

## Study on Value Reconstruction of Marriage Law in China

Yong-Mei XIA<sup>1,2,a,\*</sup>

<sup>1</sup>School of Public Affairs & Law, Southwest Jiaotong University, Chengdu, Sichuan, P.R. China

<sup>2</sup>Southwest University of Political Science & Law, Chongqing, P.R. China

<sup>a</sup>xiaym11@sina.com

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**Abstract.** The deviation of the value orientation of the current marriage law in China results in many negative implicit functions in the implementation of the marriage law. Its excessive pursuit of the freedom value, efficiency value, and the formal protection of gender equality have presented side effects which are detrimental not only for ensuring the stability of the marriage and family but also for promoting female development. Through the study of family law sociology, this paper proposed that the marriage law in China should reconstruct its value system to become guided by the value of happiness and based on the principles of rational freedom and substantive equality.

### Introduction

In China, the studies of the value of marriage law mainly focused on two categories: firstly, from the macro perspective, historical research on the evolution of the value orientation of the marriage law or a specific system within it, such as ZHOU and WANG [1], and JIANG [2]; secondly, from the micro perspective, discussion about the value orientation against a certain judicial interpretation (mostly the third judicial interpretation) or a specific regulation of the marriage law, such as CHEN and LI [3], QIN [4], and DING [5]. The second category presented slightly more results than the first one. Generally, the field of jurisprudence in China shows a lack of studies on the value of marriage law. The deviation of the value orientation of the current marriage law in China from its original concept results in many negative implicit functions in the implementation of the marriage law. Then the question is how to reconstruct the value system of the marriage law to promote the stability and development of marriage and family through the guidance of values enshrined in law. This is not only meaningful to the protection of women's rights and interests, but also has significance for social stability and development.

### Value Orientation of Current Marriage Law in China

The Marriage Law (1950), the first marriage law issued in P.R. China, is also the first law of China. In 1980, China passed a new Marriage Law (1980), and in 2001 passed Amendment (2001) of Marriage Law. Later in 2001, 2003 and 2011 respectively, the Supreme People's Court issued three judicial interpretations of the marriage law. The value orientation of law is reflected in legislation and judicature. The judicial interpretation is "quasi legislative" in nature, therefore the provisions of judicial interpretation also reflects the value orientation of law. The current marriage law and judicial interpretation in China demonstrate the pursuit of the freedom and equality, and show an inclination to valorize "efficiency".

**Freedom Value.** Marriage freedom includes freedom of both marriage and divorce. The "Marriage Registration Regulations" is issued in 2003, greatly simplifying the registration procedures of marriage and divorce in the civil affairs department. This carried out practically the principle of the marriage freedom, with explicit illustration of the freedom value of the marriage law. Furthermore, the value of freedom has begun to penetrate into the property relationship of marriage and family. The change of the property system of husband and wife is presented as the increasingly expansion of the freedom to dispose of the personal properties of husband or wife.

**Equality.** The three judicial interpretations (2001, 2003 and 2011) of marriage law strengthened gradually the gender neutrality of the personal properties of husband and wife. This gender neutral equal treatment ignored the specific characteristics of marriage and family, which is actually beneficial to the protection of the interests of the stronger party, and exacerbated the unfairness experienced by the weaker party in the marriage. In other words, gender neutral equality is essentially a form equality rather than substantial equality, and sometimes even covers up or exacerbates the substantial inequality.

**Efficiency Value.** The detailed provisions for property division in the judicial interpretations of the marriage law is undoubtedly conducive to guiding the judicial practices, which can quickly consequently resolve the property disputes between the parties of the marriage relationship, improving judiciary efficiency. The integration of the legal interpretation of marriage law and the property law is a kind of technical progress, although it has deviated from the family departmentalism of marriage law due to its emphasis on personal property and the excessive pursuit of efficiency. Usually, judicial interpretations are drafted from the standpoint of judicial persons, without enough consideration of the position of legislators and law-abiding persons. The judges and lawyers are liable to prioritize the value of efficiency value.

