

Liberty and Order: Legal Interests in China's Domestic Crime Legislation and Amendment

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Abstract: The family is an independent community, in which members have closer life ties and deeper subjective emotions than ordinary social members. The diversity of the internal relationships within the family and the different expressions of family ethics determine the pluralistic normative construction of criminal law when it intervenes in the family. However, with the transformation of the social structure, the function of the family has gradually declined. The traditional Chinese society's "family-oriented" ideology has fallen behind, and the past value judgment of "emphasizing order and disregarding freedom" does not conform to the social values of the people. Firstly, in terms of the configuration of penalties, the statutory penalties for domestic crimes are lighter than those for similar crimes, which conflicts with the increasing sense of equality, rights, and modern family concepts in society. Secondly, in the judicial practice process, the judicial organs ignore unfair interest arrangements, attach importance to outdated value judgments, overemphasize departmental interests, and infringe on the legitimate rights and interests of vulnerable groups. These behaviors all go against the values of ordinary people. This article takes the crimes of purchasing trafficked women and child abuse in traditional Chinese family crimes as examples, combined with current social trends and the transformation of traditional family values and order. Based on the unique and complex features of the protected legal interests in family crimes, it balances the values of order protection and human rights protection, faces up to the connotation and extension changes of domestic crimes in the new era, and establishes the family law theory of criminal law.

Keywords: Domestic crimes, Order protection, Human rights protection

1 Introduction

Cases of domestic crimes often become hot topics that ignite social discussions, such as the case of Xiao Huamei in Feng County. Xiao Huamei was sold three times during the period of 1998. Later on, she gave birth to eight children with Dong Zhimin and suffered from abuse and confinement during their cohabitation. These experiences led to her being diagnosed with second-level mental disability. The Intermediate People's Court of Xuzhou City, Jiangsu Province sentenced Dong Zhimin to nine years in prison for the crimes of abuse and illegal detention. However, the handling of the case failed to achieve universal acceptance in society. Why was it not considered a rape case? Is the marriage of trafficked women valid? Is the statutory penalty for the crime of purchasing trafficked women and children reasonable? The facts have proven that the existing criminal punishment system no longer satisfies the people's basic sense of justice. China's legislation on domestic crimes is influenced by the traditional feudalistic ideology in the culture, upholding the spirit of maintaining family

stability and placing family ethics in a position more important than the protection of personal rights. However, with the transformation of social structure, the functions of the family are gradually declining, and the rise of individualism and liberalism have continuously impacted China's legislative and judicial system. Therefore, a new legal perspective on family crimes needs to be established.

2 Legislation and Judicial Situation of Family Offenses

In the legislation and judicial practice of family offenses in China, there is a large amount of tacit approval or tolerance of the infringement of basic rights through the weighing of interests. The reason for this phenomenon in criminal legislation is that the legislative spirit places the maintenance of family order above the protection of individual basic rights. And the low illegality evaluation and light punishment given to family offenses in criminal legislation are the primary reasons for judicial indulgence of these crimes. This article takes the crimes of buying and trafficking women and domestic violence as examples to describe in detail the legislation and judicial situation of family offenses in China.

3 Crime of Purchasing Abducted Women

In the Supplemental Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3(1) defines "trafficking in persons" as the recruitment, transportation, transfer, harboring or receipt of persons through the use of force, threat of force, or other forms of coercion, such as abduction, fraud, deception, abuse of power or vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation, which includes at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. Therefore, it can be inferred that the crime of purchasing abducted women meets the constituent elements of trafficking in persons. First, the act element, which includes both the recruitment, transportation, transfer, and harboring of trafficked persons, as well as the acceptance of trafficked persons by the purchaser. Second, the means element, which includes violence, threats of violence, or coercion by other means, such as exploiting vulnerability. Third, the purpose element, which is exploitation, and does not require that the purpose of exploitation has been achieved or carried out. The crime of purchasing abducted women naturally has the purpose of sexual exploitation because it is often carried out for the purpose of forcing marriage or childbearing. Therefore, the crime of purchasing abducted women meets the constituent elements of "trafficking in persons". However, in the Chinese Criminal Law, Article 240 and Article 241 separately regulate the crimes of abducting and trafficking women and children, and the crime of purchasing abducted women and children. Article 241 of the Criminal Law of China only provides for one statutory penalty, which is imprisonment for not more than three years, criminal detention, or control, for the crime of purchasing abducted women and children. In contrast, Article 240 of the Criminal Law provides for three statutory penalties for the crime of abducting women and children, with a minimum of five years and a maximum of

ten years of fixed-term imprisonment for the basic offense. Aggravated offenses are punishable by ten years or more of fixed-term imprisonment, life imprisonment, and fines or confiscation of property, and may also be subject to the death penalty. The reason for such a disparity in the Criminal Law is that traditional Chinese thinking recognizes the importance of "procreation and family continuation". Although the act of purchasing constitutes a crime, the law considers that in such circumstances, the purchaser and the purchased person have formed a stable family relationship, which is different from the form of trafficking in Western countries for the purpose of sexual exploitation, and therefore should not be subject to the same punishment.

