

The Concubine in Republican China: Social Perception and Legal Construction

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Abstract

Beginning in the late nineteenth century, the question of whether concubinage violated the principle of monogamy arose in legal and public debates. Late imperial views of the concubine as a minor wife continued to influence popular views of the concubine in the Republic, leading many to condemn concubinage as bigamy. Hoping to circumvent the monogamy issue, Republican jurists who wished to continue the legal tolerance of concubinage created the new category of household member. The dual identities of the concubine—as minor wife and household member—reflect social and legal responses to the challenge posed by the new meaning of monogamy and reflect the tensions both within and between law and society.

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At the mention of the word “concubine,” an image of a hapless victim or a conniving vixen often comes to mind. For decades, these popular perceptions of the concubine featured in literature, film and the arts have influenced academic scholarship. Only recently have scholars begun to look beyond the familiar stereotypes and tropes associated with concubinage and focus specifically on the concubine as a central subject of study.¹ Such close investigation, particularly from the perspective of law, reveals the concubine to be both a multi-dimensional person and concept with a long and complicated history.

Since its emergence as a custom among elite families in the Song dynasty, concubinage has undergone significant changes, which in turn affected the concubine’s identity. A concubine occupied an intermediary position between main wife and domestic maid; where she stood along that continuum depended on legal prescription and social convention. Beginning in the Ming dynasty, the law came to recognize concubinage as a semi-legitimate form of marriage; by the Qing, the law treated a concubine as a minor wife.² Late imperial law sanctioned concubinage and extended to the custom a certain measure of legal protection.

¹ Kathryn Bernhardt, “Women and the Law: Divorce in the Republican Period,” in Kathryn Bernhardt and Philip C.C. Huang, eds., *Civil Law in Qing and Republican China*, Stanford: Stanford University Press, 1994, pp. 187-214; Kathryn Bernhardt, *Women and Property in China, 960-1949*, Stanford: Stanford University Press, 1999; Patricia Buckley Ebrey, “Concubines in Song China,” *Journal of Family History*, 1986, 11.1, pp. 1-24; Patricia Buckley Ebrey, *The Inner Quarters: Marriage and the Lives of Chinese Women in the Sung Period*, Berkeley: University of California Press, 1993; Maria Jaschok, *Concubines and Bondservants: A Social History*, London: Zed Books, 1988; Neil Ennis Katkov, “The Domestication of Concubinage in Imperial China,” Ph.D. dissertation, Harvard University, 1997; Sheieh Bau Hwa [Hsieh Bao-Hua], “Concubines in Chinese Society from the Fourteenth to the Seventeenth Centuries,” Ph.D. dissertation, University of Illinois at Urbana-Champaign, 1992; Ann Waltner, “Kinship Between the Lines: The Patriline, the Concubine and the Adopted Son in Late Imperial China,” in Mary Jo Maynes, Ann Waltner, Birgitte Soland and Ulrike Strasser, eds., *Gender, Kinship, Power: A Comparative and Interdisciplinary History*, New York: Routledge, 1996, pp. 67-78; Rubie S. Watson, “Wives, Concubines, and Maids: Servitude and Kinship in the Hong Kong Region, 1900-1940,” in Rubie S. Watson and Patricia Buckley Ebrey, eds., *Marriage and Inequality in Chinese Society*, Berkeley: University of California Press, 1991, pp. 231-55.

² Bernhardt, *Women and Property in China*, pp. 168-78.

Developments in the nineteenth century, however, unleashed forces that would make the legal tolerance of concubinage untenable. Repeated defeats in foreign wars, especially by Japan in 1895, led many Chinese intellectuals to wonder whether the source of China's weakness stemmed from the very institutions long regarded as symbols of Chinese superiority. Inspired by Western and Japanese models of modernization, Chinese reformers sought to transform the Confucian-based systems inherited from previous dynasties. In the legal realm, this called for a revision of the Qing code, and, eventually, the creation of new legal codes.

As the drive for legal reform that began in the late Qing accelerated in the Republican period, concubinage, along with the Confucian cultural universe within which it was situated, came under fire. For many, concubinage epitomized all that was wrong with imperial China and easily became a target of attack. Social critics often linked concubinage to prostitution, blaming both for causing moral degeneration and sapping national vigor; the abolition of concubinage—and the patriarchal system it sustained—was deemed necessary if China was to move forward. Women's groups in particular took the lead in the campaign to eliminate concubinage.³ For opponents to the custom, the persistence of concubinage undermined the new legal commitment to monogamy and equality between the sexes.

But what of the concubine? To many, the concubine embodied the weakness of China and was represented as a victim to be rescued. Just as China needed to lift itself out of the semi-colonial state to which almost a century of imperialist encroachment had reduced it, so too did the concubine need to liberate herself from the subordinate status to which centuries of patriarchal authority had relegated her. Along with other practices like footbinding and opium smoking, concubinage became a way for the intellectual elite to talk about the plight of the Chinese nation.

However compelling the metaphor of the concubine as China, the concubine was a person, not an abstraction. Despite the denunciation of concubinage, concubines continued to exist, for Republican law proscribed concubinage in such a way as to allow for its implicit tolerance. Legislators reasoned that codified law's silence on the concubine issue constituted an abolition of concubinage, leaving it up to judges, who found themselves

³ For a discussion of the role of women's groups in the legal campaign against concubinage, see Lisa Tran, "Sex and Equality in Republican China: The Debate Over the Adultery Law," *Modern China: An International Quarterly of History and Social Science*, 2009, 35.2, pp. 191-223.

confronted with concubines in their courtrooms, to come up with a way to apply the law to women whose legal status as concubines had been erased by legal fiat.⁴ In an environment now hostile to concubinage, how did society view the concubine? Under a new legal regime based on monogamy and equality between men and women, how did jurists recognize women who were concubines without appearing to support concubinage?

During the Republic, the concubine held two distinct identities: minor wife and household member. The popular perception of the concubine as minor wife reflects the persistence of late imperial views of the concubine well into the twentieth century. The story of the concubine as minor wife reveals that the social custom of concubinage in the Republic remained largely unchanged from Qing times. In contrast, the legal identity of the concubine marks a dramatic break from late imperial practice. The legal construction of the concubine as household member was created by Republican jurists to accommodate the social existence of concubines under a new legal order that, at least in principle, condemned concubinage. With the introduction of the new category of household member, Republican jurists sought to disassociate concubinage from its semi-marital connotations acquired during the Ming and Qing. In this way, they were able to make concubinage compatible with the legal commitment to monogamy and extend to the concubine legal rights and benefits. Together, the dual identities of the concubine as minor wife and household member reflect both a continuity with and departure from the late imperial story of concubinage.

Yet these identities were inherently at odds, with one couched in semi-marital terms and the other rejecting any association with marriage. To what extent did popular and legal conceptions of the concubine compete with one another? Although jurists had deliberately disavowed the late imperial conception of minor wifeness, substituting in its place the language of household membership, society continued to subscribe to the Qing conception of the concubine as minor wife. Not surprisingly, the introduction of a legal construct at odds with popular views resulted in the creation of a legal fiction far removed from social reality.

⁴ For a discussion of the implications of this on a concubine's claims to property, see Bernhardt, *Women and Property in China*, pp. 178-95.

