

A Brief Analysis on the Legislative Regulation of Non-Marital Cohabitation in China

Yun Fu

Wuhan University of Technology
Wuhan, China

Abstract—With the continuous change of society, people's ideas about family structure are also constantly changing. Cohabitation is no longer the experience of a few people. There was a significant increase in cohabitation among men and women who had dropped out of school and started work earlier than the legal age for marriage, college students, divorced people and elderly people who had lost their spouses. Cohabitation is not allowed in the traditional Chinese and Western traditions and it is morally condemned or even illegal. Until the 1960s, European and American countries began to change the attitude of non-marital cohabitation from comprehensive restrictions and prohibitions to partial recognition and protection, and passed corresponding laws or jurisprudence to enable non-marital cohabitants to enjoy legal status and rights and obligations. China's family sector has also witnessed a declining marriage rate and a rising proportion of non-marital cohabitation. Non-marital cohabitation brings a range of social and legal issues.

Keywords: *non-marital cohabitation, legal system research, construction*

I. INTRODUCTION

A. Research background and research significance

As society continues to change, people's perceptions of family structure are constantly changing. Now, although some non-marital men and women are not married and have a legal and valid marriage relationship, they still voluntarily live together for love. In the traditional concept, such behavior is not allowed. Such behavior is condemned by morality. However, under the influence of open Western culture, people are gradually impacting the traditional marriage model, and non-marital cohabitation has emerged as the times require. Non-marital cohabitation is a prominent feature of modern family life and should therefore be an important part of contemporary marriage and family law.

B. Research status and existing problems

1) Current situation in China

In recent years, due to the widespread existence of non-marital cohabitation, many Chinese scholars have begun to pay attention to this phenomenon and have started research. Many scholars, judges, lawyers, and legal practitioners have called for attention to the phenomenon of non-marital

cohabitation, because there are many problems, such as legal and social aspects, in allowing this status quo to develop.

2) Theoretical aspects in China

What has had a greater impact in China's legal circles is Professor Zhang Minan's "Non-marital Cohabitation-An Important Issue in Comparative Family Law" published in 1994. This article is the earliest pioneering article on the study of non-marital cohabitation in China. It has caused most scholars' attention to the phenomenon of non-marital cohabitation. Professor Zhang Minan believes that it is necessary to correctly understand non-marital cohabitation, recognize the agreement on property between non-marital cohabitants, and protect the right of custody of non-marital cohabitants. Xia Yinlan's "American Modern Marriage and Family System" published in 1999 has a chapter dedicated to flexible marriage in the United States, one of which mainly introduces non-marital cohabitation. Since then, there have been many articles on the phenomenon of non-marital cohabitation not only in law journals, but also in sociological journals. Later, some master's thesis also study the phenomenon of non-marital cohabitation. In 2008, in Wang Wei's article "Comparison of Laws on Non-marital Cohabitation", she analyzed and compared the legal systems of non-marital cohabitation from the theoretical basis of the legal system of non-marital cohabitation, to the legislative model of non-marital cohabitation, and then to the specific contents of the system of non-marital cohabitation, and also put forward her own ideas on relevant systems in China. In 2010, Professor He Lixin proposed in "Research on the Legislation of Non-marital Cohabitation in China": The diversity of gender relations in modern society will inevitably affect the trend of future family law. As a form of family law, non-marital cohabitation should be included in the scope of adjustment of family law. Professor Yang Honghe's paper of "Research on Cohabitation Law and Regulation" carried out specific research on the status of various cohabitation situations in China. Xu Jingli and Wang Kun pointed out in the "Research on the Frontiers of Marriage Law" that China's existing legal system can't effectively protect vulnerable groups in non-marital cohabitation, and it should be regulated by law to avoid non-marital cohabitation as a hidden danger. They believed that non-marital cohabitation in China should be based on the model of fact partners and supplemented by contracts. Jiang Yue's "Introduction to the Preface to the Marriage and

Family Law" believes that non-marital cohabitation is already a model coexisting with the marriage and family.