Furthermore, the stance on leniency in criminal handling of buying crimes has been further strengthened in specific practices and judicial normative documents. Article 30 of the "Opinions on the Lawful Punishment of Crimes of Abducting and Trafficking in Women and Children" issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice in 2010 provides that those who buy women or children who have been abducted, and have not committed acts of destruction or abuse against them, or have formed a stable marriage or family relationship with them, should be punished leniently according to law. Those who meet the conditions for a suspended sentence may be granted one. Those who buy abducted women or children, and whose criminal circumstances are minor, may be exempted from criminal punishment according to law. Based on this, according to Article 31 of the "Opinions," if multiple family members or relatives participate in the sale of their own children, or "buy a wife" or "buy a child," they shall generally only be held criminally responsible for the more serious crimes. The scope of accomplices was limited by legal persons. In the case of Xiao Huamei in Fengxian County, despite the fact that her case met the elements of the crime of abducting women, Tan Aiqing and his wife were not traced because of their smaller role and lighter circumstances in the crime.

In practice, using the keyword of bribery as a search

term, a total of 568 judgments from the China Judgments Online and 136 non-prosecution decisions from the China Procuratorate Online were empirically analyzed. It was observed that there are a large number of unreported cases of bribery crimes, and even if the other party is punished for trafficking crimes, the majority of the bribe-takers do not enter the criminal justice system. Research shows that the conviction rate for bribery crimes is less than 3%. Secondly, the sentencing average for bribery crimes is low, and the non-custodial rate is extremely high, with a high rate of acquittal. The actual maximum sentence imposed is only one year of imprisonment, and the average sentence is about 8.3 months of imprisonment. At the same time, the non-custodial rate for bribery crimes is about 97%, and the comprehensive acquittal rate is as high as 19.3%.

¹According to empirical investigations, since 1986, a total of 48,100 women abducted by human traffickers from all over the country have been brought to six counties under the jurisdiction of Xuzhou City in Jiangsu Province within three years. A criminal gang composed of more than 40 taxi drivers in Xuzhou City kidnapped and trafficked 101 women (the youngest of whom was only 13 years old), and embezzled more than RMB 136,700. In recent years, more than 200 people have been added to Niulou Village, Yizhuang Township, Tongshan County, almost all of whom are women who have been abducted from Yunnan, Guizhou, and Sichuan, accounting for two-thirds of the married young women in the village. ²Therefore, buying abducted women is a common phenomenon in the area, and mainstream society does not consider it to be a crime. This is because it is a custom that has been passed down for generations. The reason for this phenomenon is that the buyers have a demand for continuing their family line, which has been accepted at the social ethics level. Even in the view of scholars who uphold the "maintenance theory" of bribery crimes, "buying a wife" is a rigid need for procreation. Once a stable family relationship is formed, family stability is placed in a more important position than individual rights. This is closely related to China's traditional familialism.

4 Abuse Offense

The crime of abuse refers to the act of frequently

using physical and mental abuse, such as beating, scolding, starving, forcing excessive labor, denying medical treatment for illness, restricting freedom, and humiliating personality, to torment and torture family members living together, with a severe degree of circumstances. Article 260 of the Criminal Law stipulates that if someone abuses a family member and the circumstances are serious, they shall be sentenced to fixed-term imprisonment, criminal detention or control for no more than two years. If the crime results in serious injury or death of the victim, the perpetrator shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years. The punishment for the crime of abuse has remained the same since the Criminal Law was enacted in 1979, which is mainly due to the fact that compared with related crimes such as intentional injury, the lawmakers have imposed lighter punishments for the crime of abuse. Although the Criminal Law of 1979 classified the crime of abuse as "obstructing marriage and family," the Criminal Law of 1997 transferred all such crimes to the "crime of infringing upon citizens' personal and democratic rights." From a formal perspective, China's legislation has begun to move away from family politics and adopt a model that directly focuses on state politics. However, unfortunately, this guiding ideology has not been reflected in the criminal legislation and judicial process of the crime of abuse.

On March 2, 2015, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice of China released the "Opinions on Handling Criminal Cases of Domestic Violence in Accordance with the Law" (hereinafter referred to as the "Opinions on Domestic Violence"). Article 17 of the opinions stipulates that if abuse causes the victim to suffer minor injuries or serious illness, it constitutes a particularly heinous act in the crime of abuse. Therefore, the crime of abuse is limited to family members, and in contrast to intentional injury crimes that require minor injuries to be established, abuse crimes can be established if the perpetrator inflicts minor injuries on family members, thus lowering the threshold for conviction and protecting vulnerable family members under the law.

