

Improvement of China's Law Relief for Marital Civil Tort

Zhang, Jingguo

Quxian County Sichuan Public Security Bureau, China

James Ming-Hsun Chiang

California State University, Monterey Bay, USA

Michel Plaisent, Prosper Bernard

Department of management and technology, UQAM, Canada

michelsica@gmail.com, bernard.prosper@uqam.ca

Abstract:

Whether the marital civil infringement should get law relief, and how to remedy, still exist controversy. The jurisprudential basis of law relief about marital civil tort lies in the illegality of marital civil tort, the personality equality and personality independence of civil subject, and conforms to legal applicable rules of the common law and special law. The law relief about marital civil tort can be solved by amendment of relevant judicial interpretations, namely abolish the provisions of original Marriage Law Judicial Interpretation (I) article 29(3), reconfirm the justiciability of marital infringement. Marital infringement law relief should be legislation perfect when making the civil code, focusing on specification of marital infringement claim basis and law relief protection system.

Keywords: Marital tort; Jurisprudential basis; Law relief

1 Introduction

While a spousal relationship subsists, if exist the personal tort and property tort between couples, on the occasion that victim doesn't sue for divorce, and only requires offender to bear infringement liability, whether the court must accept? If the court accepts, and how to make a judgment in accordance with the law, namely exist the "looking for laws" problem of legal basis for judgment.

The opposition scholars have different ideas. Some scholars believe that the current marriage law has set up sound legal liability system including divorce damage compensation for marital fault behavior, can realize the purpose of relief for the victim; ^[1] Marital relations has strong moral ethicality, the role of legal norm should be controlled within reasonable limit. Couple tort civil liability goes against the marriage and family life harmony on the basis of love. ^[2] Infringement act between husband and wife has no illegality, namely the illegality is blocked, moreover there is legal support obligation between husband and wife, the performance of duty of maintenance makes the couple infringement act not derive the right of claim for infringement indemnity. ^[3] Other scholars believe that, even if admit that the marital infringement act is punishable,

how to require perpetrator to be liable for damages, still exist problems, if perpetrator is unable to bear the infringement liability for damages, and the victim's right to claim compensation become an empty promise; The perpetrator to undertake compensation responsibility is that the family property is from the "left pocket" to the "right pocket" in essence, marital property rights and obligations relations have no fundamental change.^[4] For the court how to make a judgment in accordance with the law, scholars with the positive stance think that should clear the conjugal right in the legislation, and regard it as the infringement object of spouses infringement act,^[5] Also some scholars think that should perfect China's marital property system, increase special property system and use it as the system guarantee of perpetrator undertaking the compensation liability for damage.^[6]

In judicial practice, due to the vagueness of the marriage law regulations and the specific provision of relevant judicial interpretation,^① for whether should accept the marital infringement cases, the court has different views, lead to that some courts accept the similar cases and make a judgment, others don't accept according to the specific provisions of relevant judicial interpretations.^[7]

Therefore, about marital civil tort law relief, this topic can be divided into two points: first, whether the couples civil infringement should get the law relief, namely what is the jurisprudential basis of law relief? Second, if the marital civil infringement should get the law relief, then, the law how to remedy, and also how to stipulate in the formulation of "Civil Code"? This paper revolves around the above two questions.

2. Jurisprudential Basis Of Law Relief About Marital Civil Tort

Marital civil infringement liability can be called as marital tort, refers to the tort liability that while a spousal relationship subsists, husband or wife one party implements the infringement act to constitute in accordance with the law. Compared with the general tort liability, particularity is embodied in the following several aspects: one, the time of tort liability has specificity, namely the marriage existing period. Second, offender has a special personal relation with victim, that is the legal marriage bonds. Third, the