3) *Aspects of judicial practice*

Non-marital cohabitation is more common in modern society. Therefore, there are many disputes caused by non-marital cohabitation. Regarding what kind of non-marital cohabitation cases can be accepted by the court, China only carried on the principle stipulation in Article 5 of "Interpretation of the Supreme People's Court on Several Issues Concerning the Trial of 'the Marriage Law of the People's Republic of China' (I)" and "Interpretation of the Supreme People's Court on Several Issues Concerning the Trial of 'the Marriage Law of the People's Republic of China' (II)". The adjustment scope of the law on cohabitation disputes is limited to three cases: cohabitation property division disputes, cohabitation child support disputes, and spouses cohabiting with others. This means that other non-marital cohabitation legal issues are in a legal vacuum. In addition, what have long guided China's judicial practice of non-marital cohabitation are the relevant provisions of the 1989 "Several Opinions of the Supreme People's Court on People's Courts Hearing Cases of Cohabitation in the Name of a Married Couple Without a Marriage Registration".

4) *Status of foreign countries*

Looking at the legislation of Western countries, the legal regulations of non-marital cohabitation have become increasingly mature. As early as the 1980s, scholars in many countries began to value non-marital cohabitation and recognized the social impact of non-marital cohabitation. They foresee a non-marital cohabitation as an irreversible world trend and call on the state to establish a corresponding legal system to deal with the impact of this megatrend. The legal formulation of foreign countries is also more systematic. Non-marital cohabitation partners in the United States, France, Denmark, and the Netherlands include same-sex partners. The opinions of scholars in many countries have been adopted by national laws. These are also reflected in foreign legislation, such as the "Family Partner Act" in the United States, the "Close Relationship Agreement" in France, the "Registered Partnership Act" in the Netherlands, and the "Law on Cohabitation in Law" in Belgium.

C. *Research content*

This article runs through the question consciousness, and the discussion is based on the logic of "what-why-how". The first part of this article is mainly to introduce the concept, nature and type of non-marital cohabitation, including the origin of various doctrines. The main purpose is to clarify the concept of non-marital cohabitation. The second part is a comparative analysis of a number of foreign regulations and studies. The main purpose is to learn from the absorption of foreign theoretical and practical experience, and take its essence to remove its dross. The third part analyzes the related problems in China's current legislation and judicial practice. The main purpose is to put forward specific ideas for the legal regulation of non-marital cohabitation in China from the three principles of legislative principles, legislative models and legislative content. The fourth part mainly

summarizes and contrasts related foreign studies and puts forward corresponding legislative and judicial supplements. It attempts to extend legal regulation throughout the life of non-marital cohabitation.

D. *Research methods*

1) *Document analysis*

In the research process, the author reads related works, consults various types of journals, and finds information related to non-marital cohabitation online, and sorts out the basic theories of non-marital cohabitation.

2) *Comparative analysis*

This article compares Chinese and foreign non-marital cohabitation systems, finds common ground and seeks breakthroughs in order to find feasible places for the construction of China's non-marital cohabitation systems in related fields.

II. BASIC THEORETICAL ISSUES OF NON-MARITAL COHABITATION

A. *The concept of non-marital cohabitation*

The author believes that non-marital cohabitation is a type of gender relationship in which men and women live together openly or secretly in the name of a non-spouse. This kind of relationship is not protected by law in China. The current law does not interfere with cohabitation where neither cohabiting partner has a spouse. Cohabitation with a spouse on one or both sides is illegal. Serious circumstances may also constitute the crime of bigamy and be punished by law.

B. *Research on the necessity of non-marital cohabitation*

1) *Necessity of practice*

a) *Non-marital cohabitation has caused a lot of lawsuits*

The reform of China's judicial system has been vigorously promoted, and the public's legal awareness has been significantly enhanced. The impact of non-marital cohabitation is mainly reflected in the field of litigation. The informatization of communications has continued to spread, and China's ties with foreign countries have continued to deepen. There is no doubt that people's ideas are more diversified, and it can be predicted that non-marital cohabiting families will become an independent new family form. China's legislation should respond to reality and incorporate non-marital cohabitation into legal regulations for adjustment.

b) *Contemporary reflection on marriage system*

Non-marital cohabitation is a way of life for individuals. Although people who choose non-marital cohabitation have different motivations, they have to admit that non-marital cohabitation is a highly rational choice for individuals. The declining marriage rate and rising divorce rate indicate that marriage is declining both for men and women.

Firstly, the determination of husband and wife common debt lacks a unified feasibility standard. In recent years, the problem of husband and wife debts has become more and more practical. Husbands and wives are not the borrowers, especially women who have carried huge debts without knowing it. There is no clear legal regulation on how to determine the daily needs of the family and how to determine the debts during the separation with the husband and wife.

Secondly, in the divorce system, the problem of "difficult divorce" is prominent. The marriage system is closely related to social stability. Legislators will not allow the parties to easily resolve the marriage relationship due to various issues such as social stability and child support. The Constitution grants people the right to freedom of marriage. The primary principle of the marriage law is the principle of freedom of marriage.

