

Legal Thoughts on the Divorce Damage Compensation System

Zhenyuan Jin

School of Law, Humanities and Sociology
Wuhan University of Technology
Wuhan, China

Abstract—This article specifically discusses some aspects such as the limitation of the subject of the right to compensation, the limitation of the subject of divorce damage in China, the small compensable scope, and the difficulty of proof for the no-fault party in litigation. Against the background of these issues, this article puts forward proposals to improve the divorce damage compensation system in China, that is, the scope of application of divorce damage compensation should be appropriately expanded, the subject of the right of claim and the subject of responsibility should be further clarified, the burden of proof system should be improved, and spouse rights should be specified so as to effectively protect the lawful rights and interests of spouses without fault and lay a solid legal foundation for the harmony and stability of marriage and family.

Keywords: *divorce, damages, legal system, legal scope of application*

I. INTRODUCTION

China's Marriage Law established a divorce damage compensation system in 2001. This system effectively protects the legitimate interests of the weak, provides legal protection for no-fault parties to obtain damages during divorce, and also maintains the stability of the marriage and family. It is a major improvement on China's marriage and family security system. However, judging from the judicial practice in these years, there are still many shortcomings and deficiencies in the divorce damages compensation system. Freedom of marriage is a basic right of citizens, and divorce is a legal form of the demise of marriage relationships. With the ever-increasing divorce rate in today's society, the establishment of the divorce damages compensation system in the Marriage Law is a major progress in maintaining the stable development of society. The divorce damage compensation system can not only effectively protect the legal rights and interests of spouses without fault in marriage, but also play a significant role in preventing serious fault behaviors in marriage.

II. THE SCOPE AND LEGAL APPLICATION OF DIVORCE DAMAGES IN CHINA

A. *The concept of the divorce damage compensation system*

China's Marriage Law was amended in 2001 and established a divorce damage compensation system. In the current judicial practice, the divorce damage compensation system is considered to be a legal system that compensates for the spiritual and material loss of one party caused by the behavior of the other party as the main reason for the breakdown of the marriage relationship. However, the scope of compensation for divorce damages determined in this way is not comprehensive.

China's divorce damage compensation system has been developed for a short time. There are certain restrictions on the scope of compensation and the determination of liability, which makes it difficult to determine the ownership of liability in judicial practice, and it is difficult to provide corresponding relief to right holders. Therefore, in the development of the divorce damage compensation system, it should be based on the application of laws and ensure fairness and justice to provide relief channels for right holders.

B. *Application scope of divorce damages*

According to the situation of the wrongful act stipulated in Article 46 of China's Marriage Law, during the divorce, the injured party is given the right again to sue to the court for the act of hiding, transferring, or selling the common property of the husband and wife. The injured party may request a re-segmentation of the common property and may claim damages from the fault party. This provision punishes the malicious infringement of husband and wife's common property in the divorce process. The injured party can also apply for compensation for mental damage while requesting material compensation. The scope of divorce damage compensation is a combination of material compensation and spiritual damage compensation to protect the rights and interests of both parties, which is an important manifestation of strengthening the binding force of divorce.

In the determination of the scope of divorce damage compensation in China, there are two different views on the

combination of material compensation and moral damage compensation. One view is that divorce damage compensation is within the scope of spiritual compensation, so the material damage compensation it proposes should be based on the fact that the faulting party has caused actual material damage to the injured party. Another view is that divorce damage compensation can not only include spiritual compensation, but material compensation can exist independently, without the need to be based on the actual material damage during the marriage. Material compensation is a necessary content of divorce damage compensation. [1]

C. Main characteristics of divorce damage compensation

Divorce damage compensation is a special type of tort compensation. It is a tort liability compensation based on the identity of a special civil subject. Therefore, its applicable subject, time and cause are limited qualitative provisions.

First, the subject is specific. At present, the subject of divorce damage compensation as defined in China's Marriage Law is limited to both spouses who have survived the marriage. Other civil subjects are not allowed to enter divorce damage compensation cases. Among the controversial issues is the fact that the third party status of the spousal relationship has not been clarified, and it has not been included in the subject of divorce damages in judicial practice.

