

# On the Judicial Application of The Principle of Public Order and Morality

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**Abstract:** The principle of public order and good morals, which consists of two parts: "public order" and "good customs", is enshrined in article 8 of China's Civil Code. In modern civil law, the principle of public order and good morals permeates all fields of civil law, and has become the value concept of maintaining legal order, which does not negate the autonomy of private law, but delimits the boundaries of the autonomy of private law. However, the uncertainty of its connotation and application conditions makes the application of the principle of public order and good morals will inevitably produce the contradiction between the stability of the law and the justice of individual cases. Therefore, in the judicial application of the principle of public order and good morals, the definition of the concept of public order and good morals and the conditions of judicial application should be clarified to prevent the confusion of public order and good morals with other concepts, to prevent different judgments in the same case and to prevent the escape to the general provisions, so as to realize the balance between the stability of the law and the justice of individual cases.

**Keywords:** Public order and morality principle; judicial application; substantive justice.

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## 1. Introduction

The principle of public order and good morals is a special principle in civil law, it has a dual attribute, not only is the guiding ideology, but also the adjudication norms. But in the past, scholars' research on the principle of public order and morality mainly focused on the theory, and did not pay enough attention to its judicial application. The judicial application of the principle of public order and good morals to the judge's discretion, give the judge too much discretion, and no clear conditions and standards for the application of limitations, easy to cause judicial corruption and perverse judgement. Therefore, in the judicial application of public order and good morals to improve the need for legislation and judicial synergy, legislation can further determine the connotation of the principle of public order and good morals and the conditions of application, the judicial can improve the application of procedures.

## 2. Classification, Current Status of Judicial Application and Problems with The Principle of Public Order and Morality

### 2.1. Classification of acts contrary to the principles of public order and decency

The principle of public order and good morals is the basic principle of China's civil law, the law for the specific content of the principle does not have a unified and clear provisions, the principle of public order and good morals is the combination of "public order" and "good customs", the two belong to a different category, and its collective name reflects the combination of social order and morality. The principle of public order and morality is a combination of "public order" and "good customs", which belong to different categories. The Civil Code does not clearly define behaviour that violates the principle of public order and good morals, and there is no unified theory in the academic community on behaviour that

violates the principle of public order and good morals; in practice, China's Trial Practice Guidelines adopt Professor Liang Huixing's classification, which divides the types of public order and good morals into ten categories based on China's national conditions: 1. Types of behaviour that endanger the public order of the State; 2. Types of behaviour that endanger family relations; 3. Types of behaviour that violate sexual morality; 4. Types of behaviour that shoot for luck; 5. Types of behaviour that violate human rights and respect for the human person; 6. Types of behaviour that restrict economic freedoms; 7. Types of behaviour that violate public competition; 8. Types of behaviour that violate consumer protection; 9. Types of behaviour that violate workers' protection; and 10. Types of behaviour that are profiteering. The above ten classifications of public order and good morals provide a reference for the judicial application of the principle of public order and good morals in China, but this enumerative classification cannot exhaust the violations of the principle of public order and good morals, nor can it predict new violations of the principle of public order and good morals that will continue to emerge in the future, and it is only a doctrinal summary after the judicial authorities have dealt with the case, and it cannot give guidance to the judicial authorities in dealing with new types of cases.

### 2.2. Status of judicial application

The application of the principle of public order and good morals involves various fields of civil law, and the application of the principle of public order and good morals in the field of civil law includes the following aspects: the application of public order and good morals to judge the validity of civil legal acts, in which cases are mainly the validity of entrustment contracts and the validity of the contracts of bequests and grants in the cases of extramarital affairs; the application of public order and good morals to determine the illegality of torts, in which cases are mainly the cases of infringement on ancestral graves, and the cases of The use of public order and morality to resolve property disputes; the use of public order and morality to assist in the resolution of

disputes over personality and identity rights; the use of public order and morality to adjudicate inheritance and divorce disputes; and the use of public order and morality in determining whether a violation of public order and morality is a cause for termination of a labour contract.

### **2.3. Problems in the judicial application of the principle of public order and decency**

The following two cases to show the uncertainty of the principle of public order and morality in the judicial application.

