Research on the Protection of the Interests of the Vulnerable in Foreign-Related Marital Relations

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Abstract. In foreign-related marital relations, the asymmetric interest structure formed due to cross-border settlement causes foreign parties to face significant rights and interests imbalances and be in a weak position due to multiple adverse effects such as social resources, legal cognition, and information acquisition. The current "Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations" only introduces the principle of protecting the weak in the inheritance and guardianship systems, ignoring the predicament of the weak in marital relations. It is better to introduce the principle of protecting the interests of the weak, emphasize that in foreign-related marital relations, the core rights of either party shall not be excluded under the pretext of autonomy of will, clarify the protection standards for the interests of the weak, recognize the hidden cost input of the weak, and at the same time clarify the judgment criteria in favor of the weak in adjudication, so as to realize the protection of the interests of the weak under limited autonomy of will.

Keywords: Principle of autonomy of will, Principle of protecting the interests of the weak, Asymmetric interest structure, Application of law.

1. Introduction

With the continuous deepening of globalization, international exchanges have become closer, and foreign-related marriages have become more common. In this process, cultural and value differences between China and foreign countries have led to a series of corresponding problems. Foreign-related marriage relations cover the personal and property relations between spouses, involving foreign-related factors and cross-jurisdictional legal regulation. In practice, after the conclusion of a foreign-related marriage, most couples choose to settle long-term in the country of one party based on life planning, career development and other factors. This settlement choice makes marital relations deeply bound to the legal system and social environment of the host country, but at the same time highlights a special asymmetric interest structure: the domestic party naturally enjoys the advantages of local kinship networks, social resources and legal cognition, while the foreign party faces multiple predicaments such as separation from native kinship, challenges of cultural adaptation and information asymmetry in law, laying hidden dangers for the interest imbalance in subsequent marital disputes.

The problem of right imbalance in typical scenarios of foreign-related marriages is prominent, and the academic community has produced a considerable number of research results on this issue. Therefore, this paper focuses on the special asymmetric personal and property interest structure in foreign-related marriage relations[1][3][4]. On the basis of sorting out the predicament of the weak in foreign-related marriage relations in practice, it puts forward feasible optimization paths in view of the deficiencies of the current domestic laws and regulations, in order to realize the reasonable protection of the weak in foreign-related marriage relations.

2. The Dilemma of the Vulnerable in Foreign-related Marriage

The weak generally refer to a party in a disadvantaged position in some aspect in foreign-related civil and commercial legal relations. Their disadvantaged position is reflected in many aspects,

mainly including economic disadvantage, social disadvantage, physical disadvantage and mental disadvantage.[3]

Marital relations are a civil legal relationship established on the basis of the agreement of both parties, with affection as the core bond, and concluded freely and voluntarily by both parties[6]. In the structure of contemporary marriage law, the marital property system centers on regulating spousal and family relations, with specific norms becoming increasingly rich and detailed, and inclining more to a gender-neutral stance. Family members have equal rights to decide on family affairs, equal rights to family property, and equal personal relations without dependency[7]. Therefore, at least from the perspective of legal structure, both parties in a marital relationship are in an equal position, and there should be no distinction between the strong and the weak[4].

However, from a practical perspective, due to the combined influence of many factors such as physical structure, educational background and the overall social and cultural atmosphere, traditional marriage and family relations are actually male-centered, with men in a dominant position in marital relations. [2]Thus, in both practice and academia, women are naturally regarded as a group deserving special protection, i.e., the "weak" in marital relations. In addition, if there is a significant economic gap between the two parties to a marriage, the party in a more economically disadvantaged position is often regarded as the weak in the marriage. To achieve interest balance in traditional marriages, the principle of autonomy of will runs through the core of the marriage system. Both parties may independently arrange their rights and obligations in the marital relationship within the legal framework, thus balancing the possible inequality between the two parties caused by external conditions to a certain extent.