Second, time is specific. According to the relevant explanation, "During the marriage relationship, the court will not accept compensation for divorce damages." China's Marriage Law has a clear limit on the time. The divorce damage compensation system applies to the deadline within one year after the divorce, and the special provision shall be one year after the mediation period of the second instance.

Third, the legal particulars are specific. According to Article 46 of China's Marriage Law, the system was originally based on the party who was the fault party for the breakdown of the marriage. Therefore, in addition to the above-mentioned reasons stipulated in the current Marriage Law, acts such as adultery that indirectly lead to the breakdown of the marriage relationship should also be included in the compensation for divorce damages. As long as the subjective behavior that affects the marriage relationship causes the marriage to break up, it can be used as the basis for the injured party's claim in the compensation for tort liability. However, only the specific four acts stipulated by law can be applied to the marital damages compensation system.

D. Principles of law application in divorce damage compensation

The divorce damage compensation system is to restrict the fault party in the marriage relationship, and identify the responsibility of breaking the marriage, so as to protect the rights and interests of the injured party. In order to protect the rights and interests of the injured party in divorce proceedings, the application of Chinese laws highlights the following principles.

The first is the subjective principle of fault liability. The party whose active behavior leads to the breakdown of legal marriage should have clear subjective intention and fault for his own behavior, so that he should bear legal responsibility for his active destruction, otherwise it can't constitute the liability for damages.

The second is the fault-balance principle. Marriage relationship is a relative relationship, and unilateral behavior eventually leads to the unilateral breakdown of the marriage relationship. In many cases, both parties will be at fault for the breakdown of the marriage relationship. In this case, the mixed fault liability of infringement will be constituted. The court will, based on the actual analysis, determine the corresponding liability of the parties by means of active mediation. This is the fault-balance principle.

The third is the principle of full compensation. The principle of full compensation stipulates the specific scope of divorce damage compensation. In divorce damage compensation, it should be based on the actual property loss caused by the party in fault to the injured party. The party in fault shall bear full responsibility, and the injured party may not only obtain compensation for property damage but also apply for compensation for mental damage.

III. DEFECTS IN THE DIVORCE DAMAGE COMPENSATION SYSTEM

A. The subject of the right to compensation in the divorce damage compensation system is limited

According to Article 29 of the Judicial Interpretation of the Marriage Law, the subject of the right to claim compensation for divorce damages shall be the faultless party of the parties to the divorce proceeding, and the responsible party shall be the spouse of the injured party. That is to say, the subject of the right to compensation in China's Marriage Law is only limited to the party who has not been negligent during the marriage.

In real life, the two sides of the divorce proceedings rarely have one party completely without any fault behavior; in fact, it is difficult to determine whether either party has fault behavior, which party is the pure injured party. Such provisions in China's current Marriage Law exclude the protection of the wrongdoing party's relative damage in marriage. The party with the lesser fault is not the party with none liability for fault as determined by the Marriage Law, so it can't be the subject of damages. The wording of the faulty party and the party without fault under the Marriage Law has significantly reduced the scope of the subject of compensation. In addition, in the marriage and family relationship, the parents and children of both parties will inevitably cause corresponding damages due to domestic violence and parental faults. However, these damages due to the divorce cause of both parties without the right to seek compensation can't get corresponding compensation, which is obviously not conducive to the protection of various types of victims. And third parties other than the controversial

husband-wife relationship should be able to defend their rights if they are harmed.

B. Restricted subjects of divorce damage in China

The subject's restriction is not limited to the subject of the right to claim compensation. The relative responsible subject of divorce can only refer to the spouse who has committed wrongdoing in the marriage relationship due to the provisions of the Marriage Law. Among the wrongful acts stipulated in Article 46 of the Marriage Law, acts such as bigamy and cohabitation are obviously actions involving third parties. As the inevitable third party in the faulty act of destroying the marriage relationship, the third party destroys the marriage relationship of both spouses through the behavior and causes damage to the injured party, but does not need to bear the liability for compensation. The law does not regulate such behavior, which is not conducive to the protection of the stable survival of the marital relationship. The third party who deliberately caused the rupture of the marriage relationship seriously infringed the marriage and family relationship of the non-faulting party and damaged their spouse rights, but did not need to bear the liability for damages. This is inconsistent with the value of the Marriage Law legislation that is intended to maintain the marriage relationship. [2]