### Deviation of Value Orientation: Implicit Functions of Marriage Law

The explicit functions of law refer to the objective consequence of the law conforming to the original intention of legislators, while the implicit functions of the law refer to the social influence of the law beyond the original intention of legislators. In the process of delivering the marriage law in China, some negative implicit functions have become evident which relate to the changes in the value orientation of the current marriage law.

**Uncontrolled Freedom: Divorce Ratio Increasing Yearly.** Since 2003 when the Marriage Registration Regulations were issued, the cost of divorce in China has greatly reduced. In the department of civil affairs, the divorce procedure is simplified to cancel the need to produce proof, and the review period, by issuing divorce certificates to the parties who fit the divorce conditions immediately on the spot. From 2007 to 2014, the number of registered divorce in the civil affairs department increased by (or to) 15-20 million pairs per year, while the number of divorce cases handled by the courts number increased slightly. See Fig. 1, statistic data from [6].

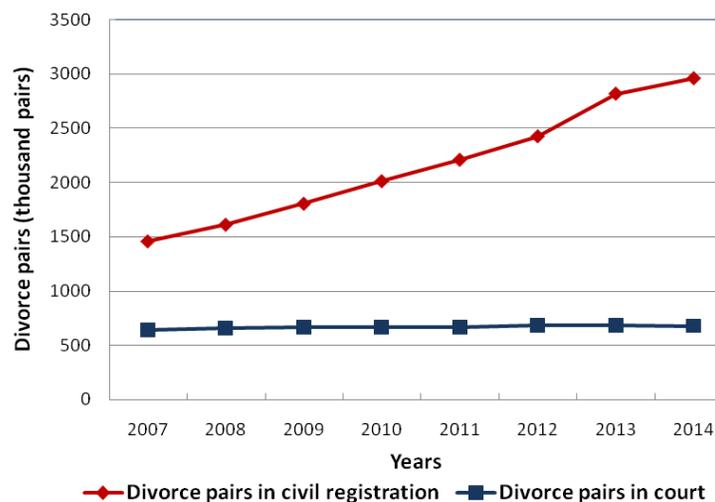


Figure 1. 2007-2014 civil registered divorce and court divorce statistics.

The rise of remarriage to the same person is a proof of impulse divorce. A survey (source) shows that the people remarrying are mostly 30 to 50 years old. Among them, more than 90% couples

remarried because they felt that the “original” ones are “good” [7]. The rise of remarriage also reflects the procedural defects of China’s registration divorce system.

**Formal Equality: Implicit Discrimination.** Marriage law presents emphasizes formal equality in the divorce property division excessively, but lacks consideration for gender differences. Some people argue that this is equal treatment, but in fact this oversight of gender difference conceals implicit discrimination. With regard to The division of house property, for example, the main data report of the third phase of the Chinese women’s social status survey on “marriage and family status” showed that women who owned real estate, including joint ownership with a spouse, accounted for 37.9% while men for 67.1% [8], as shown in Fig. 2.