However, the general presumption of the weak in traditional marital relations is difficult to apply to cross-border marriages. The party regarded as the strong in traditional marital relations based on physical structure or economic status may lose their original advantageous position and become the weak due to moving to a foreign country for a cross-border marriage. Affected by the personal relations of the parties, as well as the public interests and public order and good morals of various countries, foreign parties are far away from their native kinship and property networks, and are easily influenced by the other party in terms of property control and mental dependence, resulting in the lack of a real basis for equal negotiation in the formation of agreement between the two parties. Relying solely on the autonomy of will may lead to the result of "formal freedom but substantive injustice". For example, in the agreement on marital property, foreign parties may find it difficult to identify the unfair content in the agreed terms due to lack of understanding of Chinese law; in divorce negotiations, foreign parties may be forced to accept an unfavorable rights distribution plan in a hurry to resolve issues such as identity and residence. Such seemingly "voluntary" agreements are essentially the result of compromise by the disadvantaged party, making the principle of autonomy of will a mere formality of fairness and failing to realize substantive justice.

The disadvantaged position in foreign-related marriages is not formed by chance, but is deeply rooted in multiple incentives such as the transnational mobility structure, cultural difference structure and legal application structure. A foreign-related marriage often means that one party needs to move to the other party's country, thus forming a typical asymmetric interest pattern. On the one hand, during the duration of the marriage, the immigrant party has to pay more hidden costs to maintain the marriage. The domestic party not only has a stable kinship network, social resources and career foundation, but also during the duration of the foreign-related marriage, the foreign party often pays more immeasurable hidden costs to maintain family relations and adapt to life in the other party's country. When the marital relationship breaks down, these costs are easily ignored in the division of rights and interests and cannot be compensated accordingly, ultimately leading to an imbalance between contributions and rights returns and further damage to interests. On the other hand, after the termination of the marriage, the immigrant party also needs to pay more costs to realize their legitimate rights and interests. The domestic party has a natural familiarity with the domestic legal system, property system and judicial procedures; while the immigrant party has to break away from the native kinship and social environment, facing multiple challenges such as language barriers,

cultural differences and lack of legal information, and their ability to protect rights and interests in the marital relationship is naturally in a disadvantaged position.

It can be considered that the "weak" in foreign-related marriages is not a concept based on fixed identity labels (such as nationality and gender), but a concept with the core characteristic of relatively weak ability to protect rights and interests formed by the particularity of foreign-related marriages. Modern legal concepts pursue not only the protection of human rights, but also fairness and justice. The core of fairness and justice lies in the realization of substantive justice, i.e., the true embodiment of equality for all in both procedure and result. However, due to differences in economic conditions, physical conditions and social environment among citizens, formal equality is often difficult to achieve. To achieve substantive equality, legislation cannot treat all subjects equally, but should take these differences into account and provide necessary preferential protection for specific groups. Just as minors are specially protected in criminal law, in foreign-related marriage relations, if we blindly emphasize the absolute equality of rights and obligations between the two parties in marriage in law, it will essentially cause inequality between the two parties in the marital relationship, and appropriate preferential protection should also be given to the subject in a disadvantaged position to realize true equality.

3. The Handling of the Weak in Foreign-related Marriages by China's Current Laws

Human beings are born with certain rights that do not differ due to nationality, gender, origin, belief and other differences. Modern legal concepts pursue not only human rights, but also the so-called fairness and justice. The main focus of fairness and justice is substantive justice in private international law, i.e., providing policy preferences to non-national citizens to enable them to protect their rights as much as possible in a non-native environment

