International Journal of Trend in Scientific Research and Development (IJTSRD)
Volume 10 Issue 4, Jul-Aug 2026 Available Online: www.ijtsrd.com e-ISSN: 2456 – 6470

The Application of Law to the Substantive Requirements of Foreign-Related Marriage from the Perspective of the Dual Attributes of Marriage——Centered on Article 21 of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations

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ABSTRACT

The application of law to the substantive requirements of foreign-related marriage faces an inherent tension arising from the dual attributes of marriage as both private and public. Article 21 of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations adopts a progressive conflict rule proceeding in the order of "the common habitual residence—the state of common nationality—the place of celebration of the marriage," which represents an advance in legislative technique; however, its exclusive structure of application harbors paradoxes in protecting the reasonable expectations of the parties and the stability of status, and the disconnection between the second and the third tiers may leave the applicable law unattainable. A more fundamental problem lies in the fact that this provision treats the "consent provisions," which serve private autonomy among the substantive requirements of marriage, and the "social-order provisions," which safeguard the bottom line of social ethics, as a homogeneous whole subject to the same choice-of-law rule, failing to distinguish the divergent value objectives and application logics of the two categories of provisions. On the basis of an analytical framework built upon the dual attributes of marriage, the consent provisions, which can be cured by the subsequent ratification of the parties, should be distinguished from the mandatory social-order provisions, which cannot be altered by individual will, and the law of the place of celebration and the law of the place where recognition is sought should be applied to them respectively. In concrete application, practical difficulties must be addressed, including the ambiguity of classification, the admixture of applicable laws, the expansion of judicial discretion, and the blurred boundary between "non-recognition" and "absolute nullity"; these may be remedied through such paths as the typologization of judicial interpretation, the establishment of an order of application, and the clarification of legal consequences. The choice-of-law rule on the validity of foreign-related marriage should seek a dynamic equilibrium between the stability of individual status and the ethical bottom line of the social community, so that conflict rules may genuinely respond to the reasonable expectations of the parties and to the legitimate concerns of public order.

How to cite this paper: Yu Runze "The Application of Law to the Substantive Requirements of Foreign-Related Marriage from the Perspective of the Dual Attributes of Marriage——Centered on Article 21 of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations" Published in International Journal of Trend in Scientific Research and Development (ijtsrd), ISSN: 2456-6470, Volume-10 | Issue-4, August 2026, pp.1368-1376, URL: www.ijtsrd.com/papers/ijtsrd142193.pdf

IJTSRD142193

KEYWORDS: *foreign-related marriage; conditions for marriage; application of law; connecting points.*

I. INTRODUCTION

Marriage possesses a dual character, being both private and public. On the one hand, marriage originates in the free will and emotional consensus of the parties; it is a private choice bearing upon the development of personality and the community of life. On the other hand, marriage constitutes the basic unit of society, implicating the reproduction of population, the ethical order, and the social structure, and the State is therefore obliged to regulate and control it through law. Projected into the field of private international law, this duality generates the core tension in the application of law to the substantive requirements of foreign-related marriage. Determining which law governs the valid formation of a transnational marriage implicates not only respect for the private-life connections and identity of the parties, but also the maintenance of the public order of the society of the place of celebration or of the forum.

Article 21 of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations provides: "The conditions for marriage shall be governed by the law of the place of the parties' common habitual residence; in the absence of a common habitual residence, the law of the state of their common nationality shall apply; in the absence of a common nationality, where the marriage is concluded in the place of habitual residence or in the state of nationality of one of the parties, the law of the place of celebration shall apply." This progressive rule abandons the approach of Article 147 of the former General Principles of the Civil Law, which applied the law of the place of celebration exclusively, and represents a notable advance in legislative technique. As one scholar has observed, this provision is "neither an administrative norm governing the celebration of marriage nor a conflict rule concerning the effects of marriage, but rather a conflict rule concerning the validity of marriage."[2] Another scholar has likewise pointed out that the provision "imposes an inappropriate restriction upon the application of the law of the place of celebration with respect to the choice of law for the substantive requirements."[3]

Taking the tension between the public and private attributes of marriage as its analytical thread, this article systematically examines the normative structure and jurisprudential logic of the progressive application rule of Article 21, exposes its deficiencies in the protection of the private attribute and the ambiguity in the demarcation of the public attribute, and attempts to explore paths of improvement. The essence of the progressive application rule of Article 21 is to seek an equilibrium between the private and the public attributes of marriage; yet this equilibrium still confronts numerous difficulties in interpretation and application, and requires further optimization amid the tension between the public and the private.

