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Marriage law: Possible interactions between the new Civil Code and the Code of Canon Law

Diritto matrimoniale: possibili interazioni tra il nuovo Codice Civile e il Codice di Diritto Canonico

YARU LI

ABSTRACT

The paper underlines the possible interactions between the new Chinese Civil Code and the Code of Canon Law in matrimonial matter.

KEYWORDS

Chinese Civil Code; Code of Canon Law; Chinese Marriage Law

RIASSUNTO

Il contributo esamina le possibili interazioni tra il nuovo Codice civile cinese e il Codice di diritto canonico in materia matrimoniale.

PAROLE CHIAVE

Codice civile cinese; Codice di Diritto canonico; diritto matrimoniale

TABLE OF CONTENTS: *1. Introduction – 2. Marriage procedure and registration – 3. Marital capacity and marriage prohibitions – 4. Unregistered marriages – 5. Null marriages – 6. Effects of marriage – 7. Divorce law – 8. The point of view of Canon law.*

1. *Introduction*

In traditional Chinese society of the imperial era, marriage was a contractual relationship between two families. Therefore, it was not the bride and groom, but the heads of families and intermediaries who were responsible for violations of the law at the time of marriage, e.g. against the prohibition of marriage between bearers of the same family name. Neither the state nor organized religion played a role in the wedding ceremony: the bride, dressed in red, was carried in a red palanquin to the groom's house, where the young cou-

ple paid homage to the groom's ancestors and bowed to his parents or offered them food and drink. These acts symbolized the incorporation of the bride into the groom's family and her submission to the family hierarchy based on age and gender. Furthermore, it was customary to pay an 'engagement money' and a 'bride's money', each of considerable amount, from the husband's family to the wife's family or to intermediaries. The family order was strictly paternalistic: the head of the family was allowed to have an unlimited number of concubines and concubines in addition to the main wife.

The head of the family was allowed to have an unlimited number of concubines and secondary wives in addition to the main wife, and he ruled over the main wife, her children and their wives, etc. up to the children of the secondary wives and concubines. Divorce was possible by mutual consent. In addition, the husband could divorce unilaterally in the case of the 'seven offences' (if the wife had no child, behaved immorally, did not serve her in-laws, talked a lot, stole, was jealous, had a malignant disease), if there was not one of the three obstacles (period of mourning for the wife's parents; poverty of the husband at the time of the marriage, wealth at the time of the offence; if the repudiated wife had nowhere to return). The wife could only divorce if the husband had left her for at least three years and if the wife had denounced him¹.

In the 20th century, reformers and revolutionaries severely attacked these marriage customs, which had been in force for more than 2000 years and under which younger women were almost completely disenfranchised. Already in the Republic (1912-1949), but even more so in the People's Republic (since 1949), efforts were made to introduce free choice of partner and gender equality in marriage. Consequently, the Civil Code of the Republic, which came into force in 1931, provided for monogamy, freedom of marriage and divorce, and a reasonably equal status for spouses. On the other hand, official registration of the marriage was not required; a 'public ceremony' in the presence of two witnesses was to guarantee the freedom of will of the spouses. Nevertheless, in practice, marriages continued to be arranged mostly by parents².

The reformist ideas were implemented even more consistently in the Mar-

¹ MARCEL GRANET, *Coutumes Matrimoniales de la Chine Antique*, in *T'oung Pao*, vol. 13, 4, 1912, pp. 517-58; TCHANG KI-TONG, *La Chine et les Chinois, la famille, religion et philosophie, le mariage, le divorce*, in *Revue des Deux Mondes*, vol. 63, 2 (15 mai 1884), pp. 278-305; YUJIE ZHU, *Heritage and romantic consumption in China*, Amsterdam University Press, Amsterdam, 2018, pp. 39-91.

² GEORGES-MARIE SCHMUTZ, *Matériaux pour une sociologie de l'amour et du mariage dans la Chine d'aujourd'hui*, in *Revue européenne des sciences sociales*, vol. 22, No. 67, 1984, pp. 65-116; MARCEL GRANET, *Catégories matrimoniales et relations de proximité dans la Chine ancienne*, in *Annales sociologiques. Série B. Sociologie religieuse*, n. 1, 1939, pp. 1-251.

riage Law of the People's Republic of China, in force throughout the country since 1950, whose essential ideas were already contained in the 1931 'Marriage Regulations of the People's Republic of China': single marriage, freedom of marriage, freedom of divorce, registration of marriage and divorce, prohibition of arranged marriages and marriages for sale, equality between men and women. The 1950 Marriage Law was the first law ever passed by the People's Republic and remained one of the very few formal laws passed in its first 30 years³. It was only in 1980 that it was replaced by a new Marriage Law, valid from 28 April 2001 until the entry into force of the Civil Code on 1 January 2021⁴.

2. *Marriage procedure and registration*

Traditional Chinese marriage ceremonies have no legal effect today. According to Article 1049 (1) of the Civil Code, a marriage is only valid if it is registered as a civil marriage before a State authority after verifying that there are no obstacles to marriage (marriageability, marriage bans); for the treatment of unregistered 'old marriages'⁵.

In the case of a marriage between two Chinese people from mainland China (i.e. without the participation of a foreigner, a Chinese person from Taiwan or a Chinese person from Hong Kong or Macao), the civil administration authority at county level is in principle competent to register marriages (§ 2 § 1 1a Marriage Registers Ordinance); if necessary, the People's Government may declare another authority competent at county level to facilitate matters in remote areas (§ 2 § 1 2a Marriage Registers Ordinance). In the case of a marriage between a Mainland Chinese and a foreigner, a Taiwanese Chinese, a Chinese resident in Hong Kong or Macao, or a Chinese living abroad (i.e. Chinese nationals temporarily living abroad), the civil administration departments of the People's Governments at the provincial level are competent in the matter, unless they have declared other authorities competent (§ 2 Paragraph 2 Marriage Registry

³ NEIL JEFFREY DIAMANT, *Revolutionizing the Family: Politics, Love, and Divorce in Urban and Rural China, 1949-1968*, University of California Press, Berkeley, CA, 2000, pp. 226-312.

