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Marital Property Law: A Comparative Study between Finland, Estonia and China

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Abstract: The purpose of this paper is to compare different regimes among marital property laws among Finland, Estonia and China, with special regards to prenuptial property agreements and division of property upon divorce. Laws and court precedents in these three countries as well as a few literatures are used in the research. EU laws and regulations are also referred to in the cases of Finland and Estonia. The study finds no significant difference in the ways of division of the marital property, however it depends on which matrimonial regime the spouses has selected.

Keywords: marital property; prenuptial agreement; divorce settlement; comparative study

Introduction

Matrimonial regimes or marital property systems are systems deciding the property ownership between spouses providing for the creation or absence of a marital estate. The marital estate is created to denote what properties are included in that estate, how and by whom it is administrated, and how it will be divided and inherited at the end of the marriage.

Matrimonial regimes are applied either by operation of law or by way of prenuptial agreement in civil-law countries, and depend on the *lex domicilii* of the spouses at the time or immediately following the wedding. In most Common law jurisdictions, the main and only matrimonial regime is separation of property.

There are two different state laws that can affect the divorce settlement such as the difference between equitable distribution and community property. In the states that follow equitable distribution laws, property acquired during the marriage belongs to the spouse who earned it, however in the course of divorce, the property will be divided between each spouse fairly. The court determines, based on variety of factors, on how much each spouse receives, what and how much of the marital property.

On the other hand, in the community property state, both husband and wife are regarded to equally own all income and assets earned or acquired by either one of them during the marriage, regardless if only one of them is employed. In addition, in the community property state, equal ownership applies to debts, which means that both spouses

are liable equally for such as unpaid balances on credit cards, home mortgages and car loan balances.

Marital Property Laws in Action

The main legislative source regulating Finnish marital property law is Marriage Act (Avioliittolaki 234/1929) with later amendments. In Finland, only property relationships of married spouses are regulated by law. Besides Marriage Act, other relevant acts and decrees include Code of Inheritance (Perintökaari 40/1965), Act on Registered Partnerships (Laki rekisteröidystä parisuhteesta 950/2001). In addition, relevant EU regulations are also nationally binding, for example, Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (The Council of the European Union 2003), Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (The Council of the European Union 2009), as well as the European Convention on Human Rights (The Council of Europe 1950).

A Finnish court has jurisdiction on matters relating to matrimonial property in any of the following circumstances: (1) both respondent and petitioner are domiciled or habitually resident in Finland; (2) The last domicile or place of habitual resident of the spouses was in Finland and one og them is till domiciled or habitually resident; (3) the property in question is located in Finland, and (4) The respondent accepts that the matter can be heard in Finland (Salmenkylä 2021).

In Estonia, according to Estonian Matrimonial Property Register Act, the Republic of Estonia has one matrimonial property register, which is maintained by the Chamber of Notaries (Riigikogu 2009). Depending on which matrimonial property regime each married couples adopt, the marital property upon divorce is different. The common legal assumption of property attribution in community property regime is that property shall be deemed as the joint property of the spouses until otherwise proved. Under the community of property regime, the spouses may exercise rights and obligations related to their joint property together or with the consent of another spouse. A transaction with joint immovable property conducted without the consent of the other spouse is null and void. The consent of the other spouse regarding the transaction of joint dwelling, does only apply if the ownership of the dwelling was obtained after 1.1.2015 (Riigikogu 2009).

Under the community of accrued gains regime, property belonging to a spouse separate property, of which the owning spouse can arrange independently without the consent of the other spouse, regardless of the property acquired during or before the marriage. If the dwelling used for the house of the family or used by the other spouse who does not own it, the consent of the latter is required for transactions concerning the dwelling. The separate property is administered by each spouse independently, even after the divorce. Lastly, the separation of property regime regards to the spouses property relations, the spouses are treated as if they were not married and each spouse administers and disposes of his/her property individually on their own (Riigikogu 2009).

In question of divorce in China, it requires several fulfilments of formalities and divorce settlement. One of the most important aspects in a divorce case is marital property division. The marital property division does not affect non-marital property, therefore, all property

acquired by either spouse before the marriage is considered non-marital property. Generally, all marital property during the marriage is "equitably" divided half and half except in special circumstances (The National People's Congress of the People's Republic of China 1980).

The principle of distribution of marital property law in Chinese courts is the article 17 of Marriage Law of the Peoples Republic of China referring that" property shall be jointly owned and both husband and wife shall have equal rights in the disposal of jointly owned property" after listed the community property during the existence of relationship between the spouses (Article 17, The National People's Congress of the People's Republic of China 1980).

The property acquired by the husband and the wife during the period in which they under contract of marriage shall be in their possession, unless they have agreed otherwise. They shall have enjoyed the equal rights in the disposition of their jointly possessed property (Article 13, The National People's Congress of the People's Republic of China 1980).

There are two different aspects how to interpret the sentence "property shall be jointly owned. Both husband and wife shall have equal rights in the disposal of jointly owned property". Firstly, during the existence of marriage relationship, if the property belongs to the community property, whatever the contribution he or she makes, both husband and wife shall have equal rights in the possession, appliance, income, sanctions or jointly owned property. The second way to interpret the sentence is that when it comes to divorce, in the question of community property, the right of marital property division is equal, but it does not mean half for each party (The National People's Congress of the People's Republic of China 1980).

Article 18 of Marriage Law specifies the items excluded from community property, a) pre-marital property; b) payments relating to a

spouse's bodily injury, or living allowances for the disabled; c) "articles of living specially used by either party"; and d) "other property that shall be used by either party". The Marriage Law can also alter such arrangements by prenuptial or postnuptial agreements (Article 18, The National People's Congress of the People's Republic of China 1980).

Prenuptial Agreements

Prenuptial agreements, executed as marriage settlement (avioehtosopimus) are enforceable in Finland. A relatively new law applies in Finland which allows the spouses to decide *in advance* which law will govern their marriage, provided that at least one of the spouses has a connection based on nationality or domicile to the State whose law they want to apply.[1]

The marriage settlement is concluded in writing, which is signed and dates. Further, it must be having two witnesses without any close relationship to either the spouses, such as relative. The local register office enters the marriage settlement into force. A marriage settlement is not necessarily binding. The terms of marriage settlement can be derogated from or it can be set aside in the distribution of matrimonial property when agreement with the marriage settlement leads to an irrational result.[2]

[1]Finlex. Avioliitto-avioehtosopimus-omaisuuden ositus. Retrieved 10.6.2021 from: https://www.finlex.fi/fi/oikeus/kko/kko/2000/20000100
[2]Finlex. Avioliitto-avioehtosopimus-omaisuuden ositus. Retrieved 10.6.2021 from: https://www.finlex.fi/fi/oikeus/kko/kko/2000/20000100

From year 2000, it is possible, according to the Supreme Court decision in KKO:2000:100, to eliminate marital right only in the case of divorce. [3]

In Estonia, a marital property contract may be concluded prior to marriage or during marriage (Estonia Family Law Act §§ 8–13). A marital property contract may specify which property belonging to a spouse before the marriage remains the separate property of the spouse and which property becomes joint property of the spouses, and which of the property acquired or to be acquired during the marriage is joint property and which is separate property. A marital property contract may also specify how to possess, use and dispose of joint property of the spouses, how to divide joint property of the spouses, the mutual maintenance duties of the spouses during the marriage and upon termination of the marriage, and other mutual proprietary rights and obligations of the spouses that they consider necessary.[4]

Marital property contracts are entered in the marital property contract register. A marital property contract not entered in the register is valid in the relationship of spouses when it is notarized. The proprietary rights of a spouse arising from a marital property contract are valid with respect to third persons if an entry concerning the marital property contract is made in the marital property contract register before the claim of the third person arises. The marital property contract register is maintained pursuant to procedure provided by law in a land registry of a court.[5]

[3]Finlex. Avioliitto-avioehtosopimus-omaisuuden ositus. Retrieved 10.6.2021 from: https://www.finlex.fi/fi/oikeus/kko/kko/2000/20000100

[4]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide

[5]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide

Prenuptial agreements are now enforceable in China. Article 19 of the 2001 Marriage Law specifies that:[6]

"So far as the property acquired during the period in which they are under contract of marriage and the prenuptial property are concerned, husband and wife may agree as to whether they should be in the separate possession, joint possession or partly separate possession and partly joint possession. The agreement shall be made in writing. The provisions of Articles 17 and 18 of this Law shall apply to the absence of such an agreement or to a vague one.

