

The Conflicts Between Folk Law and State Law from The Perspective of Legal Pluralism: Take A Case of Bride Price Return Dispute as An Example

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Abstract. Legal pluralism, with its rich historical roots, has undergone significant development in China. Over time, China has embraced this legal diversity, in order to foster an environment where various legal sources and practices complement each other. As a mature legal conception, it offers fresh methodologies for tackling intricate legal issues. Bride price constitute a vital aspect of Chinese marriages, yet disputes surrounding their return are fraught with problems and challenges stemming from conflicts between state law and folk law. It has become increasingly common to handle the relationship between folk law and state law from the perspective of legal pluralism. This essay works on a typical case extracted from the official case database, China Judgments Online. Through the approach of case study, it delves into the contradictions between state law and folk law in disputes over the bride price return dispute, particularly emphasising the discrepancies on recognition of marriage, the scope of bride price and the rules governing their return. Based on these issues, the essay proposes valuable recommendations and solutions aimed at relieving the existing tensions.

Keywords: Bride Price; Legal Pluralism; Folk Law; Remedial Avenues.

1. Introduction

The history of legal pluralism could go back to the ancient period, but the conception itself emerged quite late. The term “legal pluralism” first appeared in the 1980s, in a criticism of legal centrism, focusing on the legal order of primitive society, colony and post-colony at the beginning. At the same time, the concepts of folk law and indigenous law also appeared [1]. By distinguishing the Legal pluralism from the situation that the law is nonuniform, John Griffiths points out that legal pluralism refers to a social fact that law of various provenance may be operative [2]. In other words, it generally means there are more than one effective rule or law for a particular social group to guide and regulate their social behaviour. The composition of a country’s legal system is often complicated. The complex legal system means contradictions and conflicts, and the most prominent contradiction is often reflected between the folk law and state law. Therefore, the importance of reflecting and focusing on the folk law and state law while understanding how they interact from the perspective of legal conflict cannot be overestimated [3].

According to Professor Chiba’s new approach to the definition of law, even if it is not passed by the legislature, folk law is one of the various forms of law that exist [4]. As a country with a civilization history of five thousand years, Chinese folk law plays an essential role in adjusting the rural social relationships and even urban social relationships. As one of the six major rituals of marriage in ancient China, bride price has experienced a complex evolution process from state law to folk law and then back to state law [5]. Though the state now has a legal interpretation to stipulate it, it is not as effective as the civil code, and in some regions, it conflicts with the folk law and common ideas inevitably. The ambiguous property scope and litigant, the consistent rise of price and the nearly blank positive law have all become the main problems of the bride price disputes. Marriage is a very important thing for human society, thus looking for an effective approach is particularly important for contemporary Chinese society. Legal pluralism may provide an ideal way to resolve the conflicts. This essay will analyze a specific bride price dispute through case analysis, combined with Chinese legal pluralism, to solve the conflicts between Chinese folk law and state law, in order to provide an appropriate solution for the bride price disputes.

2. Literature Review

Legal pluralism has evolved through roughly three generations. As a representative of the first generation, Marinowski attempted to reveal the particularity of legal rules by studying the normative order of primitive society and colonial society, and to explain the reasons of legal pluralism [6]. However, his conception and inference were too vague to clarify the issues. John Griffiths in his famous article “What Is Legal Pluralism” proposed two different kinds of descriptions of legal pluralism, which are legal pluralism in weak and legal pluralism in strong [2]. He did not focus on issues such as legal transplantation but chose to explain the phenomenon of legal pluralism in the capitalist society especially based on Moore’s “semi-autonomous social field”. However, the second generation still confused the law and other social rules. Turning the perspective to the background of globalization, the third generation of scholars creatively put forward more complex theories and structures to elaborate the penetration and interaction of different legal orders [7]. When legal pluralism first entered China, it was often criticized and opposed because it was regarded as violating the doctrine of the unity of national legal system. With the progress of society, the assertion that legal pluralism runs through Chinese history has been accepted [8]. Not only that, but scholars also began to combine the ancient national law and customary law to study [9].