The Qing Construction of the Concubine as Minor Wife

Because Qing views of the concubine as a minor wife continued to influence Republican society, it is critical to first examine late imperial discursive constructs of the concubine. In general, Qing law differentiated *di* 嫡 (having to do with a main wife) from *shu* 庶 (having to do with a minor wife) based on whether or not the Six Rites had been performed. The Six Rites encompassed the set of betrothal and marriage rituals which were to be followed in the acquisition of a main wife.⁵ Under Qing law, only the first woman married (*xianqu* 先娶) in accordance with the Six Rites enjoyed status as the legal or principal wife (*diqu* 嫡妻 or *zhengqi* 正妻); all other women married later (*houqu* 後娶) were considered minor wives (*qie* 妾) by default.⁶ As Republican period legal analyst Xu Chaoyang explains:

We can see that in ancient times, although [men could] marry many [women], only one woman had the qualifications of [main] wife. All the rest were what later generations would call “minor wives” (*xiaoxing* 小星). Their position was one rank below that of the [main] wife. From this, we can see that in ancient

⁵ Although there were regional variations, the Six Rites generally included the following: 1. the dispatching of a gift-bearing matchmaker to the prospective bride’s family (*nacai* 納采), 2. the acquisition of the woman’s full name and the year, month, day and hour of her birth (*wenming* 問名), 3. the comparison of the couple’s horoscopes (*naji* 納吉), 4. the presentation to the woman’s parents of a betrothal gift, usually a previously agreed upon sum of money (*nazheng* 納徵), 5. the setting of a wedding date (*qingqi* 請期) and 6. the performance of a ceremony (*qinying* 親迎). Ruan Changrui, *Zhongguo hunyin xisu zhi yanjiu* 中國婚姻習俗之研究 (Research on Chinese marriage customs), Taipei: Taiwan shengli bowuguan chubanbu, 1989, pp. 20-32; Ma Zhisu, *Zhongguo de hunsu* 中國的婚俗 (Marriage customs of China), Taipei: Jingshi shuju, 1981, pp. 7-16. By the Song, the Six Rites had been condensed into three, although they continued to be referred to as the Six Rites. Vermier Y. Chiu [Zhao Bing], *Marriage Laws and Customs of China*, Hong Kong: The Chinese University of Hong Kong, 1966, pp. 4-7; Feng Shaoli and Chen Guohui, eds., *Jiushi hunsu* 舊式婚俗 (Traditional-style marriage customs), Jiulong: Jinhui chubanshe, 1991, p. 6.

⁶ *Xing’an huilan* 刑案匯覽 (Conspectus of penal cases), Reprint, Taipei: Wenhai chubanshe, 1968 [1886], vol. 40, pp. 22a-25b. See also Bernhardt, *Women and Property in China*, p. 184.

times, [there existed] a system of one husband and multiple minor wives (*yifu duoqie zhi* 一夫多妾制).⁷

As Xu elaborates, the law prohibited “the existence of two wives of equal [standing] (*liangqi pingdeng zhi cunzai* 兩妻平等之存在); the law limited a man to one legal wife at a time, but turned a blind eye to the number of minor wives he acquired.⁸ Jiang Yaobin, writing half a century later, describes the traditional marriage system as a system of one husband, one main wife and multiple minor wives (*yifu yiqi duoqie zhi hunyin* 一夫一妻多妾制婚姻).⁹ As long as the main wife/minor wife distinction remained intact, concubinage did not technically undermine the Qing commitment to the system of one husband and one (main) wife, the term conventionally translated as monogamy.

While for the most part, Qing law only recognized as the legal wife the first woman to be married in accordance with the Six Rites, there were two exceptions to the rule. After the death of the main wife, a man could promote a minor wife already in his household to main wife status (*fuzheng* 扶正); she would then inherit the privileges and duties of the main wife. Otherwise, a man could remarry. Since the minor wife next in line did not automatically assume main wife status upon the death of the first wife, the man was free to marry again. The new wife entered the household as the successor wife (*xuxian* 續絃 or *jishi* 繼室) and assumed the position vacated by the deceased first wife.

Social practice as well reflected the distinction between a main wife and a minor wife, as evidenced by customary terms of address. Titles for the former included principal wife (*zhengqi*, *diqu* or *faq* 髮妻), main wife (*da laopo* 大老婆, *da taitai* 大太太 or *zuoda* 作大) and head mistress (*da nainai* 大奶奶); and titles for the latter included second wife (*erfang*)¹⁰ 二

⁷ Xu Chaoyang, *Zhongguo qinshufa suyuan* 中國親屬法溯源 (The origins of China's family law), Shanghai: Shangwu yinshuguan, 1934, pp. 88-89.

⁸ *Ibid.*, pp. 93-94.

⁹ Jiang Yaobin, *Zhongguo qi qie* 中國妻妾 (Wives and concubines in China), Shijiazhuang: Hebei renmin chubanshe, 1991, p. 73.

¹⁰ Literally “second room,” *erfang* is translated here as “second wife.” A concubine would be called the “second wife” or “third wife,” etc. depending on the order in which she entered the household. Here, “second wife” refers specifically to what society would consider a minor wife, and should not be confused with *ciqu* 次妻, also conventionally translated as second wife; a *ciqu*'s status was customarily closer to that of a

房 or *er taitai* 二太太), minor wife (*xiao laopo* 小老婆, *xiao taitai* 小太太, *xiaoxing* 小星 or *zuoxiao* 作小) and secondary mistress (*er nainai* 二奶奶). As suggested by the main/minor legal distinction and the plethora of social terms capturing that distinction, both law and society treated a minor wife as a subcategory similar to but always distinct from a main wife.

This view of the minor wife in the Qing manifested itself in a multitude of ways. A minor wife's residence in the household, contingent on her master's continued approval, combined with the legitimacy conferred upon the children she bore for him, differentiated a minor wife from a courtesan or a prostitute. A minor wife was integrated into kinship structures in a way that these other women were not; yet that integration was always predicated on the minor wife's subordinate status. For instance, while a main wife's entrance into the household was often celebrated with an elaborate wedding ceremony, a minor wife usually entered with little or no ceremony. In addition, unlike a main wife who enjoyed some degree of protection from arbitrary expulsion through the seven grounds for divorce (*qichu* 七出)¹¹ and the three limitations (*san buqu* 三不去),¹² a minor wife's place in the household depended exclusively on her ability to keep her husband, and often also the main wife, happy. Furthermore, a minor wife's assumption of mourning obligations to her husband and his family on an unequal basis and the obedience a minor wife owed to the main wife reified the social distinction between a main wife and a minor wife. Finally, while motherhood raised both women's standing in the household, it held different implications. For a main wife, giving birth to a son minimized the threat of divorce; for a minor wife, a son incorporated her into the kinship structure,

main wife. According to Bernhardt in *Women and Property in China* (p. 173 n. 6), a man usually married a woman as a *ciqu* to assume the duties of his first wife, who either through illness or some other incapacity, could not manage the household. Unlike an *erfang*, a *ciqu* entered the household with full observance of the Six Rites, thereby making her status in the household equal to that of the first wife, at least in the eyes of society.

¹¹ These included: failure to produce sons, adultery, incurable disease, disobedience to in-laws, jealousy, loquacity and theft (from family members). Xue Yunsheng and Huang Tsing-chia [Huang Jingjia], eds., *Duli cunyi* 讀例存疑 (Doubts remaining after perusing the statutes), Reprint, Taipei: Chinese Materials and Research Aids Service Center, 1970 [1905], statute 116.1.

¹² A wife could not be divorced if she had no natal family to return to, if she married her husband when he was poor and since then he had become wealthy, or if she had completed three years of mourning for her parents-in-law. *Ibid.*

establishing, although never guaranteeing, her position as kin in the household.¹³

For all the different titles in customary practice, popular views of concubinage reflected the basic division in legal thinking between a main wife and a minor wife. Qing law and society considered concubinage to be a semi-legitimate marriage and a concubine to be a minor wife, views that Republican society continued to endorse and that Republican jurists struggled to repudiate.

The Concubine as Minor Wife in the Republic

With all the changes that the fall of the Qing dynasty and the end of the imperial system brought in their wake, the custom of concubinage remained surprisingly resilient. Not only did the custom survive intact into the twentieth century, but Republican society continued to view concubinage in much the same way late imperial society had viewed it. Although the attacks against “Old China” sparked by the May Fourth movement began to change the way society perceived concubinage, what remained unexpectedly tenacious were Qing views of the concubine as a minor wife.

The Minor Wife in Republican Society

Memoirs and literature that paint life in Republican households with multiple wives suggest that the custom of concubinage in the Republic remained largely unchanged from late imperial times. Lin Yutang’s voluminous 1939 novel *Moment in Peking* narrates the experiences of three generations of a group of upper middle-class families in the early twentieth century. One of the stories told is of Cassia, a maid who accompanied the main wife when she married into the Tseng household. Later, at the main wife’s suggestion, Mr. Tseng promoted Cassia from maid to concubine status, a common practice with a long history.¹⁴ As a concubine, Cassia assumed new roles: “Now Cassia was companion and chief assistant to Mrs. Tseng

¹³ Ebrey, *The Inner Quarters*, p. 230.

¹⁴ *Ibid.*, p. 221.