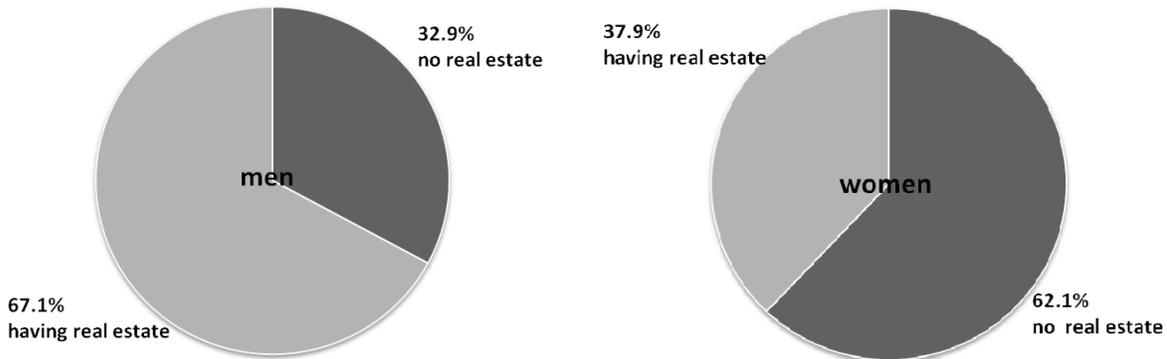


Figure 2. Comparison of proportion of men and women having real estate.

As shown in Fig. 2, the way the existing marriage law deals with the treatment of real estate appears superficially to be equal for men and women, but in fact men possesses far more proportion of the real estate than women. Consequently, the application of this regulation resulted in actual discriminatory effects against women. Moreover, during the existence of marriage, women consist of the main body undertaking housework and raising children, but in the property division in a divorce, the law has not considered the contributions of women to the family services and raising children, and has also ignored the weak position of women in society. Hence such a legal regulation has clearly constituted the implicit discrimination.

**The Sequelae of Efficiency First: Family Ethics Compromised.** The guidance of the individualism orientation and the efficiency-first of the judicial interpretations of the marriage law have a great impact on the traditional marriage and family standard in China. In a sense, the law ought to embody the lowest degree of the ethical spirit and the moral principle of the common life of mankind. If the law encourages calculating and using others among family relatives, family ethics will suffer serious violations, and will consequently cause the reduction of family responsibility and family stability.

### Value Reconstruction of Marriage Law in China

As society progresses and the role of women develop, the marriage legal system should develop with the times. It should be guided by the value of happiness, based on the notions of rational freedom and substantive equality, to reconstruct its value system and promote stability and development of marriage and the family.

**Happiness Value.** Happiness is a kind of ideal value pursued generally by mankind. It is also the ethical value orientation of the marriage law. The current marriage law lays too much emphasis on individualism. The very popular pre-marital property notarization or the personal pre-marital property declaration has raised obstacles to married life in the form of premature precautions. On the road to a happy marriage, people have already envisaged unhappiness: how can they then expect a happy marriage? Marriage law should be guided by the value of happiness, and promote the harmonious stability of the family and the overall development of family members.

**Rational Freedom.** The principle of freedom for marriage cannot be compromised. However excessive freedom will endanger the stability of marriage and family, also endanger the stability of society, and thus it ought to be corrected by the marriage legal system. The freedom of marriage should follow the legal boundary, where excessive freedom, in the form of self-willed and the impulsive actions will impair the innocent and family ethics. Marriage law should take rational freedom as its basic value pursuit. The necessary procedures and the cost increase will help the parties to calm down and carry out rational considerations and prudent consideration for their marriage.

**Substantive Equality.** Equality between men and women does not mean the same between men and women. Ultimately, the equality of legal rights on the framework of “equal treatment” mode is likely to be a continuing inequality between men and women, while “differential equality” is the real form of equality, producing the de facto equality beyond the mere form of equality. In the current marriage law, gender equality is not achieved. In the conflict between raising children and the pursuit of career, most families rely on the female to make concessions. However, the law itself does not have corresponding measurement and compensation rules for the female who bears the housework and the parenting obligations. This lack of substantive equality it is not conducive to the protection and implementation of women’s development rights.

## Conclusions

Marriage law should be guided by the value of happiness, to strengthen the legal adjustment of personal relationships in the field of marriage and family, and to enhance the sense of happiness and the sense of belonging for family members. Rational freedom and substantial equality are the most basic value underlying the marriage legal system, while the value of happiness is the highest value enshrined in it. There is a positive correlation between the value of happiness and equality. The implementation of substantive equality will help to change the weak position of the female group and promote the happiness of women. The marriage and family law, which is guided by the value of happiness, is then the best guarantee for the realization of gender equality.

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