^①Article 46 of "Marriage Law" stipulates that there is one of the following situations to lead to divorce, no-fault party shall have the right to request compensation: (a) Bigamous; (b) The person who has a spouse and live together with another person; (c) The implementation of domestic violence; (d) Maltreat or desert the family members. If a party of husband and wife doesn't to sue divorce, whether the victim has the right to require the offender to assume the liability of infringement damage compensation, this article has no definite provision. Judicial interpretation makes up it, the Supreme People's Court interpretation about several problems of applying to "Marriage Law of the PRC" (I) [Legal interpretation (2001) no.30] (hereinafter referred to as the "marriage law judicial interpretation (I)"), according to the provision of article 29(3), "while a spousal relationship subsists, one party doesn't to sue divorce and only request damage compensation according to the provision of this clause, the people's court shall not accept the case."

property tort liability needs the offender personal property to bear in accordance with the law, assumption of responsibility will inevitably involve the marital property system.

The legitimacy of marital civil tort liability law relief is rooted in the illegality of conjugal infringement act. When illegal infringement act causes another party of damage or sabotage, the offender shall bear the corresponding tort liability according to law. According to the provisions of article 2 of tort liability law, those who infringe upon civil rights and interests, shall bear tort liability according to law.^①The conjugal infringement act is usually the general infringement act, constitutes the general tort civil liability. According to the presence or absence of damage fact, the conjugal general infringement act can be divided into two categories:

- One category is damage compensation liability, liability composition needs to have the four elements of illegal behavior, damage fact, causal relationship between illegal behavior and damage fact, and subjective fault;
- Another category is the non-damage compensation liability, including stopping infringement, restitution of property, removal of obstacles, elimination of dangers, reinstatement, elimination of ill effects, rehabilitation of reputation, extending a formal apology, and other liability forms.

That is to say, to infringe the husband and wife any one party's civil rights and interests, and thus constitute a tort liability, shall be in accordance with the provisions of "tort liability law" to bear the corresponding tort liability, tort liability is the negative legal evaluation to the offender's illegal behavior. And the substantive elements of tort liability are infringement acts, no act and no liability. The marital infringement act is embodied in the implementation of illegal acts to infringe upon another party's lawful property rights or personal rights and interests, perpetrators of implementing the illegal act shall undertake the legal liability of illegal act.

The legitimacy of marital tort liability law relief conforms to the law applicable rules of the general law and special law. In terms of tort liability, tort liability law is the general law, marriage and family law is the special law. According to the applicable law of the general law and special law, the general law is universally applicable law in the country that aims at person, general things and general time; The special law is the applicable law that aims at specific persons, specific things or specific areas and specific time. ^[8] In terms of China's marriage and family law and its judicial interpretation, the law regulations of conjugal infringement act (also including judicial interpretation) mainly manifest in the divorce damage compensation system in the "Marriage Law", "Anti-domestic Violence Law" and article 29(3) of Supreme People's Court interpretation about several problems applying to "Marriage Law of the People's

^① The article 2 of "tort liability act" stipulates that "those who infringe upon civil rights and interests shall be subject to the tort liability according to this law. The civil rights and interests include the right to life, the right to health, right of name, right of reputation, right of honor, right of portrait, right of privacy, marriage autonomy, guardianship, ownership, real right for usufruct, real rights for security, copyright, patent right, exclusive right to use trademark, the right of discovery, stock right, right of succession, and so on personal and property rights."

Republic of China" (I) [legal interpretation (2001) no.30]. Divorce damage compensation system is not the legal liability basis of conjugal infringement act during the existence of marital relations, "Anti-Domestic Violence Law" regulated the system of personal safety protection order, ^① didn't not involve the problem that victim of domestic violence is not to sue divorce and only requires offenders to bear tort liability. As for the article 29 of marriage law judicial interpretation (I), explicitly stipulates that only the victim sues for divorce, can require offender to tort liability according to the divorce damage compensation system of article 46 of marriage law. Therefore, in terms of couple tort civil liability, as the special law of marriage and family law as well as relevant judicial interpretation, there does not exist legal basis to specification of couple infringement act currently, only exists the legal norms of infringement damage compensation liability within the scope of specific infringement acts at the time of a divorce, only relevant judicial interpretation has violated the judicial interpretation proper positioning, beyond the "legislation" authority to rule out the procedural rights of victim during the marriage, makes the court in the face of marital infringement cases exist the difficulty of "looking for law" in the existing marriage and family law and judicial interpretation category. When appear the difficulty of "looking for laws" in the special law, should resort to the general law in the field of tort liability, namely the "Tort Liability Law". Under the background without the special law, the court uses the "Tort Liability Law" to deal with the couple tort civil liability, the conjugal special identity, time specificity in the marriage existing period, and other particularity of conjugal tort civil liability, can't be the legal reasons to constitute infringement responsibility.