II. The Dual Attributes of Marriage

Marriage is one of the most fundamental and at the same time most distinctive social relations in human society. It carries both the private pursuit of emotional belonging and shared life by individuals, and the public functions of the reproduction of population, the perpetuation of ethics, and social stability. This inherent duality is an essential premise that must be taken into account in any inquiry into, or development of, the legal institutions relating to marriage.

1. The Private Attribute of Marriage

Marriage is, first and foremost and in essence, a private union between two independent individuals formed out of free will. Amid the complexity of human relations, two individuals, on the basis of emotional identification, congruence of values, and the willingness to share a common life, autonomously choose each other as lifelong companions. This is one manifestation of the free development of personality, the most profound expression of private autonomy in the field of status relations, and an important path of individual self-realization.

The private attribute of marriage is reflected, to a certain extent, in the irreplaceability of the emotional bond. The marital relationship differs from other social relations: it is neither naturally given by ties of blood, nor an exchange of interests in economic relations; rather, it is an intimate community gradually constructed by two originally independent individuals through sustained emotional investment and the practice of shared life. The maintenance of this relationship depends upon mutual understanding, tolerance, and support in daily life. Such matters belong essentially to the private sphere and can be neither fully replaced nor predetermined by external social norms. Everything experienced within a marriage is highly individualized and situational, and only the parties immersed in it can truly comprehend it in its entirety.

In the temporal dimension, the private attribute of marriage is further reflected in the dynamism of the subsisting relationship. Marriage is not accomplished once and for all at the moment of its celebration; it is a continuously unfolding process. In the long course of shared life, the spouses constantly adjust, grow, and reaffirm their commitment to each other. This means that the meaning and quality of the marital relationship depend to a large extent upon the subjective experience and interactive practice of the parties, rather than merely upon conformity with

[2]潘德勇.论涉外结婚条件条款的法律适用[J].法学评论,2024,42(1):163-172.DOI:10.13415/j.cnki.fxpl.2024.01.014.

[3]高升,李厂.涉外民事关系法律适用法中结婚法律适用条款研究[J].中国石油大学学报(社会科学版),2014,30(5):57-62.DOI:10.13216/j.cnki.upcjess.2014.05.035.

some external objective standard. This feature distinguishes marriage from purely institutional arrangements, for institutions are rigid and universal, whereas married life is supple and particular.

2. The Public Attribute of Marriage

From ancient times to the present, marriage has always been the basic organizational unit of society, bearing multiple irreplaceable public functions. For this reason, no society can adopt an attitude of complete laissez-faire toward marriage; the intervention of the social community in, and regulation of, the marital relationship possesses deep historical roots and institutional legitimacy.

The reproduction of population is the most basic public function of marriage; marriage is the legal framework of procreation and the precondition of its social recognition. By incorporating procreation into the institutional framework of marriage, society ensures that the new generation obtains a stable family environment, a definite identity of belonging, and the resources necessary for upbringing. This arrangement bears directly upon the foundational conditions for the sustainable development of the family and of society. Even though childbearing outside marriage has gradually increased in contemporary society, marriage remains the framework offering the greatest institutional assurance for procreation, and society maintains an institutional concern with procreation within marriage that transcends the personal wishes of the parties.

The maintenance of the social ethical order is another important dimension of the public attribute of marriage. Every society, in the course of its long historical evolution, forms ethical bottom lines concerning marriage. These include, but are not limited to: the prohibition of marriage between lineal blood relatives and between collateral blood relatives within a certain degree, so as to prevent the confusion of ethical relations and the accumulation of genetic risks; the establishment of a minimum age of marriage, so as to protect the physical and mental health of minors; adherence to monogamy, so as to safeguard gender equality and social stability; and the prohibition of bigamy, so as to protect the exclusivity and stability of existing marital relationships. These norms constitute the rigid boundaries that the social community sets upon the marital relationship, and they possess solemnity and a certain degree of mandatory force.