The agreement reached between the husband and wife on the property acquired during the period in which they are under contract of marriage and on the prenuptial property is binding on both parties.

If husband and wife agree, as is known to the third party, to separately possess their property acquired during their marriage life, the debt owed by the husband or the wife to any other person, shall be paid off out of the property separately possessed by him or her."

In 2003 the Chinese Supreme Court ruled that the types of property which could be the subject of a prenuptial agreement included a party's investment income, housing allowance, insurance, unemployment compensation, and income from intellectual property rights.[7]

According to article 39 of Marriage Law in People's Republic of China, at the time of divorce, both parties shall agree upon the disposal of the jointly owned property, which means that the plan of marital property division is not decided by one part, it must be agreed consensus by both husband and wife on a voluntary basis. Otherwise, the people's court shall decide disposal thereof, taking into

[6]The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm

[7] The National People's Congress of the pPeople's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm

consideration the actual circumstances of the property and following the principle of favouring the children and the wife.[8]

Finland vs Estonia

How is the property (rights in rem) divided? For the division, the value of the property on the date of the division is crucial. According to Finnish Marriage Act § 35, both spouses are entitled to receive half of the spouses' net marital property. [9]**In Finland, the date of the institution of divorce proceedings determines which property is included in or excluded from the marital property division. Therefore, the marital right of a spouse ends on that date.** The marital property shall be totalled and divided equally to determine each spouse's deserved part. Further, a spouse's private debts during the marriage prior to the institution of divorce proceedings, his or her share of the common debt shall be deducted relating to Finnish Marriage Act §99. If one of the spouse is excessively indebted, his or her assets shall be marked as none or zero. If one spouse's property covered by the marital right exceeds that of the other spouse, the difference shall be evened out. However, according Finnish Marriage Act §103b. the end result of the division can be adjusted, if the result

[8] The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm

[9]Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf

causes the other spouse unreasonable detriment or the other spouse receives an unjustifiable benefit from the division. [10]

If the division of the property cannot be proceeded otherwise, or if that of the common property cannot be divided, the court is granted the act to sell the property and the sale proceeds will be divided accordingly. [11]

Unlike spouses who entered marriage in Finland, Estonian Family Law Act states that the Estonian spouses are obliged to choose their matrimonial property regime, such as the community property regime, the community of accrued gains regime or the separation of property regime. If they had not chosen a matrimonial property regime before entering to the marriage or having a marital property contract, the statutory regime of community of property regime is then entered. Therefore, the property acquired during the marriage is joint property of both the spouses. [12]

Estonian marriage act considers goods that are separate from the community property such as personal belongings (e.g. clothing); property owned by either spouse prior to marriage; property acquired during the marriage by disposal without charge, including as a gift or by succession; assets acquired belonging to separate property or in exchange for separate property. [13]

[10]Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf
[11]Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf
[12]Estonian Family Law Act. Available online : https://www.riigiteataja.ee/en/eli/506062016002/consolide
[13]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide

Who is liable for existing debts after the divorce or separation? According to Finland Marriage act, both of the spouses are liable for debts which they have incurred together and which either of them has incurred for the maintenance of the joint-living during the marriage. However, a breakdown of the relationship before divorce proceedings instituted can be exclude a spouse from being liable for such maintenance debts which the other spouse has incurred after the separation, if the creditor was aware of it. [14]

In Estonian Family Law act, regardless the matrimonial property regime the spouses have chosen, a spouse is liable for the obligations incurred by the other spouse only when the other spouse may represent or obligate the spouse by his or her act. Under the community of property regime, the spouses are liable to third parties with their separate and joint property such as obligations that either the spouse has incurred to satisfy the necessities of the family; to fulfil solidary obligations taken by either spouse; and obligations where a spouse has acceded with third parties to be liable both with the separate and the joint property (assent from the other spouse is vital). [15]

Does one spouse have a claim toan equalisation payment? In Finnish marriage act, if any of the spouse receives less than he or she is entitled to in the course of the marital property division, the other spouse may adjust the difference by payment, in addition, the compensation can be done also by giving property to the other party. [16]

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[14]Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf
[15]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide
[16]Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf

According to Estonian Family Law act, in the case of other commitments, each spouse is liable with his or her own separate property and one-half of the joint property (i.e. his or her share). A creditor may request the division of joint property if it is proved that the debtor spouse's separate property is not adequate for discharging the commitments. Under the division of joint property, it is possible only after the community of property regime has ended. There is no joint property of the spouses under the community of accrued gains regime or the separation of property regime in Estonia. The community property shall be distributed equally for each spouse. [17]

Finland vs China

China does not have a specialised family court system in family and child matters. However, in the course of divorce, such as distribution of marital property, child custody and visitation are typically litigated in the matrimonial divisions of trial courts. The litigant spouse shall file a divorce action by fulfilling a complaint in the People's Court with the actual jurisdiction. [18]

On August 13th 2011, China's Supreme People's Court reinterpreted the country's marriage law. According to the law adapted, residential property is no longer to be considered as jointly owned and divided

[17]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide

[18]The Supreme People's Court of the People's Republic of China. Marital property division. Retrieved 10.6.2021 from: http://www.court.gov.cn/zixun-xiangqing-6299.html

equally in the event of a divorce. [19] The result of this new law in China, a divorced person who does not have his or her name registered with the house/home they lived or is currently living, he or she would be left without a place to live.

According to the 2018 Marriage law the community property is not included spouses' preparation properties for their marriage such as furniture (sofa, dining table, closet), electrical devices (fridge, television, washing machine), and car or gifts for the bride. The new law states that the division of their house is not possible neither. The unregistered shares of real estate gift during the marriage can be withdrawn before the divorce.[20] [21]

According to Finnish Marriage Act §103b, during the institution of the division proceedings, the adjustment of the separation is considered since in one situation when one spouse is allowed to keep a considerable amount of property and the other would be left homeless. The Marriage act in Finland no longer has regulations on nullification, cancellation or judicial separation, according to the Supreme Administrative Court, even if one of the spouses is mentally ill, a marriage cannot be declared void. The only way to dissolve the marriage is divorce, of which is the only way to distribute the marital properties. [22] On the other hand, there is a regulation in Chinese

[19] D. Eimer. China's divorce rule dubbed 'Law that makes men laugh and women cry'. The telegraph 30 Oct 2011. Retrieved 10.6.2021 from: https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8857708/Chinas- divorce-rule-dubbed-Law-that-makes-men-laugh-and-women-cry.html

[20] East News. 2018 New Marriage Law, prohibition of equal division on community property. Retrieved 10.6.2021 from: http://toutiao.china.com/qgsy/gundong/13000139/20171116/31674671.html

[21] Chinese Law. 2018 Marriage law on marital property division. Retrieved 10.6.2021 from: http://news.66law.cn/a/20180412/77965.html

[22] Ministry of Justice, Finland. Marriage Act. Retrieved 10.6.2021 from: https://www.finlex.fi/en/laki/kaannokset/1929/en19290234.pdf

Marriage law chapter 2 §7 subsection (2) people suffering from a medical condition, prohibition from the marriage. [23]

In Finland it is possible for two people, who are of the same sex, to register their marriage according to Finnish Marriage act §1 section 1 and §108 section 1 and 2, §115 section 1. Therefore, independent of sexes, both sexes are eligible for property division, if the marriage is registered. [24] While in China, only married husband (male) and wife (female) are able to settle a marital property distribution during divorce. [25]

Estonia versus China

In Estonia, matrimonial regimes for spouses to choose in the marriage such ascommunity regime, community of accrued gains regime, or the separation of property regime. Therefore, the distribution of the marital property upon divorce varies dependent on each couple's choice of matrimonial regime.[26]Contrary to Chinese matrimonial regime is that the marriage law sets the marital property as community property, of which both spouses are sharing the joint property, however during

[23] The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm
[24]Finlex. Laki avioliittolain muuttamisesta. Retrieved 10.6.2021 from: https://www.finlex.fi/fi/laki/alkup/2015/20150156
[25]The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm
[26]Estonian Family Law Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/506062016002/consolide

divorce there are regulations how joint properties are separated from each spouse. [27]

