

# The Legal Construction of Family Justice

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**Abstract.** In traditional society, family justice is mainly confirmed through ethics, which emphasizes "friendship" and "obedience" among family members. In modern society, family justice is more concerned with the basic rights of individual family members and opposes the unreasonable distribution of obligations, so family justice needs to be realized through law. The pursuit of family justice is not only the purpose of human beings, but also the purpose of law. The realization of family justice requires not only the regulation and guidance of family law, but also the support of social law and human rights law.

**Keywords:** Family Justice; Family Law; Social Law; Human Rights Law.

## 1. Introduction

In traditional societies, family justice is primarily affirmed through ethics. Ethics is a logic of inference from the inside out, which has the advantage of emphasizing "doing unto others as you would be done" and the disadvantage of blurring the boundaries. In traditional society, family ethics emphasizes "love" and "obedience" among family members, such as the cardinal guides: husband guides wife, father guides son. In modern society, family justice is more concerned with the basic rights of individual family members. Undue expansion of the rights of family members and unreasonable distribution of obligations may undermine the equal rights of other family members, and also undermine family justice. How should Chinese law deal with family? The legal system is the main means to achieve justice in a society, and the justice of the system is mainly reflected through the law. [1] The law concentrates on expressing the value concepts and value pursuits of human society. [2] In modern society, family justice needs to be realized through the law. As John Eekelaar concluded, "the question is not whether law is a sufficient condition for family justice, but whether law is a necessary condition." [3] The realization of family justice requires not only the regulation and guidance of family law, but also the support of social law, as well as human rights law to provide human rights standards for the formulation and revision of domestic law.

## 2. Family Law

From the level of institutional justice, family law is the most important carrier of family justice. China's current family law is mainly based on legal norms of marriage, which consists of NPC legislation and judicial interpretation, and its content is also mostly about the provisions of property relations between husband and wife, with fewer provisions to adjust the identity relations. The future reform direction of marriage and family law should be to make up for the provisions adjusting identity relations and regulate the rights and obligations between family members.

### 2.1 From Family-based to Individual-Based

Judging from the evolution of the matrimonial property regime and the current regulations, our marriage and family law has completed the shift from family-based to individual-based. With the transition of legal culture from familism to individualism, we no longer understand family justice from the perspective of the family as a whole, but from the perspective of individuality of rights. Both the Constitution and international human rights conventions provide that the family should be protected by the state, and that the "right to family" is a constitutional right, the subject of which is the individual. In other words, family law is an individual-based law, while social law, which is responsible for supporting the development of the family, is a family-based law.

The changes in contemporary family law are largely due to the dramatic changes in the concept of family and marriage. This change is particularly evident in the continuing growth of social inclusion and diversity. Since the 1980s, with the development of the affirmative action movement and the increase in women's participation in the labor force, as well as the widespread advancement of social movements in the field of human rights, a new understanding of family justice has emerged, and family law has become the primary forum for defending family justice. The law's involvement in agreements between spouses has deepened because "the dynamics of intimacy in the family can distort the contracting process"[4], resulting in unfairness in the content of the agreement. The law needs to exclude excessive oppression of one of the spouses from the other spouse in the agreement, so as not to impede the free development of the personality of one of the spouses.

## **2.2 Correcting Implicit Discrimination in Marriage Law**

The contemporary legal system of marriage ignores the social fact of gender inequality and, by extension, the cycle of vulnerability created by the gender division of labor in the family and the exacerbation of gender inequality. Some national laws take this fact into account and provide a system of divorce alimony. Divorce alimony is used as a short-term transitional support to help divorced women become self-sufficient as soon as possible. However, divorce alimony systems do not address the deep roots of gender inequality in the family, and high divorce alimony provisions can lead to reverse discrimination, leaving men in divorce-induced poverty or in a situation where they are afraid to divorce because of the high cost of divorce. Making the laws on divorce stricter would have little impact on the number of marriages that break up, and may actually deter some people from getting married in the first place. [5] China has no divorce alimony laws, and women are assumed to be able to get job to support themselves and their children immediately after divorce. In addition, the lack of family law compensation for household work and opportunity costs may also keep women in poverty because of divorce or afraid to divorce. Family law should strive to correct its implicitly discriminatory provisions.