C. The scope of compensation provided by the divorce damage compensation system is too small

Article 46 of the Marriage Law clearly stipulates that the divorce damage compensation system is only applicable to the four major faults: "bigamy", "cohabitation with another spouse", "domestic violence", and "maltreatment and abandonment of family members". However, with the development of social economy, the bad behavior that destroys marriage relationship can't be limited to the above four types. In particular, how to determine the wrongful act that has not met the above criteria for serious wrongdoing, whether the marriage is broken by adultery, and whether the victim can claim damages on this ground are still unclear. There are also interference in family parental relations, prostitution, drug gambling, and spouse violations of the Criminal Law. If these circumstances lead to the breakdown of the marriage, it is unreasonable under the Marriage Law for the innocent party to fail to claim damages from the fault party. However, the limited scope of compensation for the four cases stipulated in China's Marriage Law legislation is obviously too small, resulting in many cases that the rights of the victims can't be guaranteed and the rights of the group can't be relieved. [3]

D. It is difficult for the litigant to prove the evidence in the divorce damages lawsuit

China's civil procedure law has relevant provisions of "who advocates who gives evidence", and the parties are responsible for providing evidence for their claims. Therefore, in the divorce damages litigation, the claimant must provide evidence to claim that the other party has committed gross wrongdoing. If the injured party wants to

apply for compensation for divorce damages, it is necessary to provide evidence of one party's gross negligence in the marriage relationship, that is, to prove that it has done harm, and also to prove causality. The evidence presented on this basis must be confirmed by the court before the injured party can apply for divorce damages. Divorce is inherently uncertain. The basic trust in the existence of marriage and family life prevents the injured party of the spouse from investigating the wrongdoing of the fault party in a timely manner. Witnesses in family life are usually members of the family. Witnesses may not be willing to testify in court for the privacy protection of both families. Since being a victim in real life, under certain conditions, he or she will be in a disadvantaged position and can't bear the burden of proof. As a result, no-fault parties will not receive judicial remedies and their rights will always be infringed. [4]

Acts such as bigamy and cohabitation are usually covert, so it is very likely that the victim will not know it at all, which will make it impossible to investigate and obtain evidence. Even if clues are found, the acts such as hiring private detectives, stalking and secretly recording will be deemed to be illegal by the court. However, marriage and family life is based on emotion and trust. Even if one party commits wrongdoing, most families will take corresponding recovery measures instead of collecting evidence in the first place.

IV. SUGGESTIONS FOR IMPROVING CHINA'S DIVORCE DAMAGE COMPENSATION SYSTEM

A. Appropriately expanding the scope of application for divorce damages

From the perspective of judicial practice and social reality, it is necessary to expand the scope of cognizance of the fault behavior in the divorce damage compensation system. From the perspective of legislative technology, it is possible to enumerate specific serious wrongdoings that pose great challenges to the basic principles of the Marriage Law, and then include them with pocket clauses. For the following faults such as: one party commits adultery with another, prostitution, "sharing wife together, sharing husband together", one party has drug abuse, gambling and other vices, one party has been sentenced to a major penalty for an intentional crime, one party deliberately concealed from a disease that should not be married, fraudulent maintenance and marital rape and so on, they all should be included in the scope of damages. In addition, the basic clause that "other situations in which one party has serious faults leading to divorce" needs to be adopted to meet the needs of other new problems that have arisen with the development of society, and to make up for the limitations listed. However, among the serious negligent acts that disrupt the marriage and family relationship, for the serious negligent acts that disrupt the marriage and family relationship, it is necessary to make a reasonable distinction between the application of damages between husbands and wives by increasing the legal situation.

B. Further clarifying the subject of the right for claim and the subject of responsibility

Family members include couples and children. The fact of divorce not only harms the faultless party, but also brings indelible psychological obstacles to the growth process of minor children. China advocates protecting the healthy growth of minors and reasonable compensation in material terms is a way to make up for their unsatisfactory status. Therefore, minor children should also have the subject qualification of the right to claim damages. Secondly, the violent and abusive behavior of the fault party may cause harm to the parents, but the author thinks that the parents of the faultless party do not have the subject qualification. Because this part of the claim for damages coincides with the claim of the party without fault. If the faulty party abandons the parents of the faultless party, they should choose to protect their legitimate rights and interests through Civil Law or Criminal Law according to their severity.