The "Anti-Domestic Violence Law of the People's Republic of China" (hereinafter referred to as the "Anti-Domestic Violence Law"), which came into effect on March 1, 2016, stipulates in Article 15 that public security organs should respond promptly to reports of domestic violence, stop domestic violence, investigate and collect evidence according to relevant regulations, and assist victims in seeking medical treatment and injury assessment. If a person without civil capacity or with limited civil capacity suffers serious injuries due to domestic violence, is facing a threat to personal safety, or is in a dangerous state with no one to care for them, the public security organs should notify and assist the civil affairs department in placing them in temporary shelters, rescue and management institutions, or welfare institutions. Article 21 provides that if a guardian seriously infringes on the legitimate rights and interests of the person being guarded through domestic violence, the people's court may, upon application by the near relatives of the person being guarded, the residents' committee, the village committee, the civil affairs department of the county-level people's government, or other relevant personnel or units, revoke the guardian's qualification and designate another guardian. The revoked guardian shall continue to bear the corresponding maintenance, support, and nurturing costs. At the same time, the law stipulates that parties can apply for a personal protection order to safeguard their own safety. The formulation of the "Anti-Domestic Violence Law" provides victims with comprehensive and proactive protection, but these provisions only lower the threshold for conviction of abuse crimes or provide preventive protection for victims, and do not necessarily indicate whether the criminal law provisions of the abuse crime are reasonable.

From the perspective of criminal legislation, the legitimacy of creating criminal laws and norms comes from the legitimacy of the purpose and means.³ The legitimacy of the purpose is provided by the theory of legal interests, and the legitimacy of the means is sufficient according to the traditional principle of proportionality. The legitimacy of creating the crime of abuse lies in protecting the personal rights of family

members, and the legitimacy of the means is embodied in "control, detention, and imprisonment for up to seven years," which means that this legal penalty is sufficient to ensure the normative effectiveness of the crime of abuse, achieve legislative purposes, and does not violate the principle of proportionality. This indicates that the legislator did not allocate the same statutory penalty for the crime of abuse as for the crime of intentional injury, and therefore, the crime of abuse is only used to punish relatively minor acts of infringement. However, the author believes that the crime of abuse itself has a more complex basis for protecting legal interests than the crime of intentional injury and should therefore have an increased sentencing allocation, which will be discussed specifically in the following fourth lecture.

In practice, the People's Court of Chengwu County, Shandong Province (2019) Lu 1723 Criminal First Instance No. 160, [the informant Wang Meixiang often beat and punished her 5-year-old daughter Deng Mou, causing her hands to be burned and infected, her legs injured, and making her lose weight by dieting, resulting in Deng Mou1 being in a semi-hungry state. In January, at 11 o'clock one day, Wang Meixiang found feces on Deng Mou1's pants and had her wash her body with cold water in the yard. Around 1 pm, Wang Meixiang saw that Deng Mou1 was still washing, so she repeatedly splashed her with cold water. Later, Deng Mou1 fell unconscious and died despite rescue efforts being ineffective. After appraisal, the victim Deng Mou1 died of respiratory and circulatory failure caused by multiple factors such as cold, external trauma, hunger, and young age and physical weakness, with cold being the main factor. The court ruled that Wang Meixiang was guilty of abuse and sentenced her to six years in prison.] As an example, judicial authorities often determine whether behavior constitutes abuse in the following ways: judging whether a single act is sufficient to cause minor injuries or more serious consequences. If a single act is sufficient to cause minor injuries or more serious consequences and the perpetrator's subjective intent is intentional, it constitutes intentional injury; if a single act does not constitute minor injuries or more serious consequences, it is necessary

to look at the number of similar acts, frequency, and the perpetrator's subjective purpose and motive to determine whether the perpetrator constitutes abuse. However, this method of inferring subjective mentality from objective results is prone to errors, and based on different judges' different considerations, it often results in different judgments for the same case. In this case, the author believes that the highest average temperature in January in Chengwu County, Shandong Province, where the incident occurred, was only about 5 degrees Celsius. The behavior of letting a young daughter bathe in the open courtyard with cold water clearly carries the risk of frostbite or even death, and her behavior constitutes intentional injury or even intentional homicide, and the ultimate cause of the victim's death can objectively be attributed to the cold. Therefore, the perpetrator at least constitutes intentional injury causing death.

5 Obligations of kinship and the feudalistic view of criminal law

Currently, China's avoidance attitude towards family crimes is closely related to traditional Chinese societal thinking. The ancient Chinese ethical order was an ultra-stable system based on the family or clan, with the father-son relationship as the axis.⁴ The feature of ancient society's criminal law was to maintain feudalism through punishment. In China, the family is patriarchal, with the father or ancestor as the head of the household who holds all the rights within the family. This includes the right of direct elder relatives to discipline their descendants, and in doing so, it is not uncommon for physical harm leading to death to occur. Is it legal for parents to kill their offspring? As early as the Qin Dynasty (221-207 BC), the monarch had the right to kill his subjects, and a father had the right to kill his son. Emperor Qin II ordered the execution of Meng Tian and Fusu, to which Fusu replied, "If the father gives death to his son, how can he dare to request it again?" (from "Records of the Grand Historian" and "Biography of Li Si"). During the Qing Dynasty, if children and grandchildren were killed by their parents for being disobedient, except for cases of justified killing, the parents would be exempt from punishment. The specific content of teaching rules, however, was unclear

and ambiguous, and as long as a father claimed that his descendants violated the teaching rules, the court did not need to inquire about the reason. Moreover, since direct elder relatives had the right to discipline and punish their descendants, there was no offense of injury. If a descendant violated the teaching rules and was killed, the legal punishment was also very light or even no punishment at all. This legislative spirit is also reflected in China's current punishment for abuse crimes, where abuse resulting in serious injury or death is punishable by imprisonment for 2 to 7 years, and unintentional killing is punishable by imprisonment for 3 to 7 years. The law only focuses on the severity of the abuse, but does not protect the victim's long-term mental and physical suffering.