According to article 39 of Marriage Law in People's Republic of China, at the time of divorce, both parties shall agree upon the disposal of the jointly owned property, which means that the plan of marital property division is not decided by one part, it must be agreed consensus by both husband and wife on a voluntary basis. Otherwise, the people's court shall decide disposal thereof, taking into consideration the actual circumstances of the property and following the principle of favouring the children and the wife.[28] In Estonia, there was no indication of such law that prefers children and the wife. [29]

Conclusion

Upon marital property law in Finland, Estonia and China, each state is deployed and follows the civil law system.[30][31][32] There is not much

[27]The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm
[28]The National People's Congress of the People's Republic of China. Marriage law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882701.htm
[29]Estonian Martital Property Register act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/513042015002/consolide
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[31]Estonian general part of the Civil Code Act. Retrieved 10.6.2021 from: https://www.riigiteataja.ee/en/eli/530102013019/consolide
[32] Council of Europe. The Finnish Judicial System. Retrieved 10.6.2021 from:

difference how would the property during the marriage be divided, however it depends on which matrimonial regime have the spouses adjusted to. Prenuptial agreements in each state are of the same, thus eliminating properties from the joint property during or before the marriage.

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18. The National People's Congress of the People's Republic of China. 1980. Marriage Law. Retrieved 10.6.2021 from: http://www.npc.gov.cn/wxzl/wxzl/2000-12/11/content_4394.htm

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古代匈奴习惯法研究

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摘要：匈奴是中国北方游牧民族，兴起于公元前二世纪，衰落于公元一世纪，之后匈奴的分支再次活跃二百年，直至淡出历史舞台。匈奴在中国古代少数民族文化发展融合中起着不可估量的作用，其政治、文化、农牧业、军事等都在历史长河中留下浓墨重彩的一笔。本文通过对匈奴习惯法内涵的解读，对古代匈奴在日常生活中的社会组织、继承、债权、土地、婚姻、盗窃等民事和刑事方面习惯法进行深入分析，以期进一步了解匈奴习惯法文化、习惯法影响与意义，从而更深入了解古代匈奴生活生产方式，展现古代匈奴原始的面貌。

关键词：匈奴，习惯法，影响

Abstract: The ancient Huns were nomadic peoples in northern China who rose to prominence in the second century BCE and declined in the first century CE. A branch of the Huns later re-emerged, lasting for about two hundred years before gradually disappearing from the stage of history. Their development played a significant role in the cultural integration and historical evolution of ancient China. The Huns' political system, culture, agriculture, and military power all left a lasting impact.

This paper first defines and explains the meaning and connotations of customary law. It then examines the social organization of the Huns, as well as their rules regarding creditors' rights, land, inheritance, marriage, theft, and other aspects of civil and criminal customary law. By studying the Huns' national customary law, we aim to uncover its features, functions, and influence within their society. In doing so, this research seeks to provide deeper insight into the daily life, cultural practices, and original social structure of the ancient Huns.

Key words: Ancient Huns, Customary Law, Nomadic Society, Cultural Integration, Legal History

随着中国法治的的发展，多元文化主义在法学理论界和实践中被人们接受，习惯法也渐渐成为讨论热点。习惯法是中华法学的重要组成部分，有其不可替代的作用和意义，少数民族习惯法对少数民族的生活生产而言具有不可估量的价值。从中国传统社会的实际情况看，有些国家制定法较为抽象，因此对少数基层社会影响力不大，并未深入人心，以至于在许多地方民间出现了法律规避现象。少数民族习惯法则实实在在每时每刻地规范每一个民族成员的行为，对其产生具体直接的影响。对某些特定少数民族地区的人而言习惯法对他们更有约束力。在中国法治现代化建设过程中，普遍存在着对法的认识和探讨偏重于国家制定法，而对传统的少数民族习惯法则不够重视。少数民族习惯法实际上在

社会发展变迁中比国家法更贴近普通民众的生活，对其行为的规范更直接。只有当社会普罗大众愉悦地认可并欣然遵守法律时，法律的生命力才更能体现出来。

本文通过对匈奴社会婚丧嫁娶、生活生产、继承等方面习惯法的研究，分析匈奴习惯法的特征和功能及它在文化方面的重要作用，深入了解其民族特点、风俗人情，揭示匈奴习惯法的价值和意义，希望通过笔者的梳理使大家对这个曾经统治大漠南北的强大民族有更多的认识和了解，从而为中国古代少数民族习惯法的研究做出一定贡献。

一、少数民族习惯法的涵义

何谓习惯法？中国的著作和学者对习惯法的表述是：1.《中国大百科全书》的解释：习惯法指国家认可和由国家强制力保证实施的习惯，是法的渊源之一。在国家产生以前的原始习惯并不具有法的性质。[1]2.《辞源》对习惯法界定为：一国之风尚礼俗，为法律所承认，不必有条文之制定者，谓之习惯法。[2]3.学者认为习惯法是独立于国家制定法之外，依据某种社会权威和社会组织，具有一定强制性的行为规范的总和。[3]牛津法律词典对习惯法是这样界定的：当一些习惯、惯例和通行的做法在相当一部分地区已经确定，被人们所公认并被视为具有法律约束力，像建立在成文的立法规则之上一样时，它们就理所当然可称为习惯法。

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[1] 中国大百科全书.法学[M].北京:中国大百科全书出版社,1984,87.

[2] 辞源[Z].上海:上海商务印书馆民国四年版,1915,23.

[3] 高其才.论中国少数民族习惯法文化[J].中国法学,1996,01.

基于以上各种定义，笔者认为，少数民族习惯法是各民族为了满足生存和繁衍的需要，在生产实践中逐步总结创造出来的具有强制力的人人遵守的规则，其对每个民族成员具有约束力，实施依靠族内权威和组织。习惯法贯穿于少数民族各个方面，它扮演了成文法的作用，其特征为民族性、地域性和强制性。

二、匈奴及匈奴习惯法

匈奴是中国古代北方游牧民族，历史文化源远流长。《史记》载：“匈奴，其先祖夏后氏之苗裔也，曰淳维。唐虞以上有山戎、猃狁、荤粥，居于北蛮”。[1]匈奴约兴起于春秋战国，在冒顿单于以“鸣镝射头曼”自立后达到鼎盛时期。西汉匈奴分为南北两部，南匈奴归汉，北匈奴西迁，衰落于东汉初。后来匈奴的分支部落兴盛，最主要的有屠各、卢水胡、铁弗匈奴，在内蒙古、陕西、山西等地活跃了近两百年，南北朝时期逐渐淡出历史舞台。古代匈奴是一个混合的多民族，并非是一个单一民族，如在屠各、宇文、独孤等分支下还有其他姓氏部落。林幹认为，被称为匈奴的那一支系，由于社会生产力较之其他部落先进，在部落形成过程中起主导支配作用，随着部落的形成和发展，匈奴那一部分遂以他们的名称总括和代表其他部族。[2]古代匈奴是游牧奴隶制国家，没有自己的文字，故而习惯法在其民族发展中起着非常重要的作用，涉及到生活生产各个领域，包括社会组织、头领、婚姻、财产、继承等等，研究古代匈奴习惯法有着非常重要的意义。

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[1] 司马迁.史记[M].北京：中华书局,1962,110.

[2] 林幹.匈奴通史[M].北京：人民出版社,1986,03.