⁴ OLIVIERO DILIBERTO, *La lunga marcia. Il diritto romano nella Repubblica Popolare Cinese*, in LUCIANO CANFORA, UGO CARDINALE (cur.), *Disegnare il futuro con intelligenza antica*, Il Mulino, Bologna, 2012, pp. 53-67; ID., *Diritto romano e codificazione cinese tra passato, presente e futuro. Alcune considerazioni*, in *Bullettino dell'Istituto di diritto romano 'Vittorio Scialoja'*, vol. 110, 2016, pp. 293-296.

⁵ OLIVIERO DILIBERTO, DOMENICO DURSI, ANTONIO MASI (cur.), MEILING HUANG (tr.), *Codice civile della Repubblica Popolare Cinese*, Pacini, Pisa, 2021.

Ordinance). Marriages between two foreigners will no longer be accepted by marriage registration authorities as of the end of March 2019.

In the case of a marriage between mainland Chinese, local jurisdiction lies with the marriage registration authority of the place of registration of the permanent family of at least one of the two parties (§ 4 § 1 Marriage Registry Ordinance). In the case of a marriage between a Chinese person and a foreigner, a Chinese person from Taiwan, a Chinese person living in Hong Kong or Macao or a Chinese person living abroad, the Marriage Registration Authority of the Mainland Chinese permanent family registration place has sole local jurisdiction (Article 4(2) of the Marriage Registry Ordinance)⁶.

The husband and wife must present themselves in person to the authority (§ 1049 S 1 CC; § 4 Marriage Ordinance) and present the following documents: (1) their family booklet and identity card, (2) signed declarations that they do not have another spouse and that they are not related in the direct or collateral line up to the third degree (§ 5 Abs 1 Marriage Ordinance). Chinese nationals residing abroad must present a valid passport instead of a family booklet and an identity card, and their declaration that they do not have another spouse and that they are not related by blood to the other party in a straight line and up to the third degree in a collateral line must have been certified by a certification body recognized by the Chinese party (§ 5 Abs. 2 Marriage Register Ordinance). Foreigners must present a valid passport or other valid international travel document instead of a family booklet and identity card. The declaration in this case is limited to not having another spouse (the declaration of not being related to the other party by blood in the direct line and up to the third degree in the collateral line is not required). Again, the declaration must be certified by a certification body recognized by the Chinese party (§ 5 § 3 Marriage Registry Ordinance)⁷.

The Marriage Registry Authority checks, based on the available documents, whether the material requirements for the marriage are met (§ 7 § 1 Marriage Registry Ordinance). Consequently, the registration of the marriage must be refused if the legal age for marriage has not been reached or if one of the other marriage prohibitions exists (absence of voluntariness on the part of both parties, multiple marriages, kinship relationship; § 6 of the Ordinance on Marriage Registers); the refusal must be motivated (§ 7, § 2, second sentence

⁶ S. XIAOYING QI, *Remaking families in contemporary China*, Oxford University Press, New York, 2021, pp. 92-134.

⁷ 陈树辉编著《婚姻家庭继承纠纷疑难案件裁判要点与依据》，北京法律出版社2021pp299-355[CHEN SHUHU(陈树辉) *Points and bases of decision in difficult cases of marital, family and inheritance disputes*, Law Publishing House, Beijing, 2021, pp. 299-355].

of the Ordinance on Marriage Registers). If the material requirements are met, the Marriage Registry Authority must register the marriage on the spot and issue the marriage certificate (§ 1049 § 2 CC or § 7 S 2 HS 1 LOM).

Upon receipt of the marriage certificate, the conjugal union is constituted (§ 1049 S 3 CC).

3. *Marital capacity and marriage prohibitions*

Chinese law provides for a series of marriage prohibitions which, if registered, lead to the nullity or annulment of the marriage.

According to Section 1047 of the Civil Code, the man must be at least 22 years old and the woman at least 20 years old at the time of marriage. Thus, even after the entry into force of the CC, the exceptionally high age for marriage remains, from the point of view of comparative law, linked to the restrictive demographic policy adopted in China until recently. During the current liberalization of this demographic policy, the CC did not adopt the (in any case non-legally binding) regulation of the previous marriage law, under which people were encouraged to marry late and have children late.

In this regard, marriage was considered late when the man was at least 25 years old and the woman at least 23 years old at the time of the marriage; childbirth was considered late when the woman did not give birth to the child until she was 24 years old.

For members of certain ethnic minorities, based on the enabling provision contained in Article 75 of the Law on Legislation, different rules apply in part about the minimum age for marriage in the autonomous region concerned, according to which it is two years lower for men and women.

Currently, special rules on the age of marriage continue to apply for certain professional groups (university students, civil aviation employees and professional athletes). They are based on a letter from the Ministry of Civil Administration dated 9.7.1986 as a guide for marriage registry authorities. According to this letter, the age of marriage in civil aviation is 26 for men and 24 for women. The absolute ban on marriage applies (regardless of age) to professional athletes for as long as they are members of the national team; in special circumstances, the 'organization' may grant an exception. As a rule, university students must be at least 30 years old or have graduated. The legal consequences of a violation are not explicitly stated⁸.

⁸ *Ivi*, pp. 442-577.

§ Article 1048 of the Civil Code prohibits marriages between blood relatives in the direct line and up to the third degree in the collateral line (i.e., according to the Chinese count, with common grandparents, therefore also between brothers and half-brothers and between cousins).