The transmission of property and social security likewise constitute important content of the public attribute of marriage. Marriage is the basic institutional vehicle for the accumulation of family property and its transmission across generations; the division of the community property of spouses, the determination of rights of inheritance, and the allocation of duties of maintenance and support are all founded upon the marital relationship. The operation of the State in fields of public governance such as taxation, the distribution of welfare, and demographic statistics also depends heavily upon a clear determination of marital status. Whether a person subsists in a valid marital relationship carries implications for public governance that far exceed the sphere of his or her private life.

3. The Relationship between the Private and the Public Attributes of Marriage

In fact, the public and the private attributes of marriage do not stand in a zero-sum relationship in which one grows at the expense of the other. The public attribute does not negate the private attribute; rather, it provides the guarantee for the realization of the private attribute at a higher institutional level. Without the public institutional framework of marriage, marriage would be nothing more than a private emotional compact lacking institutional assurance, and the "consensus" of the parties could obtain neither external recognition nor support. It is precisely in this sense that the public attribute of marriage is not the suppression of the private attribute but the precondition of its realization. At the same time, the private attribute imposes a continuous constraint upon the public attribute: marriage is, after all, the choice of life made by two concrete persons, and any social regulation that wholly disregards the will and the well-being of individuals departs from the fundamental purpose for which the institution of marriage exists. The vitality of the institution of marriage resides precisely in its maintenance of a dynamic, tension-filled equilibrium between the general norms of society and the concrete circumstances of individuals.

4. The Protection and Regulation of Marriage by Law

Since marriage possesses the foregoing dual attributes, the legal regulation of marriage operates along two dimensions. On the one hand, the law provides institutional guarantees for the free choice and reasonable expectations of the parties, thereby responding to the private attribute; on the other hand, it sets inviolable bottom lines for the basic ethical order of society, thereby responding to the public attribute. The rules concerning the conditions for the validity of marriage operate beneath this framework, further determining whether the parties possess the mental capacity to understand the nature and consequences of marriage, and whether they have satisfied the threshold conditions set by the social community for entry into marriage.

III. An Analysis of Article 21 of the Law on the Application of Laws to Foreign-Related Civil Relations from the Perspective of the Dual Attributes of Marriage

"The conditions for marriage shall be governed by the law of the place of the parties' common habitual residence; in the absence of a common habitual residence, the law of the state of their common nationality shall apply; in the absence of a common nationality, where the marriage is concluded in the place of habitual residence or in the state of nationality of one of the parties, the law of the place of celebration shall apply." Article 21 of the Law on the Application of Laws to Foreign-Related Civil Relations adopts a three-tier progressive structure, each tier being the product of a different proportional combination of the public and the private attributes.

The analysis in Part II of this article has demonstrated that marriage possesses both private and public attributes. Before proceeding to the concrete analysis of Article 21, however, a clarification is necessary: the private attribute is not equivalent to the personal law, nor is the public attribute equivalent to the law of the place of the act or the law of the forum. The public attribute may be borne by the personal law—the State regulates the matrimonial conduct of its nationals through the personal law, which is itself an embodiment of the public attribute; it may equally be borne by the law of the place of celebration—the State of celebration imposes conditions upon marriages concluded within its territory, which is likewise an embodiment of the public attribute. The private attribute may likewise point to the personal law—respect for the connection between the parties and the law with which their identity is bound up is an embodiment of the private attribute; it may equally point to the law of the place of celebration—the reasonable expectations of the parties are anchored in the law of the place where the marriage is concluded, which is also an embodiment of the private attribute. Therefore, in evaluating Article 21, one must not simplistically equate "priority of the personal law" with "priority of the private attribute," or equate "priority of the law of the place of celebration" with "priority of the public attribute." One should first determine whether a given rule essentially serves the private or the public attribute, and then examine whether the connecting points it employs effectively realize the value objectives of that attribute.

1. The Exclusive Application of the First-Tier Rule Deviates from the Value Objectives of the Private Attribute

The first-tier rule of Article 21 requires the application of "the law of the place of the parties' common habitual residence." As one scholar has pointed out, this priority is "less the first in order of application than the only one in order: if satisfied, the marriage is valid; if not satisfied, it is invalid"[4]. So long as the parties had a common habitual residence before the marriage, then regardless of where the place of celebration is located and regardless of whether the law of that place holds the marriage valid, the fulfillment of the conditions for marriage must be determined according to the law of the common habitual residence, and the second and third tiers are left no opportunity of application whatsoever.