#### **2.3.1. Introduction to the Luzhou bequest case**

The defendant in this case, Jiang Lunfang, and her husband, Huang Yongbin, registered their marriage in May 1963, and lived together for more than 30 years after their marriage. Because Jiang Lunfang is not fertile, the two adopted a son, Jiang Lunfang for inheritance of parental heritage to obtain a set of housing, because of the city construction of the house was demolished, by the demolition of another housing unit compensation for a set of housing resettlement to Jiang Lunfang, and Jiang Lunfang in the name of the housing title registration formalities. 1996, the bequeathor of the HuangYongBin and the plaintiff ZhangXueYing acquaintance, the two people will be in the name of husband and wife began to live together. 2000 September, the HuangYongBin and JiangLunFang JiangLunFang inheritance proceeds from the property sold at 80000 price to ChenZhen. In September 2000, Huang Yongbin and Jiang Lunfang sold the property that Jiang Lunfang inherited to Chen Rong at a price of 80,000, but agreed that the taxes and fees arising from the housing transaction would be borne by Jiang Lunfang. And Huang Yongbin, Jiang Lunfang will sell the house in the money 30,000 yuan grant with his son outside the purchase of commercial housing. 2001, Huang Yongbin due to liver cancer disease hospitalised in the late stages of treatment, during the period has been by the defendant Jiang Lunfang and his relatives care, care. HuangYongBin on 18th April 2001 made a written will, will receive housing subsidies, provident fund, pension and half of the sale of 40,000 yuan and their own use of a mobile phone, gifted to the plaintiff ZhangXueYing all. 22nd April 2001, the bequest of HuangYongBin passed away. Before the cremation of Huang's body, the plaintiff ZhangXueYing accompanied by lawyers, read the will left by HuangYongBin when he was critically ill, and asked to exercise the rights in accordance with the will, was JiangLunFang refused. Subsequently, ZhangXueYing to the defendant JiangLunFang control all the property, refused to pay the plaintiff bequeathed property, will JiangLunFang to luzhou city naxi district people's court.

The court held that Huang Yongbin's bequeathing of his personal property to Zhang Xueying violated the provisions of the law and the principles of public order and morality. Huang Yongbin during the marriage with others, Zhang Xueying know Huang Yongbin married and cohabited with, their behaviour is contrary to social morality, but also has violated the law, accordingly, the court finally found that the will is invalid, and rejected the plaintiff Zhang Xueying's claim. The court of second instance for the same reason, rejected the appeal, and maintain the original judgement.

#### **2.3.2. Case analysis**

In the Luzhou bequest case, the decedent, Huang Yongbin, bequeathed property to Zhang Xueying, an extramarital cohabitant, by setting up a bequest agreement that excluded

the rights of his spouse and son as legal heirs. The legal heirs of Huang Yongbin bequest will bequestee Zhang Xueying lawsuit to the court. The court rejected the validity of Huang Yongbin's bequest agreement on the grounds that it violated the principle of public order and morality, and the legatee Zhang Xueying's claim was rejected by the court.

Legal principles have the function of filling legal loopholes, and when there are specific provisions, they should be applied first; when there are no specific provisions in the law and the legal loopholes cannot be filled according to the various loophole-supplementation methods, the legal principles can be applied directly. The principle of public order and good morals belongs to the authorised legal provisions, belongs to the concept of uncertainty, the application of the situation is very complicated, easy to trigger the abuse of power, should be applied with caution. Luzhou bequest case according to the relevant provisions of the Inheritance Law at the time, as well as the bequest is true and voluntary, the court should be based on the bequest of the bequest of the bequest of Huang Yongbin's bequest agreement, respect for the will of the free disposal of property, the bequest of property judgement to be bequest to the bequest of the bequest of the will of the zhangxueying all. However, the court disregarded the provisions of the Inheritance Law and the bequestor's true expression of will, and directly applied the principle of public order and good morals to negate the validity of the bequest agreement. The court disregarded the specific provisions of the law, and directly applied the principle of public order and good morals, which not only violated the usual logic of applying the rules of law and principles of law, but also triggered a conflict between the principle of autonomy of meaning and the principle of public order and good morals.