[the main wife], and wife to her husband as well.”¹⁵ Of significance is Lin’s characterization of Cassia’s new role as “wife,” attesting to the persistence in the Republic of the Qing conception of the concubine as a minor wife.

Second generation Canadian-born Denise Chong’s biography of her grandparents, aptly entitled *The Concubine’s Children*, also provides evidence of the continued perception of the concubine as a minor wife in the early twentieth century. Chong’s grandfather, Chan Sam, had joined other sojourners from the southern province of Guangdong to make his fortune in Canada. Leaving behind his main wife, Chan Sam settled in Vancouver and soon amassed enough money to purchase a concubine. As Chong explains, her grandfather “was thirty-six and had yet to father sons;” taking a concubine was a customary way to fulfill a man’s patrilineal duties.¹⁶

In another memoir set in Republican China, Su-hua Ling’s description of her mother Ju-lan’s disappointment at learning that she was to be Fourth Wife rather than Second Wife as she had been led to believe suggests the importance of order in determining a woman’s status in a household with multiple wives. Giving birth to a son offered a woman low on the marital ladder a way to sprint her way to the top. This was the case for Sixth Wife, the last one to enter; by giving birth to the much-coveted son, she won the favor of the master and assumed greater authority than her position warranted.¹⁷

While the birth of a son diminished—although it could never completely eliminate—the threat of arbitrary expulsion, the main wife could claim the son as her own. In the Qing, the main wife was, by law and custom, the “social mother” of all the children borne by her husband’s minor wives.¹⁸ This late imperial practice seems to have continued despite the provisions in the Guomindang (GMD) civil code guaranteeing a concubine’s claims to her birth children. Wang Yiwei’s narrative¹⁹ about her life, which spanned most of the twentieth century, opens with a story of how

¹⁵ Lin Yutang, *Moment in Peking: A Novel of Contemporary Chinese Life*, New York: J. Day Co., 1939, p. 47.

¹⁶ Denise Chong, *The Concubine’s Children*, New York: Viking, 1995, p. 22.

¹⁷ Ling Su-hua [Ling Shuhua], *Ancient Melodies*, London: Hogarth Press, 1953.

¹⁸ Francesca Bray, *Technology and Gender: Fabrics of Power in Late Imperial China*, Berkeley: University of California Press, 1997, pp. 351-58.

¹⁹ The narrative account was based on a series of interviews of Wang Yiwei (1905-1993) conducted by Wang Zheng in 1993. Wang Yiwei founded *Niusheng* 女聲 (Women’s voice) in 1932 and served as its editor-in-chief.

her mother, the main wife, claimed the minor wife's son as her own as soon as he was born.²⁰

The relationship between a main wife and a minor wife, then, was predicated on the superiority of the former and the inferiority of the latter. As long as both parties knew their place and did not overstep their boundaries, harmony and order obtained. The story of the concubine Cassia discussed earlier, for instance, portrays the hierarchical relationship between a main wife and a minor wife:

A wife is like a flower, which may either be enhanced in beauty and dignity or completely spoiled by the vase that goes with it. Mrs. Tseng felt dignified by the arrangement and completely secure, because she was a well-bred woman, sure of her own ground. She could read and write, while Cassia could not, and the distinction between wife and maid-concubine was protected by a feeling of status and character. The wife could wear skirts, but the concubine must wear trousers. For her part, Cassia knew better than to challenge Mrs. Tseng's position and the respect due her as mistress.²¹

Literacy, breeding, dress—these were just some of the more salient markers distinguishing a main wife from a minor wife. The more subtle signifiers of status reveal themselves in Mrs. Tseng's unmistakable air of self-confidence and Cassia's humble and deferential demeanor.

Similarly, Jung Chang's recounting of her grandmother's experiences as first a minor wife to the warlord general Xue Zhiheng and then later as a successor wife to Dr. Xia, a Manchu widower, highlights the stark contrast between the two positions in the eyes of Republican society.²² As a minor wife, Yang Yufang, Chang's grandmother, understood well the implicit rules intended to keep her in an inferior position. However, when she remarried after the general's death, this time as a main wife, she assumed management of Dr. Xia's household. For Dr. Xia's eldest son, the prospect of his father taking Yufang as a successor wife so outraged him that he shot himself as a last resort to shock his father into changing his mind. That, perhaps more than anything, illustrates the very real differences between a main wife and a minor wife in the eyes of Republican society.

²⁰ Wang Zheng, *Women in the Chinese Enlightenment: Oral and Textual Histories*, Berkeley: University of California Press, 1999, p. 223.

²¹ Lin, *Moment in Peking*, p. 47.

²² Chang Jung, *Wild Swans: Three Daughters of China*, New York: Anchor Books, 1991, p. 46.

Only the entrance of a main wife, with the authority vested in her new position, posed a potential threat to the balance of power already established in the household.

Scholarly studies of women in late imperial China document the power wielded by main wives in the “inner quarters” at the expense of minor wives and maidservants.²³ A main wife enjoyed rights and privileges exclusive to her position. Dr. Xia’s adult children balked at the prospect of those rights and privileges passing on to a woman they viewed as a conniving upstart who had seduced their aging father. Had their father taken Yufang as a minor wife, as they had suggested, Yufang would have assumed a much lower position. However, as a successor wife, she gained the highest position for a woman in the household.

Together, these stories demonstrate that Republican society continued to view and treat a concubine much as it had done in the Qing. Neither a full wife nor a casual sexual partner, the concubine occupied an intermediate space somewhere in between. In short, a minor wife was a “wife” to the extent that her reproductive capabilities served the same patrilineal purpose as the main wife, but she was “minor” in the sense that in practically every way she remained subservient to the wife who preceded her.

The Minor Wife in a Republican Court

Besides memoirs and literature, court cases also attest to the persistence in Republican society of late imperial views of concubinage as a semi-legitimate marriage and the concubine as a minor wife. Testimonies of litigants and witnesses indicate that the Qing distinction between a main wife and a minor wife continued to influence popular thinking. Republican judges at times also echoed Qing logic in their questioning and reasoning. Despite Republican jurists’ explicit repudiation of the Qing view of concubinage in semi-marital terms, the construct of the concubine as a minor wife continued to pervade the courtroom.

Bigamy cases involving concubines illustrate well the murky line between marriage and concubinage. In such cases, even the court had to acknowledge that concubinage was a *de facto* marriage and that a concubine was a minor wife in social, if not in legal, terms. As the Beijing District

²³ Bray, *Technology and Gender*; Ebrey, *The Inner Quarters*.

Court explained in a 1943 bigamy case, concubinage can often be mistaken for marriage. In this case, the plaintiff, 16-*sui* Wang Xiuzhen, based her claim to legal wife status on her residence permit, which recorded her relationship with the defendant Shi Bingzhang, a wealthy Beijing merchant, as that of husband and wife. The court, however, rejected the validity of the residence permit in determining the legal status of Wang Xiuzhen. The court reasoned that “a concubine’s relations with a husband is also generally called husband and wife relations; this arises from ignorant custom and common perception.”²⁴

Although the court dismissed the residence permit as evidence of marriage, based as it was on customary practice rather than legal definition, it does demonstrate well the blurry line between concubinage and marriage in popular thinking. The blurriness of that line owed much to the indiscriminate use of the term for wife, “qi,” to refer to both main wives and minor wives. Thus, in the case above, the label “qi” on the residence permit could refer to either a main wife or a minor wife; in the court’s eyes, it was not invested with any legal meaning but merely reflected popular usage. Indeed, in his initial counterclaim filed in response to the bigamy charges lodged against him, the defendant had referred to Wang Xiuzhen as simply his wife (*qi*); the court did not construe this as the defendant’s admission that Wang Xiuzhen was his legal wife.

While the title “qi” in popular usage could be used to refer to either a main wife or a minor wife, the term “qie” referred specifically and exclusively to a “minor wife;” a woman who was really a main wife would never be casually, much less formally, referred to as “qie.” Consequently, when Wang Xiuzhen’s mother admitted at one point that her daughter had been married as a minor wife (*qie*), the court did not turn a deaf ear as it had when the defendant had referred to Wang Xiuzhen as his wife. In light of corroborating evidence documenting Wang Xiuzhen’s status as a minor wife, the court dismissed the bigamy charges.