From the perspective of the private attribute, this design harbors a profound paradox. The core value of the private attribute is the protection of the reasonable expectations of the parties and the stability of status. As a private relation, the determination of the validity of marriage ought to respect the reasonable expectations that the parties formed at the time of celebration on the basis of reliance upon the law of the place of celebration. Yet the exclusive application of the first tier may result in a marriage that is lawful and valid at the place of celebration and in which the parties have long cohabited being declared invalid merely because it fails to conform to the law of the pre-marital common habitual residence. As a connecting point of the personal law of natural persons, habitual residence "has as its essence attention to the present interests of the parties, deference to the objective connection between the present interests of the parties and a particular jurisdiction"[5]. In the determination of the validity of marriage, the "center of gravity of the present interests" of the parties lies in the stability of the status relationship, not in "tracing back" to the common habitual residence at some point before the marriage. The exclusive application of the first tier runs precisely counter to this. Whether it is necessary for the new statute to apply the law of the habitual residence first and across the board to all questions involving status and capacity "remains to be tested by practice"[6].

From the perspective of the public attribute, this design is likewise problematic. If the legislature's

[4] 同注释①

[5]刘仁山.现时利益重心地是惯常居所地法原则的价值导向[J].法学研究,2013,35(3):172-188.

[6]郭玉军.涉外民事关系法律适用法中的婚姻家庭法律选择规则[J].政法论坛,2011,29(3):21-27.

consideration was that the common habitual residence has the closest connection with both parties, such consideration is reasonable as an "entry examination" at the stage of the celebration of marriage; but at the stage of validity determination, the marriage has already been concluded and the center of the parties' life may already have shifted. At that point, to cling to the law of the pre-marital common habitual residence and to confer exclusive effect upon it is, in substance, to extend erroneously into the stage of validity determination the public-private proportion appropriate to the stage of celebration.

2. The Disconnection between the Second and the Third Tiers Frustrates Both the Public and the Private Attributes

The second-tier rule of Article 21 requires that, in the absence of a common habitual residence, "the law of the state of common nationality" shall apply. From the perspective of the public attribute, nationality is the legal bond between the State and the national, and the application of the law of the state of nationality embodies the State's concern for its nationals abroad. However, the qualifying requirement of "common" nationality greatly discounts this function. In the more common configurations of transnational marriage—one party being a Chinese citizen and the other a foreign citizen, or the two parties being of different foreign nationalities—the second-tier rule is rendered directly inapplicable for want of a common nationality. The third-tier rule requires that, in the absence of both a common habitual residence and a common nationality, the law of the place of celebration may apply only on the premise that "the marriage is concluded in the place of habitual residence or in the state of nationality of one of the parties." The legislative intent of this restriction is the "prevention of evasion of law," but this objective should be achieved at the stage of celebration, rather than at the stage of validity determination by way of restricting the application of the law of the place of celebration. As one scholar has pointed out, Article 21 is "unsuited to the special ethical requirements of the substantive conditions for marriage" and will instead bring about "drawbacks such as deliberate evasion of law by the parties and frequent recourse by the courts to the system of reservation of public order"[7]. The connection between the second and the third tiers also produces a blank zone in the application of law. Analyzing the choice-of-law predicament created by Article 21, one scholar has observed that in our country "the attributions of conflict-of-laws legislation have become increasingly refined and perfected at the micro level, yet there remain defective attributions giving rise to choice-of-law difficulties for which no adequate remedy can be found within the system"[8]. Where the place of celebration has no personal-law connection with either party, the third tier will face the predicament of having no applicable law to rely upon: the "blank space" deliberately left by the legislature neither prescribes the application of the principle of the closest connection nor establishes a supplementary clause in favor of the validity of the marriage.

3. The Absence of Normative Awareness in Distinguishing "Consent Provisions" from "Social-Order Provisions"

The most fundamental problem of Article 21 is that it treats all the substantive requirements of the validity of marriage as a homogeneous whole and subjects them to the same progressive rule, without distinguishing that grounds of invalidity of different natures should be governed by different choice-of-law rules.

The substantive requirements of marriage in fact comprise two kinds of norms of entirely different natures. Although both kinds qualify as substantive requirements, the value objectives they serve are wholly distinct. The former serves the private attribute of marriage, namely the protection of the autonomy of will of the parties, ensuring that marriage is founded upon free and genuine consent. The latter serves the public attribute of marriage, namely the maintenance of the non-negotiable ethical bottom line of the social community.