The legitimacy of marital civil tort liability law relief is the embodiment of civil subject personality equality and independence. On the one hand, from the perspective of civil subject qualification, the civil subject qualification is personality, ^[9] the qualification namely personality of all civil subject are equal before the law. ^②Equality as the basic value idea and basic principle of civil law, one of its core meanings is that the law protects all civil subject equally, not because of the civil subject's identity, status, religious faith, nationality and others to have difference. While a spousal relationship subsists, if one party of husband and wife implements infringement act and damage another party's personal rights or property rights, the offender as infringer should bear tort liability to the infringement act in accordance with the law, the legal safeguard of victim's personal or property rights is the embodiment of law equally protecting the legal rights and interests of all the civil subject, not affected because of victim's husband or wife identity, otherwise, the marriage will become the law forbidden area of tort liability, this is unthinkable for a modern democratic country. On the other hand, civil subject has the independent personality, any civil subject can't enforce own will on

^① Refer to the fourth chapter of "Anti-Domestic Violence Law"

^② In the civil law, personality usually has three meanings, one is the qualification of civil subject, second is the capacity for civil rights, third is the personality right. This paper uses the word "personality" on the first kind of meaning.

other civil subject, any civil subject has own rights to decide their own affairs, including the rights through legal action to defend their lawful rights and interests. During the duration of marriage, husband or wife doesn't lose the natural rights of independent personality due to the specific identity, any one party can't enforce own will on another party, can't break the law to infringe another party's legitimate rights and interests without permission; One party's legitimate rights and interests are violated, and have the rights to independently make the punishment including resort to the law to protect their legal rights and interests. So, the legitimacy of marital tort civil liability is valid claims of couple to the law about equality and independent personality.

3. Improvement of Marital Civil Tort Law Relief

Two persons conclude the marriage relations, the existence of couple legal status can't be the reason that one party suffers the unlawful civil infringement and doesn't receive the law relief, which is contrary with the spirit of using the law to govern the country and concept of governing country of human rights assurance. Therefore, under the background that the victim doesn't advocate divorce or not put forward divorce proceedings, the court should accept the victim's claims to call to account the offender's tort liability according to law and make legal judgment. In order to protect the victim's legitimate rights and interests, this paper puts forward the following opinions.

3.1 The amendment of relevant judicial interpretations

As described in the previous section, the marriage law judicial interpretation (I) has made specific provision, namely if the party doesn't sue for divorce and separately claims compensation for damage according to the provisions of article 46 of "Marriage Law", the court shall not accept it. The problem of this provision is worth studying. One is the judicial interpretations whether have power to make such provision? According to the provisions of NPC Standing Committee about legal interpretation decision, Supreme People's Court explains the problems of law and decrees specific application in the court trial work.^① The Marriage Law has no specific provision about the marital infringement, marriage law judicial interpretation (I) as the legal interpretation of the highest judicial organ, whether it is beyond the authorization of the NPC Standing Committee, which is worth studying. The key of judgment lies in such interpretation whether belongs to the problem of specific application of laws and decrees! This paper thinks that, under the situation that the marriage law didn't explicitly stipulate the marital infringement law relief, relevant judicial explanation has been beyond the scope of authority of the National People's Congress (NPC), at the same time also violated the purpose of authority itself. The second is whether the marital infringement law relief must be through judicial interpretation to explicit? Within the category of marriage and family law, the law problem belongs to the legal