Certainly, the semi-marital nature of concubinage in social practice made it difficult for judges at times to tell a main wife and a minor wife apart. The judge in another bigamy case in Beijing in 1942 found himself confronting three women, all claiming to be the main wife. Of interest in this case is the very clear distinction between a main wife and a minor wife in the minds of the women.

²⁴ Beijing difang fayuan 北京地方法院 (Beijing District Court). Beijing Municipal Archives (hereafter BMA), 65.7.9258. Cases are cited by catalog number.

In the case at hand, Zhang Yafeng, a prosperous Beijing merchant married to three women, found himself accused of bigamy by his newest wife of two years, 18-*sui* Mrs. Zhang née Wang.²⁵ According to the newest Mrs. Zhang, the defendant had informed her that his first wife was deceased and that she would be his successor wife. However, the young woman later discovered that not only was the first Mrs. Zhang alive and well, but so was another Mrs. Zhang who preceded herself and who claimed that *she* was the successor wife. In the final count, there were three Mrs. Zhangs, all claiming to be the main wife of the defendant Zhang Yafeng.²⁶

A brief analysis of the terms used by the three women to refer to themselves and to each other reveals the continuing influence in the Republic of the Qing distinction between main wife and minor wife. All three agreed that the first Mrs. Zhang was the *faqī*, a title reserved for the first woman a man formally married. As the *faqī*, then, the first Mrs. Zhang was also by default the principal wife (*zhengqī*). The youngest Mrs. Zhang did not contest the first Mrs. Zhang's position; indeed, she even referred to the older woman as "main wife" (*dà nǚrén* 大女人). What she vehemently objected to was being categorized as a minor wife (*zuoxiao*) or as Third Wife (*sanfang* 三房). Throughout the legal proceedings, the youngest Mrs. Zhang consistently referred to herself as a "main" (*dà*) wife, a title she insisted was rightfully hers since she believed she had been married as a successor wife. A Qing court would have dismissed her claims as groundless since the presence of a main wife in the household meant that all women married later were automatically deemed minor wives. But after the 1929-30 civil code went into effect, a Republican court was bound by a new legal definition of marriage that opened the door for concubines who had been married in a public ceremony witnessed by at least two people to claim legal wife status.²⁷ This case demonstrates that despite Republican

²⁵ It was not unusual for some years to pass before a woman filed bigamy charges against her alleged husband. A regular theme running throughout such bigamy cases was the concubine's financial motives. Consistently, it was the lack of economic support from the man—whether through abandonment, neglect or poverty—that drove a concubine to file a bigamy suit.

²⁶ BMA, 65.6.4516.

²⁷ For a discussion of the legal implications of the new definition of marriage in the GMD civil code for concubines, see Lisa Tran, "Cong qie dao qi: Guomindang minfa de hunli yaoqiu de hanyi" 從妾到妻: 國民黨民法的婚禮要求的含義 (From concubine to wife: implications of the wedding ceremony requirement in the Guomindang

law's explicit denial of any degree of marital status to concubinage, the social identities of main wife and minor wife persisted, making it difficult for Republican jurists to maintain the legal distinction between marriage and concubinage. Although the suit was eventually dropped, the youngest Mrs. Zhang sought to take advantage of this murky legal ground to claim legal wife status.

For all the confusion over who was a main wife and who was a minor wife, no one questioned the applicability of these Qing categories to the case at hand. Taken together, such stories—whether constructed from imagination, memory or legal cases—suggest that the custom of concubinage and society's view of concubines survived intact in the political transition from imperial to Republican China.

The Republican Legal Construction of the Concubine as Household Member

The persistence of late imperial views of the concubine as a minor wife placed Republican lawmakers in a bind. On the one hand, they had made a public commitment to monogamy as a legal principle; on the other hand, they implicitly wanted to continue the legal tolerance of concubinage. Whether motivated by self-interest or because they wished to avoid social disruption, Republican legislators refused to criminalize concubinage as bigamy. Lawmakers feared what would happen if all the men who kept concubines were thrown in jail; many expressed concern about the state's ability to enforce the law. Despite the shift in power after the Revolution of 1911, the character of the Republican elite remained largely unchanged. Just as many Qing officials had concubines, so too did a number of important figures in the Republic, including Jiang Jieshi (Chiang Kai-shek), head of the GMD; Wang Chonghui, chair of the Judicial Yuan and advisor to the commission entrusted with drafting a new civil code; and Yang Sen, the Sichuan warlord famous for the number of concubines he kept. Unlike their late imperial predecessors, however, Republican leaders could no longer invoke Confucian ideals to justify their extramarital liaisons, espe-

civil code), in Philip C.C. Huang and Kathryn Bernhardt, eds. *Zhongguo gujin falü, shehui yu wenhua: cong susong dang'an chufa* 中國古今法律: 社會與文化: 從訴訟檔案出發 (Law, society and culture in China, past and present: research from archival case records), Beijing: Falü chubanshe, 2009, pp. 321-50.

cially after the May Fourth assault on Confucianism. How could they protect a man's prerogative to keep concubines without appearing to betray the legal commitment to monogamy?

To achieve these inherently conflicting goals, jurists declared concubinage to not be a marriage of any kind. They reasoned that if the law did not consider a concubine to be a wife, then how could concubinage be in violation of the system of one husband and one wife? A 1919 decision by the Daliyuan exemplifies the kind of legal maneuvering typical of early Republican efforts to reconcile the apparent contradiction between monogamy and concubinage:

The laws currently in force have adopted monogamy (*yifu yiqi zhi* 一夫一妻制). The relations between a household head²⁸ and a concubine cannot be considered the same as the relations between a husband and wife.²⁹

By opening with a declaration of the legal commitment to monogamy, even if only to discount its relevance to concubinage, the Daliyuan implicitly acknowledged the challenge that the monogamy ideal posed to the legal tolerance of concubinage. To meet that challenge, all the semi-marital connotations concubinage had acquired in the Qing had to be expunged; concubinage could no longer be thought of as anything remotely resembling marriage.

In 1913, the Department of Justice (*Sifabu* 司法部) issued an emphatic statement denying any relationship whatsoever between bigamy and concubinage:

The crime of bigamy in the criminal code merely refers to having a wife and then marrying another wife.³⁰ Concubinage is not a formal marriage (*fei zheng-*

²⁸ The reference to a concubine's master as "household head" (*jiazhang* 家長) had its origins in the Ming, according to Zhao Fengjie, *Zhongguo funü zai falü shang zhi diwei* 中國婦女在法律上之地位 (Chinese women's legal status), Reprint, Shanghai: Shangwu yinshuguan, 1977 [1928], p. 62 n. 89.

²⁹ Guo Wei, *Daliyuan panjueli quanshu* 大理院判決例全書 (Complete collection of Daliyuan judgments on important cases), Reprint, Taipei: Chengwen chubanshe, 1972 [1933], p. 211.

³⁰ To correct the impression the Department of Justice gave that only men committed bigamy, the Daliyuan issued a statement later that year clarifying that the law against bigamy "of course included women with husbands who married again." Zheng Yuan-

shi hunyin 非正式婚姻); it has absolutely nothing to do with the crime of bigamy.³¹

As the Daliyuan,³² the highest court in the early Republic, affirmed in a 1917 ruling, “Marrying a concubine cannot be called marriage. Therefore, a man with a wife who also takes a concubine has not committed bigamy.”³³

The Daliyuan’s denial of marital status to concubinage shaped later Republican legal thinking under the Supreme Court and the Judicial Yuan.³⁴ In a criminal bigamy case in Beijing in the 1940s, the defendant cited in his counterclaim the Daliyuan’s 1917 ruling quoted above and a 1931 interpretation by the Judicial Yuan confirming the Daliyuan ruling. According to both judicial decrees, the defendant contended, “marrying a concubine by no means constitutes marriage.”³⁵ As the defendant had acquired the plaintiff to serve as his concubine, his union with her could only be considered illicit cohabitation (*tongju pindu* 同居姘度); hence, the defendant concluded, the bigamy charges against him held no legal basis and should be dropped.

If jurists were no longer to consider concubinage a semi-legitimate marriage as they had done in the Qing, then how were they to think about it? To ensure that concubinage would not be confused with marriage, jurists had to erase the semi-marital connotations inherited from the Qing and introduce a new way of talking about concubines.

zou, Zhu Hongda and Shao Zumin, eds., *Xingfa jijie* 刑法集解 (Collected interpretations of the criminal code), Shanghai: Shijie shuju, 1932, p. 427.