匈奴主要生活于中国北方地区，因其特殊的地理环境从而形成了具有民族特色的生活习惯、民族文化、生产生活方式。匈奴习惯法大致可分为以下几个方面：民事习惯法（包括婚姻、继承、丧葬信仰、所有权债权习惯法），刑事习惯法及诉讼纠纷解决机制。

(一)民事习惯法

匈奴的民事习惯法主要包括婚姻习惯法、丧葬信仰习惯法、继承习惯法和所有权债权习惯法。

1.继承习惯法

匈奴的继承制与现代意义上的继承制并不完全对应，它除财产继承外，更多的是指身份继承，即直系亲属从长辈那里继承的家族内或社会上的身份。从这一意义讲，匈奴的继承制可分为王位继承与财产继承。

（1）王位继承

古代匈奴社会是典型的奴隶制社会，阶级和奴隶划分比较明显。他们以贵族的首领为领导者，称为单于，王位的产生主要是世袭制，单于生前确定接班人人选。据史记、汉书、后汉书之中记载，在匈奴单于位的继承制度中，大体有这样几种继承方式，即父死子继、兄终弟及和传弟与传子交叉继位的混合继承方式。这几种继承方式中，父死子继是单于位继承的主要方式，兄终弟及在多数情况下只是父死子继的补充，而传弟与传子交叉继位的混合继承方式则是上述两种继承方式的衍生物。据史书记载可以统计出来，在秦、汉两朝 41 位匈奴单于中,由儿子直接继承单于位的有 16 人，兄终弟及者 8 人，传弟与传子交叉继位的混合继承者 11 人，以宗族等其他身份继位者 6 人。父死子继方式中，成年长子往往是第一顺序的继承人，在上述由儿子继承王位的 16 人

中，除个别不是长子(壶衍单于)外,其余均为长子继承。匈奴看重母亲的出身，以子凭母贵的方式选择太子是中国古代北方游牧民族常用的方式之一，但不是最基本的法则。实际上在许多特殊情况下成年长子的继承权将受到影响而改变。如匈奴传载：单于有异母弟为左大都尉，贤，国人向之，母阏氏恐单于不立子而立左大都尉也，乃私使杀之。此事件中左大都尉虽然未能继承单于位，但却说明有贤能才干的单于兄弟或长子以外的儿子同样有权利和可能继承。兄终弟及的方式继承主要有两种情况：一是单于故去时其子尚未成年，则单于位只能由单于兄弟中的一人为第一继承人，而单于无兄弟或兄弟中无人符合继承条件时，则由与死者血缘最亲近的族人继承。这种王位的继承法实际上是上述长子继承法的衍生或变异,它是长子继承制的补充过渡。 另一种情况是兄直接传位于弟，这种兄弟间的直接继承与被继承者儿辈年龄大小无关。不过纵观秦汉时期匈奴单于位的继承，这种兄弟间的直接继承似乎只限于在老呼韩邪单于的儿辈中进行。老呼韩邪单于约定传国与弟,完全是单于家庭内部王位继承顺序上的一次普通调整，是极其偶然的事情。但由于这一传竟长达 77 年(公元前 31--公元 46)，共 6 位单于，因此它在相当长的时间里被后代尊为圭臬，对于匈奴单于位的继承产生了较大的影响。正是由于传国与弟的影响，在接下来的匈奴单于位继承中，实行了一种以传弟与传子交叉继位的混合继承法。

（2）财产继承

由于社会经济发展水平不同，少数民族之间的财产状况有很大差别，家庭之间的财产也各不相同，但各民族都非常重视财产继承，有内容丰富的财产继承方面的习惯法，对财产继承人、继承的原则、顺序、绝户财产的处理等作了具体的规定。在匈奴家庭中，老弱地位较青壮年低，史书中有“壮者食肥美，老者食其余。贵壮健，贱老弱”的记载。这只是游牧民族生活习俗的一方

面，当父权家长年老时，他失去的仅仅是统兵和指挥作战的权力，他在家庭或家族中的宗法地位及其他权力如财产分割、分派继承人等并未丧失。而且这种现象大多出现在一般家庭或是家族中，在匈奴上层贵族特别是匈奴单于、左右贤王等领导集团中，父权家长制是贯穿始终的，父权家长地位和权力无论是在国家组织中还是家庭组织中都一直伴随，不会随年龄的增加而削弱。

古代匈奴社会生产力并不高，个人所拥有的财产主要是牛羊，还有自己生活生产工具，贵族有自己的奴隶。史记记载“随畜牧而转移”、“逐水草迁徙，毋城郭常处耕田之业，然亦各有分地。”由此不难看出，贵族是有分地的，但对于以游牧为生的匈奴人来说意义不大。财产继承主要体现在匈奴家庭的分居制上。所谓匈奴家庭的分居制是指匈奴男子成年后，由父亲划分出一定的财产，令其另立门户单独起灶。在匈奴传中，匈奴单于的儿辈们成年后基本上都被分封到各地，只有在发生重大事情时才汇聚王庭。如且侯单于死，长子左贤王未至，族人以为有病，更立左大将为单于；又虚闾权渠单于死，郝宿王刑未央使人召诸王。这些都足以说明单于的成年儿辈是常年居住在外的。此外，与匈奴同俗的乌孙中也存在着成年男子分居的制度，父亲最终的财产往往属于最后与父亲共同居住的儿子,这个儿子一般为幼子，当然这个儿子也是最后赡养父亲的人，权利和义务是对等的。但这里所指的财产继承并不包括对父亲生前在家族或社会上的身份、官职以及父亲生前妻妾的继承。在匈奴，长辈身份、官职以及生前妻妾的继承权通常落实在长子身上。

2.婚姻习惯法

婚姻的缔结是人类自身生产的前提条件，是人类繁衍的保障。因此各民族都重视婚姻问题，婚姻习惯法是中国少数民族习惯法的重要组成部分。各民族的婚姻习惯法规定了婚姻的成立、

缔结程序、夫妻关系、离婚等方面内容，这些规范既考虑到婚姻所固有的自然属性，也注重婚姻的社会本质和社会功能。

古代匈奴实行氏族外婚制，氏族之间允许结婚。史书中记载匈奴有几个主要的贵族姓氏呼衍氏、兰氏、须卜氏和丘林氏。《后汉书·南匈奴传》说他们常常与单于通婚。据《汉书·匈奴传》载，单于的氏族是挛鞮氏与呼衍氏等，并不属于同一氏族。[1]这些氏族都是实行外婚制。王昭君的两个女儿中，长女出嫁须卜氏族，小女出嫁当于氏族，可见呼韩邪单于和须卜、当于等氏族也是实行氏族间外婚。直到公元三、四世纪，匈奴人还是实行外婚。例如“五胡十六国”时建立“汉”政权的匈奴贵族刘渊及他的儿子刘聪，本来出自屠各胡(匈奴族的别支)，可是他们的妻子却都属于呼衍氏的女儿。氏族外婚制的遵守，说明氏族组织的外壳依旧存在，虽然氏族组织的内容和性质早已发生变化。实行氏族间外婚对于种族的繁衍和人口的素质提高都有不可替代的作用。

匈奴习俗中对于女子婚前的性行为较为宽容，但对于女子婚后的贞节则相当重视，因此对于妇女初嫁所生的第一个孩子，在不能确定其生父的情况下，一般都采取“杀首子”的方式处理掉，匈奴法律不仅对此不加干涉，反而进行保护。可见在许多方面匈奴依然遵从于民间习俗。

收继婚是古代匈奴婚姻的重要形式。《史记》载：“父死，妻其后母。兄弟死，皆取其妻妻之。”由此可以看出匈奴实行收继婚。父亲死后，儿子娶后母为妻子，或者是兄弟死后其他兄弟

[1] 班固.汉书[M].北京:中华书局,1962,233.

娶死去兄弟的妻子为妻。成帝时，呼韩邪单于死，其子复株累单于复妻其后母王昭君。宣帝时壶衍胸鞮单于死，其弟虚闾权渠单于以右大将之女为大阏氏，而废黜前单于之妻颛渠阏氏。由于他遗弃寡嫂，违反了妻兄弟之妻的习俗，故招致了颛渠阏氏之父的怨恨。这在今人看来，是不能理解的。后来由于长期受汉族伦理道德观念的影响，内迁匈奴的思想观念发生了变化，开始否定原本符合匈奴传统的旧习俗。古代匈奴的收继婚主要是妻后母和收继兄弟妻两种形式，除此之外，还包括叔叔娶侄子的妻子和侄子娶婶母的收继形式，这都是前两种方式的转换。匈奴单于生母是不被收继的，这是古代北方少数民族遵从的习惯法则。据《匈奴传》记载，卫鞍侯单于死后，且提侯之妻、狐鹿姑单于兄弟俩的生母就未被收继；而狐鹿姑弟单于的继承名壶衍鞮单于的生母撷渠阔氏也未被收继。