It is not expressly regulated whether this prohibition on marriage should also apply between stepchildren and stepparents (and their respective relatives), as well as between adopted children and adoptive parents (and their respective relatives). The details are controversial in the literature; it is difficult to find references to practice. First, the wording of the general reference provisions in § 1072 par. 2 CC (for stepchildren and stepparents) and § 1111 CC (for adopted children and adoptive parents) argues in favour of the applicability of the marriage prohibition in both cases, according to which the provisions on the relationship between natural parents and children apply *mutatis mutandis* to their respective rights and duties, which also includes the marriage prohibition in § 1048 CC. The prevailing view in the literature focuses on the fact that this is ‘fictitious consanguinity’ (i.e. a relationship comparable to consanguinity). In the case of stepchildren and adoptive parents, this is regularly assumed; in the case of stepchildren and adoptive parents, part of the literature seems to want to make the marriage prohibition dependent on the stepchild having cohabited with the adoptive parent for a longer period or having been maintained by the adoptive parent. In the direct line (but not in the collateral line), the prohibition of marriage remains in force even if the corresponding legal relationship has been terminated⁹.

Even if the parents have their natural child adopted by a third party, the prohibition of marriage between them remains in force, since the parents’ rights and duties are transferred with the adoption, but the blood relationship is not dissolved.

The literature also assumes a (customary) prohibition in the case of direct in-laws, whereas this does not apply to the collateral line. Consequently, the marriage between father-in-law and daughter-in-law would be inadmissible, not that between brother-in-law and sister-in-law.

The prohibition of marriage for persons suffering from an illness for which one should not marry according to medical opinion (see § 7 n° 2 Marriage Law) no longer applies since the entry into force of the CC. According to § 1053 CC., on the other hand, the marriage may be annulled for concealment of a serious illness.

Since 2003, a prior medical examination is no longer required for persons

⁹ *Ivi*, pp. 733-801.

wishing to marry. The Marriage Register Ordinance of 1993, previously in force, still required persons wishing to marry to undergo a medical examination before marriage and to present the result of the examination when registering the marriage. As early as 1986, however, the Ministry of Civil Administration had issued a notification that differentiated between diseases according to whether there was an absolute or temporary ban on marriage or whether marriage was permitted but with a ban or restrictions on procreation. It is said in the literature that it is left to the private and autonomous decision of the persons concerned whether to undergo a medical examination. In a 'marriage registration application information sheet', the parties must confirm by their signature that they are 'aware of each other's health conditions'.

Also, since 2003, there are no special prohibitions for marriages with foreigners. However, there are special rules for marriages of active military personnel.

Moreover, double marriage (bigamy) is prohibited by Section 1042 (2) of the Civil Code.

Finally, Section 1042 (1), sentence 1 of the Civil Code prohibits marriages arranged by third parties, 'marriages for sale' and other acts that compromise the freedom to marry. As is clear from the wording and the legal system of the provisions on defective marriage (cf. § 1046, § 1052 CC.), in all these cases there must always be a violation of the man's or woman's matrimonial freedom in the form of coercion, or a threat exercised by the other party or a third party. A threat within the meaning of § 1052 CC. is defined in detail in § 18 Interpretation Family rules. On the other hand, simple violations of the prohibition in § 1042 c. 1 s 2 CC. to use the occasion of a marriage to demand pecuniary benefits, as was the traditional practice, are harmless to the marriage itself. This corresponds to the pragmatic line of the Communist government in combating these traditions¹⁰.

4. *Unregistered marriages*

The application of the compulsory registration of de facto marriages (see above), introduced in 1986, has proved difficult in practice. There are still many de facto marriages in which the partners have not registered the marriage, even though the union was intended and experienced as a marriage and is considered as such by those around them. Especially in rural areas, mar-

¹⁰ *Ivi*, pp. 900-988.

riages were often only registered late, often not at all. De facto marriages are therefore still widespread today.

In the run-up to the revision of the Marriage Law in the early 1990s, there were discussions on how to deal with these de facto marriages. Originally, the Communist government recognized de facto marriages and (until 1986) legally treated them in the same way as registered marriages. The prerequisite for a de facto marriage was that the partners were considered spouses by the environment and that the conditions for a valid marriage (voluntariness, age requirements, etc.) were fulfilled when the case was submitted to the court or an authority.

The legislator now insists on registration as a matter of principle and only grants relief for ‘old marriages’ concluded before 1.2.1994. If the marriage has not been registered, it is in principle not legally valid; an exception applies only to certain ‘old marriages’. Consequently, § 1049 S 4 CC. (like § 8 Abs 4 Marriage Law, recently introduced during the 2001 revision of the Act) provides that the registration must be recovered if the marriage has not been registered. § 6 of the marriage rules. Family rules states that, in the case of a subsequent registration, the marriage must be considered valid from the moment when both parties meet or have met the actual conditions for marriage established by the Marriage Law. The general provisions on the registration of marriages apply to the registration procedure (see § 8 of the Marriage Ordinance)¹¹.