For foreign-related marriage relations, China's relevant provisions are mainly concentrated in Articles 24, 25 and 26 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relations. Article 24 of the Law on the Application of Law for the first time makes a separate provision on the application of law to the property relations of foreign-related spouses, in which the first half introduces the principle of autonomy of will into the conflict rules of the property relations of foreign-related spouses for the first time, stipulating that both spouses may explicitly choose the applicable law. At the same time, the article also restricts this autonomy of will, i.e., only the law of the habitual residence, the law of the nationality or the law of the main property location of one party may be chosen. If the spouses have no agreement on the choice, and there is no common habitual residence and nationality, the law with the closest connection shall apply. There is no restriction on the time scope of the choice in Article 24, i.e., the parties may freely choose the applicable law either before or after marriage..[9] Article 26 of the Law on the Application of Law responds to the application of the principle of autonomy of will in the way of divorce by agreement in the case of foreign-related divorce, stipulating the order of application of law: the agreement shall be followed if there is one; if there is no agreement, the law of the common habitual residence shall apply first; if there is no common habitual residence between the two parties, the law of the nationality of both parties shall be chosen; if the nationalities of both parties are also different, the law of the place where the divorce formalities are handled shall apply. It can be said that the Law on the Application of Law has not established the principle of protecting the weak's interests in foreign-related marriage relations[10].

A comprehensive review of the Law on the Application of Law shows that it clearly stipulates the application of laws conducive to protecting the weak's interests in the provisions on the application of law to parent-child relations, maintenance and guardianship. On the one hand, this shows that the Law on the Application of Law does not exclude the principle of protecting the weak's interests, and even intends to incorporate it into legislation. But at the same time, it cannot be ignored that in the laws stipulating the protection of the weak's interests, there is no clear standard for the definition of

the "weak". Articles 29 and 30 of the Law on the Application of Law only indicate that the "maintained person" and the "ward" are the "weak". In Article 25, the conflict rules do not clearly specify the "weak" in parent-child relations. Secondly, the provision of applying laws that are "conducive to" protecting the weak's interests lacks clarity, predictability and operability. Articles 25, 29 and 30 of the Law on the Application of Law all set up "conducive to" clauses, specifically in the form of "applying the law conducive to protecting the rights and interests of... among... laws". However, these provisions conducive to the protection of the weak's interests are "blind" rules, lacking clarity, predictability and operability. They only consider the selection process of legal application, not the specific content of substantive law and the final handling result of the case, making it impossible to predict whether the applicable legal content and the case handling result are truly conducive to protecting the weak's interests, and difficult to realize the value orientation of the law in pursuing substantive justice[11].

For the "weak" in foreign-related marriage relations, if the autonomy of will is not properly restricted, the rights and obligations between the two parties are likely to be completely controlled by the strong party, and the interests of the "weak" are difficult to be guaranteed. The core value of law lies in fairness and justice, and the unrestricted application of the principle of autonomy of will may lead to unconscionable results, which is the space for the intervention of the principle of protecting the weak. In foreign-related marriages, due to the natural inequality of the parties' status, pure autonomy of will may lead to the strong party infringing on the rights and interests of the weak party by taking advantage of their advantageous position, violating the principle of fairness. The principle of protecting the weak does not negate the autonomy of will, but on the premise of respecting the parties' autonomy of will, it corrects the substantive injustice caused by formal fairness through preferential protection for the weak party, making the distribution of rights and interests more in line with the fairness and justice pursued by the law. This corrective function is not a breakthrough of private law autonomy, but a specific implementation of the civil law principle of fairness. Foreign parties often face the predicament of "having no way to complain" due to inadequate protection of their rights and interests. The introduction of the principle of protecting the weak can provide a clear right relief channel for the weak party, make up for their natural disadvantages in the game of rights and interests through preferential legal rules, effectively solve the predicament of the weak paying more and suffering more losses, and respond to the realistic demand of society for fairness and justice.