Bride price has become a common social phenomenon in China. It is not difficult to find multiple functional attributes of bride price through reading literature. From the perspective of etiquette attribute, bride price serves as an etiquette of marriage and a way to maintain social order [10]. In terms of the legal nature, the delivery of bride price means that the engagement is established and has the official legal effect [10]. When dealing with the disputes, the legal nature of the bride price is usually “the subject matter with the dissolution condition”, and the interpretation of the claim basis is often based on unjust enrichment [11]. What’s more, while the bride price is a certain amount of property to support the newborn family, therefore it has a monetary nature [12].

3. A Case of the Bride price Return Dispute

3.1. Basic Case Facts

Different from quantitative analysis, qualitative analysis is usually conducted to complete a empirical research through the method of case study. To be specific, the case analysis of typical case could effectively reflect the occurrences, development and changes of legal issues [13]. Therefore, the analysis of a typical bride price return dispute can well reveal problems and lay a strong foundation for solving problems at the same time.

Due to the rule of feudal autocratic patriarchal society for more than two thousand years, hitherto the Chinese still cannot wholly get rid of the excessive attention of women’s reputation before marriage. When handling the bride price return disputes, the judges often take “whether the marriage has been registered” and “whether the couple have lived together” as two main influential factors to consider. According to these factors, the disputes could be classified into four different scenarios, those are registered and lived together, not registered but lived together, registered but not lived together and not registered nor lived together. The second scenario, which is quite complex and extreme, will be discussed and analyzed below.

Guided by the methodology mentioned above, an appropriate case was selected. The case is the No.993 appeal case which was heard by the Xining Intermediate People’s Court of Qinghai Province in 2024 and reported in the official website called China Judgements Online. To illustrate the case facts clearly, the names of the parties would be simplified into “M” and “W”, in which the “M” refers to the man who wanted his money back and “W” refers to the woman who insisted on not returning the bride price back. W and M met through an introduction conducted by an irrelevant third body and had a daughter later. Although they held a wedding ceremony, they did not register their marriage, and they lived together for approximately two years. In order to get married, M gave W a bride price of 93,000 yuan and other cash gifts totaling 75,900 yuan before, as well as other accessories.

Correspondingly, W's dowry included gifts such as a refrigerator, television and washing machine, valued at approximately 10,997 yuan, also along with other accessories. Before the trial on appeal, the court of first instance held that due to the lack of evidence regarding the accessories, the court temporarily did not value and recognise these parts of property. Therefore, based on the situation that whether the parties had registered their marriage and the length of their cohabiting duration, the court of the first instance comprehensively considered their economic conditions and the situation of their daughter, and eventually ordered W to return 40,000 yuan to M. The amount returned was reduced because the dowry partly offset the bride price. After hearing, the appeal court found it more appropriate to maintain the judgment of the first trial.

3.2. The Controversial focus

The claims of the parties are the cues to the discovery of controversial focus. Both M and W choose to appeal after their first instance. M wanted his whole money back, including bride price and other cash gifts. W appealed for the reverse, which means she refused to return the bride price and other cash gifts. She believed the cash gifts are not included in the bride price, and rebutted it was M's fault that led to the "divorce" (they did not register their marriage). Based on this, the controversial focus shall be: (a) the effectiveness of their unregistered marriage; (b) the scope of the bride price; (c) the extent of fault and its impact on distribution of property; (d) whether the bride price ought to be returned. The controversial focus is quite clear, nonetheless, folk law and state law diverge in their opinions on these issues. The divergences will be discussed later in section 4.3.

4. Analysis From the Perspective of Legal Pluralism

4.1. Legal Pluralism in Modern China

China's long history and interaction with international society have affected the study of legal pluralism in China, reflecting the divergences between various types of rules. It has not only encompassed the experience of two thousand years of feudal farming society, but also the last century's pivotal transitions through the two major social forms of capitalism and socialism. Nowadays, China is actively embracing the international community, subsequently promoting the transformation from an industrial country to a modern country. The global economy has undergone profound changes against the backdrop of globalization, with increasingly frequent cultural clashes among various ethnic groups. The outcomes of these processes are the high complexity of Chinese normative system and the significant diversity of normative categories. The specific word "normative" is used here because from a narrow perspective, law can indeed be regarded as a type of norm, yet it is crucial to acknowledge that there exist norms that exercise legal-like functions without falling under the classification of law.