^① Refer to the second article of "decision of the NPC Standing Committee on strengthening the legal interpretation work"

loophole, namely can't find the specific basis of marital infringement law relief within the scope of reasonable law. But from the entire civil infringement law category to analyze, except with a specific identity relationship, the conjugal infringement and ordinary infringement have no the substantial difference, should adopt the purpose amplified interpretation, starting from the legislative purpose of protecting the victim's legitimate rights and interests, the conjugal infringement and ordinary infringement will be treated equally, and the "Tort Liability Law" is applicable to all.

Based on the above analysis, at the same time considering the reality of China's court judgment level, this paper thinks that there is the necessity of judicial interpretation to the marital infringement problem. On the one hand, should abolish the provision of article 29(3) of original marriage law judicial interpretation (I). On the other hand, the proposed specific interpretation items are: in the marriage existing period, one party violates the basic principles of Marriage Law and infringes another party's personal rights and property rights and interests, the victim shall have the right to initiate legal proceedings and investigate the offender's liability for tort according to the marriage law, tort liability law, the civil procedure law and other laws. The significance of such interpretation lies in that both remind judge according to other laws to compensate for the law loophole of marital tort in the marriage law, so that the court system can use uniform legal basis to deal with such cases; Also use the judicial interpretation to reiterate the legitimacy of victim law relief for the marital tort, embodies the legislative spirit of marriage law.

3.2 Improvement of marital tort legislation

Marital tort issues should be with the aid of establishment of China's "Civil Code" and the legislation improvement. "General Rules of Civil Law" has been promulgated and will come into effect on October 1, 2017, marriage and family law or relatives law as part of specific provisions of "Civil Code" in the future, should make systematic legislation stipulation to the marital infringement issues.

- 1) stipulate the claims foundation of marital infringement in the general rules of marriage and family law, namely the legal basis that the victim advocates the marital tort. The legal basis of marital tort should be stipulated in the general section, namely, during the duration of the marriage relationship, if one party infringes another party's personal and property rights and interests, shall bear tort liability according to law. About this, it is necessary to make the following instructions.
 - The legal basis of marital tort can set up an article of law separately, also can put in one article with other prohibitive norms. ^①

^① "Marriage Law" should be an important part of marriage and family law or relatives law in the future "Civil Code" to perfect, among them, the legal provisions of marital infringement can merge with the article 3 of the current "Marriage Law". Article 3 are prohibitive provisions, such as prohibit the arranged marriage, mercenary marriage,

- The specific legal basis of marital tort in accordance with the law to bear the liability for tort, mainly include the marriage and family law (that is the relevant specifications of marriage and family law or relatives law in the future "Civil Code") and the tort liability law (that is the relevant specification of tort liability law in the future "Civil Code"), the former specification nature belongs to the special law, the latter belongs to the general law, special law is superior to the general law and applicable.
- The elements of marital tort proceedings are divided into the subject, object and content of proceedings. The subject of proceedings is the marriage litigant, the victim is the accuser and the offender is the defendant. The object of proceedings is the personal and property rights and other legitimate interests. The content of proceedings is relationship of rights and obligation between victim personal and property rights infringement.
- The way of undertaking the tort liability should be based on the victim litigious claim and apply to the relevant provisions of tort liability law^②.

2) The improvement of protection system legislation about the marital tort law relief: .

- Add the unusual property system, perfect the marital property system in China. China's marital property system includes the agreement property system and legal property system, in China, the family of implementing the agreement property system is very limited, the vast majority of family carry out the legal property system. According to the provision of "Marriage Law", legal property system includes the legal community property system and legal separation property system,^① but lack the bridge property system design of legal community property system translating into legal separation property system in the marriage existing period.^[10] This paper thinks that only add the special property system, the judgment of marital tort cases can have the practical significance under the background that the majority of China's family implement the legal property system, namely according to the victim's claims, or the court will change the marital legal community property system into legal separation property system, and then make a judgment and require the offender to bear corresponding property tort liability.

other behavior of interference with the freedom of marriage, etc, this paper put forward the legal basis of marital infringement, in essence, also prohibit the personal and property rights infringement between husband and wife.