³¹ Ge Zunli and Han Chao, eds., *Zhonghua minguo xin xinglü jijie* 中華民國新刑律集解 (Collected interpretations of the new criminal code of the Republic of China), Shanghai: Shanghaihui wentang shuju, 1918, p. 79.

³² The Daliyuan was established in 1906 and was based in Beijing. Bernhardt, *Women and Property in China*, p. 76.

³³ Guo, *Daliyuan panjueli quanshu*, p. 507.

³⁴ After 1927, the Daliyuan was renamed the Supreme Court (*Zuigao fayuan* 最高法院), and after 1929 the authority to interpret the law was transferred to the newly established Judicial Yuan (*Sifayuan* 司法院); the Supreme Court remained as the final court of appeals. Philip C.C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*, Stanford: Stanford University Press, 2001, p. 10 (footnote).

³⁵ BMA, 65.8.6981.

The Concubine as Household Member

Beginning in the early Republic, the language of household membership gradually phased out the discourse of minor wifehood in legal discussions of the concubine. Where recognition of concubinage as a semi-legitimate marriage had elevated the concubine to minor wife status in the Qing, the extension of household membership to the concubine in the Republic redefined her legal status as a permanent member of the household. Although the concubine's legal *status* as household member (*jiashu* 家屬)³⁶ remained consistent throughout the Republic, the legal *basis* of her household membership changed throughout the course of the Republic; the Daliyuan defined a concubine's household member status in contractual terms, while the Supreme Court and the Judicial Yuan tied it to co-residence.

The Contractual Basis of Household Membership

The category of household member can be misleading in the particular case of concubines because it may imply a more intimate degree of kinship than lawmakers intended. By defining a concubine's status in terms of household membership, Republican jurists merely wished to extend to a concubine some of the rights and privileges to which her residence in the household entitled her.³⁷ As would become clear after the implementation of the GMD civil code in 1929-30 and the judicial interpretations that followed, their intention was not to recognize the concubine as kin.

Although codified law never formally acknowledged a concubine's status as household member, rulings by the Daliyuan, the Judicial Yuan

³⁶ The Chinese word *jia* 家 can mean family, household or house. "Family" connotes kinship relations defined by blood or marriage, while "household" and "house" can include unrelated persons. Since the Republican legal recognition of the concubine as *jiashu* stemmed from her residence in the household rather than from any claims to kinship, the Republican legal conception of *jia* is translated as household rather than family. Indeed, the Draft Civil Code of the Great Qing considered *jiazhang* to be synonymous with *huzhu* 戶主; both can be translated as "head of household." "Da Qing minlü cao'an" 大清民律草案 in *Falü cao'an huibian* 法律草案彙編 (Compendium of the draft legal codes), Reprint, Taipei: Chengwen chubanshe, 1973 [1926], vol. 2 (1911), p. 8.

³⁷ Bernhardt, *Women and Property in China*, p. 211.

and the Supreme Court clearly indicate Republican lawmakers' intention to categorize the concubine as such. The Daliyuan in a 1914 ruling emphasized that while a concubine's relationship with her master could not be legally considered marriage, she could for practical purposes be considered a member of the household.³⁸ In short order, several decisions in 1915 reaffirmed the legal categorization of the concubine as a household member.³⁹

What was the legal rationale for defining a concubine's status in terms of household membership in the early Republic? The drafts of the civil code had based household membership on both the household registration system and kinship.⁴⁰ Adapting these provisions to the particular case of the concubine, the Daliyuan based the concubine's status as household member on her permanent residence in the household and on the contractual nature of her relationship with her master. In a 1916 ruling, the Daliyuan reasoned that since a man and his concubine lived in the same household with the intention of sharing a life together, the concubine should then be considered a member of the household.⁴¹ For this reason, the Daliyuan excluded mistresses from the category of household member.⁴² In a 1917 ruling, the Daliyuan stated that "a concubine's status as household member stems from a contract."⁴³ A concubinage contract, the Daliyuan clarified in a 1926 ruling, was different from whatever agreement a man may work out with his mistress or live-in lover; only a concubinage contract qualified the woman for status as household member.⁴⁴ Thus, the unique nature of a concubinage contract combined with a concubine's permanent residency in her master's household distinguished her from a man's other extramarital sexual partners and entitled her to household member status.

Far from innovative, the Daliyuan's characterization of a man's relationship with his concubine in contractual terms merely reflected what already existed in social practice. Concubinage was at heart the sale of wo-

³⁸ Guo, *Daliyuan panjueli quanshu*, p. 250.

³⁹ *Ibid.*, pp. 208, 209, 251.

⁴⁰ "Da Qing minlü cao'an," 8-9; "Minlü cao'an qinshubian" 民律草案親屬編 (Book of family of the draft civil code) in *Falü cao'an huibian*, vol. 2 (1915), p. 2; (1925), 2.

⁴¹ Guo, *op. cit.*, p. 209.

⁴² *Ibid.*, p. 210.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 239.

men,⁴⁵ and a written contract merely documented that fact.⁴⁶ A typical contract listed all the parties involved: the man, the concubine, the matchmaker who had arranged the union, and the woman's parents, who would receive the body price for the sale of their daughter into concubinage. The contract explicitly stated that the woman was to be taken as a concubine, duly noted the consent of all parties involved in the transaction and spelled out the terms under which the concubine would take up residence in the man's household.⁴⁷ The Daliyuan declared in a 1915 ruling that a mutually agreed upon contract established the relationship between household head and concubine and as with all contracts, could not be cancelled by either party without legal grounds.⁴⁸

The Residency Requirement of Household Membership

GMD jurists found the Daliyuan's categorization of the concubine as a household member to be a viable solution, for it allowed them to grant the concubine some measure of legal protection without having to recognize the custom of concubinage. However, the household member category in the 1929-30 civil code in which a concubine was placed was based exclusively on co-residence.

Like the Daliyuan, GMD jurists did not intend the extension of household membership to the concubine to be construed as the recognition of the concubine as kin. They concluded that if they wished to continue to categorize the concubine as a household member, they needed to construct a new category based on residency but not on kinship. Marius Hendrikus van der Valk points out that GMD lawmakers created the new residence-

⁴⁵ While one could make the same point about marriage, the elaborate rituals that marked the arrival of a wife masked the financial aspects of the exchange; with concubinage, few social niceties were observed, thereby exposing the blatantly financial nature of the exchange.

⁴⁶ The law did not require the execution of a written contract to establish the relationship between a man and his concubine. In a 1918 ruling, the Daliyuan affirmed an earlier judgment issued in 1915, declaring that "a contract does not require writing for its existence. If it can be proved by any witness or other means that the declarations of intention made by the parties are *ad idem*, it will be sufficient." As cited in V.A. Risanovsky, *The Modern Civil Law of China*, Part 1, Harbin: Zaria, 1927, p. 95.

⁴⁷ BMA, 65.8.5994.

⁴⁸ Guo, *op. cit.*, p. 208.

based definition of household membership for the specific purpose of accommodating the continued social existence of such groups as concubines.⁴⁹

The codification of a new category of household membership based exclusively on residency made explicit the distinction between *qinshu* (親屬) and *jiashu*. Only “*qinshu*” referred specifically to relatives—those persons related to one another by blood or marriage. In contrast, “*jiashu*” encompassed a broader category of persons living together in the same household but not necessarily tied by kinship. A concubine could be considered part of the household (*jia*), but the law would never deem her kin (*qin*).

To capture the distinction between “*qinshu*” and “*jiashu*,” lawmakers created two categories of household membership: one based on kinship and cohabitation, and the other defined exclusively in terms of co-residence. In the first, the “household” was defined as “a body of *relatives* who live together in one household with the object of sharing a life in common permanently” (*italics added*).⁵⁰ Household members in this category who separated from the household lost their household member status (*jiashu zhi shenfen* 家屬之身份) but not their kinship status (*qinshu zhi shenfen* 親屬之身份), the Supreme Court clarified in a 1932 ruling.⁵¹ Former head of the Daliyuan Yu Qichang referred to this group as “proper household members” (*zheng jiashu* 正家屬) to contrast them with those without kinship status, whom he called “quasi household members” (*zhun jiashu* 準家屬).⁵² This latter group fell under the civil code’s new category of house-

⁴⁹ Also included in this category was the *tongyangxi* 童養媳, a young girl who was sold as a child to the family of her intended husband and married to the family’s son when she reached the age of maturity. Marius Hendrikus van der Valk, *An Outline of Modern Chinese Family Law*, Peking: Henri Vetch, 1939, Reprint, Taipei: Ch’engwen Publishing Co., 1969, p. 159.