As regards existing de facto marriages, the transitional provision of § 7 of the marriage rules. Family rules distinguishes the legal consequences depending on the moment at which the de facto union was concluded: (1) if the parties involved had already concluded the de facto marriage before 1.2.1994 (the date on which the Marriage Ordinance came into effect) and if the conditions for registering this marriage also existed at that time, the de facto marriage is treated in the same way as a registered marriage (the interpretation speaks of an ‘actual marriage’). (2) If, on the other hand, the parties did not enter the de facto marriage until after 1.2.1994, or if the conditions for registering this marriage existed only after this date, this union is equated to a registered marriage only if it is registered subsequently. If a case is brought before the court in which the existence of the marriage is relevant, the People’s Court must inform the parties that registration must be completed before the case can be considered. Until the registration is completed, the laws regulating marriage

¹¹ 周利民贺小电著《婚姻家庭继承法实用教程》北京中国人民大学出版社2021pp51-93and204-275ZHU LIMIN, HE XIAODIAN (cur.), *Practical Course on Marriage, Family and Inheritance Law*, Renmin University Press, Beijing, 2021, pp. 51-93 and 204-275].

do not apply and the court will not accept an action for dissolution of the de facto marriage. On the other hand, the court must accept actions for the maintenance of joint (non-marital) children or for the division of property on termination of the relationship, § 7 no. 2 marriage rules CC. Family rules § 3 marriage rules. Until the entry into force of the CC., the regulations of an interpretation of the 1989 marriage rules “on the treatment of cases in which the registration of the marriage has not been established, but one lives and cohabits under the name of spouses” were relevant but were repealed by a decision of the Supreme People’s Court of 29.12.2020 with effect from 1.1.2021. It is unclear which regulations will apply in their place. It is conceivable that the Supreme People’s Court assumes that the Civil Code regulations will apply by analogy to these disputes (child maintenance and distribution of assets)¹².

5. Null marriages

The 2001 revision of the Marriage Law introduced new provisions on null and void marriages, which have now been incorporated into the CC in an amended form (Articles 1051-1054 CC). These are marriages that have been registered even though they should not have been because of a prohibition that existed at the time of the marriage or because one of the spouses concealed a serious illness. If the court declares the marriage null and void or annuls it by decree, the marriage is considered non-existent from the beginning.

According to Article 1051 of the Civil Code, a marriage is null and void if one of the following requirements for marriage has not been met: prohibition of double marriages, prohibition of marriage if the relationship is too close, failure to reach the legal age for marriage. This is an exhaustive list; other breaches do not lead to the nullity of the marriage (cf. § 17 § 1 Supreme People’s Court interpretation Family rules). For instance, a marriage is not null and void due to a procedural error in its registration. A civil action brought on this ground would be rejected by the People’s Court for lack of jurisdiction. In this case, however, it is possible to file an administrative appeal or an administrative action (§ 17 § 2 Supreme People’s Court interpretation Family rules). These administrative proceedings are intended to correct procedural errors¹³.

最高人民法院民事审判第一庭编《最高人民法院民法典婚姻家庭编司法解释（一）理解与适用》北京：人民法院出版社，2021年，第104-181页 [FIRST CIVIL TRIAL DIVISION OF THE SUPREME PEOPLE’S COURT (cur.), *Supreme People’s Court Judicial Interpretation of the Marriage and Family Section of the Civil Code (I) Understanding and Application*, People’s Court Press, Beijing, 2021, pp. 104-181].

¹³ *Ivi*, pp. 288-371.

It is not expressly regulated whether the breach of the special rules on the age of marriage for certain occupational categories is to be understood as a ‘failure to reach the legal age of marriage’ within the meaning of Article 1051 of the Civil Code, which would lead to the nullity of the marriage. The relevant provisions do not mention any legal consequences, and the relevant commentary of the Supreme People’s Court does not mention the special provisions. Probably the most valid reasons argue in favour of a lack of nullity in this case: if nullity had been intended, one would have expected this to be at least indicated in the Supreme People’s Court commentary. Rather, it is more likely that a violation would entail, at best, professional consequences, as also foreseen in the special case of students (exmatriculation), and that the persons concerned would have difficulty registering their marriage, since the marriage registration authority must follow the guidelines of the Ministry of Civil Administration’s letter¹⁴.

According to Article 10 of the Supreme People’s Court Interpretation of the Family Code, a marriage is cured of the causes of nullity of the marriage listed in Article 1051 of the Civil Code if a circumstance of nullity of the marriage that still existed at the time of the marriage has ceased to exist prior to the submission of the application for the declaration of nullity of the marriage.

In general, the marriage annulment proceedings are initiated by an application to the People’s Court. Each spouse is entitled to file an application. Furthermore, § 9 of the Interpretation Supreme People’s Court rules. Family also grants a right of petition to the ‘interested parties’ and differs as follows according to the grounds for nullity: In the case of multiple marriages, the “close relatives of the parties and the basic organization” also have a right of application (§ 9 no. 1); in the case of a prohibition of marriage due to too close a relationship, the right of application is available to the “close relatives” of the spouses (§ 9 no. 3); and in the case of the spouse not having reached the legal age of marriage, the right of application is available to the “close relatives” of the spouse who has not reached the age of marriage (§ 9 no. 2). In the case of a third-party application by “interested parties”, both spouses are called upon to answer the application (cf. § 15 Supreme People’s Court Interpretation Family rules).

Section 14 of the Supreme People’s Court Interpretation CC. Family rules even allows the nullity of the marriage to be established a posteriori, after the death of one or both spouses. In this case, only the surviving spouse is the defendant (see § 15 § 2 Supreme People’s Court – Interpretation CC. Family

¹⁴ *Ivi*, pp. 395-448.

rules). In the case of the death of one or both spouses, the application may also be filed by an interested party. If both spouses are already deceased, there is no defendant¹⁵.

It should be noted that the People's Court – regardless of any application – is obliged *ex officio* to determine the nullity of the marriage. This principle can be derived from several individual provisions of the Supreme People's Court interpretation of the CC. Family rules: Thus, the nullity of the marriage must be established by a ruling even if the applicant has withdrawn his application (§ 11 par. 1 of the Supreme People's Court CC. Family rules Interpretation). If both an application for divorce and an application for a declaration of nullity are received for the same conjugal relationship, the court must first decide on the application for nullity (§ 13 Supreme People's Court Interpretation CC. Family rules). Even if there is no application for annulment, but the People's Court finds in the context of a divorce case that the marriage is null and void, the court must notify the spouses *ex officio* of the nullity of the marriage and declare the marriage null and void by a corresponding declaratory judgment (see § 12 Supreme People's Court Interpretation CC. Family rules). In marriage annulment proceedings, there is also no need for conciliation (§ 11 (2) Family rules).