3.丧葬信仰习惯法

匈奴习惯法还通过对丧葬、宗教信仰、社会交往等方面进行规范，使社会生活的各个领域都有规范进行调整。有关丧葬的习惯法，主要在葬制、葬地、葬仪(停灵、入硷、祭灵、埋葬)及服孝这几方面，充分反映了生者对死者缅怀感情的心理状态。在匈奴社会中，丧葬的规模形式不尽相同。如对贵族首领的丧葬就比较隆重“其送死，有棺槨金银衣裘，而无封树丧服。近幸臣妾从死者，多至数千百人”。由此可见，匈奴社会典型的“重贵族、轻庶民”特征。在丧葬时，匈奴送死之具，有棺有槨，随葬物亦有金银衣裘。中国古代士以上的葬礼，聚土为坟，植树为记，谓之封树，庶人则不封不树。匈奴在丧葬中没有封树。贵族死后，有一定的人员陪葬。考古学家科斯洛夫在蒙古国诺颜山发掘的匈奴贵族墓葬中，发现一个墓室里有十七个殉葬奴隶的发辫，还有金银首饰、棺槨等物，很好地证明了这一点。

匈奴丧葬礼仪过程中，“男子们剪下自己的辫子，在自己原先已令人害怕的脸上刻下深深刀痕，用鲜血哀悼其领袖”，这是西迁后阿提拉时代的匈奴贵族葬礼，但在中国北部众多墓葬中也发现这种剪下来的发辫和发束，甚至多达数百条。鲜血与发辫就是为了表达对死者的哀伤和尊敬。这种习俗在秦汉时期的西北民族中较为普遍。

匈奴信仰日月星辰天神，没有自己信仰的教派。例如史记记载的“事而候星月，月盛壮则攻战，月亏则退兵。”后汉书中也有这样的记载“匈奴俗，岁有三岁祠，常以正月、五月、九月戊日祭天神”。这样的信仰习惯一直被传承下来，之后其他民族中如突厥、蒙古族等都有类似的崇拜，比如蒙古族人民信仰“腾格里”，他们相信长生天，并且在其服饰器具上面刻上相应的图腾。由于匈奴人迷信天地、鬼神，因此便把偶像作为天地鬼神的化身而予以崇拜。《史记·匈奴列传》及《汉书》都说汉武帝时，霍去病过燕支山北击匈奴，获得“休屠王祭天金人”。金人即偶像，匈奴人造此偶像作为“天主”而祭祀之，故《金日禅传》赞中有“本以休屠作金人为祭天主，故因赐姓金氏”之语。这个金人，大约有一丈多高，汉武帝把它陈列于甘泉宫，对它不祭祀，仅烧香礼拜而已。从诺颜山匈奴墓葬中出土了木俑，证明匈奴人确实崇拜偶像。

古代匈奴崇拜巫医。史书记载匈奴的胡巫不少。《汉书》载匈奴使巫埋牛羊于所出诸道及水上以诅军。单于赠给汉帝的马、裘，常先使巫祝之。可见巫对于匈奴的军事、政治影响也很大。古代匈奴对天地巫医鬼神的崇拜，一直被人们世代相传，变成了一种神圣的信仰。

4.所有权债权习惯法

所有权习惯法主要包括一般财产所有权，山林土地所有、占有、使用权，草场占有权，牧场占有权，渔场占有、使用权等,特别是山林土地所有、占有、使用习惯法极为系统丰富。关于所有权，在古代匈奴社会中的表现为：“所得卤获因以予之”“战而扶舆死者，尽得死者家财。”他们抓获的人就归自己所有，变成他们自己的奴隶，夺得的财产也归自己，这表现了在民事财产方面的“先占取得”。作战不力，虽然战死了家财充公归朝廷所有。

(二) 刑事习惯法

为维护正常的社会秩序，保障民族成员生命财产的安全和生产、生活的顺利进行，各少数民族有大量的刑事习惯法，对诸如杀人伤害、偷盗损坏财产的行为进行各种处罚。匈奴刑事习惯法主要包括对故意杀人罪、盗窃罪的处罚。

1.故意杀人罪

古代匈奴没有成文法典，史书记载，匈奴“毋文书，以言语为约束”，他们主要是靠言语来约束自己的行为，这也就是他们的习惯法。古代匈奴对故意杀人罪的处罚见于史记“拔刃尺者死”。这句话很好的说明了他们对于故意杀人的人直接以死罪论处，将杀人者处死。而与匈奴一脉相承的蒙古族规定杀人者死，以命抵命，没有以物质、金钱赎罪的习惯法。只是雇工在放牧牲畜时，因迷失方向或其他原因而致死的，雇主除受到罚牲畜、打板子、打黑鞭或押一个时期等处罚外，得以物质金钱牲畜来偿命。

2.盗窃罪

少数民族刑事习惯法中，最主要的部分便是对偷盗的处罚，各民族都严厉禁止偷盗行为，把保护公有和私有财产作为习惯法的重要任务。

在古代匈奴社会，对偷盗的处罚是非常明确的，而且也非常严厉。如史记中记载“坐盗者没入其家，有罪小者轧。大者死。狱久者，不过十日，一国之囚不过数人。”这是匈奴单于规定的。虽然这样的规定没有以文字的形式表达出来，但是却和法律有相同的效力，在古代匈奴社会成为人人遵守的习惯法。

坐盗者没入其家作为匈奴的主要法律记载下来,而且还是唯一的一条关于刑法的法律条文。这条法律条文虽然不长,但包含了数个罪名。如“拔刃尺者死,坐盗者没入其家”就包含了械斗罪、杀人罪、盗窃罪等罪名。匈奴的兵器有长、短之分，长兵器是用来作战的。所谓“拔刃尺者”是指以长兵器用作匈奴内部的械斗，这是法律严厉禁止的行为。因此无论其行为的结果如何都是死罪。匈奴法律之所以特别强调械斗罪、盗窃罪，并制定了如此严厉的刑罚，反映了匈奴内部此类犯罪行为的多发性特征。

3.侵犯财产罪

《匈奴传》在介绍匈奴习俗时说，匈奴“各有分地,逐水草移徙。”既言“各有分地”,则无故进入他人的“分地”显然是不允许的，其行为本身就已构成犯罪。这种罪名在被认为与匈奴“同俗”的乌孙中也同样存在。据《汉书》卷九十六《西域传》载，雌栗靡为乌孙大昆弥时，曾颁布了一条法令曰:时大昆弥雌栗靡健，翕侯皆畏服之，告民牧马畜无使入牧，国中大安和翁归靡时。“无使入牧”的含义，颜师古注为“勿入昆弥牧中,恐其相扰也”,这是符合原意的，但如果解释为“无使入昆弥及他人牧地”则更为贴切。它表明无论是在匈奴,还是在乌孙，随意闯入他人的牧地是侵犯他人财产的犯法行为,是要被治罪的。匈奴法律对于其

他的日常刑事犯罪行为并无更细的划分,只是以“大罪”、“小罪”等罪名加以区别。这一方面反映出匈奴法律的民族特征,同时也说明匈奴社会尚保留着大量的原始习俗。

4.违背盟誓罪

汉高祖白登之围时，曾与匈奴立有盟约，规定秦故塞以北为匈奴游牧之地，秦故塞以南为汉朝管辖，但匈奴并未认真执行。《匈奴传》载汉文帝时，匈奴右贤王不顾汉朝与匈奴的和亲盟约，常常侵扰汉边界。汉为此致书匈奴，就匈奴犯边一事指责单于违约。匈奴单于回书曰:汉边吏侵侮右贤王，右贤王不请，听后义卢侯难支等计，与汉吏相恨，绝二主之约，离昆弟之亲。……今以少吏之败约，故罚右贤王，使至西方求月氏击之。匈奴单于罚右贤王西击月氏，显然是一种托词,但却可以证明此类罪名的存在。《南匈奴列传》记载韩昌、张猛与匈奴单于订立盟约时也曾经规定,“自今以来，汉与匈奴合为一家，世世毋得相诈相攻。有窃盗者，相报，行其诛，偿其物。”这也是对违约者的处罚。