Article 21, however, draws no such distinction. It subjects the two kinds of provisions, which ought to be governed by different applicable laws, to a single set of tiered rules. As one scholar has pointed out, Article 21 is "unsuited to the special ethical requirements of the substantive conditions for marriage"[9]; the substance of this criticism lies precisely in the fact that the social-order provisions among the substantive requirements of marriage possess a strong ethical character and territoriality, and that the criteria for their judgment cannot simply be entrusted to the law of the common habitual residence or of the state of common nationality, with which the marriage may have only an incidental

[7]梅傲.结婚实质要件法律适用的路径选择——兼评《涉外民事关系法律适用法》第21条[J].西安电子科技大学学报(社会科学版), 2013, 23(4): 93-97. DOI:10.16348/j.cnki.cn61-1336/c.2013.04.008.

[8]张春良.系属的体系化与体系化的系属——从《涉外民事关系法律适用法》第21条展开[J].法律科学(西北政法大学学报),2018,36(5):180-190.DOI:10.16290/j.cnki.1674-5205.2018.05.072.

[9] 同注释⑥

connection. Consent provisions and social-order provisions serve different value objectives and should be subject to different choice-of-law rules. That Article 21 conflates the two is precisely its most fundamental shortcoming in the allocation of the public and the private attributes.

IV. The Problem of Legal Inclination in the Determination of the Validity of Marriage

A. The Principle Favoring the Validity of Marriage

"It is better to demolish ten temples than to break up one marriage." In the matrimonial field of private international law, a widely discussed substantive policy is the principle of "favoring the validity of marriage." The core idea of this principle is that, on questions of marital validity, the balance should incline toward upholding the validity of the marriage, so as to protect the reasonable expectations of the parties and the stability of status. Article 9 of the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages likewise provides that "a marriage validly entered into under the law of the place of celebration, or a marriage subsequently validated under that law, shall be regarded as valid in all contracting States." Although the number of contracting States to this Convention is limited, it suffices to show that the international community has attained a certain measure of consensus on this question. Having surveyed the legislative practice of various countries, one scholar has observed that "norms on the validity of marriage take 'favoring the marriage' as their first principle, adopting the place of celebration as the principal connecting point."[10] However, while strengthening the private attribute of marriage, this principle may also erode its public attribute, and may even produce a backlash against the very private attribute of marriage.

The advantages of this principle need not be rehearsed here; it suffices to enumerate two undesirable consequences to which it may give rise.

1. Evasion of Law

Evasion of law has long been an important issue that cannot be ignored in private international law. Every society has its own bottom lines of marriage formed on the basis of history, culture, religion, and morality. In fact, these norms are not "consent provisions" that may be excluded by the agreement of the parties, but inviolable "social-order provisions." The reason Article 21 departs from the earlier legislative approach, which took the law of the place of celebration as the principal rule, and adopts instead the common personal law as the principal rule is precisely to prevent the situation in which the parties, in order to evade the prohibitive requirements for marriage under their national law, lawfully conclude a marriage abroad and promptly return to their home country to reside. What concerns the legislature is that marriages concluded abroad between citizens of the home country are gradually increasing in number; if such spouses ultimately return to reside in the country for the long term, yet the formation and effects of their marriage continue to be determined by the substantive requirements of the law of the place of celebration, this will be highly detrimental to the maintenance of the basic institutions of the national marriage law and the legislative values and policies they embody. If the principle favoring the validity of marriage is applied without restraint, it may enable the parties to evade the mandatory norms of the forum by concluding a marriage abroad.

2. Detriment to the Protection of the Weaker Party to the Marriage

The essence of this drawback is, in truth, also a consequence produced by the evasion of law. In the domain of public order, the law watches over each of its children like a father at once kindly and stern. Although it objectively restricts the freedom of marriage of the parties to a certain extent, it simultaneously protects those vulnerable groups who are mentally immature and unaware of the consequences of marriage. If the determination of validity uniformly inclines toward upholding the marriage, then "unconditional freedom will inevitably lead to the oppression of the weak by the strong."

Accordingly, the application of the principle favoring the validity of marriage should be subject to limitations, particularly in fields such as the age of marriage and consanguinity, in which human society possesses relatively widespread consensus. Article 11 of the 1978 Hague Convention likewise permits contracting States to refuse recognition of the validity of a marriage in four circumstances: one party already has a spouse; the parties are related within the prohibited degrees; one party has not attained the minimum age of marriage and has not obtained the necessary dispensation; or one party lacks the mental capacity to consent to the marriage.