2) *Theoretical necessity*

What is the nature of marriage? This is an issue that has been endlessly debated in many fields. Since modern times, people have three main theories about the nature of marriage: system theory, contract theory, and ethics theory. The system theory says that the essence of marriage is legality. Marriage is a legal system. Although the contract of marriage is chosen by the parties themselves, the marriage system is legal. The contract theory believes that the essence of marriage is a contract, and the most important feature of a contract is the agreement between the two parties. Both parties express the same meaning, and the establishment of a marriage is based on the consent of both parties. Marriage is a form of contract because it is a voluntary agreement between the opposite sexes of an adult.

a) *The due construction of the civil code — marital freedom and the rights-based*

The fundamental characteristic of a country ruled by law is to respect and protect human rights. The legitimacy of Chinese national code is a rights-based view. China's civil code pays more attention to the development of diversity while pursuing the in-depth development of human individuality. This requires that our civil code can adjust the complex social structural relationship. With the opportunity of compiling the civil code of China, the rights standard should be fully integrated into the spirit of the times of the civil code of China, and new meanings should be given to the right to marriage. It can be seen that freedom of marriage does not only mean freedom to get married, freedom to divorce, but also freedom to choose not to marry. This is respect for personal life as well as respect for individual independence and free spirit. Non-marital cohabitation should be regulated by law both in reality and in theory. Such marriage relationships should be incorporated into the civil code and regulated in the marriage and family.

C. *Feasibility study of non-marital cohabitation*

1) *Preparation for judicial practice*

First of all, China's judicial authorities have done a lot of practical preparations in the face of a society in which the number of disputes over cohabitation is increasing. Secondly,

the Supreme Court of China issued a series of outstanding mediation cases and trial guidance cases on cohabitation relations. Finally, China has specialized agencies and professionals for hearing family matters. Cohabitation dispute cases are family matters. Cohabitation dispute cases are highly concealed and ethical, which makes it difficult to start trials. Great achievements have been made in family trials, a series of family courts have been established, and a large number of family judges have been trained, all of which have provided sufficient practical preparations for China's non-marital cohabitation laws and regulations.

2) *Preparation for legal theory*

The legal regulation of non-marital cohabitation in China has a theoretical basis. In recent years, scholars in China have carried out very detailed research on non-marital cohabitation pages. The issue of non-marital cohabitation has been included in the agenda of the annual conference and discussed at the China Marriage Law Research Association.

III. ANALYSIS OF INTERNATIONAL LEGISLATION STATUS OF NON-MARITAL COHABITATION

A. *Foreign research status*

Regarding non-marital cohabitation, it has been resisted by society and prohibited by law since ancient times. Until the 1960s, European and American countries began to change the attitude of non-marital cohabitation from comprehensive restrictions and prohibitions to partial recognition and protection, and passed corresponding laws or jurisprudence to enable non-marital cohabitants to enjoy legal status and rights and obligations.

B. *Research on non-marital cohabitation in Japan*

Compared with Western cultures that respect individualism, both Japan and China consider the "family" to be the basic unit of society and the country, and individuals are only a part of the family. The traditional concept of "home-based" has always influenced patriarchal ancient Chinese and Japanese societies. Marriage has taken the form of ritual marriage.

C. *French civil mutual aid contract system*

The French civil mutual aid contract system (the "cohabitation by agreement" system) is a French-origin legal model of cohabitation, which lies between marriage and free cohabitation. The combination is more convenient. Both parties can freely agree on all aspects of cohabitation life in violation of the law of coercion and public order and good customs. In terms of tax system and welfare, they also enjoy benefits that are weaker than those of marriage and stronger than those of free cohabitation.

D. *Regulations on U.S. non-marital cohabitation*

Since the second half of the 20th century, there have been dramatic changes in American marriages and families known as "revolutions", with the rise of non-traditional families, including single-parent families, single-person families, and

non-marital cohabiting families. A survey in 2006 showed that 50.2% of US households do not have a marriage relationship, most of which are so-called "non-family families", that is, homosexuals or heterosexuals living together without formal marriage. For same-sex or heterosexual common-law partners who continue to live together in public without a legal marriage relationship, their relationship can't be recognized and protected by the Marriage Law. When it is clearly unfair, the traditional way of remedy is common law marriage theory and equity in principle.