（三）诉讼和纠纷解决机制

在古代匈奴社会最初形成过程中，一般解决冲突的方法是直接找部族首领。冒顿单于自立后，匈奴社会获得了长足的发展达到鼎盛时期。匈奴没有文字，早期的匈奴社会主要是靠大家的自觉性和道德相互约束。当时的社会发展水平较低，社会生产力不高，生活生产资料有限，所以冲突不多。匈奴社会初期的冲突调适完全可以依靠首领和众人的劝说而解决。到中后期，才出现部分有特殊原因的符号，但没有自己完整成体系的文字。匈奴社会发展到鼎盛时期以后，社会各方面长足发展，社会矛盾也增多，便产生了“首领制法”。史记载“其法，拔刃尺者死，坐盗者没入其家，有罪小者轧，大者死。狱久者，不过十日，一国之囚不过数人。”这里的法是指习惯法而非成文法。由此段文字不难看

出，匈奴社会中期习惯法已经相当完善，基本得到大家的共识。由首领提出规则告知部族所有人，大家落实遵守。出现冲突时，就会找德高望重的人或者头领解决。匈奴社会发展到后期，各项制度渐渐完善，于是就出现了狱讼。后汉书记载“呼衍氏为左，兰氏、须卜氏为右，主断狱听讼，当决轻重，口白单于，无文书簿领焉。”匈奴后期已经成立了专门管刑事和民事犯罪的部门，而不是最初的靠部族首领和人们的道德来约束。这也说明匈奴的奴隶社会已达到较高水平。

三、匈奴习惯法的影响和意义

匈奴习惯法对中国古代北方游牧民族有着重要的影响，其中许多习惯法被传承，规范着其他少数民族人们的生活行为。

匈奴国家政治制度中，单于为最高首领，总揽一切军政大权，单于之下有左右贤王、左右谷备王、左右大将等等。匈奴这种左右翼和什、百、千、万十进制的军事行政组织形式，一直为后来的北方民族所承袭。如乌桓就有千夫长、百夫长的军事组织形式，柔然有“千人为军”、“百人为幢”的十进制组织，蒙古族也有百夫长、千夫长、万夫长的设置。匈奴的政权机构分为三大部：统治中心即单于庭，居于匈奴中部，左右贤王庭分别居于东部和西部。公元二世纪中叶,鲜卑首领檀石槐也将鲜卑政权分为左、中、右三部，足见匈奴政权形式对于鲜卑的影响。今天内蒙古自治区仍采用左、中、右旗的行政划分法，究其渊源沿于匈奴。公元一世纪，匈奴分为南北，南匈奴附汉，北匈奴被迫西迁。当北匈奴从漠北西迁到乌孙，再由乌孙继续往康居迁徙时，其“羸弱不能去者,住龟兹北”。龟兹，今新疆库车县一带，这些留居在龟兹北边的匈奴人后来建立了拥地数千里、众二十余万的悦般政权。这是匈奴在中国新疆境内建立的政权，它对于中国新疆地区的早期开发不无影响。

匈奴人从小就习骑射，亦兵亦牧,这种上马则备战斗,下马则屯聚牧养的游牧民族习俗一直为以后的北方诸游牧民族所继承发扬，这也是北方游牧民族兴起和强盛的原因之一，而匈奴则是具有这种天性的头一个强大民族。匈奴“以马上战斗为国”,其所积累的军事战斗知识非常丰富，汉初冒顿单于与高祖刘邦在平城交战，采用的是“详(佯)败走,诱汉兵”的战术。这种诱兵战术亦为后来的北方民族所采用。

匈奴还与其他民族互为杂居、融合。魏晋南北朝时及以后的杂胡，包括屠各卢水胡、揭胡、乌丸、乞伏、稽胡，莫不是已经或不断分解的匈奴族与其他各族融合的结果。但这些所谓匈奴别部或匈奴别种的杂胡，魏晋以后都逐渐淹没于史籍，除少数融合到北方塞外各族如蠕蠕、高车、突厥中外，大多数都融合到中原汉族之中，成为汉族中新增加的姓氏，如呼延氏、刘氏、乔氏、卜氏、金氏、曹氏等等。匈奴的畜牧业、木制业、毛织业、陶器等手工业也较发达，特别是匈奴的冶铁业在汉代就已具有相当的规模和水平，其冶铁业主要是生产兵器、重要的工具和马具等。匈奴人居住的穹庐即以毛毡为墙而成，匈奴人住穹庐即颤(毡)房、食肉饮酪的生活习俗一直为当时和后来的其他少数民族所吸收。如乌桓鲜卑、突厥、乌孙、柔然、吐谷浑等皆“穹庐为室兮毡为墙,以肉为食兮酪为浆”，大体与匈奴同俗，特别是匈奴人所发明的毡房(即后来的蒙古包)至今还为蒙古、藏、哈萨克等民族所沿用。

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Online Grooming, Cyberbullying, Human Trafficking, and Juvenile Criminal Liability under Chinese Law

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Abstract: This article examines the legal framework governing online grooming, cyberbullying, human trafficking, and juvenile criminal liability in the People's Republic of China. Drawing on the Criminal Law of China, the Law on the Protection of Minors, and judicial interpretations by the Supreme People's Court and Supreme People's Procuratorate, the analysis highlights how Chinese law addresses online offences against minors and the liability of minors as offenders. While online grooming is not explicitly codified, it is subsumed under abduction, trafficking, and rape provisions, with attempt liability applicable where abduction does not occur. Cyberbullying is criminalized under the offence of "picking quarrels and provoking trouble," with a relatively low threshold when severe harm or public disruption results. Human trafficking facilitated by electronic means is punishable both as attempt and as a completed crime, with harsher

penalties when combined with sexual abuse. Juvenile offenders are treated differently from adults, with reduced sanctions and emphasis on education, though minors can be prosecuted for serious online offences, including grooming, cyberbullying, fraud, and facilitation of trafficking. The article concludes that while legal protections for minors in China are extensive, policy reforms continue to adapt to the challenges of cyberspace.

Keywords: Online grooming, Cyberbullying, Human trafficking, Juvenile justice, Chinese criminal law

Introduction

The rapid growth of digital communication technologies has created new challenges for legal systems worldwide. In China, issues such as online grooming, cyberbullying, human trafficking through electronic means, and the involvement of minors in such activities have increasingly come under scrutiny. The Chinese legal framework addresses these phenomena primarily through the Criminal Law of the People's Republic of China (《中华人民共和国刑法》), the Law on the Protection of Minors (《中华人民共和国未成年人保护法》), and supplementary judicial interpretations issued by the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP). This article provides an overview of the Chinese legal responses to these issues, with particular focus on the liability of minors and the applicability of criminal and administrative sanctions in cyberspace.

1. Definitions of "Child" and "Minor" in Chinese Law

The distinction between a *child* and a *minor* is foundational in the Chinese legal system, as it determines both the scope of protection afforded to victims and the extent of criminal liability imposed on offenders.

a. Definition of "Child"

The 1984 *Reply to Several Questions Concerning the Specific Application of Laws in the Handling of Human Trafficking Cases* (最高人民法院《关于处理拐卖妇女、儿童案件具体应用法律若干问题的解答》) issued by the Supreme People's Court (SPC) provides the most detailed classification of age groups relevant to trafficking and abduction cases. It distinguishes:

- **Infants (婴儿)**: under one year of age.
- **Toddlers (幼儿)**: between one and six years old.
- **Children (儿童)**: between six and fourteen years old.

On this basis, the SPC determined that for the purposes of trafficking and abduction offences, the broad category of "children" (儿童) extends to all persons under the age of 14. This classification remains significant in criminal practice, as it establishes a lower threshold of vulnerability and triggers harsher penalties for crimes involving victims under this age.

b. Definition of "Minor"

By contrast, the term *minor* (未成年人) has a broader legal meaning. Article 2 of the *Law of the People's Republic of China on the Protection of Minors* (1991, revised 2006, 2012, and 2020) defines minors as "citizens under the age of 18." This definition applies across

civil, administrative, and criminal contexts, and functions as a general principle of child protection law in China.

Thus, the legal system recognizes a dual categorization: a "child" under 14 years old (with heightened protection in criminal cases, especially trafficking and sexual offences), and a "minor" under 18 years old (with protection extending to educational, administrative, and family law matters).

c. Age of Sexual Consent

The *Criminal Law of the People's Republic of China* (Article 236) establishes 14 as the age of sexual consent. The provision specifies that "whoever rapes a young girl under the age of 14 shall be deemed to have committed rape and shall be severely punished" (强奸不满十四周岁的幼女的，依照强奸罪从重处罚). The law treats sexual intercourse with a girl under 14 as statutory rape, irrespective of her consent. This standard reflects the legislature's presumption of incapacity to consent and the heightened need to protect children from exploitation.

