

Study on Implicit Discrimination in Marriage Law of China

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Abstract. In recent years, the divorce rate in China has increased year by year. The proportion of female active divorce increases, the fertility willingness of women declines and the willingness to marry of unmarried women to fall. The current Marriage Law in China and its judicial interpretation gradually replace the family property system with the personal property system, ignoring the rights and interests of women as the main bearers of housework, which constitutes implicit discrimination at the institutional level. The individualism orientation of the current Marriage Law and the deviation of the value orientation under the judicial guidance not only impair the stability and development of marriage and family, but also are not conducive to protecting the equal rights of women.

Introduction

On November 2 of 2017, the *2017 Global Gender Gap Report* (hereinafter referred to as the “Report”) released by the World Economic Forum shows that Chinese gender equality index has fallen from 57th in 2008 to the 100th in 2017 in a total of 144 countries participated in the ranking. The gender equality of women in employment and higher education enrollment has reached the world average, although the overall gender equality index has declined. According to the statistics of the *Statistical Bulletin of Social Service Development* and the *China Yearbook*, the divorce rate in China has been rising continuously in recent years, the number of unmarried people is growing, and low birth rate has become a trend, also women’s happiness and satisfaction in marriage and family have dropped significantly. Therefore, this paper attempts to study the issue of implicit discrimination in the Marriage Law of China.

Current Status and Characteristics

Divorce Rate Increasing and Marriage Rate Presents Inflection Point

According to the data of the rough marriage rate and the rough divorce rate in China in the *Statistical Bulletin of Social Service Development* released by the Ministry of Civil Affairs in 2009-2016, the divorce rate in China has increased year by year in recent years, and the marriage rate has turned from 2014 and began to decline, as showing in Table below.

2009-2016 Rough Marriage Rate and Rough Divorce Rate Statistics [1] (‰).

Index \ Year	2009	2010	2011	2012	2013	2014	2015	2016
Rough marriage rate	9.10	9.30	9.67	9.80	9.92	9.58	9.00	8.3
Rough divorce rate	1.85	2.00	2.13	2.29	2.58	2.67	2.79	3.0

Proportion of Female Active Divorce Increased and Willingness to Marry of Unmarried Women Decreased

According to the information from Civil Affairs Departments, courts and media reports, the proportion of women who propose to divorce in China is as high as 70% to 80%. [2] Taking Chengdu of Sichuan Province as an example, the Chengdu High-tech District Court conducted an analysis of 465 divorce cases accepted by the court around 2011. The analysis results showed that 68% of divorce cases were initiated by woman. [3] Women's satisfaction and happiness in marriage is much lower than that of men. Divorce rates continue to rise, women's expectations for marriage decline, more and more women choose to be single. In addition, after China's Family Planning Policy is open to the second child, the gender discrimination faced by the working married women without child has increased, which also affects the willingness to marry of women without birth plans.

Fertility Willingness of Women Reduced and Demographic Dividends Reduced

Since the marriage law does not recognize and implement the value of raising children and housework, women who have abandoned their careers to return to their families for raising their children may acquire no economic compensation when they are divorced, and they will be discriminated because of missing their best age for career development. Therefore, married women are inclined to choose to give priority to their career development, while delay or give up fertility. In order to alleviate the pressure of aging, the National Health and Family Planning Commission clearly requires that the total fertility rate will rise from 1.6 in 2015 to 1.8 by 2020, and the annual average natural growth rate should be maintained at around 6‰. Year 2016 was the first year of China to carry out the "second child" policy. The natural population growth rate rebounded slightly while still below 6‰, although the total birth and birth rate in 2017 did not rise up but dropped down. Hence, it can be seen that even if the "second child" policy is fully released, the natural population growth rate cannot meet the government's expectations. The decline in fertility rate shows that the overall women's fertility willingness has reduced in China, the future demographic dividend will be reduced.

Implicit Discrimination in Marriage Law

In 1950, P. R. China promulgated the first marriage law. In 1980, China passed the new Marriage Law, and in 2001 passed the amendment to the Marriage Law. Subsequently, in order to resolve the disputes arising in practice, the Supreme People's Court issued three judicial interpretations of the Marriage Law on December 24 of 2001, December 4 of 2003 and July 4 of 2011 respectively. Also in February 20 of 2017, the supplementary provisions of the Judicial Interpretation (II) of the Marriage Law were passed. Since the founding of P. R. China, the Marriage Law have overemphasized formal equality in the property system. Some people argue that this is the equality, but in reality it is a kind of implicit institutional discrimination. The so-called implicit discrimination means that the system is not literally treated differently, but because of the differences in objects, the system will have discriminatory effects once applied in practice.

De-sexualized Property System: Personal Property System gradually Replacing Family Property System

The change of marital property system in China's Marriage Law has evolved from a single statutory common property system to the coexistence system of a legal property system together with an agreement property system, and gradually established and improved the personal property system. In particular, the three judicial interpretations of the Marriage Law have reinforced the tendency of husband and wife to protect personal property. Literally, this de-sexualized regulation is equal, and seems to be nothing wrong with it. However, this kind of equal treatment that ignores gender differences lacks consideration of the particularity of marriage and family, and actually strengthens the protection of the interests of the strong side, resulting the strong side in the marriage

and family relationship stronger, and the weak side weaker. Taking the real estate division as an example, because the actual assets of men and women are different, the implementation of the neutral equality regulations are more favorable to men than women, which actually leads to the discriminatory effect of exacerbating the female's weak position.