The concept of family obligation is closely tied to patriarchal criminal law because it reinforces traditional gender roles and expectations within the family unit. Patriarchal criminal law refers to a legal system that is based on a male-dominated, hierarchical society. It is characterized by laws and policies that give men more power and privilege than women, and that enforce traditional gender roles and family structures. Women and girls are often expected to prioritize the needs of the family over their own individual desires or goals. This can manifest in various ways, such as through expectations to care for younger siblings, to contribute to household chores and care for elderly relatives, or to prioritize marriage and childbearing over education or career advancement.

In the context of criminal law, patriarchal attitudes have historically influenced the treatment of family crimes such as domestic violence and sexual assault. In many patriarchal societies, these offenses were seen as private matters to be resolved within the family unit rather than as crimes against the state. This meant that victims often had little recourse for seeking justice, as the legal system was not equipped to handle cases that occurred within the family. Taking the crime of buying abducted women as an example, because the purpose of the perpetrator in buying women is to form a family and to "pass on the family line," this behavior is tolerated by the law, accepted by society, and accommodated by patriarchal thinking. This

openly tramples on the basic values of human beings in the constitution.

Moreover, patriarchal attitudes can also be seen in the way that family crimes are prosecuted and punished. In some cases, perpetrators of family crimes are given lighter sentences because they are seen as having acted to protect or defend their family honor or because they are deemed to have had good intentions. This is often the case in so-called "honor killings," where a family member kills a woman who is believed to have brought shame to the family. Honor killings are a form of gender-based violence and are a gross violation of human rights. They are rooted in patriarchal beliefs and attitudes that consider women as the property of men and view their behavior as a reflection of the family's honor. Women who refuse to conform to these patriarchal norms are seen as a threat to the family's reputation and are therefore targeted for punishment, often resulting in their murder. For example, in India, a 19-year-old named Naveen was beheaded by her father in 2016 for having a relationship with a man from a different caste.

In conclusion, family obligation and patriarchal criminal law are two related concepts that have been used to justify discriminatory practices against women and reinforce traditional gender roles and expectations within the family unit. These concepts have historically influenced the way that family crimes are prosecuted and punished, and have often resulted in the under-protection of victims and the over-protection of offenders. It is important for legal systems to recognize and challenge these patriarchal attitudes in order to ensure that all individuals are treated equally and fairly under the law.

From a historical perspective, China entered into a civilized society without completely dismantling the previous feudal kinship structure. Although Chinese society has undergone various changes, the kinship-based feudal system and its remnants and variations have long been preserved and have had a profound impact on social life. The inertia of thought created by thousands of years of cultural history has resulted in legislation that still prioritizes maintaining family stability over protecting individual rights. The state views the family as the smallest unit of society, an economic unit, and a

community of shared living. Maintaining family stability is believed to be crucial for maintaining social stability. However, with changes in social structure, the traditional functions of the family are in decline, and the rise of awareness of individual rights is constantly challenging the existing legal system. The transformation of legislative spirit is urgently needed.

6 Obligation and Liberal Criminal Law View

Liberalism is the mainstream ideology of Western society. The rule of law in liberalism is the crystallization of the development of Western political civilization in modern times and is considered to have "promoted and prospered Western civilization" absolutely. As a subsystem of liberal legal theory, the liberal criminal law view advocates individualism and demands full protection of individual freedom, prohibiting infringement of individual freedom, and fully endowing individuals with the right to defend their own freedom and the ability to combat infringements on their freedom. Therefore, some scholars advocate that the liberal criminal law view does not need to focus on family ethics issues and regards individuals in families as ordinary individuals in society. From this perspective, the liberal criminal law view sees family members as individuals with no difference from strangers, emphasizing that these individuals have the same rights and obligations as those outside of the family, and that eliminating the process of raising and caring for the poor and elderly is a state obligation and has nothing to do with the family. Even if the law recognizes the family, it mainly emphasizes the right to the family, advocating that the scope of the family's rights includes equal rights, personal freedom, communication freedom, residence, migration, religious beliefs, work, property, and so on. This makes family members have some special legal obligations relative to other members. Violation of these legal obligations may lead to criminal punishment.