⁵⁰ *The Civil Code of the Republic of China*, Shanghai: Kelly and Walsh, 1930, Reprint Arlington: University Publications America, 1976, Article 1122.

⁵¹ Fu Bingchang [Foo Ping-Sheung] and Zhou Dingyu, eds., *Zhonghua minguo liufa liyou pan jie huibian* 中華民國六法理由判解彙編 (Compendium of the six laws of the Republic of China, with rationales, judgments and explanations), Taipei: Xinlu shudian, 1964, vol. 2, p. 1147.

⁵² In this latter category, Yu placed sons-in-law, children who followed their mother when she remarried, *tongyangxi* and concubines. Yu Qichang, *Minfa yaolun: Qinshu jicheng* 民法要論：親屬繼承 (Important views on civil law: family and inheritance),

hold membership based exclusively on co-residence: “Persons who are *not relatives* but who live together in one household with the object of sharing a life in common permanently are deemed to be members of the household” (*italics added*).⁵³

Judicial interpretations later clarified that this explanation of household membership applied to the concubine.⁵⁴ In a 1933 ruling, the Supreme Court explained,

Concubinage has already been abolished with the implementation of the Book of Family.⁵⁵ After the Book of Family went into effect, persons who are not relatives but who live together with the purpose of sharing a life in common on a permanent basis are to be considered household members. According to Article 1123, section 3 of the civil code, [a concubine] must be considered a member of the household.⁵⁶

For the remainder of the Republic, this became the legal basis of the concubine’s household member status.

The shift in the concubine’s status from minor wife to household member occurred within the broader transition from the Confucian-

Beijing: Chaoyang xueyuan, 1933, p. 107. Other scholars used different terms to differentiate between the civil code’s two categories of household members, such as “main household members” (*jiben jiashu* 基本家屬) vs. “affiliated household members” (*fushu jiashu* 附屬家屬) and “natural household members” (*ziran de jiashu* 自然的家屬) vs. “artificial household members” (*nizhi de jiashu* 擬制的家屬). Tao Huizeng, *Minfa qinshu lun* 民法親屬論 (On family in civil law), Shanghai: Faxue bianyishe, 1937, p. 235; Li Yichen, *Xianxing qinshufa lun* 現行親屬法論 (On the family law currently in force), Shanghai: Shangwu yinshuguan, 1946, p. 174; Luo Ding, *Qinshufa gangyao* 親屬法綱要 (Essentials of family law), Shanghai: Dadong shuju, 1946, p. 248.

⁵³ *The Civil Code*, article 1123.3.

⁵⁴ See Fu and Zhou, *Zhonghua minguo liufa*, vol. 2, p. 1143; Yu, *Minfa yaolun*, p. 107; Tao, *Minfa qinshu lun*, p. 235; Li, *Xianxing qinshufa lun*, p. 174; Luo, *Qinshufa gangyao*, 1946, pp. 248-49; Zhu Xuefang, *Zenyang baozhang ni de quanyi* 怎樣保障妳的權益 (How to protect your rights and benefits), Shanghai: Zonghengshe, 1947, p. 8.

⁵⁵ The Book of Family, the fourth of the five books that comprised the GMD civil code, was promulgated on December 16, 1930, and implemented on May 5, 1931. Fu and Zhou, *Zhonghua minguo liufa*, vol. 2, p. 979.

⁵⁶ Guo Wei and Zhou Dingmei, eds., *Zuigao fayuan minshi panli huikan* 最高法院民事判例匯刊 (Collected publications of Supreme Court judgments in civil law), Shanghai: Faxue shuju, 1934, vol. 17, p. 60.

inspired patrilineal system to the new “small family” (*xiao jiating* 小家庭) model.⁵⁷ How was the new family ideal, which emphasized conjugal fidelity over filial piety, to accommodate the concubine, whose presence in the household had been morally justified in patrilineal terms and whose purpose had been to domesticate a man’s extramarital sexual activities? Obviously, she had no place; but until the new family ideal replaced the patrilineal system in social reality, GMD jurists had to deal with concubines without appearing to sanction concubinage and the patriarchal values it represented. The architects of the civil code had pretended that concubinage no longer existed, but that was not a viable solution given the continued social existence of concubines. The new definition of household membership offered jurists a convenient way to apply the law to a group who no longer legally existed.

The Recognition of the Concubine as Legal Wife

For all their insistence that concubinage not be considered any form of marriage, Republican jurists did make two concessions. The first was the identification of the concubine as a wife and relative in limited circumstances in Article 12 of the 1914 Amendment Act of the Provisional Criminal Code, which remained in effect until 1928.⁵⁸ The second was the legal recognition as wife of a concubine who had been promoted by her master to main-wife status after the death of his first wife. Although lawmakers limited the circumstances under which the law would recognize a concubine as a wife, that they made these concessions in the first place indicates that even jurists themselves believed that concubinage did, in some respects, resemble marriage.

The first major piece of legislation of the newly established Republic of China was the Provisional Criminal Code, promulgated in 1912. Uncertain of how to deal with the concubine issue, lawmakers decided to ignore it for the time being. Most likely prompted by the multitude of queries

⁵⁷ For a discussion of the small family ideal, see Susan L. Glosser, *Chinese Visions of Family and State, 1915-1953*, Berkeley: University of California Press, 2003.

⁵⁸ *Zhonghua minguo xingfa lijie* 中華民國刑法例解 (Judicial precedents of the criminal code of the Republic of China), N.p.: Shangguang shufa haiyi jushou, 1929, pp. 168-70.

from the courts on how to handle cases involving concubines, lawmakers finally dealt with the thorny issue in the Amendment Act promulgated on December 24, 1914.⁵⁹ Article 12 outlined guidelines for handling cases involving concubines.⁶⁰ The first section specified that the “wife” referred to in the Provisional Criminal Code’s definition of relatives (Article 82) and the “married woman” referred to in the regulation against adultery (Article 289) were to include the concubine. An analysis of the relevant laws reveals that lawmakers intended to make a concubine subject to the same punishment as a wife for certain crimes committed against her master and his kin.

Article 82 defined the legal criteria for “ascendant” and “relative,” terms which appeared in the statutes on homicide, the desecration of graves, abandonment, theft, slander and threatening personal safety and property. The code included a separate set of laws punishing relatives who committed such crimes against an ascendant, whether as the principal offender or as an accomplice; these laws generally prescribed a steeper penalty than those governing the same crimes committed by persons unrelated to one another.⁶¹ For instance, the murder of an ascendant automatically meant

⁵⁹ The legal force of the Amendment Act remained in question for some local officials. In late 1916, the magistrate of Wuding County in Yunnan, in a query regarding a wife-selling case, dismissed the Amendment Act since it had never been passed by Parliament (*Guohui* 國會). In response, the Yunnan Superior Court conceded that while the Amendment Act had not been formally adopted by Parliament, neither had the central government explicitly revoked it. Marius Hendrikus van der Valk indicates that the Yunnan Superior Court based its opinion on the authority of a presidential mandate issued on June 29, 1916, which rendered effective all laws and ordinances issued since May 1, 1914, unless expressly abrogated. *Interpretations of the Supreme Court at Peking: Years 1915 and 1916*, Taipei: Ch’eng-wen Publishing Co., 1968, pp. 12-13, 353 n. 2. On that basis, the Daliyuan deemed the Amendment Act to have the force of law. Guo, *Daliyuan panjueli quanshu*, pp. 307-08.

⁶⁰ After the implementation of the 1929-30 civil code, the Judicial Yuan explicitly revoked the Amendment Act’s provisions on concubines in a 1933 interpretation. Fu and Zhou, *Zhonghua minguo liufa*, vol. 2, p. 1143.