In fact, the idea of introducing the principle of protecting the weak into the foreign-related marriage system is not a castle in the air. Protecting the weak's interests in foreign-related marriages has become a common trend in private international law, and most countries have established targeted protection rules through legislation or judicial practice. For example, in common law countries, the United States has promoted legislation on the protection of the weak through the "Conflict of Laws Revolution" and established a divorce maintenance system, mainly including two types: "rehabilitative alimony" and "compensatory alimony"[12]; the United Kingdom also excludes the application of foreign laws that are unfavorable to the weak through public policy, considers the contributions of the weak party in the division of divorce property, and the Legitimacy Act stipulates the protection of the rights of illegitimate children. Similar to the above, the Quebec Civil Code of Private International Law of Canada requires that the establishment of parent-child relations shall choose the law conducive to the child among the law of the child's residence or the national law, and the law of the place or nationality of one parent at the time of the child's birth. In civil law countries, the Legislation on the Reform of Private International Law of the Federal Republic of Germany stipulates a maintenance subsidy system to protect the weak party of the couple[13]; the Swiss Federal Private International Law stipulates that parent-child relationship disputes shall apply the law of the child's habitual residence in priority, which can be applied by analogy to the Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Japan, Hungary and other countries require that foreign-related maintenance shall apply the personal law of the maintained person. In addition, Hague Conventions such as the Convention on the Law Applicable to Matrimonial Property

Regimes and the Convention on the Law Applicable to Maintenance Obligations also clarify the core position of the protection of the weak. China's introduction of the principle of protecting the weak is not only a reference to international common practices, but also an inevitable requirement for integrating into the international legal system, with sufficient international basis.

4. The Introduction of the Principle of Protecting the Weak's Interests in the Foreign-related Marriage System under Limited Autonomy of Will

Marriage and family relations are different from ordinary commercial contract relations. On the one hand, the establishment, alteration and termination of legal relations such as marriage, maintenance, adoption and guardianship at the legal level are all based on emotional communication and psychological choices between the parties at the factual level. This is the realistic basis for the must adhere to and application of the theory of autonomy of will in the field of marriage and family. Specifically, civil legal relations in the field of marriage and family are constructed on a large number of factual acts and legal events, such as factual acts such as gift-giving, legal events such as birth, old age, illness and death, and even objective facts not regulated by legal norms such as love. It is precisely because the will of both parties is consistent that marriage has the possibility of establishment and continuation. At this level, the principle of autonomy of will is the cornerstone of the existence of the marriage system. However, in foreign-related marriages, blind emphasis on the autonomy of will will instead diminish it. For cross-border marriage participants who have broken away from their original living environment and social culture, it is difficult to tell whether all decisions made according to their own will are real autonomy of will or false autonomy of will forced by the environment. On the one hand, the principle of autonomy of will supports the marriage system, and on the other hand, the interests of the weak in foreign-related marriages are indeed difficult to be protected. It is advisable to establish a "limited autonomy of will" in order to realize the coordination between the protection of the weak's interests and the autonomy of will. Clarifying the application level of the principle of autonomy of will and the principle of protecting the weak's interests is the premise of achieving the balance between the two, and the core rule of "taking autonomy of will as the foundation and protection of the weak as the supplement" should be established.

First of all, the parties have the right to independently agree on the ownership of marital property, the way of divorce and other matters, and their agreed terms shall be respected as long as they do not violate mandatory provisions and do not damage the basic rights and interests of the weak. For example, both spouses may agree to choose the law of the habitual residence, the law of the nationality or the law of the main property location of one party as the applicable law for property relations, and the court shall not arbitrarily negate the validity of this choice. On the other hand, the prohibitive boundary of the autonomy of will should be defined. It is clear that the parties shall not exclude the core rights and interests of the weak by agreement, including the right to basic living security, the right to child custody, the right to the division of joint property, etc. If the agreed terms contain content such as "depriving foreign parties of living expenses during residence", "restricting the weak party's right to visit children" and "concealing joint property", the court shall determine the terms as invalid or revocable and activate the weak protection rules for correction. At the same time, the coordination space between the protection of the weak and the autonomy of will is recognized. The parties are allowed to voluntarily agree on the weak protection clauses in the agreement, such as clarifying the property share of the weak party and the maintenance expenses after divorce in the property agreement. As long as such agreements do not violate the principle of fairness, the court shall give priority to recognizing their validity, realize "protection in autonomy" and reduce the necessity of public power intervention. This hierarchical division can not only respect the consensual nature of marital relations, but also avoid the abuse of autonomy of will, which is conducive to the unification of formal fairness and substantive justice.

