

Study on the Application of the Principle of Public Order and Good Faith in the Field of Marriage and Family

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ABSTRACT

Article 8 of the Civil Code explicitly stipulates that the principle of public order and good morals shall be applied as a fundamental principle in civil law. Taking the judgement documents of 2022-2023 as an object, the basis for applying the principle of public order and good morals when hearing cases in the field of marriage and family in judicial practice is summarized. In this process, there are problems such as the lack of effective judicial interpretation of the principle of public order and good morals, mixing with the principle of honesty and trust, and the abuse of the principle of public order and good morals. The value and role of the principle of public order and good morals should be clarified, and the boundaries with other principles should be clearly delineated; and then the principle should be fully justified in judicial practice, and a unified evaluation system should be established.

KEYWORDS

Public order and morality; Judicial application; Empirical research

With the in-depth development of judicial reform, judicial adjudication is faced with major challenges such as value judgment, and the people put forward higher requirements for the fairness, quality and efficiency of judicial adjudication, and it has become a consensus to strengthen the reasoning of adjudication documents. Public order and good morals as a legal principle with strict application of rank, must also follow the needs of the times to refine the specific provisions of the corresponding judicial interpretation, to alleviate the ambiguity of the legal norms, but also to clarify the standards of judicial decision-making, to a certain extent, to limit the discretion of the judge. However, in the process of applying the principle of public order and good morals in the field of marriage and family, there are still problems such as the formal understanding of the principle, the lack of standardization of the application criteria and the mixing of the principle with other principles. Measures should be taken at the levels of legislation, judicial application and value guidance to refine the application of the principle of public order and good morals and better serve the judicial practice.

1 Analysis of the application of the principle of public order and good morals

1.1 Overview of the invocation situation

The principle of public order and morality, as a generalized clause with greater flexibility, has changed with the development of the times, and its precise connotation needs to be studied in conjunction with actual cases. In order to analyze the actual invocation of the principle of public order and morality and its proportion in judicial practice, the Chinese Judicial Instruments Network

(裁判文书网), respectively, input the terms “Civil Code”, “public order and morality”, “legal principles” and “cohabitation out of wedlock”, and then enter the terms “civil code”, “public order and morality” and “legal principles”. “extramarital cohabitation” and other keywords, searching with 2022-2023 as a limited period of time, excluding duplicated cases and irrelevant cases, and obtaining a total sample analysis of 330 cases of judicial decisions on public order and morality. It should be noted that the number of cases in this total sample cannot be searched exhaustively, and this paper can only try to be as objective as possible within the scope of the retrieved sample.

In terms of the types of cases of judicial decisions on public order and morality, there were 315 civil cases, accounting for 95.4%, 13 administrative cases, accounting for 3.9%, and 2 criminal cases, accounting for 0.06%. Categorizing the high number of civil cases, the top three were mainly marital and family disputes (270 cases), contract disputes (25 cases), and personality right disputes (20 cases).

In the process of browsing the final eligible cases, we found that the application of the principle of public order and good morals is mainly concentrated in the field of marriage and family, in-depth study we found that the application of public order and good morals to resolve disputes over the bride price accounted for a relatively small proportion of disputes, mainly in the process of disputes over property return due to extramarital cohabitation.

1.2 Invocation mode type

1.2.1 Interpretation of the ruling basis

Interpretation of the law is one of the more common basis of decision in the current judicial decision, mostly in family disputes and other cases with a special relationship, used to explain the principle applies to the reasons for the case. For example, in the property return dispute caused by extramarital cohabitation ^[1], the judge cited the principle of public order and morality to argue that during the marriage, one spouse is not due to the needs of daily life will be gifted to a third person's behavior because of the violation of the duty of fidelity between husband and wife to the null and void. In the dowry dispute ^[2], the judge invoked the principle of public order and morality to further explain that our country prohibits the solicitation of property through marriage, and that the plaintiff and defendant live together for a relatively short period of time after marriage, which is contrary to the intent of the marriage, and therefore ruled that the dowry should be returned.

In the process of reviewing the judgment, we found that most of the adjudicators for this type of case directly choose “public order and morality principle + simple discussion” mode ^[3], so that the adjudication of the document in the text is more reasonable. One of the most typical, is because of the violation of sexual morality gift other people's property caused by property disputes.

1.2.2 To fill the legal loopholes

Generally speaking, the people's court to make decisions based on the law; the law does not provide, can apply custom, but shall not violate the public order and morals. The lagging nature of the law leads to the current law and can not regulate to the rapid development of society appeared in the new situation. At this point, the judge needs to exercise a certain range of discretion to hear the case under the value orientation conveyed by the basic principles. For example, in the dispute between Chen Guiling and Yin Fenglan to confirm the invalidity of the contract ^[4], there is a surrogacy agreement between the plaintiff and the defendant, there is no corresponding legal norms to regulate this issue. Therefore, the court relies on the fact that surrogacy violates the laws of natural reproduction, and may not only jeopardize the lives and physical health of the people concerned. Currently, there are no legal norms to regulate this issue. Therefore, the court based on

the act of surrogacy against the laws of natural reproduction, not only may endanger the lives and physical health of the people concerned, but also involves the establishment of the surrogate child's kinship, child support disputes, but also faces the citizens' reproductive rights and individual freedom may form a conflict and other issues, obviously contrary to our traditional social ethics, morality and public order and morals of the basic principles of the contract to be invalid, to solve this problem. Practical problems.