Insufficient Protection of the Housework Bearers' Rights

Due to the influence of traditional concepts, the Chinese women are responsible for more housework than men. During the marital relationship, women are the subjects responsible for raising children and housework. The regulations of current Marriage Law on the division of property during divorce lack of recognition and compensation for labors of women in child-rearing and housework, which constitutes implicit discrimination. Chinese women's unpaid work time due to housework and care after work is 44.6% of total labor time, which is about 2.36 times that of men. The Marriage Law should set standards for the monetization of child-rearing and housework. In addition, compensation for child-rearing and domestic workers should not be limited to the labor they pay, but should also include personal development rights that are abandoned to take care of the family. [4] In particular, the Marriage Law only mentions housework in the divorce section. It is not clearly defined in the part of marriage and family relations that raising children and housework is a common obligation of both husband and wife, which is worthy of rethink by legislators.

Rights of Choice under Low Labor Support Rate

According to the third survey report on the social status of Chinese women, the employment rate of women aged 18-64 in China is 71.1%, of which the rural women's employment rate is 82.0%. The Chinese women's employment rate is far higher than the world's average of 53%. Why is the gender equality index ranked 100th? This is related to the low labor support rate in China as a developing country, where the labor support rate refers to the number of people including themselves who can be supported by the labor compensation received by a worker. According to the statistics on the income and consumption expenditure of urban and rural residents in China from 2008 to 2017, the per capita disposable income of urban residents can meet the consumption expenditure needs of 1.4 people, and the disposable income of rural residents can meet the consumption expenditure needs of 1.2 people [5]. Thus the disposable income of a worker excluded from his or her own living expenses is not enough to support a second person while maintaining the standard of living. Before social development and labor dependency ratios are raised to a more reasonable value, most women are not free to choose whether to become full-time housewives, and they must be employed in order to maintain an adequate standard of living. Therefore, the high employment rate of Chinese women cannot represent the gender equality situation in China. This high employment rate is not the result of women's free choices. When the Marriage Law does not guarantee the interests sacrificed by women for family development, faced with the double burden of family and career, women who are overwhelmed have to choose to abandon their families, because low labor support rates determine that women cannot give up their jobs. Therefore, the divorce, the unmarried or the Dink can be argued to be the counter-result of the Marriage Law.

Behind Discrimination: Deviation of the Value Orientation of Marriage Law

Split Familialism

Traditional Chinese society is pursuing familialism. After the social reform and opening up in China, individualism began to infiltrate all aspects of Chinese society and gradually influenced the awareness of legislators. The impact of individualism on familialism is legally manifested as the impact of the individual standard on the family standard. The Chinese Marriage Law and its Judicial Interpretations every change in the matrimonial property system is a concession from the family standard to the individual standard. From the legal property system to the agreed property system, to the establishment and strengthening of the personal property system, the evolution of the marriage property system of the marriage law reflects the change of its value orientation from the

family standard to the individual standard. The personal orientation of marriage law not only breaks the traditional familialism in practice, but also impairs the horizontal relationship between husband and wife. It also has different influences on the vertical relationship between parents and children. This is largely inconsistent with the idea of sharing development of family members. In the Marriage Law, individualism and familialism should be taken into account, that is, "family standard based on individual rights." From the perspective of individualism, we should pay attention to the realization of individual happiness. From the perspective of familialism, we should pay attention to the development of family harmony and implement the coordinated development of family members and families.

Deviation of Value Orientation under Judicial Guidance

The judicial interpretations of the Marriage Law on the detailed provisions of property division are conducive to guiding judicial practices, can quickly resolve property disputes between parties in a marriage relationship, and are conducive to improving judicial efficiency. The judicial interpretations of Marriage Law and the integration of property law are progressive in legislation technology, but their excessive pursuit of efficiency violates the value orientation of marriage law itself. Protecting and promoting the stability of marriage and family is undoubtedly one of the legislative purposes of the Marriage Law, and the purpose of legislation determines the value orientation. Judicial interpretations have the nature and function of "quasi-legislature". Therefore, the content of judicial interpretations should also follow and reflect the purpose of legislation. The judicial interpretations under the value of efficiency have caused people's expectations of marriage to drop drastically, which has contributed to divorce rate ascent and marriage rate decline. The current "Marriage Law" in China was passed in 1980 and amended in 2001, with the full text of six chapters, a total of 51 items. The Supreme People's Court has released a number of "Marriage Law" judicial interpretations in response to the needs of litigation practice. According to the statistics, there are 51 terms in the Marriage Law, accounting for 37%; there are 86 terms of the total judicial interpretations of the Supreme People's Court, accounting for 63%. In the Marriage Law, there are only 18 terms regulating the "family relationship", that is, the third chapter of the Marriage Law, accounting for only 13%. China's "Marriage Law" has gradually evolved into an indeed divorce law.

Conclusions

If implicit gender discrimination can be corrected in the Marriage Law, it can be valued and avoided in other systems. Legislators should bear in mind that the Marriage Law is a law that regulates the relationship in marriage and family, not just a divorce law.

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