The marriage is voidable under § 1052 CC. if it was contracted based on a “threat” and under § 1053 CC. if one spouse has not truthfully informed the other spouse of a serious illness before the marriage was registered. For the definition of threat, see § 18 par. 1 Supreme People's Court -Interpretation CC. Family. Section 18 par. 2 Supreme People's Court -Interpretation CC. Family rules makes it clear that only the spouse under duress has the right to apply for the annulment of the marriage. According to § 1052 (2) of the Civil Code, the application is subject to a period of preclusion of one year from the end of the acts of duress. If the compelled spouse's physical liberty has been restricted during the marriage, the one-year period starts to run from the day on which he regains his physical liberty (Article 1052 § 3 of the Civil Code). The provisions relating to the suspension, interruption and extension of the limitation period do not apply to the one-year period (§ 19 Para. 1 Supreme People's Court Interpretation CC. Family). The absolute limitation period pursuant to Section 152 para. 2 CC does not apply either. (§ 19 para. 2 Supreme People's Court Interpretation CC. Family)¹⁶.

As with the entry into force of the CC. the ground for marriage annulment

¹⁵ *Ivi*, pp. 498-561.

¹⁶ *Ivi*, pp. 602-673.

on grounds of illness was abolished, § 1053 CC. now provides for the possibility of marriage annulment if one spouse does not truthfully inform the other spouse of a serious illness before the marriage. According to Section 1053(2) of the Civil Code, the application is subject to a preclusion period of one year from the date of knowledge or culpable ignorance of the ground for annulment.

An application for annulment of the marriage must be submitted exclusively to the People's Court (cf. §§ 1052 S 1, 1053 S 1 of the Civil Code).

A void or annulled marriage has no binding effect from the beginning; the parties involved do not have the rights and duties of spouses (§ 1054 S 1 CC.). The People's Court collects the marriage record *ex officio* and transmits the final decision to the marriage registration authority (§ 21 Family Ordinance), which is then documented in the marriage registry (§ 16 Marriage Ordinance).

After the decision on the invalidity of the marriage, further decisions on the division of property and joint children may be necessary.

The general rules of property law (§§ 1062 ff., §§ 1087 ff. CC.) do not apply to the division of property after the end of a defective marriage. In contrast, relatively rudimentary rules can be found in § 1054 CC. According to it, the parties involved must first try to agree on how to proceed with the property acquired during the cohabitation. If no agreement is reached, the People's Court decides by judgment in accordance with the principle of the special consideration of the innocent party (§ 1054 subsection 1 s 2 Civil Code). If the marriage is null and void due to bigamy, the division of property must not damage the property interests of a party to the legal marriage (§ 1054 para. 1 s 3 Civil Code). In order to protect its rights, the party to the legal marriage has the right to request its formal participation as a third party in the proceedings with the right to make its own applications (cf. § 16 Supreme People's Court Interpretation CC. Family). About the division of property, on the other hand, the law establishes the presumption (rebuttable by evidence) that the property acquired during the cohabitation is jointly owned (see § 22 Supreme People's Court Interpretation CC. Family). However, in the case of division, account must be taken of the fact that the party who was not responsible for the nullity or annulment of the marriage and who relied on the validity of the marriage receives a 'greater' share¹⁷.

§ 1054(2) of the Civil Code now also provides for an express claim for damages by the spouse not responsible for the nullity or annulment of the marriage. In the first place, the request is addressed to the other (guilty) spouse.

¹⁷ *Ivi*, pp. 729-784.

However, for the facts referred to in § 1052 of the Civil Code, it is argued that other persons who jointly caused the marriage by threat are also liable for damages. The purpose of this claim is to punish the guilty party and protect the blameless spouse who has “invested energy and money in the marriage”. At the same time, it is emphasized that the claim does not exist if both parties are guilty of nullity or annulment of the marriage. For the individual facts of a void or voidable marriage under Articles 1051 and 1052 of the Civil Code, the literature provides rules for determining whether one spouse is at fault. The claim includes both material and immaterial damages.

If joint children were born in the void marriage, the provisions of the Marriage Law relating to parents and children apply accordingly (Article 1054(1) (4) of the Civil Code)¹⁸.

6. *Effects of marriage*

The Civil Code contains some general provisions on the effects of marriage: for instance, husband and wife have the same status in the family (Article 1055 of the Civil Code) and are both free to produce, work, study and become socially active, without one spouse being able to restrict or interfere with the other spouse in this respect (Article 1057 of the Civil Code). Marriage also has consequences in succession law, the spouse having the right to inherit (see Article 1061 of the Civil Code)¹⁹.

Furthermore, Article 1043(2) of the Civil Code stipulates, among other things, that spouses must “be faithful to each other, respect and take care of each other”. In this respect, however, it is only a programmatic sentence with no binding legal value, as is also apparent from the interpretation of the Supreme People’s Court CC. Family rules, according to which a request based only on § 1043 CC. is not accepted (see § 4 Supreme People’s Court CC. Family rules interpretation).

Furthermore, after the marriage is registered, the spouse may become a member of the spouse’s family or the spouse may become a member of the spouse’s family on the basis of a mutual agreement between the spouses (§ 1050 CC.). However, spouses may also create a new family. This ‘family membership’ does not entail any immediate legal consequences. In the litera-

¹⁸ *Ivi*, pp. 800-881.