Emphasizing legal obligations is the liberal position. Liberalism pursues a society that protects individual freedom, limits the government's use of power through the law, and pursues a kind of freedom relative to the state. It believes that the law is based on abstract, general

individuals. Citizens have legal obligations relative to the state, society, and others while enjoying rights. Although the liberal criminal law view is a subsystem of liberal legal theory, it is built on the basis of the liberal family view, which emphasizes the value and rights of individuals, and believes that the individual value of family members is higher than the collective value of individuals. Therefore, crimes that infringe on the personal, property, and other interests of family members are no different from crimes that infringe on the personal, property, and other interests of individuals outside of the family, and the criminal law does not need to construct special crime and punishment norms for them. Sacrificing the basic values of equality, mutual respect, and important rights and interests such as life and physical and mental health between family members in the name of "family stability" is not acceptable. There is no difference in the essence of crimes caused by general harm and those caused by family violence, and the court should not differentiate in protecting legal interests. There is no reason to treat them differently because the victim and the perpetrator have a family relationship.⁵ The author believes that this is a liberal criminal law stance that completely abandons the constraints of family ethics on the conviction and sentencing of criminal law and is not advisable.

On the one hand, the criminal law perspective cannot replace family obligations with legal obligations. Family and society are two distinct realms of life, and the meaning of legal subjects in each realm is different. There is a difference in the subjective will contained in the personal rights of family members and social members. Strangers in society only have passive expectations that do not violate each other, and even within the theoretical framework of social solidarity obligations, other social members cannot be expected to give positive attention to family members like they do to their own family. Family members not only have passive expectations that do not violate each other, but also reasonably have positive expectations of mutual care based on close living relationships and subjective emotions. With regard to the crime of abuse, criminal behavior not only includes passive non-action based on specific obligations to nurture

and support, such as not providing medical treatment when someone is sick, but also includes active behavior, such as hitting, restricting freedom, insulting personality, and so on. Therefore, deconstructing family members from traditional identity relationships and replacing family obligations with legal obligations cannot provide protection to family members and may even cause more serious harm.

On the other hand, the liberal criminal law perspective is not in line with China's reality. Domestic crimes, such as domestic violence, child abuse, and elder abuse, often involve power imbalances within the family unit. These crimes are deeply intertwined with cultural and social norms related to gender roles, family hierarchies, and Confucian values. For example, traditional Confucian values place a high value on obedience, respect for authority, and maintaining social order, which can make it difficult for victims of domestic abuse to speak out against their abusers. Women in particular may face significant barriers to seeking help, due to societal expectations around their roles as caretakers and their duty to maintain the family unit.

The liberal criminal law concept, which emphasizes individual rights and freedoms, may not be well-suited to address these complex cultural and social issues. The emphasis on individual autonomy and choice may not align with the traditional Confucian values that underpin Chinese society, and may be seen as potentially disruptive to the social order. Additionally, the liberal concept of criminal law may not provide adequate protections for victims of domestic abuse, who may face significant social and cultural barriers to seeking help.

Furthermore, the Chinese legal system has historically had a complex relationship with issues related to gender and family dynamics. While there have been efforts in recent years to strengthen legal protections for victims of domestic violence and other forms of domestic abuse, there is still significant work to be done to address the underlying cultural and social factors that contribute to these issues. Any attempt to reform the criminal law system in China must take into account these unique cultural and social dynamics, and must be tailored to

address the specific needs and challenges of victims of domestic abuse.

7 The Family Law Theory of Criminal Law

Since the late Qing Dynasty, the Chinese legal system has been constantly evolving, and China has started the process of modernizing its legal system. Throughout this process, there has been a theme of learning from and resisting the West, with Confucianism, the orthodox ideological system that has persisted in China for two thousand years, being the key keyword of this theme. Vincent Luvinson pointed out that "they are emotionally attached to their own history, but intellectually devoted to foreign values." Under the tension between these two ways of thinking, a Chinese legal system with Western characteristics was formed. However, this modernization of the rule of law did not break down traditional legal culture. Due to the fact that Confucianism, which is deeply rooted in Chinese traditional culture, contains the spirit of self-restraint, self-control, self-sacrifice, and selflessness, in most cases, our law does not encourage individuals to be unrestrained, but emphasizes order, norms, and etiquette, and emphasizes the value of following the group and defending the interests of the group. Therefore, under the influence of ideological and cultural factors, China's early legal system also showed the characteristics of being dominated by the value of order and interests. The main task of the 1979 Criminal Law was to maintain social order, to safeguard and protect the minimum and most basic negative freedom of citizens, and the pursuit of order is the nature of criminal law legislation. The purpose of legislators in formulating criminal law must be to maintain the overall order of society. Since the establishment of the market economy system after 20 years of reform and opening up, the value concept of the 1997 Criminal Law, while inheriting the legislative value of emphasizing order in the previous Criminal Law, also absorbed the value of freedom, which is a crucial step for China's criminal law to protect freedom. Since its promulgation in 1997, the Criminal Law has been in use and has not been revised directly by the Criminal Code, but rather through amendments to

maintain the stability of the law.⁶ Looking back at these amendments, China's revision of criminal law values has, on the whole, focused on maintaining order over freedom, especially in the area of family crimes, where the patriarchal social structure centered on the family is still maintained, and the inherent pattern of the traditional legal culture mechanism of the Confucianism-dominated ideological system is still in place.⁷

From a dynamic development perspective, any order has inertia and lag. Social norms often reflect people's level of understanding when they are formed. Therefore, the social order formed by social norms often corresponds to the ideal social living pattern that people pursue, and the order and freedom are in a relatively harmonious state. However, as people's understanding of society and themselves deepens, they inevitably pursue a social living pattern that better meets their needs and is more in line with human nature, which requires the formation of new social norms and new social order. At this time, existing social norms and orders become shackles for people to pursue their ideal life freely, thus putting freedom and order in sharp opposition.