2. Online Grooming and Criminal Liability

The concept of "online grooming" (网络诱拐/网络勾引) does not appear explicitly in the *Criminal Law*. However, its underlying conduct is addressed through overlapping provisions concerning abduction, trafficking, and sexual offences. The Chinese criminal law system does not typically create offence categories for each new technological development; rather, it applies existing offences to novel contexts such as cyberspace.

a. Abduction and Trafficking of Minors

Article 240 of the *Criminal Law* criminalizes abducting and trafficking women and children. It provides that "whoever abducts and traffics in women or children shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years and shall also be fined" (拐卖妇女、儿童的，处五年以上十年以下有期徒刑，并处罚金). The constituent elements of this offence include the use of **violence, coercion, deception, inducement, or other methods** to remove a woman or child from her lawful guardianship and transfer her to another person.

Online grooming, when involving inducement or deception aimed at persuading a minor under 14 to meet in person, may therefore fall within the preliminary acts of abduction. The focus of Article 240 is not solely on physical removal but also on the use of manipulative means to gain control over the victim.

b. Grooming without Abduction: Attempt Liability

Where the perpetrator engages in online grooming but fails to complete the act of taking the minor away, the law applies the doctrine of **attempted crime** (未遂犯) under Article 23 of the *Criminal Law*. An attempted crime arises where the offender has already undertaken acts to commit a crime but, for reasons independent of their will, has not succeeded in completing it. Accordingly, if evidence shows the intent to abduct or sexually exploit the child, grooming behavior—even without physical contact—may be prosecuted as an attempt.

c. Joint Crimes and Division of Labor

In cases of **joint crimes** (共同犯罪), liability may attach even when the grooming activity is carried out by one accomplice, provided that another perpetrator completes the act of abduction, transfer, or sale within the agreed division of labor. For example, if one offender

grooms a minor online while another arranges the physical transfer, both may be held liable for a completed trafficking offence.

d. Legal Implications

Consequently, while online grooming itself is not codified as an independent crime, Chinese law addresses it indirectly. Grooming that culminates in abduction or sexual assault constitutes a completed crime under Articles 240 or 236. Grooming that falls short of physical removal may still result in criminal liability as an attempt, depending on the circumstances and the provable intent of the perpetrator.

3. Cyberbullying and Public Order Offences

a. Legal Basis: "Picking Quarrels and Provoking Trouble"

China does not define "cyberbullying" (网络欺凌) as a distinct offence in the *Criminal Law*. Instead, harmful online conduct such as harassment, intimidation, and abuse is prosecuted under the broader offence of **picking quarrels and provoking trouble** (寻衅滋事罪), codified in **Article 293** of the *Criminal Law of the People's Republic of China*.

Article 293 provides that a person who engages in willful acts that disrupt public order, including abusive, intimidating, or harassing conduct via information networks, may be subject to criminal liability. The provision was further clarified by the **2013 Judicial Interpretation** of the Supreme People's Court (SPC) and Supreme People's Procuratorate (SPP), which explicitly extended its scope to conduct committed online. Specifically, the Interpretation states that:

"Using information networks to abuse or intimidate others, if the circumstances are vile and disrupt social order, shall be convicted and punished as the crime of picking quarrels and provoking trouble."

This extension formally incorporated cyberbullying, cyberstalking, and similar online behaviors into the ambit of criminal law, despite the absence of a standalone cyberbullying offence.

b. Threshold for "Disrupting Social Order"

One of the most contested aspects is the threshold for establishing that online abuse constitutes a disruption of "social order" (社会秩序). Unlike Western jurisdictions, which often require evidence of direct, individualized harm (such as serious emotional distress or threats of violence), the Chinese standard emphasizes the broader *social impact* of the act.

The threshold is not set especially high. Courts consider factors such as:

- The **severity of harm** to the victim (e.g., suicide, mental illness).
- The **scope of dissemination**, including whether abusive posts or videos went viral or attracted wide public attention.
- The **extent of disruption**, including whether the conduct undermined online order, caused significant public reaction, or damaged social stability.

Thus, ordinary peer bullying among classmates may not rise to the level of criminality unless the harm is severe. However, once a

victim's psychological well-being is gravely affected or public order is seen as disrupted, prosecution under Article 293 becomes likely.

c. The Liu Xuezhou Case and Regulatory Reform

A tragic example of the consequences of online abuse is the **Liu Xuezhou incident** (2022). Liu, a 15-year-old boy who had been abandoned as an infant and later adopted, became the target of intense cyberbullying after publicly seeking his biological parents. He was subjected to widespread online ridicule and harassment, which contributed to his suicide.

The case sparked national outrage and highlighted the deficiencies of China's existing legal framework for protecting minors from online abuse. In response, the **Cyberspace Administration of China (CAC)** and the **State Internet Information Office** announced efforts to strengthen preventive mechanisms. Among the most notable initiatives is the drafting of the **Regulations on the Protection of Minors on the Internet** (《未成年人网络保护条例》), which aim to:

- Establish clear duties for platforms to monitor and delete harmful content.
- Impose stricter verification and reporting obligations on service providers.
- Expand family, school, and community responsibilities for online safety.
- Incorporate the principle of "comprehensive governance of social order" (社会综合治理) into cyberspace, emphasizing a

multi-agency approach involving public security, education, telecommunications, and health authorities.

This demonstrates the Chinese model of addressing cyberbullying not only through punitive criminal law but also through preventive regulation, administrative enforcement, and systemic governance.

4. Human Trafficking and Electronic Facilitation

a. Human Trafficking under Article 240

Human trafficking (拐卖人口) is explicitly criminalized under **Article 240** of the *Criminal Law*. The provision punishes acts of abducting, selling, purchasing, or otherwise transferring women and children through means such as coercion, deception, or inducement. Sentences range from five years' imprisonment to life imprisonment or the death penalty in aggravated cases (e.g., causing death, involving multiple victims, or subjecting victims to sexual exploitation).

b. Distinguishing Grooming for Trafficking and Grooming for Sexual Exploitation

Although both trafficking and sexual exploitation often involve grooming behaviors, they are treated as distinct offences in Chinese criminal law:

- **Sexual exploitation of minors** is prosecuted under **Article 236** (rape) or **Article 237** (forcible molestation/indecent assault). Consent is legally irrelevant when the victim is under 14.

- **Trafficking of minors** is prosecuted under **Article 240**, focusing on the act of transfer and control rather than the sexual element.

If sexual abuse occurs during the course of trafficking, the law imposes **cumulative liability** (从一重处罚), meaning the perpetrator may face more severe punishment due to the combination of crimes.

c. Online Facilitation of Trafficking

With the advent of the internet and social media, grooming for trafficking often occurs online, where perpetrators use false identities, promises of work, or romantic manipulation to lure minors. Chinese courts have treated such behavior as falling within the scope of Article 240 when it is linked to an intent to abduct or traffic a minor.

Importantly, even where no actual abduction occurs, **attempt liability** applies under **Article 23 of the Criminal Law**. If evidence shows that a perpetrator engaged in online grooming with the concrete intent to traffic a minor but failed to consummate the act for reasons beyond their control, the crime is considered attempted trafficking (拐卖未遂). The punishment for attempt is generally lighter than for a completed crime but still significant.

d. Policy Implications

This legal approach underscores two features of Chinese law:

1. **Preventive emphasis**: By allowing grooming acts to be punished as attempted trafficking, the law intervenes before the victim is physically abducted.

2. **Dual-track accountability**: When online grooming overlaps with sexual abuse, offenders face liability under both trafficking and sexual offence provisions, ensuring stricter sanctions.

The reliance on existing provisions, rather than the creation of a stand-alone "online grooming" offence, reflects China's tendency to adapt traditional criminal categories to digital contexts rather than proliferate new offences.

5. Juvenile Offenders and Differentiated Treatment

a. Criminal Liability Age Framework

China applies a **tiered system of criminal responsibility** based on age, as stipulated in **Article 17 of the Criminal Law**:

- **Under 14 years**: No criminal liability (completely exempt).
- **14–16 years**: Criminal liability only for eight serious offences, including intentional homicide, intentional injury causing serious harm or death, rape, robbery, drug trafficking, arson, explosion, and poisoning.
- **16–18 years**: General criminal liability applies, but punishment is reduced.