The complexity and diversity of norms revolve around numerous intricate aspects, albeit they can be historically categorized and elaborated upon from three distinct angles. Firstly, the folk law plays an equivalent role as state law. The folk law is a legal abstraction which comes from various sources like regional traditions, ethnic customs and general morality. Secondly, international law has participated in the dispute resolution process as well as domestic law. Many intergovernmental or non-governmental organizations' rules in some territories are more authoritative and convincing than domestic law. So far there have been effective ways to invoke international law with the full respect to domestic law, such as preserving clauses and setting extents. What is the most characteristic is that the value orientation of domestic law possesses a strong sense of collectivism, which was influenced by the Confucianism and Marxism (the Soviet Union). However, with the implementation of reform and opening-up policy, the continental legal systems of Germany and Japan, along with the inherent values of individualism, have indirectly taken root in China. The Chinese Civil Code first replaced "citizens" with "natural persons" and officially recognised the legitimacy of private interests, which had seemed to be violations to the socialism principle and infringements to the public ownership by General Provisions of the Civil Law (2009). This shows a huge diversion in value orientation under

the integration of plural laws. Legal pluralism has shown great value in solving relative disputes under the three circumstances, especially in providing multiple ways to achieve justice efficiently.

4.2. Current legislation and Regional Customs on the Bride Price

From the legislative perspective, when the Marriage Law has not yet expired, Article 10 of the Judicial Interpretation (2) issued by Supreme People's Court makes provisions for the return of bride price. It states:

if the parties request the return of bride price given according to customs, the court shall support it if any--

(a) the parties have not gone through the marriage registration procedures.

(b) the parties have gone through the marriage registration procedures but have not actually lived together.

(c) the bride price was given before marriage and resulted in financial difficulties for the giver.

(d) The application of provisions in Items (b) and (c) of the preceding paragraph shall be subject to the condition that the parties are divorced.

This clause was also reasserted in the Article 5 of the Judicial Interpretation to the Marriage and Family Division of the Chinese Civil Code. What's more, due to the increasingly fierce and prominent disputes over bride price in modern China, the Supreme People's Court had to release a new judicial interpretation specifically on the issue of bride price in 2024. This interpretation makes specific and professional provisions on the scope of bride price and the proportion of return.

From the customary perspective, however, the rules depend on the location and nationally. Although customary law also confronts state law in non-minority and non-remote areas, the focus of discussion should be on remote minority areas, because state laws only allow consideration of the customs of ethnic minorities to a certain extent [14]. Among the Kazakhs in the northwest regions, traditionally, there are only three circumstances that allow the return of bride price: marriage without parental consent, death after engagement, or the parent of the bride choosing to remarry their daughter to another person. However, in modern society, the conflict between the customary law of Kazakhs and state law is mainly manifested in the recognition of the legal validity of ritual marriage (the wedding ceremony) and the emphasis placed on cohabitation time by customary law [15]. Similarly, in the southwest of China, the Miao people attach greater importance to the principle of honesty and credit. The party who breaks the marriage first bears the adverse consequence, regardless of whether the reason for breaking the marriage is reasonable [16]. The customary law in ethnic minority areas is diverse, with both commonalities and unique characteristics among different regions. In fact, they all have discrepancies with state laws.

4.3. Analyse the Causes of the Contradiction in Combination with the Case

Combining the case facts in part 3.1, controversial focus in part 3.2 and different rules in part 4.2, several issues will be discussed below. The first issue is about the relationship between engagement and bride price. Engagement is the pre-procedure of formal marriage, and it is also the paramount process for the parties to firstly express and exchange their formal willingness to marry. Serving as an elementary ritual for a long time, however, it was repeatedly prohibited by the modern state after its foundation. Engagement is one of the necessary procedures for marriage, marked by the delivery of bride price [17]. Delivering the bride price and also asking for it were regarded as human trafficking during the early years of the People's Republic of China. Nevertheless, it continued to circulate in indirect ways and gradually mainstream again. With the development of China's economy, the bride price is also increasing. Engagement undoubtedly demonstrates the importance and necessity of paying bride price. In fact, because of China's surplus male population, paying bride price has also become a way for women's families to test men. The bride price symbolises the groom's compensation for labor loss and upbringing costs [18]. Even if the aforementioned scenario doesn't address engagement, it doesn't mean the engagement should be ignored here.

