jewelry and the money at home and ran off with Wei Zhengchao, and a concubine of Liu Kuixian, who fled his household in 1781 while he was away (Baxian, 6.1: 1723, 1779.1.9 [m-52]; 6.1: 1739, 1781.7.19 [m-60]).
- 13 As previously noted, a tenth condition—no. 4, “where the wife has so ill-treated the lineal ascendants of the husband, or has been so ill-treated by them, that life in common becomes intolerable”—applied only to the wife, presumably because most marriages were assumed to be patrilocal.

- 14 The translator of the 1928 criminal code, Yu Tianxiu, ignored the *heyou* part of the article and rendered the provision as simply “kidnaps or abducts,” or *lüeyou*.
- 15 Recall that I have until now translated *zongrong* as encourage or allow. But Yu was quite right, in the new circumstances, to render the term as “connive,” ascribing a coequal role to the woman.
- 16 Guomindang law saw prostitution as an act—the selling of sex for gain, whereas the Qing code had associated it with debased status groups. The Guomindang code’s term for prostitute, *chang*, of course, had no such taint of class.
- 17 Note that the official English version uses “desertion” rather than “abandonment.”
- 18 Guomindang law’s espousal of monogamy was such as to make the concubine in effect a legal nonperson, almost devoid of any rights at all. For the full implications of that position, see Bernhardt (1999: chap. 7).
- 19 But a man could not charge his concubine with adultery because she had no legal status.

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The codes are cited by article or statute only and are given in the list below by title. References to the Qing code are to Xue Yunsheng’s ([1905] 1970) compilation, as edited by Huang Tsing-chia (Huang Jingjia); the statutes are cited by Huang’s numbering system. Except for the 1929–1930 Guomindang Civil Code, for which there is an official English version, the translations of the various provisions are my own, unless specifically noted otherwise.

For quick reference, the list below shows the sequence of the cite forms I use for the cases. The bracketed numbers following the archival material refer to my own files, which are organized by category with an assigned case number (d = debt, i = inheritance, l = land, m = marriage). Dates are in the form 1893.7.4. They are the dates of the original plaint if available or otherwise of the judgment.

Baodi	<i>Juan</i> (卷, bundle) number and lunar date
Baxian	Category number, subcategory number, <i>juan</i> number, and lunar date if available
Danshui-Xinzhu	Cataloger’s number and lunar date (cited as Dan-Xin)
Shunyi	Category number, <i>juan</i> number, and date
Wujiang	Category number, subcategory number, <i>juan</i> number, and date
Yibin	By date only (archive is not fully cataloged)
Yueqing	By date only (the cases are all from category 2, subcategory 2, <i>juan</i> 61)

Xing’an huilan is abbreviated as XAHL in the citations.

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