⁶¹ Exceptions to this were the laws on theft, which exempted from punishment relatives who stole from other family members. Derk Bodde and Clarence Morris, based on their interpretation of the commentary in the Qing code, attribute this to the view of the possessions of household members as communal rather than personal property. *Law in Imperial China, Exemplified by 190 Ch’ing Dynasty Cases*, Philadelphia: University of Pennsylvania Press, 1973, p. 38. The Provisional Criminal Code, which was a revision of the Qing code, carried the same logic.

the death penalty; in all other cases of homicide, the punishment could be as light as a ten-year prison sentence. Including the concubine in Article 82's definition of "relative" in effect made the concubine as criminally liable as a wife for crimes committed against senior members of her master's family.

Likewise, including the concubine in Article 289's category of "married woman" enabled the law to punish a concubine just as it would a wife for any sexual transgression. For, like a wife, a concubine's principal duty was to produce sons for the patriline; thus, her sexual purity was of utmost importance. A concubine who engaged in sex with other men was no different from a wife who committed adultery. Hence, lawmakers stipulated that the "married woman" referred to in the adultery law was to also include the concubine.

Whereas the intent of the first section of Article 12 was to make a concubine subject to the same punishment as a wife when she committed a crime against an ascendant or engaged in illicit sex, the second section extended to the concubine, under limited circumstances, the same legal protection guaranteed family members. The second section identified other articles in which a concubine was to be included:

The term "ascendant on the husband's side" in subsection 2 of Article 1 of this Act shall include an ascendant on the side of the master of the family in the case of concubine [sic]; the term "wife," "daughter-in-law," "grand-daughter-in-law" and "any descendant, other than those mentioned above, who is living in the same house" in Article 5 of this Act shall include respectively one's own concubine, concubine of one's son or grandson or of any other descendant living in the same house, and the term "descendant" in Article 8 of this Act shall be applicable to a concubine of a descendant.⁶²

Including the concubine in subsection 2 of Article 1 safeguarded her right to self-defense against cruel and violent acts committed by a senior member of the household. However, this clause only applied to acts that made living together intolerable. Where the injury inflicted by the senior member against the concubine was minor, the prescribed punishment for the ascendant could be commuted to a fine, according to Article 8. Article 5 prescribed the penalty for forcing a "female relative" into prostitution. Although the Provisional Criminal Code included a general law against

⁶² *The Provisional Criminal Code of the Republic of China*, Beijing: The Commission on Extraterritoriality, 1923, pp. 127-28.

forcing women into prostitution (Article 288), the maximum sentence was a one-year prison term; if the woman was a relative, the sentence could be as long as five years according to Article 5. The inclusion of the concubine as a “female relative” would have discouraged a family member keen on making a profit from targeting a concubine. In short, Article 12 inserted the concubine into the kinship networks of her master’s family to extend to her the same legal protection guaranteed family members, albeit in these very limited circumstances.

Questions remained about the meaning and applicability of the specific provisions of the Amendment Act. In 1915, the magistrate of Zhongdu County in Guangxi asked if the law would consider a concubine to be a relative. Citing the Amendment Act, the Daliyuan clarified that a concubine was to be considered to have kinship relations (*you qinshu guanxi* 有親屬關係) with the household head and his family.⁶³ On the basis of Article 12, the Daliyuan concluded that a concubine could be legally considered a relative. As other interpretations by the Daliyuan made clear, however, Article 12 only applied to the specific articles listed; it was not to be construed as a blanket extension of legal wife status to concubines.

In conflating the concubine with the wife, albeit for strictly legal purposes and in only limited cases, early Republican lawmakers seemed to be continuing the Qing practice of recognizing concubinage as a semi-legitimate marriage and the concubine as a minor wife. At least that was how the magistrate of Changshou County in Sichuan read the Amendment Act’s provisions on the concubine. In his query to the Daliyuan in reference to a 1915 abduction case involving a concubine, the magistrate interpreted Article 12 as a guideline to be applied to all the articles in the Provisional Criminal Code and not just to those specifically identified. As the magistrate understood matters, “in all cases where a crime establishes [the injured party’s] status, a wife and a concubine shall be treated more or less the same.”⁶⁴ The case that prompted the magistrate’s query involved a woman kidnapped by a man who subsequently made her his concubine. Hence, her status as a concubine only came about as a result of the commission of the crime of abduction. In the opinion of the magistrate, her new status as concubine granted the woman the right to charge the man with abduction. Citing the second section of Article 355 of the Provisional

⁶³ Guo Wei, ed., *Daliyuan jieshili quanwen* 大理院解釋例全文 (Complete texts of Daliyuan interpretations), Shanghai: Shanghai faxue bianyishe, 1931, p. 215.

⁶⁴ *Ibid.*, pp. 176-77.

Criminal Code, which covered situations in which a woman married her kidnapper, the magistrate sought clarification on the requirement that the couple be divorced before the woman could file charges of abduction against the man.⁶⁵ Since the woman was a concubine, and concubinage was not formally marriage, did the divorce requirement apply in this case?

Even though he acknowledged that concubinage was not a formal marriage, the magistrate talked about the concubine as if she were no different from a wife. In many ways, the magistrate's understanding of concubinage in semi-marital terms echoed Qing legal thinking and practice on the concubine issue. Qing law never equated a wife with a concubine, but many of its statutes treated a wife and a concubine in the same way when it came to criminal matters. To a great extent, early Republican jurists from the central to the local levels continued to be influenced by Qing views of concubinage and adjudicated cases involving concubines in much the same way as they had done in the Qing.⁶⁶ This comes as no surprise, considering that the Provisional Criminal Code was a revised version of the Qing code. Little wonder, then, that the magistrate would leap to the conclusion that the conflation of the concubine with the wife in Article 12 was to apply to all laws containing the word "wife" in the Provisional Criminal Code.

In its reply, the Daliyuan corrected the magistrate's misunderstanding. As it tersely explained, "A concubine's status is not the same as that of a wife; section 2 of Article 355 [of the Provisional Criminal Code] does not apply in this case."⁶⁷ Although the Daliyuan did not elaborate, the message was clear: the conflation of the concubine with the wife in Article 12 applied only to the articles specified; it was not to be interpreted as a blanket statement applicable to all references to wife or married person in the code. In a similar case in 1919, the Daliyuan reaffirmed that the married person referred to in section 2 of Article 355 did not apply to a concubine.⁶⁸ If the scope of Article 12 of the Amendment Act did not extend beyond the articles enumerated, then how were judges to adjudicate cases involving concubines that did not fall within the purview of Article 12?

⁶⁵ Although the article uses gender-neutral language, the gendered translation presented here more accurately reflects social reality.

⁶⁶ See for instance Guo, *Daliyuan jieshili quanwen*, pp. 140, 217, 263-64, 293, 307-08, 310, 509; Guo, *Daliyuan panjueli quanshu*, pp. 216, 224, 224, 226, 227, 228, 230-32, 236-38.

⁶⁷ *Ibid.*, pp. 176-77.

⁶⁸ *Ibid.*, p. 647.

The Daliyuan's lack of clear guidelines led a number of lower courts to continue to misinterpret Article 12 as license to substitute "concubine" wherever "wife" appeared in the Provisional Criminal Code, as the Anhui Superior Court did in two queries to the Daliyuan in 1920.⁶⁹ In a 1917 case involving a man who had sold his wife as a concubine to another man, the Jilin Superior Court also interpreted the conflation of the concubine with the wife in Article 12 as a general rule to follow in handling criminal cases involving concubines. The Jilin Superior Court wanted to know if the same principle could be applied to civil matters. The Daliyuan, however, neither affirmed nor overturned the provincial court's assumption that a concubine should be placed in the same category as a wife for legal purposes; the precise nature of the concubine's status was deemed immaterial to the matter at hand.⁷⁰ Once again, the Daliyuan avoided establishing a general rule to follow in cases involving concubines.

Promoted Concubines

In late imperial times, a man could promote a concubine to legal wife status after the death of the main wife, a custom referred to as *fuzheng*. This was a prerogative of the man allowed under Ming and Qing law and that continued to be acceptable under Republican law.⁷¹ In a 1917 ruling, the Daliyuan reaffirmed the right of a man to elevate a concubine to legal wife status after the demise of his main wife.⁷²

Whether the law would recognize the promoted concubine as a legal wife, however, depended on when that promotion occurred. The Daliyuan followed late imperial practice and acknowledged as a matter of course the legal status of a promoted concubine as wife. As in the Qing, a man's word held the force of law; he could simply declare a favorite concubine his main wife, and the law recognized her as such. As the Daliyuan explained in a 1919 decision, in cases of *fuzheng*, no ceremonial rites need be per-

⁶⁹ *Ibid.*, pp. 755-56, 780-81.