7.1 Game between the values of freedom and the values of order

In the context of family crime legislation, the game of freedom value and order value refers to the tension between two competing values: individual freedom and social order. Individual freedom is a value that emphasizes the rights and autonomy of individuals. This value is often associated with liberal democracies, which prioritize individual rights and freedoms. In the context of family crime legislation, individual freedom might be seen as the freedom of individuals to live their lives without fear of violence or abuse within the family.

Social order, on the other hand, is a value that emphasizes the importance of maintaining social stability and order. This value is often associated with authoritarian regimes, which prioritize social stability over individual rights and freedoms. In the context of family crime legislation, social order might be seen as the importance of maintaining family harmony and protecting traditional

gender roles and family structures.

The balance between freedom and order is naturally uneven. Pursuing freedom will inevitably challenge order, while maintaining order will inevitably interfere with freedom. As a public law, the primary purpose of criminal law is to maintain order. However, it also has a natural deprivation attribute. Therefore, while nurturing order, we must be vigilant and guard against its improper infringement on citizen's rights.

In traditional Chinese culture, Confucianism embodies the spirit of self-restraint, self-discipline, self-sacrifice, and selflessness. In most cases, our laws do not encourage individuals to be free-spirited, but emphasize order, norms, and etiquette, and emphasize following the values of the group and defending the interests of the group. Therefore, under the influence of ideological culture, our early laws also showed the characteristic of monopoly on the value of order and benefit. The main task of the 1979 Criminal Law was to maintain social order, to ensure and maintain the minimum, most basic negative freedom of citizens. Pursuing order is the nature of criminal law legislation. The purpose of lawmakers in formulating criminal law is inevitably to maintain the overall social order. Since the establishment of the market economy system in the 20 years since the reform and opening up, the 1997 Criminal Law still shows the tendency to prioritize order maintenance over freedom in legislative and judicial value concepts. The balance between freedom and order is also inherently uneven; the pursuit of freedom inevitably clashes with order, and the maintenance of order necessarily interferes with freedom. "As public law, the primary function of criminal law is to maintain order, but it also has a natural deprivation attribute. Therefore, while safeguarding order, we must also be vigilant and guard against its improper infringement on citizens' rights." Sacrificing basic values such as equality, mutual respect among family members, and important rights such as life and physical and mental health in pursuit of so-called "family stability" is no longer in line with people's existing understanding.

7.2 The Basic Structure of the Protection of Interests in Domestic Crimes

Firstly, the interests to be protected in domestic crimes will exhibit a dual nature of "individual interests + collective interests." Basic rights have both individual and public aspects. Therefore, the individual basic rights in family life not only protect the specific individuals in the family but also serve as the constitutional function of constructing an abstract family legal system to promote a better family life. At the same time, in criminal law theory, social systems that are important to human life and related to the efficient operation of society as a whole belong to collective interests and should be protected by criminal law. The family legal system is precisely a social system highly related to public communal life, so the individual basic rights in family life obtain the attribute of collective interests beyond their individual interest attributes. Intuitively, the behavior that constitutes a domestic crime seems to only infringe upon the individual basic rights highly protected by the constitution in family life, but its harmfulness is twofold, both infringing upon the individual rights of specific family members and the collective interest of the abstract family legal system. Unfortunately, criminal legislation and justice only pursue one-sided maintenance of order, ignoring the protection of individual rights and misunderstanding the specific connotations of collective interests.

Secondly, the interests to be protected in domestic crimes will also present rich content of "objective interests + subjective interests." Hegel once pointed out that as an ethical entity, family normativity is love. And in modern society, love must be based on the premise of equality and mutual respect between the lover and the beloved. Otherwise, the normativity of "love" can often become alienated into violence, fear, domination, and even tragedy. Therefore, in family life where love is the normativity, while the objective rights such as the right to life and health enjoyed by individuals in general social life relationships should be given increased protection, their subjective rights such as the desire for recognition, trust, and respect should also be recognized and protected. Some argue that "moral sense, belief, and faith are indeed crucial and must be taken into consideration in legislation." In other words, lawmakers cannot ignore

the existence and legitimacy of those subjective needs that are crucial and worth protecting in life relationships. Therefore, the interests to be protected in domestic crimes in criminal law not only include objective interests but also more importantly, include subjective interests that are easily overlooked.⁸ For example, in the crime of buying and selling abducted women, the buyer not only exercises violence and restricts the women's behavior objectively but also subjectively exists a "objectification of women", which treats women as tools for reproduction and damages the personal dignity of victimized women.