E. British non-marital cohabitation system requirements

With the non-marital cohabitation relationship being gradually accepted and recognized, British law in fact deals with the non-marital cohabitation problem by combining the parties' self-agreement and court discretion with a combination of legal provisions. On the one hand, the law recognizes that the parties themselves choose to determine the rules governing cohabitation. For example, cohabiting parties can regulate mutual property relations and other affairs by setting up mutual gifts, expressly establishing property trusts, and entering into cohabitation contracts; on the other hand, the court may resolve issues such as property disputes between cohabitants based on the application of rules such as presumed trust or estoppel.

IV. LEGISLATIVE PRINCIPLES OF NON-MARITAL COHABITATION IN CHINA

A. The principle of differential treatment

Differential treatment is to treat non-marital cohabitation and marital behavior separately, and they can't be confused. The non-marital cohabitation relationship is more about the parties to establish and dissolve the cohabitation relationship according to their own wishes. The content is also determined by the parties themselves. There is no unified standard model, and looseness and arbitrariness are obvious. It distinguishes non-marital cohabitation from marital relations at the legal level.

B. The principle of value neutrality

The principle of value neutrality means that when dealing with non-marital cohabitation relationships, there is no need for blame, but there is no need for encouragement. The legal regulations on non-marital cohabitation should not be limited to cohabitation itself, but other social problems arising from it should also be properly resolved. When a party seeks a legal solution to the problem, when dealing with the parties' rights and interests, they must be fair and just and follow the principle of value neutrality. For non-marital cohabitation, the principle of value neutrality must be followed, without blame and encouragement. The principle of value neutrality shows that the law respects the lifestyle chosen by the parties.

C. The principle of autonomy of will

Autonomy of the will is to respect the wishes of the parties and the freedom of the individual. The rights and

obligations in a marriage relationship are statutory, and they are fully recognized and regulated by law. Unlike normal marriage registration in accordance with legal procedures, in non-marital cohabitation relationships, the parties retain great autonomy, with the core of respecting the parties' freedom of choice. According to this principle, parties can deal with and decide various matters in the process of cohabitation through cohabitation agreements, and the law should recognize the effectiveness of cohabitation agreements between parties. In the free expression of meaning, in the field of private law, the parties should still be given as much freedom as possible when there is no violation of the legitimate rights and interests of others.

V. CONSTRUCTION OF CHINA'S LEGAL SYSTEM OF NON-MARITAL COHABITATION

A. The basis of China's non-marital cohabitation legislation

First of all, there are many non-marital cohabitants in China. Under the situation that the social problems caused by non-marital cohabitation are becoming increasingly prominent, the law should regulate the social problems caused by this. Second, in today's increasingly diversified society, of course, the legislation of non-marital cohabitation can't be separated from the foundation of moral ethics.

B. Answers to China's legal issues concerning non-marital cohabitation

Relevant laws and regulations affirm the legitimacy of non-marital cohabitation to a certain extent, but at the same time, the obstacles in the legal process of non-marital cohabitation should also be squarely addressed and cracked. Individuals' rational and moral constraints are relatively limited. It is necessary to attach importance to the superiority and coercive force of the law as a norm of social behavior and living standards. It is also necessary to see that the legal regulation of non-marital cohabitation has its necessary and irreplaceable advantages.

At the same time, relevant laws should also provide some protection to non-marital cohabitants, and to weaken the value orientation and interest orientation carried by the marriage law to varying degrees.

C. References and development of the legal system for non-marital cohabitation

Regarding the relevant legal system, it is necessary to uphold the attitude and spirit of "taking the essence and removing the dross". It is necessary to not only learn from the basic factors of foreign laws and regulations on non-marital cohabitation, but also objectively examine the impact of the current social real life and social and cultural system on non-marital cohabitation regulations. Efforts should also be paid to seriously and practically analyze the specific content of the national legislative system and the corresponding judicial practice, try to summarize the laws, explore the real reasons behind commonality, and absorb the

regulatory content of the social ethics of Chinese gender relations and the status of non-marital cohabitation in order to truly resolve social problems caused by cohabitation in marriage.

VI. CONCLUSION

In the development and change of social concepts, it is believed that the phenomenon of non-marital cohabitation will increase more and more, and it may even become a life mode that is balanced with the marriage relationship. Non-marital cohabitation, as an objective new existence, has its own shortcomings. However, there are reasons for it. In the face of the increase in non-marital cohabitants and the emergence of a large number of non-marital cohabitation disputes, China's laws must respond and develop regulations. Otherwise, it will cause more social disputes.

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