Secondly, the specific judgment criteria for the weak's interests shall be clarified, and a comprehensive judgment system of "taking objective standards as the main and subjective standards

as the supplement" shall be constructed to avoid vague identification or improper expansion of the protection scope. Objective standards should focus on the "substantive difference in the ability to protect rights and interests", including three core elements: first, the correlation degree of social resources, focusing on investigating the party's kinship network, social support, career stability, etc. in the host country. If a foreign party has no stable kinship support and scarce social network in the host country, it can be initially identified as the weak; second, the level of legal cognition, combining the party's language ability, understanding of China's marriage and family law, access to professional legal assistance, etc. Foreign parties who cannot effectively claim their rights due to language barriers and lack of legal information should be included in the scope of weak consideration; third, the ability to obtain property information, investigating the party's control over the joint marital property and the access channels of property clues. If one party has no knowledge of the scope and status of the joint property and no effective way to find out, it shall be identified as the weak. Subjective standards should focus on the "hidden contributions in marriage", mainly including the assumption of housework, assistance in cultural adaptation, sacrifice of career development, etc., and refer to the emotional value attribute of property at the same time. For example, if a foreign party abandons their own career to maintain the family, undertakes the main housework for a long time, or provides language translation and cultural adaptation guidance for the Chinese party, even if their economic income is not low, they shall be identified as the weak party; for property with commemorative significance and once serving as the main living place of the family, the degree of emotional connection can be used as an important basis for judging the correlation of the weak's interests and included in the subjective consideration. Although these hidden contributions are difficult to quantify, they are directly related to the maintenance of marital relations. They can be included in the comprehensive consideration of the weak judgment through the distribution of the burden of proof, such as the party claiming to be the weak providing evidence to prove the contributions, so as to realize the comprehensive protection of the weak party. In the comprehensive judgment, a clear conclusion shall be formed by combining subjective and objective standards. When hearing foreign-related marriage disputes, the court shall first judge the difference in the parties' ability to protect rights and interests according to objective standards, then consider the hidden contribution according to subjective standards, and finally comprehensively identify the scope of the weak. For foreign parties, if they meet two objective elements of "scarce social resources and insufficient legal cognition" at the same time, or have the subjective element of "significant hidden contributions", they shall be identified as the weak; for domestic parties, they can only be identified as the weak when their rights and interests are damaged due to physical disability, economic dependence, long-term assumption of family responsibilities, avoiding a one-size-fits-all judgment based on nationality.

Thirdly, the applicable rules of "being conducive to the weak" should be refined and the judicial criteria should be standardized. The clarification of "being conducive to the weak" is the key to avoiding judicial arbitrariness, and specific provisions should be made from the aspects of application scenarios and identification methods to provide a legal basis for the court. In terms of application scenarios, "being conducive to the weak" is mainly aimed at two core disputes: custody disputes and property division disputes. In custody disputes, the core of "being conducive to" is the "balance between the weak's rights and interests and the children's interests". Specifically, the following factors should be focused on: first, the weak's care ability, including their economic strength, time and energy, residential stability, etc. If the weak has basic care ability, priority should be given to consideration; second, the emotional connection between the child and the weak. If there is a deep emotional dependence between the child and the weak, this emotional bond should be respected; third, the weak's own development needs, such as the residence status protection and career planning of the foreign weak, to avoid the inability to protect their legitimate rights and interests due to the loss of custody. At the same time, the exercise rules of the right of visit should be clarified to ensure that the weak can continue to maintain emotional contact with their children, and the weak's right of visit shall not be deprived due to the attribution of custody. In addition, the exclusion circumstances of "being conducive to" should be clarified. If the weak has acts such as seriously damaging the