¹⁹ 陈胜才:《婚姻家庭编》,北京:中国检察出版社,2021,pp.81-127[CHEN SHENGCAI (CUR.), *Civil Code—Legal Adviser to the Public: Marriage and Family Section*, Beijing, China Procuratorate Publishing House, 2021, pp. 91-155].

ture, it is emphasized that this is due to tradition: Traditionally, only a male descendant can continue the family tradition as ‘successor’. However, not all families have a male descendant, mainly because birth planning has so far been very restrictive. Moreover, ‘admission’ into a family regularly has the practical consequence that the admitted family member moves into the admitted family’s household, whereas a ‘newly established’ family creates a new family of its own.

According to § 1059 par. 1 CC, spouses are obliged to maintain each other. The spouse who is entitled to maintenance has a claim against the other spouse for maintenance needs (cf. § 1059 para. 2 CC). Further details are not specified in the law or the interpretations of the Supreme People’s Court.

The literature takes a restrictive view of the obligation of spouses to pay maintenance under Section 1059 of the Civil Code: the right to maintenance (enforceable and actionable by the courts) exists only if one of the spouses is destitute or has difficulty in supporting himself/herself. In the literature, there are no concrete statements on the amount of the maintenance claim. It is only said that the courts must take into consideration the capacity of the debtor, the actual state of need of the creditor, and the general standard of living of the place in question. In addition, the literature states that the obligation to pay maintenance is part of the ‘obligation to meet living expenses’, which must be met in the first place with the joint assets and only then with the personal assets of the spouses if their joint assets are not sufficient.

7. *Divorce law*

Chinese divorce law distinguishes between divorce by mutual consent and divorce pursued by only one side²⁰.

aa) Consensual divorce before the registry authority

In the case of a divorce by mutual consent, an official procedure is provided for (cf. § 1076 Civil code in conjunction with §§ 10-13 Marriage Register Ordinance). A divorce by mutual consent requires that both spouses conclude and sign a written divorce agreement, § 1076 para 1 Civil code. The divorce agreement must contain the declaration of intent of both spouses that they wish to divorce and have agreed on matters such as child maintenance and the settlement of property and liabilities (cf. § 1076 para 2 Civil code).

The marriage register authority has subject-matter jurisdiction for the di-

²⁰ S. KE LI, *Marriage unbound*, Stanford University Press, Stanford, CA, 2022, pp. 152-187.

voiced by mutual consent in accordance with the rules already outlined in the context of marriage. In the case of a divorce of Mainland Chinese, the marriage register authority of the place of permanent household registration of at least one of the two parties is locally competent (§ 10 para 1 Marriage Register Ordinance). In the case of divorce of a Mainland Chinese from a foreigner, a Taiwanese Chinese, a Chinese residing in Hong Kong or Macau, or a Chinese residing abroad, the marriage registry authority of the place of permanent household registration of the Mainland Chinese has sole local jurisdiction (§ 10 para 2 Marriage Registry Ordinance)²¹.

Both spouses must appear in person at the registry authority, each apply for divorce (Section 1076(1) of the Civil Code or Section 10(1) of the Marriage Registry Ordinance) and present the following documents: (1) the household registration booklet and the identity card; (2) the marriage certificate; (3) a written divorce agreement jointly signed by both parties (Section 11(1) of the Marriage Register Ordinance), the content of which the law mentions as examples agreements on child maintenance, property and liabilities (see Section 1076(2) of the Civil Code, Section 11(3) of the Marriage Register Ordinance). Non-Mainland Chinese must present valid passports or visas instead of the household registration booklet and the identity card (§ 11 para 1 Marriage Register Ordinance).

The basic idea of the divorce agreement is that it should serve to ensure the provision for the children and the spouse who is in financial difficulties at the time of the divorce. The agreement must therefore not violate “the spirit” of the relevant statutory provisions on the consequences of divorce, in particular on child maintenance and on the division of property (sections 1084- 1090 of the Civil Code). Furthermore, the agreement must comply with the general principles of equal rights for men and women and the protection of women and children. In practice, it is not uncommon for a further maintenance and care obligation of one spouse for the other (ill) spouse to be agreed. In addition, the agreement must not harm the legitimate interests of third parties.

A cooling-off period was newly introduced with the CC on 1.1.2021: to this end, section 1077 of the CC stipulates that either spouse may withdraw the application for registration of divorce within 30 days of the day on which the marriage register authority received the application for registration of divorce. After the expiry of this period, both spouses must again appear in person at the marriage register authority within 30 days to request the issuance of

²¹李舒、唐青林、袁惠主编《合伙纠纷裁判规则·典型案例办案思路与实务要点精解》中国法制出版社，2022，pp.110-268 [LI SHU, TANG QINGLIN, YUAN HUI (cur.), *Rules for adjudicating partnership disputes – Typical case handling ideas and practice points in detail*, China Legal Publishing House, Beijing, 2022, pp. 110-268].

the divorce certificate. If the issuance is not requested (within this period), the application for registration of divorce is deemed to be withdrawn.

The marriage register authority checks whether the requirements for divorce are met based on the documents on hand. Accordingly, a divorce by mutual consent is to be rejected if no divorce agreement has been reached, the parties involved have no or only limited legal capacity or the registration of the marriage has not been carried out in China (§ 12 Marriage Register Ordinance). If necessary, the marriage register authority has to investigate *ex officio* (§ 13 n. 1 Marriage Register Ordinance). However, a comprehensive verification of the spouses' information by enquiries with authorities is no longer provided for; the spouses must, however, be questioned separately to ensure the truthfulness of the divorce agreement; however, an examination of the content of the divorce agreement takes place only partially. If these requirements are met, the register authority must register the divorce and issue a certificate of divorce (section 1078 of the Civil Code, section 13 S 2 of the Marriage Register Ordinance). With the issuance of the divorce certificate the marriage is divorced²².

bb) Disputed divorce

At the request of one of the spouses, the marriage may be divorced by court order (section 1079 subsection 1 Civil code).