## **3. Social Law**

### **3.1 Viability and Responsibility**

The achievement of family justice also requires the support of social law. "The substantive freedoms that we enjoy respectively and that enable us to fulfill our responsibilities depend greatly on individual, social and environmental specifics." For an independent and autonomous individual, the connection between freedom and responsibility is two-way and interdependent. "Without substantial freedom and the viable ability to do something, a person cannot be responsible for what he does." [6] Sometimes responsibility is conditional on freedom. For example, a child who is deprived of basic educational opportunities in childhood may be incompetent for the rest of his life; an adult who is ill and cannot afford to obtain treatment is also deprived of the freedom to care for himself or others. Therefore, the viable capacity and ability to take responsibility that a person actually has depends on the arrangements of society, and the state and society should be responsible for the development of this capacity.

### **3.2 The Guiding Function of Social Law**

The realization of family justice requires most of the social systems and social arrangements outside the family to change. The formalization of law reflects the guiding function of law, and the functionalization of law reflects the social function of law. When family law is functionalized, the guiding function of law on the pattern of family life needs to be accomplished through the complement of social law. In social law, marriage may bring economic benefits or welfare. Some studies point out that married people are happier and healthier than unmarried people, so marriage should be encouraged. In practice, however, the government's policy of providing benefits to married families through social law is not based on the above-mentioned reasons, but more on considerations

of public interest, such as increasing population, sharing support obligations, and promoting social stability.

### 3.3 Family Development and Family Functioning

The state's support for family development through social law can effectively enhance family functions, promote positive interaction between individuals and families, and facilitate the realization of family justice. Before 1979, the state had not yet established a social welfare system for the entire population, which objectively strengthened the family's protection function for the individual and enhanced the individual's dependence on the family and the sense of solidarity among family members. [7] Even to this day, the law in China still stipulates that the main mode of care for the elderly is "aging at home". The family is responsible for the care of the elderly, children and other family members, and the burden on the family is heavier than in the past, but the function of the family is weakened. It is necessary to increase welfare support for families through social laws and family policies, and to give certain "benefits" to marital families in order to enhance the functions of families, as well as the formalization function of laws to guide people to choose the lifestyle of marital families. The state should be a provider of family welfare and a supporter of sustainable family development; and social law and family policy should focus on supporting family development and strive to enhance family functions, including affirming and supporting the development of female family members, and creating conditions for the realization of family justice.

## 4. Human Rights Law

Human rights protection is the minimum standard and the highest pursuit of the rule of law. Along with the promotion of the concept of human rights, the human rights movement has broken through the boundaries of the public and private spheres, penetrating the values of fairness and reasonableness into the family and emphasizing equal respect for the rights of each family member. Respect for human rights "is a universal minimum moral requirement". The human being "must not be treated as a mere means" but "as an individual with intrinsic value in his or her own right". The law can neither ignore the family nor accept family structures and practices that violate human rights standards.

From the Universal Declaration of Human Rights to the Declaration on the Right to Development, from the Convention on the Elimination of All Forms of Discrimination against Women to the Convention on the Rights of the Child, international human rights law has gradually transmitted human rights values and concepts into the domestic laws of many countries. Take the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for example, which recognizes that gender culture and gender division of labor traditions limit the realization of women's equal rights. The preamble of the Convention specifically states that efforts should be made to change the traditional gender division of labor between men and women in society and in the family, and that States parties should work to change the gender culture and eliminate gender bias and gender-based stereotypes. Many articles of the Convention deal with issues of marriage and family relations, emphasizing that women have equal rights with men in the choice of spouse, childbirth, personal rights and disposition of property, and that the State has the obligation to provide social services that enable individuals to reconcile family and work. These elements and ideas continue to influence the revision and improvement of relevant laws in China.

The recognition of international human rights conventions should lead to practical action. From the legal point of view, domestic laws should be amended to bring them into line with the international human rights conventions to which it is a party, or at least to interpret domestic legislation in accordance with the human rights standards set by the conventions. In addition, in judicial practice, courts can also apply human rights standards to reconcile conflicting claims through value judgments. In short, laws and government actions should meet human rights standards, or be adjusted to meet human rights standards. Along with the establishment of the principle of "respecting and safeguarding human rights" in our Constitution and the promotion of the National Human Rights Action Plan of

China, the principle of human rights protection has become a yardstick for measuring justice in the family.

## 5. Conclusion

Family justice is as important as political justice. For most people, the order of life in the family is more important. This is because murder and arson in the social sphere is not a frequently encountered event, but injustice in the family is a problem that can be encountered at any time in daily life. The pursuit of family justice is both a human and a legal purpose. To solve the problem of family justice, "ultimately, we have to rely on the power of the state and the law". Without the reference of the law, people's understanding of injustice in the family will be extremely flexible. An individual's "expectation" of family life should be a reasonable expectation, not a completely arbitrary one. Only the law can provide a yardstick for such "expectations", establish principles for family justice, and provide guidelines for the behavior of people in the family.

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