There are many conflicts between state law and folk law on engagement and bride price. First, engagement is considered to be optional by state law, but it is customarily compulsive that few people directly marry without engagement [5]. The 1980 Marriage Law, the 2001 Marriage Law and the Chinese Civil Code all state that it is forbidden to claim money or property by marriage. Since the bride price is a necessary process for engagement, it is difficult to implement the law in actually legal practice. Second, from the perspective of state law, the parties could not be constrained by the engagement, while from the standpoint of folk law the reverse is true. Moreover, engagement dispute means the occurrence of the engagement destruction. The destruction sets obstacles for handling property dispute in accordance with state law. According to the judicial interpretation of the Supreme People's Court, the bride price ought to be refunded in the absence of a formal marriage registration. Actually, the engagement is similar to signing a "marriage contract", where the fault party (the destructive party) is at a disadvantage in moral and integrity. Therefore, the faulty party cannot request the other to return the bride price. Returning to the aforementioned case, M delivered the bride price to W, which could be regarded as they made an engagement. If M is at fault and the purpose of formal marriage (registration) cannot be achieved, then W cannot be requested to return the bride price in accordance with the customs of engagement. However, according to legal provisions, since the two parties have not officially registered, the purpose of the bride price cannot be fulfilled, and obviously, it should be returned. In conclusion, the dispute surrounding the engagement between state law and folk law has a direct bearing on the disposition of the bride price.

The second issue is about the relationship between official marriage registration and wedding ceremony. Excluding religious factors, living together in the name of legal couples without marriage registration is a quite peculiar phenomenon for urban residents. That is because according to the Article 1049 of the Chinese Civil Code, both men and women who require marriage shall apply for marriage registration at the marriage registration authority in person. If not, the parties may not receive the legal remedies that should have been granted when dispute happens. By contrast, holding weddings rather than registering was once seen as a sign of marriage establishment, because weddings have the traditional function of making a declaration to society, especially in rural society. As mentioned previously, M and W did not register their marriage. However, they held a wedding ceremony in accordance with local customs. Since part of the bride price and dowry have been spent during the joint life of W and M, whether this part of the property belongs to the "joint property of couple" is also controversial. The "factual marriage" disappeared in mainland China after 1994, which means that W and M are in a pure cohabitation relationship. Thus, whether the wedding ceremony should serve as the cornerstone for recognising factual marriage again, thereby entailing the classification of assets as joint property, is a matter that necessitates further deliberation.

The third issue is about how to distinguish the bride price from other cash gifts. Bride price is conceptually framed as a conditional gift contingent upon the completion of marriage on law. In reality, there exists a myriad of monetary gifts. While not explicitly and officially labeled as "bride price", they are still required for marriage and carry other auspicious meanings. According to the latest judicial interpretation (state law) promulgated in February 2024, one of the most crucial criteria in determining the nature of presents is their amount. Nonetheless, customarily the bride prices ought not to be conflated with other monetary gifts, as they are distinct in their cultural significance. In the typical case, M also deliver other cash gifts to W, named "Chabao" and "Wenbao". Both parties are Hui people, and the marriage customs of Hui nationality are closely related to tea, which is also the source of the names of the two kinds of cash gifts. In fact, these gifts are the gift that M entrusted a third party to introduce M to W, and the gift that M requested to engage with W, a total of 75,900 yuan. However, the bride price is 93,000 yuan, which is very close to "Chabao" and "Wenbao". If all of the other cash gifts are distinguished from bride price (folk law), it will undoubtedly be a huge loss to M (almost a half). If all large gifts are regarded as bride price (state law), it is difficult to determine the judgment standard in specific amount, which expand or narrow the scope of bride price.