#### **2.3.3. Problems in the judicial application of the principle of public order and decency**

First, the principle of public order and morality is not clearly defined. Public order and morality are indeterminate concepts with a wide range of connotations and extensions, and in understanding the principle of public order and morality, it is easy to confuse the principle of public order and morality with general moral concepts, and to make unfavourable rulings as long as a certain kind of behaviour violates social moral concepts. For example, in the Luzhou bequest case, it was held that the act of cohabitation outside marriage violated social morality, while the bequests and gifts made by the bequestor to dispose of personal property were also considered to be legal acts without legal effect. The case transgressed the provisions of the Inheritance Law by directly applying the principle of public order and morality, a phenomenon that escaped to the general provisions.

Secondly, the judicial application of the principle of public order and good morals is not standardised. (1) the principle of public order and morality in the judicial application of the object of judgement error. In luzhou bequest case, the focus of controversy is the bequest of the bequest of the bequest agreement is valid, the judge is not applying the inheritance law to determine the effectiveness of the bequest agreement, but ZhangXueYing and HuangYongBin there is an extramarital cohabitation relationship for the reason of the application of the relevant provisions of the marriage law and the principle of good morals and public order, that HuangYongBin made the bequest of the invalidity of the agreement. In this case, the principle of public order and morality was applied to the act of extramarital cohabitation rather than to the bequest agreement, and once an extramarital cohabitation relationship

existed, the validity of other legal acts was denied, with no distinction being made between acts such as the payment of living expenses.(2) Escape to general provisions. To the general provisions of the escape refers to the referee regardless of mandatory provisions, apply the principle of public order and morality to solve the problem. In Luzhou bequest case, according to the relevant provisions of the inheritance law, Huang Yongbin bequest agreement should be valid, but the judge oversteps the provisions of the inheritance law, the application of the principle of public order and morality, and the application of the inheritance law, and the application of the judgement is diametrically opposed to the inheritance law. Specific rules than the principle of law in the application of priority, in the case of specific rules can be applied, the adjudicator does not apply the specific rules, but the application of the principle of law, is obviously against the general principles of adjudication. The application of the principle of public order and good morals sometimes causes judges to involuntarily evade towards general provisions. Therefore, the principle of public order and morality need more perfect legislation, judicial application conditions. (3) The phenomenon of different judgements in the same case is serious. In the case of the same facts of the case, the same is the application of the principle of public order and morality, some cases negate the effectiveness of the act, some cases confirm the validity of the act, this situation is mainly due to the application of the principle of public order and morality of the application of the legal effect of the conditions and the application of the principle of public order and morality of the judicial application of the principle of public order and morality of the concept of the definition and the conditions of application of the principle of public order and morality of the precise, not only to effectively limit the judge's discretion, but also to maintain similar cases in the verdict results. (c) Maintaining uniformity in the judgement results of similar cases.

### **3. Suggestions for Improving the Judicial Application of The Principle of Public Order and Morality**

The principle of public order and morality, as a guideline for specific rules of civil law, should be applied appropriately. We need to clarify whether the principle of public order and morality can be applied in a case and how it should be applied. The application of the principle of public order and good morals implies that the adjudicator has a large discretionary power. In modern countries governed by the rule of law, especially under the dominance of the supremacy of law, the law has the absolute authority and superiority to counteract the influence of arbitrary rights, and to exclude the existence of arbitrariness, privilege, and even the existence of extensive discretionary power on the part of the government . Therefore, even in a modern State governed by the rule of law, the exercise of discretion is a matter of caution, and the principle of public order and good morals requires a clear definition of its content and the conditions for its application in order to prevent the abuse of discretion.

#### **3.1. Level of legislation**

First, the specific concept of the principle of public order and morality should be clarified. First, the relationship between the principle of public order and good morals and peremptory norms should be clarified. Public order and

morality are not included in peremptory norms, and the principle of public order and morality is a general, authorising and guiding norm, and clarifying the relationship between the two can prevent adjudicators from escaping beyond peremptory norms to general provisions. Secondly, as the content of public order and good morals encompasses a wide range, and because of individual differences, the public perception of public order and good morals is different, the legislator should, in accordance with China's national conditions and the actual situation of society, conduct social surveys, widely consult the community, and with the majority of the public, the public agree with the standard, the public order and good morals of the principle of the concept of a clear definition.