7.3 The normative construction of pluralistic criminal law

With the development of socialized large industry, the original functions of the family have significantly decreased, and many family functions have been externalized to social institutions. People are more involved in social life. Personal sense of achievement and personal value also rely more on satisfaction in organizations such as businesses and careers. Personal social status no longer depends on the family, but mainly on personal efforts and talents. The satisfaction of family members' psychological needs also begins to no longer be limited to the family. All of this has led to a weakening of individual dependence on the family, and the strengthening of individual consciousness.⁹

However, the development of the rule of law is rooted in a deep legal tradition as a local resource. Traditional and modernity, as a pair of difficult knots, run through the entire process of China's rule of law development. Therefore, tradition has not become a thing of the past, but has been integrated into the present and has become a cultural force in the construction of criminal law. This is something that must be taken into account when criminal law intervenes in family order. Therefore, criminal law must seek a balance point between family obligations and legal obligations, using family obligations as a standard for measuring guilt and sentencing. This requires the strengthening of a family law perspective.

Firstly, there should be enhanced protection of individual basic rights in the context of family

life. According to Abraham Maslow, an American psychologist, after satisfying their physiological needs, people will develop a need for safety, love, and self-esteem, with the highest level being the need for self-actualization.¹⁰ In the 1970s and 1980s, the social needs of Chinese citizens were focused on "survival," but today, as we have achieved comprehensive poverty alleviation, built a moderately prosperous society, and moved towards the second centenary goal, citizens are more concerned with "living" in terms of social needs. In the United States, there are various laws and policies that aim to protect the basic rights of individuals in the context of family life. For example, The Violence Against Women Act (VAWA) was first passed in 1994 and has been reauthorized several times since then. It provides federal resources to help victims of domestic violence, dating violence, sexual assault, and stalking. VAWA also establishes new federal crimes for domestic violence and strengthens penalties for existing crimes. What's more, The Child Abuse Prevention and Treatment Act (CAPTA) provides federal funding to states for the prevention, assessment, investigation, and treatment of child abuse and neglect. CAPTA also requires states to have mandatory reporting laws for suspected child abuse and neglect.

Secondly, with regards to personal injury crimes, the position of "no punishment within the family" should be weakened, and the criminal responsibility of the offender should be pursued. In recent years, there has been a growing awareness of the importance of individual rights in the legal system in China. The criminal law system has traditionally focused on maintaining social order and stability, which has often meant that individual rights have been overlooked or disregarded. This is particularly true in the context of family crimes, where the emphasis has been on maintaining the integrity of the family unit rather than on protecting individual rights.

One key aspect of the shift towards a more rights-based approach to family crimes is a focus on the equality of personal rights. This means recognizing that all individuals within the family, regardless of their gender, age, or other characteristics, have the same rights and should be treated equally under the law. In practice,

this means that perpetrators of family crimes should be held accountable for their actions regardless of their relationship to the victim or their position within the family.

There are several reasons why the concept of equality of personal rights is important in the context of family crimes. First, it recognizes the inherent dignity and worth of all individuals, and affirms that they have a right to be free from violence and abuse. Second, it helps to challenge traditional patriarchal norms that have often led to the subjugation of women and children within the family unit. By recognizing the equal rights of all family members, the legal system can help to break down these power imbalances and promote greater gender equality. Third, the emphasis on equality of personal rights can help to prevent the normalization of violence within the family. When family crimes are treated as a private matter rather than a public one, there is a risk that they will be seen as acceptable or even expected. By emphasizing the equal rights of all family members, the legal system can help to challenge this normalization of violence and promote a culture of respect and non-violence within the family. Finally, the focus on equality of personal rights can help to ensure that justice is served in cases of family crimes. When the legal system prioritizes social order over individual rights, there is a risk that perpetrators of family crimes will not be held accountable for their actions. By emphasizing the equal rights of all family members, the legal system can help to ensure that perpetrators are held accountable and that victims receive the support and protection they need to recover and rebuild their lives.

Overall, the concept of equality of personal rights is a critical aspect of a more rights-based approach to family crimes in China. By recognizing the inherent dignity and worth of all individuals within the family, the legal system can help to promote greater gender equality, prevent the normalization of violence, and ensure that justice is served in cases of family crimes.

Thirdly, the principle of "punishing the strong and sparing the weak" should be emphasized in cases of personal injury crimes. Family crimes refer to crimes committed by family members against each other,

including spousal abuse, child abuse, elder abuse, and other forms of domestic violence. Such crimes are considered especially heinous because they involve the violation of trust, intimacy, and familial bonds. In China, family crimes are a growing concern, and there is a need to strengthen legal protections for vulnerable members of the family. The vulnerable groups in the family include children, women, and elderly people. These groups are vulnerable due to their physical and emotional dependence on their family members, as well as the power dynamics within the family. For example, children are often powerless and dependent on their parents, and women may be subject to the authority of their husbands or male family members. Elderly people may be isolated and dependent on their caregivers. As a result, these groups are more likely to be victims of family crimes.