^② Article 179 of "General Rules of Civil Law" stipulated 11 ways of bearing civil liability, among "repair, redoing, replacement, "continue to perform" and "payment of liquidated damage" belong to the bearing ways of liability for breach of contract, the rest 8 all can be bearing ways of tort liability, article 15 of "Tort Liability Law" made specific provision. Therefore, the bearing ways of marital infringement can be fully suitable for article 15 of "Tort Liability Law". But consider that the "General Rules of Civil Law" and "Tort Liability Law" will become a part of the "Civil Code" in the future, so, the applicable law of marital infringement liability bearing way is the different normative quote application problem within a code.

^① Article 17 and 18 of "Marriage Law" stipulated the couple legal property system, namely the legal community property system and legal separation property system. Article 19 stipulated the spouse's contractual property system.

- Add the debt voucher system with condition, namely in the marital tort proceeding, under the circumstance that the victim doesn't advocate altering the marital property system or the court thinks that can't change the marital property system, after the victim consent, through judgment to decree offender to bear the property tort liability, takes the "tort liability" as a conditional debt and debt voucher with offender's sign or seal consign to the victim, and the so-called debt "condition" is the date that divorce judgment or divorce registration takes effect. Conditional debt voucher system ensures the possibility that the victim requires the offender to bear the liability for tort under the premise that don't alter the marital property system and victim's agreement, can reduce the negative impact of couple relationship and make for the repair of goodwill as between spouses.
- The short-term prescription of marital tort claims. According to the provisions of "General Rules of Civil Law", the general prescribed period for litigation is three years, calculate from that know or should know the rights damage and obligors. ① After all, the marital tort is different from the general infringement, in view of that the marital tort occurred between couples during the the marriage existing period, and considers the ethical nature of marriage and the change elements of goodwill as between spouses, this paper argues that the limitation of marital tort action should be shorter than the ordinary tort statute of limitations, one year should be advisable, the standard of calculation is invariant, but if the victim personal freedom is curbed illegitimately, should propose within one years since the date of restitution of personal freedom. ②

4. Conclusion

In this paper, main conclusions are as follows:

1. Marital civil tort liability can be called as marital tort, refers to the tort liability that during the marriage existing period one party of husband or wife implements the infringing act to another party to constitute in accordance with the law. The jurisprudential basis of marital tort law relief lies in the illegality of marital tort, civil subject personality equality and independence, and conforms to the legal principle applicable rules of the general law and special law.
2. Marital tort law relief can be solved by the amendment of relevant judicial interpretation. The provision of article 29 (3) of primary marriage law judicial interpretation (I) should be abolished, and promulgate the new provision to replace it. Namely: during the marriage existing period, the party violates the basic principle of Marriage Law and infringe another party's personal and property rights and interests, the victim shall have the right to take legal action

① Refer to the article 188 of "General Rules of Civil Law"

② Here use the relevant provisions of article 11 of "Marriage Law" for reference, if marriage is contracted by coercion and cancel the marriage, namely the coerced party should put forward the claim to cancel the marriage within one year since the date of marriage registration. If one party whose personal freedom is curbed illegitimately requests to cancel the marriage, should propose within one year since the date of personal freedom restitution.

and investigate the offender for tort liability according to the marriage Law, tort liability law, the civil procedure law and other laws.

3. The marital tort law relief should give the improvement of legislation when formulating the "Civil Code". First, to stipulate the basis of marital tort claims in the general rules of marriage and family law, namely during the marriage existing period, if the couple infringes the mutual personal and property right and interests, shall bear tort liability according to law. Second, to improve the protection system of law relief for of marital tort, add the special property system, conditional debt voucher system, short-term limitation system of marital tort claims, etc.

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