The People's Court has subject-matter jurisdiction for the contested divorce (cf. § 1079 para 1 Civil code, §§ 22 ss. Civil Procedure Law). According to § 22 Civil Procedure Law, the People's Court at the place of residence of the defendant has local jurisdiction. The People's Court at the plaintiff's domicile (or, if domicile and habitual residence do not coincide, the plaintiff's habitual residence) has jurisdiction under section 23 of the CPC (only) in divorce actions brought against persons who are not in the territory of the PRC, whose whereabouts are unclear or who have been declared missing, who are in labour education or who are imprisoned. Further rules on local jurisdiction can be found in a judicial interpretation of the Supreme People's Court on the Civil Procedure Law of 30.1.2015 as amended on 29.12.2020. If the defendant has left the domicile (i.e. the place where he or she is registered, section 3 Supreme People's Court interpretation Civil Procedure Law) for more than one year, the People's Court at the plaintiff's domicile has jurisdiction; if the plaintiff and the defendant have left the domicile for more than one year, the court at the defendant's habitual residence has jurisdiction; if the defendant has no

²² 主编安凤德《婚姻家庭案件疑难问题裁判精要》,北京法律出版社2021pp.130-182[AN FENGDE(CUR),*Summary of Decisions on Difficult Issues in Matrimonial and Family Cases*, Law press China, Beijing, 2021, pp. 130-182]

habitual residence, the People's Court at the defendant's place of residence at the time of filing the action has jurisdiction (section 12 Supreme People's Court interpretation Civil Procedure Law).

For divorces of Chinese resident abroad whose suits are not accepted by the foreign court due to lack of jurisdiction, the People's Court at the place of marriage or at the last Chinese place of residence of a spouse has jurisdiction – if the marriage was contracted in China (§ 13 Supreme People's Court interpretation Civil Procedure Law); if the marriage was contracted abroad, the People's Court at the original place of residence or at the last Chinese place of residence of a spouse has jurisdiction (§ 14 Supreme People's Court interpretation Civil Procedure Law). If one spouse's residence is abroad while the other spouse's residence is in mainland China, the People's Court at the spouse's residence in China has exclusive jurisdiction (section 15 Supreme People's Court interpretation Civil Procedure Law). If both spouses are abroad but not domiciled there, the People's Court at the domicile of one or the other spouse has jurisdiction for divorce actions (§ 16 Supreme People's Court interpretation Civil Procedure Law)²³.

If one spouse is legally incapacitated, the guardian may file the divorce action on his or her behalf. This follows indirectly from Art 62 Supreme People's Court interpretation Family rules, which provides for a special procedure if the guardian remains inactive although the legally incapacitated spouse is significantly violated in his or her legal rights and interests by the other spouse.

In divorce proceedings, compulsory mediation by the court is initially provided for (Art 1079 para 2 HS 1 Civil code). The court has to investigate ex officio whether the substantive requirements for divorce are met, i.e. whether "circumstances exist which have led to the breakdown of the spouses' feelings" (Art 1079 para 3 no 5 Civil code). The marriage is to be divorced if it is broken (§ 1079 para 2 HS 1 Civil code).

§ Section 1079 Civil code assumes that the marriage has broken down in the following cases: in the case of a double marriage, if one of the spouses lives with someone else, if violence is committed in the family or a family member has been abused or abandoned, if one spouse does not give up gambling, intoxication or other evil habits despite repeated admonitions, if one of the spouses has been declared missing, if the spouses have lived apart for at least two years because of inharmonious feelings, or if a dispute arises between the spouses as to whether children should be conceived (so § 23 2. HS

²³ 主编张琴斌《中华人民共和国家庭教育促进法释义》北京中国法制出版社2021年10月18日出版。ZHANG YONG, CAI SHUMIN (ed.), *Law of the People's Republic of China on the Promotion of Family Education Interpretation*, China Legal Publishing House, Beijing, 2021, pp. 102-181].

Supreme People's Court interpretation Family rules).

If one of these circumstances exists, the respondent cannot object to the petition for divorce under § 63 Supreme People's Court interpretation Family rules that the other spouse is (also) at fault.

In principle, the consent of the other spouse is required in the following cases: if the spouse of an active military member requests a divorce (section 1081 of the Civil Code in conjunction with section 64 of the Supreme People's Court interpretation Family rules), if the husband requests a divorce during a pregnancy of the wife and within one year after the birth of a child or six months after an abortion (section 1082 of the Civil Code).

With the entry into force of the Civil code, a right to divorce was introduced. According to this, the court must grant a divorce if both spouses, after the people's court has not allowed the divorce by judgment, have continued to live separately for at least one year, section 1079 para 5 Civil code²⁴.

9. *The point of view of Canon law*

The legislation of the Church reaffirms that every Catholic must, as a matter of principle, marry a Catholic (cf. Canon 1086) in order to remain always in the faith, he has received and to increase his spiritual life, following the path of the true faith, in mutual help in the moral life, with the assistance of the Church. In fact, beginning with the first theologians and Fathers up to the present day, the Church always shows great desire to defend the faith of the faithful, and for this reason has instituted the impediment of disparity of worship that limits marriage between a Catholic and a non-baptized person. Both in the history of the people of Israel and in the first Christian communities, there has always been a prohibition against marrying pagans; as history progressed, there was a legislative evolution: already with the first Particular Councils of the 4th century, *ad liceitatem* prescriptions were introduced, which developed into *ad validitatem* prescriptions from the 7th century; the Code of 1917 considered this exception of marriage to be a diriment impediment (can. 1070), then the 1983 Code confirmed this discipline with some significant novelties²⁵.

²⁴ HE XIN, *Divorce in China*, New York University Press, New York, NY, 2021, pp. 29-106.