Therefore, it is necessary to strengthen a norm of "heavy punishment for serious crimes and light punishment for minor crimes," giving more restrictions to the freedom of the strong and more protection to the freedom of the weak. When there is abuse, injury, rape, and other behaviors towards children by parents within the family, a criminal policy of heavier punishment should be strengthened, instead of using family ethics to block the responsibility or degree of responsibility of the perpetrator. For example, in Taiwan, Article 221 of the Criminal Code stipulates that "a person who has sexual intercourse with another person by means of robbery, coercion, intimidation, hypnosis, or other means contrary to the other person's will shall be sentenced to imprisonment for more than three years but less than ten years. An attempt to commit the offense shall be punished." Article 229-1 stipulates that "a spouse who commits the offenses specified in Articles 221 and 224, or a person under the age of eighteen who commits the offense specified in Article 227, shall be punished upon complaint." This is mainly based on the legislative purpose of "maintaining family integrity and providing room for the resolution of marital issues." In mainland China, judicial practice does not recognize "rape within marriage" as a crime, which is based on the influence of family ethical order on criminal recognition, believing that handling such crimes would

affect the recovery of family relationships. This obviously puts the maintenance of family order in a transcendent position, and China's legislation and judiciary should make changes.

Fourthly, a national concept of paternal authority should be established to protect minors. National paternal authority refers to the general guardianship that the state has over children and other persons who have no legal capacity. It was first seen in ancient Rome, where the legislation led by Licinius established a natural parental authority period of only seven years for biological parents, and after the age of seven, children belonged to the state. The concept of national paternal authority in China's legal and cultural traditions has a coupled conscious association. China's ancient feudal emperors often promoted Confucian culture, which included the idea of "caring for the young," leading the country, society, and families to have supervisory and guiding responsibilities for children's behavior and attitudes. For example, during the Song Dynasty, the inspection system and the warehouse for young scholars and the office for the care of young children managed personal and property matters related to households in distress, orphans, officials who died, and poor families based on laws and regulations. For issues such as abandonment and adoption, the government also made corresponding resettlement measures. However, the "caring for the young" proposed in ancient China essentially had a characteristic of "mercy," and did not have a systematic theoretical system that emphasized the state's responsibility for protecting minors and the principle of the best interests of the child, as in the theory of national paternal authority. Therefore, unlike Western countries such as the United Kingdom and the United States, China did not establish its nation and system on the basis of the social contract theory. In terms of legislative tradition, Western countries have formed a comprehensive juvenile law discipline and system that integrates civil, criminal, and administrative law through continuous experimentation and a series of reform adjustments. In contrast, China has mainly constructed its juvenile justice system based on the basic principle of "education as the mainstay and punishment as a supplement", including

the Law on the Protection of Minors. However, the lack of support from foundational theories has resulted in slow progress in building a comprehensive system for protecting minors. In the future, the principles of state guardianship and protection of minors should be implemented in the field of politics and law.

Finally, it is advocated to apply restorative justice. The family community is significantly different from the social community in that family members have close living connections and deep subjective feelings, giving the family strong autonomy. Moreover, we cannot ignore the fact that the family, as a community that objectively exists in any society, has independent personality, ability, and value. The rights and freedoms of individuals need to be protected and realized through the family, and the governance and development of society require the support of the family. China's traditional culture of "harmony" and the criminal reconciliation and mediation in the Shaanxi-Gansu-Ningxia Border Region are important contents of restorative justice. By reforming the treatment of offenders of family crimes, it is advocated to apply restorative justice, which not only punishes offenders for their criminal behavior and corrects them but also encourages victims in the family to report the crime, and allows family affection to continue, making the harmonious voice ring again in families that have been hurt or broken by family crimes.¹¹Therefore, the family-oriented criminal law perspective is not simply to impose heavier punishments on the perpetrators of criminal behavior, but to reasonably solve the infringement of family members and minimize harm. If criminal law disregards the ethics of the family and forcibly intervenes, it will lead to the fragmentation of the family, and the legitimate rights and interests of the victims will ultimately be difficult to guarantee, which is not worth the loss.

8 Conclusion

Currently, the expectation for family stability is still an important influencing factor in how criminal law views family order, and it is often placed above the value judgment of prohibitive norms such as prohibiting unlawful harm, which means that judicial practice has not

properly dealt with the protection of the personal rights and interests of victims. Instead, it has caused further harm to family members and become a harmful form of punishment. However, the traditional family ethics model has disintegrated, and the functions of the family have declined, while family members enjoy complete personal and property rights. The establishment of the family-oriented criminal law perspective strengthens the basic rights protection of the weak in the family, providing a basis for the balance of order value and freedom value. Finally, a free, equal, and harmonious family life not only has a crucial impact on individual survival and development but also has a close relationship with the formation of a good social public life order. Such a constitutionally significant family life needs to be shaped by protecting the basic rights of family members.

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