children's interests and maliciously transferring property, the rule of "being conducive to the weak" shall not be applied to avoid the abuse of rights. In property division disputes, the core of "being conducive to" is to establish the rule of "fair division and preferential protection". First, clarify the scope of joint property, include cross-border property such as overseas real estate and deposits in the division scope, require the parties to declare property truthfully, and stipulate punitive consequences for acts of concealing and transferring property, such as dividing less or no property. Second, establish the burden of proof on the domestic strong party to prove the scope of joint property. If they cannot prove that the property is personal property, it shall be presumed to be joint property. Third, implement preferential protection division, and give the weak an appropriate property preference on the basis of considering the contributions of both parties, such as giving them a 10%-20% preferential share in the joint property with reference to factors such as the duration of the weak's hidden contributions and the value of housework, and at the same time guarantee the weak's basic living needs, such as reserving their right of residence to the joint residential house or giving them necessary living subsidies. In addition, for the division of cross-border property, international judicial assistance should be strengthened, and a cooperation mechanism for property investigation and enforcement should be established to ensure the effective realization of the weak's property rights and interests. In terms of identification methods, the principle of "prioritizing substantive protection" should be adhered to to avoid formal judgment. The place of the closest connection can be used as a reference factor, but cannot replace substantive judgment. The court needs to find out the application results of different applicable laws, compare and analyze the protection for the weak, instead of directly applying the lex fori. Drawing on the German practical experience, judges should compare the law chosen by the parties with the mandatory protection norms to the advantage of the weak, and apply the law more conducive to the weak first; if all the applicable laws provided by the conflict rules are not conducive to the weak, the principle of the closest connection can be cited as an exception clause to correct the deviation of connecting points and expand the protection channels. In view of the difficulty in ascertaining foreign law, the judicial administrative organ can take the lead in integrating the professional resources of universities, research institutions and law firms to establish a "database for ascertaining foreign law in foreign-related marriages", covering the legal rules and judicial practices of marriage and family in major countries, facilitating the court's comparative application and improving the pertinence of protection.

5. Conclusion

The interest imbalance in foreign-related marriages is not an accidental phenomenon, but rooted in the asymmetric interest structure formed by transnational settlement. Foreign parties have objective disadvantages in social resources, legal cognition and information access, and are easily in a disadvantaged position in custody disputes and property division under the formal application of the principle of autonomy of will. The introduction of the principle of protecting the weak does not negate the autonomy of will, but corrects its formal defects through limited restrictions. It has jurisprudential legitimacy, practical necessity and is in line with international common practices, but faces dilemmas such as hierarchical conflicts, normative deficiencies and operational problems in China's judicial practice. Based on this, constructing a balanced path with limited autonomy as the foundation, precise protection as the core and standardized operation as the guarantee is conducive to clarifying the boundary of the parties' autonomy of will, refining the identification standards for the weak, standardizing the applicable rules of "being conducive to the weak", and realizing the organic unity of private right autonomy and substantive justice.

From a broader perspective of foreign-related legal governance, the fair settlement of foreign-related marriage disputes is not only a demand for the protection of individual rights and interests, but also an important embodiment of national judicial credibility and international image. The introduction of the principle of protecting the weak's interests under limited autonomy of will is essentially the transformation from "formal equality" to "substantive equality" through the refinement

of rules. With the continuous deepening of globalization, the complexity of foreign-related legal relations will continue to increase. How to prevent interest imbalance on the basis of respecting private right autonomy will become a long-term issue in the construction of foreign-related legal governance. Building a more fair, efficient and inclusive settlement system for foreign-related marriage disputes will provide a solid legal support for the orderly development of cross-border exchanges and cultural mutual learning.

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