²⁵ 孙亮:《教会法特有的司法原则:以教会法婚姻中的法律保护主义提名为核心》,载《基督教学》第3辑,宗教出版社, HUAILIANG, *Judicial Principles Peculiar in Canon Law: An Analysis Centered on Functions of Defender of the Bond and Promoter of Justice in Canonical Marriage*, in *Study of Christianity*, vol. 25, Religious Culture Publishing House, Beijing, 2019, pp. 366-377]; OLIVIERO DILIBERTO, *Paolo di Tarso, I ad Cor.*

But marriage that is not sacramental does not enjoy absolute indissolubility, i.e. in certain cases, it does not exclude some possibility of dissolution, which the Church, since apostolic times, has admitted in favour of the faith (cf. I Cor 7, 12-15). The Church's doctrine on the dissolution of non-sacramental marriages, as well as on the awareness of its power, has matured over the centuries. There are more marriages which can be dissolved today than in the first millennium. The main reason for dissolution, however, is always the same: the *favor fidei*²⁶.

In the thousands of years of its history, China has received many religious beliefs from the outside, which have become intertwined with the indigenous one, commonly called traditional, in which the worship of local gods is prominently associated with the worship of ancestors. This religion has entered deeply into the social and cultural fabric in the history of Chinese civilization, and has played, and still plays, an important role in the family, influencing the value and purpose of marriage, responsibility for children and their upbringing.

For the Chinese, marriage was, and is, a family affair, not just a union of love between lovers, because the purpose of marriage is the continuation of the family that ensures the continuation of ancestor worship, that is, the carrying on of new generations to provide for the memory of that family of the past. In this sense, the new family formed by marriage had one foot in the past and one in the future. The spouses' present consisted in managing the obligations arising from their new social status.

Therefore, for the Chinese, marriage was necessary, indeed, indispensable. Chinese culture, deeply rooted in the family, still retains some of the ancient values, despite the country's rapid social and economic change.

Because of this cultural and political situation, Catholic marriage presents quite a few problems, especially in the case of marriage with religious disparity. In fact, many Catholics, maintaining tradition, still prefer marriage among the faithful. But in the current social situation, (emigration from villages to industrial cities, westernization of customs, materialistic education, etc.) the possibility of finding a Catholic partner is rather rare, and in recent years, marriage with cult disparity has become common²⁷.

VI, 1-8 e le origini della giurisdizione ecclesiastica nelle cause civili, in *Studi economico-giuridici*, vol. 49, 1979, pp. 181-219.

²⁶ FERNANDO PUIG, *Realismo giuridico e la dottrina canonistica contemporanea sull'essenza del matrimonio*, in *Ius Ecclesiae*, vol. 16, 2004, pp. 433 – 453.

²⁷ PIETRO LO IACONO, *Repubblica popolare cinese, Chiesa cattolica ed eterosessualità del matrimonio (Quando dal diritto naturale scaturiscono sorprendenti convergenze)*, in *Il Diritto di famiglia e delle persone*, 2, 2021, pp. 715-773.

So far, the Church, while maintaining the impediment, admits its dispensation for the faithful who do not have the possibility of finding a partner of the same faith. The rules for obtaining this dispensation consist of:

1) requesting, but only from the Catholic party, commitments and promises that safeguard the continuation of religious practice and therefore the solidity of the faith, so as to guarantee the baptism and Catholic upbringing of the offspring;

2) informing the other non-baptized party of this promise;

3) making both parties aware of the aims and essential properties of marriage (cf. can. 1125); also, how the latest modifications made to the rules for obtaining the dispensation, are marked by the ecumenical spirit and therefore respect for the culture, or ideology, or different faith of the non-baptized party. In the current Code, however, there is only one ‘mixed’ impediment, that of *disparitas cultus*, while the second impediment of this type, present in the Codex of 17, that is, that of *mixtae religionis*, and which was *impedimentum impediens* (can. 1060-1064), no longer exists in the new Codex, and instead, under the rubric *De matrimoniis mixtis* (can. 1124-1128) the request for a license to celebrate is permitted.

We note, however, that request No. 2 places all the burden and responsibility for the preservation of the faith and the religious education of the offspring on the Catholic party since the non-Catholic party is only required to “be informed” of the partner’s promises.

With regard to request No. 3, it must be emphasized that being instructed on the purposes and essential properties of marriage, certainly requires all engaged couples to attend a marriage preparation course, which also includes this chapter of the Catechism. It is not written, however, that attendance is compulsory and in fact, until now, it was limited to the Catholic part only. It must not be forgotten that Catholics are a minority group in China, and unbaptized people are totally ignorant of Church doctrine, particularly concerning marriage, or even ignorant of the existence of Catholicism. The content of this request goes far beyond the knowledge that the betrothed couple can acquire and assimilate in the brief, and not compulsory for both parties, premarital courses that have been organized so far.

As far as the education of the offspring is concerned, there seems to be no doubt that such education in odd-numbered marriages becomes more difficult than in marriages between two Catholics, even in the hypothesis that the non-baptized spouse leaves the Catholic spouse free to baptize and educate their children in the Catholic Church. This research sought, at least in its intention, to demonstrate that in this specific area, the application of the norms of Canon Law is closely linked to pastoral activity, on which essentially falls the respon-

sibility for religious education, knowledge, and awareness of the meaning of marriage, and, ultimately, the religious education of offspring.

We note, in conclusion, how canon law, and its application also in the field of matrimony, can indeed be a real instrument for the development of full and effective matrimonial equality and also an effective and concrete benchmark for religious freedom, based on the principle that '*salus animarum suprema lex*'²⁸.

²⁸ JUAN IGNACIO ARRIETA, *La salus animarum quale guida applicativa del diritto da parte dei pastori*, in *Ius Ecclesiae*, 12, 2000, pp. 343-374.