Secondly, the criteria for determining violations of the principle of public order and morality should be clarified. Legislators can be in the Civil Code on the principle of public order and morality of the judgement of the subject, object, benchmarks to make specific provisions. Luzhou bequest case, the court is the object of judgement is wrong, the focus of the case and for the violation of the principle of public order and morality of the object of judgement should be made by Huang Yongbin bequest agreement, and the court will be Huang Yongbin and ZhangXueYing extramarital cohabitation as a violation of the principle of public order and morality of the object of judgement, therefore, the legislator need to clarify the principle of public order and morality of the subject of the judgement, the object of, the benchmark. In judicial practice, the principle of public order and morality is more similar to a principle of the bottom, the emergence of new cases, there is no specific rules, and according to the legal loophole supplementation method can not fill the loopholes of legal facts can be punished by violating the principle of public order and morality. Judges can effectively fill legal loopholes and prevent the abuse of discretion based on their knowledge of a series of targets and benchmarks for determining behaviour that violates the principle of public order and morality.

Finally, the legal consequences of violating the principle of public order and good morals are clearly stipulated. Because the basic principles of civil law is the most abstract civil law norms, its compliance and violation of the possible legal consequences are also abstract, according to the basic principles of civil law, we can only roughly know: compliance with the basic principles of civil law will produce legal consequences in favour of the perpetrator, non-compliance with the basic principles of civil law will produce civil law consequences unfavourable to the perpetrator, as for what kind of favourable and unfavourable consequences, it is not clear. . In the Luzhou bequest case, the extramarital cohabitation relationship violates the principle of public order and morality, and will produce unfavourable legal consequences, but it is not clear what kind of unfavourable legal consequences will be produced. Legislators should make clear provisions in the Civil Code on the legal consequences of violating the principle of public order and good morals and the principle of attribution.

#### **3.2. Level of judicial application**

Firstly, in applying the principle of public order and good morals, it is necessary to prevent the phenomenon of "evasion of the general provisions". As a basic principle of civil law, public order and good morals is an enabling provision, the concept of which is uncertain, and the application of the

principle of public order and good morals should be subject to certain limitations. When there are specific rules, specific rules should be applied, the lack of specific rules and exhaust all the methods to fill the gap, you can apply the principle of law; when there are more than two specific rules can be applied and contradict each other, you can use the principle of law as a value guide, the application of the value of the principle of law in line with the value of the specific rules. In addition, if the principle of public order and morality is applied directly, the phenomenon of "escaping to the general provisions" will arise.

Secondly, the procedure for applying the principle of public order and morality. Since the principle of public order and morality encompasses a very wide range of contents, judges, when hearing a case, should know in advance the contents of public order and morality in the region where the parties are located, and decide whether or not to apply the principle of public order and morality in the light of the specific circumstances of the case and the contents of public order and morality. By following such a procedure, abuse of the principle of public order and morality can be avoided. After knowing the content of the specific public order and morality, the judge should also judge whether the public order and morality is in line with the requirement of goodness in the good customs, and should not be applied if it is not in line with the majority public perception.

Finally, the legal consequences of abusing the principle of public order and morality should be stipulated. Since public order and good morals are uncertain concepts, the application of the principle of public order and good morals gives judges greater discretionary power, which is prone to breed judicial corruption; therefore, the legal consequences of the arbitrary abuse of the principle of public order and good morals by judges in the course of adjudicating a case should be clearly stipulated, so as to effectively limit the discretionary power of the judges and to avoid possible judicial corruption.

#### 4. Concluding Remarks

With regard to the application of the principle of public

order and morality, in case adjudication, in the absence of specific rules, judges should not refuse to adjudicate a case, but should fill in the legal loopholes in the light of the specific circumstances of the case and the objective criteria, so as to achieve a balance between the stability of the law and the justice of the individual case. For private law autonomy and even civil rights, public order and morality is not a "beast of prey". The principle of public order and good morals to protect social justice and people's rights as the fundamental value orientation, under the guidance of the concept of people-oriented, the judge to master the application of the principle of public order and good morals of the conditions and procedures, in order to protect the rights of citizens and the pursuit of justice in individual cases. A clear definition of the connotation of the principle of public order and morality and the conditions for its application can also effectively prevent the application of the principle of public order and morality from escaping into general provisions, judicial corruption, and the phenomenon of different judgements in the same case.

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