2 Problems arising from the application

2.1 Escape to the general terms

China's first case of public order and morality Luzhou inheritance case^[5], Huang Mou in the dying before, all the inheritance in the form of a will to a third party Zhang Mou, but his wife refused to fulfill the Zhang Mou to the court, in Luzhou City, Naxi District, four consecutive sessions, found that Huang Mou's bequests and the original "General Principles of the Civil Law" on the provisions of the seventh article of public order and morality is inconsistent with the ruling that the will is invalid, the case of the verdict triggered a great controversy, why an inheritance of the basic principles of social ethics and morality, as well as the invalidity of contracts.

The outcome of the case triggered a huge controversy, why a case of inheritance type in the existence of the current effective inheritance law, and the application of the relevant provisions of public order and morality for trial? The reality is that there are still clear legal provisions in the courts around the world that use the principle of public order and good morals in juxtaposition with other laws. Based on the infringement of property rights, infringement of personal rights and other specific norms can solve the problem, but the public order and morality provisions are applied as a panacea.

Although the application of public order and morality in our law is not clearly stipulated, but in the legislator's legislative intent is to exhaust the rules of law can be applied to the principle of law. However, in judicial practice, in many judgments, the judge simply mentioned the way to apply the principle of public order and morality, and did not make a full argument on the relevant legal relationship, the current effective legal rules are empty, resulting in the abuse of the principle of public order and morality, not conducive to legal stability at the same time is also prone to judicial arbitrariness, destroying the value of the law of the order.

2.2 The phenomenon of different judgments in the same case is serious

The article for different courts in the field of marriage and family application of the principle of public order and morality in the similar case to analyze, different judges met similar cases made different or even diametrically opposed to the judgment.^[6] the same spouse cheated on his or her spouse's property return disputes, a court held "Luzhou bequest case" decision ideas, that due to marital infidelity occurred in the act of gift contrary to public order and morals shall be invalid return; and similar cases have different judgment results.

In Jiang Mou and Zhu Mou, Ding Mou property dispute, although the court invoked the principle of public order and morality that the act of gift is invalid, but the two defendants Zhu Mou, Ding Mou to derailment of cohabitation behavior are at fault on the grounds that the two will belong to the plaintiff Jiang Mou's half of the property to be returned.

Two inconsistent results behind a very similar case, despite the theory of "Luzhou bequest case" referee ideas there are many criticism, but the judicial referee attitude of reciprocity, and can not help but let a person have questions.

3 The improvement of public order and good morals recommendations

3.1 A reasonable definition of the principle of public order and good morals

Summarized through the case we found that the principle of public order and morality in judicial practice is the fundamental reason for the abuse of the principle of the provisions of the principle is too general, the lack of specific provisions to support. The legislature can pay attention to the representative academic theories, drawing on the academic research more mature theories, citing its reasonable part, clear the scope of application of public order and good morals, delineate the boundaries with the principle of honesty and credit,^[7] unity of legal stability and flexibility. At the same time, it is also necessary to study in-depth cases of violation of public order and good morals, and summarize similar cases through comparison, so as to summarize the applicable standards under different circumstances, and carry out typological research on the principle of public order and good morals.

In addition to the legislature's clarification of the application criteria of the principle of public order and morality, the judiciary should also make efforts. Because the application of law is actually a process of transformation from written legal norms to specific legal relations. The judiciary can, after the legislature has refined the principle, issue relevant judicial interpretations of a particular provision or terminology to eliminate ambiguity in the law and apply it uniformly. The High Court can regularly collect cases relating to public order and morality tried by lower courts, correct any deficiencies in the trial process, and, if there is a general problem at a particular point in the courts at all levels, issue a guiding opinion clarifying it, so as to guide the courts at all levels in the trial of this principle, forming a standard for trials in the region, and providing a reference point for the trial staff of the region. The judiciary should emphasize that judges can discuss the principles of the basic principles contained in the specific rules cited in the case in the reasoning part of the judgment, but in the final citation of the basis of the judgment, if there is a specific rule of law, only the rule of law can be applied.^[8]

3.2 Conform to the mainstream value concept, establish a unified evaluation system

In order to curb the occurrence of the phenomenon of different judgments in the same case due to the judge's own value judgment system, the judge should not only comply with public opinion, make in line with the public's expectations, fairness and impartiality in the general sense, and follow the predictability of the law; we should listen to the feedback from the professionals for the hot issues in the society from the actor's motivation, the contracting conditions, the implementation of the effect of the in-depth consideration of the various aspects of as far as possible to rule out the evaluation of the conditions related to other interference, to realize the relative rational evaluation under the specific conditions. We need to listen to more feedback from professionals after in-depth thinking on hot social issues from the motives of the perpetrator, contracting conditions, implementation effects, etc., and exclude the interference of other conditions as much as possible, so as to realize the relative rationality evaluation under specific conditions. In the process of analyzing the case, we have to make the public opinion as the main expert opinion, to achieve a balance between the two. Neither can be detrimental to the fairness and justice at the same time can not be biased by public opinion, the loss of legal thinking of legal people should be.^[9]

References

[1] See Shanghai Songjiang District People's Court (2023) Shanghai 0117 Minchu 18538 Civil Judgment.

[2] See Gansu Province Pingliang City Kongdong District People's Court (2023) Gan 0802 Minchu No. 2390 Civil Judgment.

- [3] Please refer to Civil Judgment No. (2023) Lu1602 Minchu 1561 of Bincheng District People's Court, Binzhou City, Shandong Province for details.
- [4] See Beijing Chaoyang District People's Court (2022) Beijing 0105 Minchu No. 61121 Civil Judgment.
- [5] See Xi'an Lianhu District People's Court (2023) Shaan 0104 Minchu 593 Civil Judgment.
- [6] Peng Saihong. On the judicial application of the principle of public order and good morals, in Xianghu Forum, No. 2, 2008.
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