B. Other Preferential Principles

Preferential judgments analogous to the principle favoring the validity of marriage also include the principle of protecting the interests of the weaker party, the doctrine of reservation of public order, and so forth.

This article maintains that, in exploring this question, value judgments may appropriately be taken into

[10] 焦燕.婚姻冲突法问题研究[D].武汉大学,2005.

consideration, but they must never be made the sole criterion, nor even allowed to play the principal role. What conflict rules resolve is the question of the application of law; at this stage, the court's consideration of the substantive rights and obligations of the case has not yet begun. Therefore, whether it is the protection of the weaker party or the favoring of the marriage, the consequences of applying these principles may well prove indeterminate, or even contrary to their original intent. The application of conflict rules is antecedent, and the validity of marriage should be determined solely by reference to the characteristics and the inner meaning of marriage itself.

V. Paths of Improvement from the Perspective of the Dual Attributes

1. Distinguishing "Consent Provisions" from "Social-Order Provisions"

The determination of the validity of marriage is, in essence, an examination of the dual attributes of marriage as a social relation: the validity of a marriage depends not only upon the personal will of the parties but also upon whether the social order is prepared to accept the marital relationship. The determination of marital validity should therefore proceed from the dual attributes of marriage and be divided into two dimensions of different natures: one concerns the personal will of the parties, namely the "consent provisions"; the other concerns the social order, namely the "social-order provisions."

By "consent provisions" are meant those grounds of invalidity that can be cured by the subsequent ratification, consent, or continued cohabitation of the parties. The essence of such provisions is to determine whether the declaration of will of the parties is genuine, free, and voluntary, and the logic they follow is that of individual justice. Whether a party was free, whether he or she was informed, whether he or she was deceived—these questions must be answered with reference to that party's concrete circumstances. Accordingly, the applicable law for consent provisions should point to the connecting point most closely connected with the genuineness of the parties' declaration of will, and the place of celebration is precisely a comparatively apt choice. Since most States adopt the system of registered marriage, the registration itself constitutes an examination of the genuineness of the parties' declaration of will, conducted under specific spatiotemporal conditions and in accordance with specific norms. The law of the place of celebration can provide the most direct basis for determining whether the parties' declaration of will at the time of celebration was genuine.

By "social-order provisions" are meant those bottom-line norms that cannot be altered by the will of the parties, such as the prohibition of bigamy, the prohibition of marriage between close relatives, and the minimum age of marriage. The essence of such provisions is to determine whether the marriage has crossed the ethical bottom line drawn by the social community. The logic they follow is not individual justice but general prevention. A social-order provision does not declare the marriage void ab initio in every jurisdiction; it declares only that, within this particular jurisdiction, the marriage is not recognized, thereby manifesting the self-protection of a jurisdiction's own social structure, and the parties may resort to another jurisdiction to seek recognition by other courts. Accordingly, the applicable law for social-order provisions should point to the law of the place where recognition is sought: when a marriage is submitted to a jurisdiction for recognition, the only entity entitled to say "this marriage touches my social order, and I cannot accept it" is that jurisdiction itself.

2. Concrete Criteria for Distinguishing the Two Kinds of Provisions

In adjudicating cases concerning the validity of foreign-related marriage, a judge may distinguish between the two kinds of provisions according to the following criteria.

The core criterion is curability. If a ground of invalidity of marriage can be cured by the subsequent ratification, consent, or continued cohabitation of the parties, it is a consent provision; if it cannot, it is a social-order provision.

Step one: examine whether the ground of invalidity "can be cured by the subsequent ratification, consent, or continued cohabitation of the parties." The judge should ask: supposing the parties initially suffered from the ground of invalidity in question, but subsequently expressly manifested their willingness to maintain the marital relationship and continued to cohabit, should the law respect this choice? If so, the ground belongs to the consent provisions; if not, it belongs to the social-order provisions.

Step two: on this basis, the judge should determine whether the ground of invalidity implicates the genuineness of the individual declaration of will or the maintenance of the social ethical bottom line. If the ground concerns whether a party was defrauded or coerced, or whether a fundamental mistake existed, these questions must be answered with reference to the concrete circumstances of the parties; they belong to the judgment of individual justice and correspond to the consent provisions. If the ground concerns bigamy, marriage between close relatives, or failure to attain the statutory age of marriage—matters that cannot be altered by the subsequent consent of the parties because social rules must apply to all cases—then it belongs to the judgment of general prevention and corresponds to the social-order provisions.