This framework reflects the balance between accountability and protection, rooted in the principle that juvenile offenders are both perpetrators and vulnerable persons in need of rehabilitation.

b. Judicial Philosophy: "Education First, Punishment Second"

The **Supreme People's Court (SPC) Opinions on Strengthening Juvenile Trials in the New Era (2021)** reaffirm the guiding principle of **"education first, punishment second" (教育为主、惩罚为辅)**. Courts are instructed to:

- Apply **leniency** where possible, prioritizing non-custodial measures such as probation, suspended sentences, and community corrections.
- Consider the offender's **family background, social environment, and prospects for reform** in sentencing.
- Provide **two-way protection**: safeguarding the legitimate rights of both juvenile offenders (against excessive punishment) and victims (through compensation and restorative justice mechanisms).

This represents a shift toward **restorative justice** and away from retributive approaches in juvenile cases.

c. Extended Jurisdiction of Juvenile Courts

Juvenile courts are specialized tribunals within the people's courts. Their jurisdiction is defined not only by age but also by **educational context**:

- **Primary rule**: Defendants under 18 at the time of the offence and under 20 at the time of trial are tried in juvenile courts.

- **Extended application**: Students under 22 may also be tried in juvenile courts if their cases relate to youth development, education, or peer relationships.

This flexible jurisdiction reflects recognition that maturity and social dependence extend beyond legal adulthood.

d. Sanctions and Administrative Penalties

There is no separate catalogue of sanctions for minors. Instead, punishments are **lighter in degree**, reflecting the principle of mitigation under Article 17. In addition:

- Administrative penalties can apply under the **Public Security Administration Punishment Law (PSAPL)**. For instance, **Article 21** allows fines, warnings, or short-term detention for minor public order violations.
- For juvenile offenders, administrative penalties are often coupled with parental notification, school involvement, or mandatory counseling.

e. Civil Reparations

Even if a juvenile is below the age of criminal responsibility (under 14), victims retain the right to seek **civil damages** under the *Civil Code* and *Tort Liability Law*. Courts may order parents or guardians to bear liability for harm caused by minors. This ensures victim protection where criminal punishment is unavailable.

- **6. Special Issues: Minors as Perpetrators**

a. Online Grooming by Minors

If a minor **aged 14 or above** grooms a child under 14 with intent to rape, the conduct falls under **Article 236 (rape)**. Even if the rape is not completed, the minor may be punished for **attempted rape** (未遂犯).

- If no intent to rape is present, mere grooming does not independently constitute a criminal offence, as Chinese law has not yet codified grooming as a standalone crime.

b. Cyberbullying by Minors

Minor forms of online bullying (e.g., insults among peers) may not reach the criminal threshold. However, where bullying causes **serious psychological harm, widespread dissemination, or suicide**, minors can be prosecuted under **Article 293 (picking quarrels and provoking trouble)**.
Courts take into account both the **age of the offender** and the **extent of the harm** in determining whether administrative or criminal measures are more appropriate.

c. Sexual Harassment Online

Online sexual harassment (e.g., sending obscene messages, repeated solicitation) is generally treated as an **administrative violation** under the PSAPL rather than a criminal offence. Police may impose fines or short-term detention. However, if harassment escalates into coercion or physical abuse, criminal liability may arise under **Articles 237–238** (indecency and insult to women).

d. Misinformation and Fraud

Criminal liability for fraud (诈骗罪) attaches to individuals **aged 16 and above**. Thus, minors who spread misinformation or commit online fraud below this age generally escape criminal punishment but may still face school discipline, family interventions, or civil liability.

e. Minors Facilitating Trafficking

Chinese judicial practice confirms that minors can themselves become perpetrators in trafficking-related offences. A notable case occurred in **2008**, where **17-year-old Sun** lured two underage girls into prostitution. He was convicted of **assisting trafficking/prostitution** and sentenced to five years' imprisonment and fined 5,000 yuan (reported by *China News* in 2010).
This illustrates that juvenile offenders involved in organized crimes such as trafficking are subject to serious criminal sanctions despite their age.

7. Broader Observations

a. Prevalence of Online Fraud over Grooming

While **grooming and trafficking** attract strong public concern and international attention, data suggest that **online fraud** is more common among juvenile offenders in China. Typical cases involve minors engaging in telecom fraud, online scams, or digital extortion.

b. Data Gaps

Systematic statistics on juvenile prosecutions for online offences are limited. Most information comes from *case law databases* (e.g., China Judgments Online) or media reports. This lack of transparency makes it difficult to assess trends, though anecdotal evidence suggests an upward trajectory in internet-related juvenile crime.

c. Policy Direction

Chinese criminal policy shows a trend toward:

1. **Tightening preventive regulation** of cyberspace, with increased platform accountability (e.g., CAC regulations on minors' online protection).

2. **Strengthening family-school-social responsibility** mechanisms to prevent juvenile offending.

3. **Expanding administrative controls** as a flexible alternative to criminal prosecution for minor misconduct.

4. **Maintaining rehabilitative orientation**, particularly through restorative justice initiatives in juvenile courts.

Conclusion

China's legal framework regarding minors reflects a **dual orientation**: on the one hand, it provides **strict punitive measures** to safeguard children from exploitation, abuse, and trafficking; on the other, it adopts a **protective and rehabilitative stance** toward juvenile offenders themselves.

In the area of **online grooming**, although the Criminal Law does not explicitly recognize grooming as a standalone offence, its substantive

elements overlap with existing provisions on rape, abduction, and trafficking. This allows courts to impose liability where intent and preparatory acts are clear, even on the basis of attempt liability. However, the absence of a specific offence leaves certain gaps, particularly in cases where manipulation occurs online without immediate physical harm.

With respect to **cyberbullying**, China has integrated digital misconduct into the long-established category of **picking quarrels and provoking trouble (Article 293)**. This illustrates a flexible use of public order offences to address new social harms. High-profile cases, such as the **Liu Xuezhou incident (2022)**, have underscored the severe consequences of online abuse and have pushed regulators to strengthen the governance of cyberspace. The ongoing development of the **Regulations on the Protection of Minors on the Internet** represents an attempt to codify preventive and supervisory responsibilities for online platforms, thereby embedding child protection more explicitly within China's digital governance regime.

Human trafficking, particularly when facilitated by electronic means, remains one of the gravest crimes against children. Article 240 of the Criminal Law ensures heavy penalties for those who deceive or abduct minors, with harsher sanctions where sexual exploitation is involved. Importantly, online grooming with trafficking intent may be punished as an attempted crime, reflecting a preventive and anticipatory approach to criminal liability in the digital era.

When minors themselves become offenders, Chinese law applies a differentiated system. The **tiered criminal liability ages (14, 16, and 18)** reflect a nuanced understanding of cognitive development, culpability, and capacity for reform. Judicial policy, particularly the **SPC's 2021 Opinions on Juvenile Trials**, emphasizes "education first, punishment second," prioritizing non-custodial measures, restorative

justice, and social reintegration. At the same time, serious crimes such as rape, trafficking, and severe cyberbullying committed by minors may still result in significant custodial penalties.

More broadly, China's criminal policy illustrates an **adaptive balance between repression and protection**. On one side, the law demonstrates an uncompromising stance against adults who exploit children, ensuring deterrence and public protection. On the other, it recognizes that juvenile offending often reflects broader social, familial, and developmental challenges, and thus requires correction and education rather than solely punitive sanctions.

Finally, the increasing **intertwining of law and technology** in China underscores the dynamic nature of this field. Online platforms are not only potential facilitators of harm (through grooming, bullying, and trafficking) but are also key actors in preventive governance, through content moderation, reporting mechanisms, and algorithmic supervision. The ongoing evolution of China's legal framework suggests a trend toward greater **platform accountability**, more precise regulation of digital conduct, and stronger integration of criminal, administrative, and civil remedies.

In sum, China's approach to online grooming, cyberbullying, and trafficking reflects a **comprehensive but evolving system** that seeks to protect minors as victims, regulate them as potential offenders, and adapt continuously to the challenges posed by the digital age.

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