⁷⁰ *Ibid.*, pp. 312-13.

⁷¹ Bernhardt, *Women and Property in China*, p. 169.

⁷² Only the man who owned the concubine, however, enjoyed this privilege. In a 1914 judgment, the Daliyuan denied marital status to a concubine who had been promoted to main wife status by the household head's relatives after his death. Guo, *op. cit.*, pp. 207, 219.

formed unless required by local custom;⁷³ in the eyes of the law, all that mattered was the man's expressed intent to promote a concubine to main wife status.⁷⁴

With the introduction of a ceremony-based definition of marriage in the GMD civil code in 1929-30, however, the law no longer automatically recognized as a legal wife a concubine who acquired main wife status through *fuzheng*. If she had been promoted after the civil code went into effect, then the legal criteria for a valid marriage—an open ceremony witnessed by at least two persons—had to have been performed for the law to recognize her status as a legal wife.⁷⁵

GMD jurists made an exception if the concubine had been promoted prior to 1931. As the Supreme Court affirmed in a 1933 decision, a concubine who acquired main wife status through *fuzheng* before 1931 could be registered as a successor wife (*jishi*).⁷⁶ With this ruling in mind, the Supreme Court in a 1937 Beijing case deemed Zhong-Cheng Shuming, who had originally been taken as a concubine, to be a successor wife after the main wife, Zhong-Qi Guiqing, had severed relations when she left more than ten years ago. The court interpreted the registration of Shuming as the legal mother (*dimu* 嫡母) of Guiqing's son as evidence that the now deceased husband had promoted his concubine to legal wife status sometime after the departure of his first wife.⁷⁷ In an ironic twist of events, a promoted concubine became the legal mother of the son of a former main wife.⁷⁸ When Guiqing, the former main wife, returned years later to re-

⁷³ In Guizhou, for instance, custom required that a ceremony be held for a promoted concubine to acquire main wife status. "Guizhou sheng zhi renshi xiguan" 貴州省之人事習慣 (People's customs in Guizhou province), *Falü pinglun*, Sept. 20, 1925, p. 18.

⁷⁴ Guo, *op. cit.*, p. 222.

⁷⁵ *Zuigao fayuan panli yaozhi: zi 16 nian zhi 40 nian* 最高法院判例要旨:自 16 年至 40 年 (Important points of judicial precedents of the Supreme Court from 1927 to 1951), Taibei: Zuigao fayuan panli yaozhi faxing weiyuanhui, 1954, vol. 1, p. 192.

⁷⁶ Guo and Zhou, *Zuigao fayuan minshi panli huikan*, vol. 14, pp. 41-43.

⁷⁷ *Sifa gongbao* 司法公報 (Judicial gazette), Nanjing: Sifa weiyuanhui mishuting zongwuke, 1940, pp. 4-6.

⁷⁸ While a promoted concubine assumed the role as legal mother (*dimu*) of all her husband's children, any children she had borne while a concubine remained "the children of a concubine" (*shuzi* 庶子); they could not acquire status as "the children of the main wife" (*dizi* 嫡子) even though their mother was now the main wife. Zhu Xuehui, "Shuzi yu qi mu fuzheng hou, shifou qude dizi zhi shenfeng?" 庶子於其母扶正後, 是否取得嫡子之身份? (Do a concubine's children acquire the status of the main wife's

claim her status, the court ruled that, having severed relations with her husband, she could no longer be considered a main wife and the legal mother of her son; her only claim to him now was as birth mother.

Where granting a promoted concubine legal status as wife did not violate the bigamy laws, the conflation of the concubine with the wife in Article 12 increased the risk of concubinage being confused with bigamy. In the case of the former, the man had to be widowed or divorced to raise a favorite concubine to legal wife status; both Qing and Republican law prohibited a man from exercising his *fuzheng* prerogative while he was still married to the main wife. In the case of Article 12, lawmakers limited the conflation of the concubine with the wife to specific articles in the Provisional Criminal Code and the Amendment Act. Yet lower-level courts were wont to interpret Article 12 as a general rule applicable to all articles pertaining to wife and married persons in the Provisional Criminal Code, a tendency that the Daliyuan struggled to stifle. To make that concession would be to admit that concubinage constituted bigamy, and that, Republican jurists were adamantly opposed to doing.

To a great extent, the legal recognition of concubines as wives in *fuzheng* cases and in Article 12 indicates that Republican jurists themselves could not but concede the semi-marital nature of concubinage. In this regard, the concubine's two identities reflect the disjuncture between codified law and legal practice. In the former, lawmakers hoped that by ignoring the concubine issue they could continue the legal tolerance of concubinage—and hence leave intact the late imperial view of the concubine as minor wife—without appearing to betray the commitment to the modern ideal of monogamy. In the latter, judges faced with concubines in their courtrooms invoked the language of household membership to accommodate concubines who no longer held a legal identity of their own. With law and society at odds with one another, and with lawmakers and judges juggling conflicting priorities, it is little wonder that late imperial views of the concubine as minor wife challenged the concubine's new legal identity as household member. Yet in their rhetoric if not always in practice, Republican jurists steadfastly held to the legal identity of the concubine they had created, even as they conceded the popular view of the concubine as minor wife. That Republican jurists failed to consistently stick to their own official construction of the concubine as household

children after their mother has been promoted to main wife status?), *Falü pinglun*, May 11, 1924, 1.46, p. 4.

member prompted many observers to regard with scorn what was clearly a forced and artificial category.

What became increasingly obvious was that concubinage and monogamy were inherently at odds, and no amount of legal maneuvering on the part of Republican jurists could shield the fact that concubinage was at heart a form of bigamy. The Chinese Communist Party (CCP) already acknowledged that fact in its marriage legislation in the Jiangxi Soviet and the border areas, although the categorization of concubinage as bigamy would not be explicitly spelled out until after the promulgation of the Marriage Law in 1950. Unlike the GMD, whose leadership and membership included the majority of men who kept concubines, the CCP had no vested interest in protecting concubinage.

But self-interest only partially explains the GMD's reluctance to criminalize concubinage as bigamy. Given the widespread custom of concubinage, lawmakers feared that prosecuting men with concubines would break up families, wreak social havoc and create political chaos; the Confucian understanding of the relationship between family harmony, social order and political stability still resonated with the GMD leadership. In addition, despite its denunciation by intellectual elites and social activists, concubinage was still socially acceptable, if no longer morally justifiable.

Perhaps, then, the Republican formulation of the concubine as household member offered, if not the best, at least a temporary compromise under the circumstances. Given Republican jurists' goals—to maintain stability and to appear modern—the categorical denial of marital status to concubinage enabled them to preserve concubinage without technically betraying their espoused commitment to the principle of monogamy. Likewise, the legal construction of the concubine as household member allowed jurists to protect the interests of concubines without openly endorsing concubinage. Skeptics then and now may see the Republican legal response to concubinage as a clever ploy to sneak in an anachronistic custom. But Republican jurists considered too high the social costs of criminalizing concubinage as bigamy and took a more moderate approach based on the expectation that concubinage would gradually disappear on its own.

Clearly, the dual identities of the concubine in the Republican period reveal a China caught between a social reality inherited from the Qing and a legal ideal inspired by Western definitions of modernity. At one level, the uneasy coexistence of minor wife and household member attests to the tension between new legal principles and entrenched social practices. At an-

The Concubine in Republican China

other level, the two identities of the concubine reflect a China in transition. Perhaps, given time, the Republican strategy would have gradually phased out concubinage as GMD jurists had intended. Arguably, the success of the CCP campaign against concubinage in the 1950s owes in part to this earlier legal assault on concubinage, however modest. Rather than dismiss as ineffectual or self-serving the Republican construction of the concubine as household member, perhaps it would be more fair to interpret the introduction of this new legal identity—and its clash with the late imperial image of the concubine as minor wife—as symptomatic of the tensions both between and within law and society.