Potential Drawbacks and Improvements

Although the dichotomy of consent provisions and social-order provisions possesses a clear logic in theory and provides an operable criterion of judgment in practice, it still confronts several non-negligible drawbacks in concrete judicial application, which must be addressed.

First, there exists a zone of ambiguity in classification. Certain grounds of invalidity of marriage are neither purely "consent provisions" nor purely "social-order provisions," but contain elements of both attributes. In this regard, two interpretive rules should be established. First, the judge should exhaust every interpretive possibility so as to classify the ground of invalidity into one category or the other; for grounds that genuinely cannot be classified into either category, the social-order provisions should apply—for when there is a serious classificatory doubt as to the validity of a marriage, priority should be given to safeguarding the public order of the forum. Second, there should be a "principle of supplementary application of the public order of the forum": in the case of mixed grounds, if part of a ground implicates the social order, the ground as a whole should be classified among the social-order provisions, because the social-order provisions possess a "one-vote veto" effect.

Second, the admixture of applicable laws. Where grounds of invalidity belonging to both the consent provisions and the social-order provisions coexist in the same case, the court will have to apply two different applicable laws respectively. In this regard, an order of application may be established "with the law of the place where recognition is sought as the principal line and the law of the place of celebration as the auxiliary line": the judge should first apply the law of the place where recognition is sought to determine whether a given ground of invalidity constitutes a social-order provision. If it does, that ground is directly governed by the law of the place where recognition is sought; if it does not, the law of the place of celebration is then applied to determine whether the ground constitutes a consent provision.

Third, the excessive expansion of judicial discretion. The application of the dichotomy depends upon the judge's determination of "curability," which is itself a highly subjective process of discretion. In this regard, the typologization of judicial interpretation should be advanced, expressly enumerating the typical instances of the social-order provisions. In adjudicating, if a ground of invalidity is expressly listed in the catalogue of typical instances of social-order provisions, the judge need no longer exercise case-by-case discretion as to its "curability." Only for novel or ambiguous grounds outside the catalogue does the judge need to make a determination of curability. This model of "catalogue plus discretion" ensures both the certainty of adjudication in the majority of cases and the flexibility to respond to novel questions. For situations not exhaustively covered by the catalogue, the principle of the closest connection may serve as the ultimate supplementary basis.

Fourth, the blurred boundary between "non-recognition" and "absolute nullity." This should be clarified at the level of institutional design. The "non-recognition" of a marriage means only that the relationship in question does not produce the effects of marriage law in the place where recognition is sought; yet the property interests and maintenance needs formed by the parties within that relationship may still obtain relief under other civil legal institutions. Non-recognition of a marriage does not mean that a person's contributions during the subsistence of the relationship are reduced to nothing.

VI. Conclusion

The dual attributes of marriage determine that the choice-of-law rules on the validity of foreign-related marriage must seek a dynamic and prudent equilibrium between the two. The determination of the validity of a foreign-related marriage ultimately concerns whether a person can preserve a sense of security and dignity of status in a life that crosses national borders. The significance of choice-of-law rules lies not in mechanically completing the operation of selecting the applicable law, but in enabling individuals in transnational marriages, wherever they may be, to obtain stability of status relationships within their reasonable expectations, while enabling every social community to guard the ethical bottom line it has itself drawn. To seek, between rule and flexibility, between the individual and society, and between private consensus and public order, an institutional arrangement that respects difference while maintaining the bottom line—this is the eternal theme of private international law in the field of status.

With the progress of science and technology and the development of society, the scale of transnational movement of persons continues to expand, and the forms and the inner meaning of transnational marriage are constantly undergoing new changes, which places higher demands upon the rules for determining the validity of foreign-related marriage. We must always return to marriage itself and continually adjust the design of the rules, responding at once to the practical needs of individuals for stability and dignity of status and upholding the bottom line of the public interest of each society, so that the institutional design of private international law may better serve people's transnational lives in an open world.

In the future, with the exchange and integration of cultures, people's understanding of marriage will move from diversity toward consensus, and the promising prospect of internationally unified substantive law will gradually unfold before us.

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