5. Suggestions on Balancing the Conflicts Between Folk Law and National Law

5.1. Problem-Solving Principles

When solving the problems, it is essential to follow the legal hierarchy prescribed by positive law now. Although the Chinese legal system is a socialist legal system with Chinese characteristics, in terms of legislative techniques and content such as principles, styles, and specific provisions, it inclines to be close to the continental legal system. The Article 10 of Chinese Civil Code regulates the conditions when customs are applicable. The first condition is that there isn't any law governing the issue. When solving legal problems, the priority should be given to the application of state law rather than customary law. If not, it will seriously damage the credibility of the state and the coherence of the legal system. The second condition is the necessity to prove the custom exists locally. It is obviously the responsibility of the party who advocates the application of customary law to provide evidence to prove the existence of specific custom. The third condition is that the customary law must not invade public order and general kind morals. It seems that the requirements for applying the common law are quite strict. Therefore, a valuable principle is to adhere to the position of legal positivism, which means the application of customary law shall not violate the provisions of statutory laws.

While adhering to the state law, the complementary role should be given to the folk law. China is a statutory law country and Chinese judges only apply statutory law now [19]. The most frequently used method is leveraging legal blanks or directly delegating authority to folk law as stipulated by legal provisions. However, China's Guiding Case System and Similar Case Retrieval System indicate that China is learning from the case law system. Guiding cases are not supposed to be invoked as independent legal sources, but rather as necessary means of judicial reasoning [20]. The Supreme People's Court published guiding cases and typical cases regularly. Thus, persisting in the combination of legal clauses (state law) and cases (folk law is applied successfully) also became a suggested principle for judges.

5.2. Legislative and Judicial Remedies

Folk law contains many universally significant elements that can serve as learning reference and resource for state law. They eventually be selectively adopted by legislative bodies and become part of the new state law. Those that are only applicable to certain regions should also be fully respected by state law though they cannot guide the whole nation. Furthermore, state law must recognise the importance of fostering an environment conducive to the development and evolution of folk law. By leaving sufficient room for the growth and adaptation of these customary practices, state law enables a more inclusive and comprehensive approach to dispute resolution. Regarding bride price return dispute, the state law is required to treat engagement with a rigorous attitude to respect folk law. In the future, the widely recognised customs will be incorporated into national laws. Meanwhile, new customs will emerge. To conclude, a legislative mechanism that is "folk law--state law--folk law" should be entirely formed and implemented.

During pre-litigation mediation, incorporating folk law allows for a more holistic approach to resolving disputes. Many conflicts are deeply rooted in social, cultural, and economic factors unique to a particular region or community. Through the application of folk law, mediators can better comprehend and address these fundamental issues, resulting in solutions that are both legally sound and palatable to all parties involved. If the parties all welcome the assistance of folk law, the weakness of state law would be avoided, because during mediation the mediators are not necessarily bound to strictly adhere to the dictates of law. This avenue definitely increases the likelihood of successful and long-lasting resolutions.

As mentioned previously, the judges are allowed to learn from a guiding case in their legal reasoning. Nevertheless, there is a scarcity of such cases in practice, primarily because some judges hesitate to render bold judgments, driven by an apprehension of assuming accountability. This implies that judicial discretion should be safeguarded and appropriately expanded. Only by granting judge's

discretion can they better balance and reconcile the contradictions and conflicts between national law and customary law. Successful judgments will provide basis and even reference for subsequent judges, empowering them to uphold the reasonable interests of parties with greater confidence, rather than blindly adhering to convention.

6. Conclusion

In summary, this essay has discussed the conflicts between folk law and state law, showcasing them through analysis and research of a typical case. Especially on the issue of bride price, there are differences between the two in terms of the recognition of marriage, the scope of bride price, and the rules for the returning. From a standpoint of legal pluralism, the legislative bodies and judges have the chance to utilize both of them better. Due to the limitation of space, this essay has only elucidated and illustrated one case, which inevitably lacked comprehensiveness. However, it provides a preliminary background and framework for future research on the same issue of bride price from a legal pluralism perspective.

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