On the subject of responsibility, the "third party" should be added as the subject of compensation. [5] Although the third party is not counterparty in the marriage relationship, he or she is an assistant of the wrongdoing party's process behavior. And the third party's act has caused damage to the non-faulty party, which is in line with the requirements of joint infringement. The "third party" here is different from the third person in the concept of Civil Law. Although it is not a counterpart, the existence of the "third party" is a great damage to the rights protected by China's Marriage Law. Secondly, the point of time identified by the "third party" should be the entire duration of the marriage. As long as the marriage is registered and not registered for divorce or before the end of the divorce proceedings, no infringement of the effectiveness of marriage registration is allowed. "Third parties" on the grounds that their love has broken up still need to be bound by law, in order to protect the effectiveness of marriage more authoritatively and comprehensively. When defining the concept of "third party", with the emergence of "sharing wife together" and "sharing husband together", there is no need to restrict their gender. Secondly, the subjective intention of the "third party" needs to be considered. The third party must know or should know that the fault party is married but still take the initiative or indulge in an extramarital relationship with the fault party. It must not include situations in which the fault party made him or her "be forced to be a third party" by illegal means such as coercion or intimidation.

C. Improving the burden of proof system

In view of the fact that proof is difficult for non-fault party in judicial practice, it is necessary to confirm the legitimacy of spouse's legitimate rights and interests. The right to privacy is a basic right and can't be ignored in divorce proceedings. Non-faulting parties must not violate their right to privacy when collecting relevant evidence of counterparty violations; otherwise the evidence obtained will not have legal effect and can't be regarded as legal evidence during the trial of the case. The law should encourage the proper conduct of collecting evidence and explain clearly how to

collect evidence of the other party's immoral behavior in public is a legitimate act that does not violate the privacy of others. The burden of proof of the non-fault party should be reduced, and the fault party should be provided with evidence to the contrary to prove that he or she did not violate the law in order to relieve corresponding liability. Taking the inversion of the burden of proof is conducive to establishing and improving the liability system for divorce damages. In the process of obtaining evidence in a divorce proceeding, the court can assist the non-fault party to obtain evidence to the greatest extent possible, so as to prevent the non-fault party from using improper means to lose its litigation benefits. According to the relevant regulations of China's Marriage Law, the injured party can submit requests for assistance to grass-roots organizations, public security departments and other units, and the relevant departments are also responsible for supporting the injured party to obtain evidence. In the process of obtaining evidence in related cases, the above-mentioned relevant departments should actively cooperate with the non-fault party's evidence collection requirements and provide them with assistance within a reasonable scope to help them obtain material compensation for damage. With the cooperation of the court and relevant departments, the difficulty of obtaining evidence for the victim's spouse will be greatly reduced. [6]

D. Clarifying the basis for the right of claim and making specific provisions on the right of spouse

Regarding the legal basis of the divorce damage compensation system in the academic world, there are two claims of breach of contract and infringement. The author agrees with the point of view of infringement. The infringement theory holds that both parties to the marriage have obtained civil rights related to marriage due to the facts of marriage, and these rights should of course be protected by law. The fault party's wrongdoing has damaged the interests of the counterparty, and naturally it shall bear tort liability. The conclusion of a marriage is essentially a contract. When the two parties have reached the agreement to perform their marriage obligations and enjoy corresponding rights during registration, this is a true and equal expression of both parties. In the divorce damage compensation system, the fault party violates the legal obligation and violates the legitimate rights and interests of the opposite party instead of a pure breach of contract. The non-fault party asks them to pay compensation, instead of violating the agreed obligations and causing them to pay compensation. If the legal basis of the divorce damage compensation system is regarded to be a breach of contract, many practical problems will arise in practical application. Because the serious fault acts stipulated in the compensation for divorce damage not only cause material damage to the non-fault party, but also are peculiar in that it also causes non-negligible spiritual damage to the non-fault party. If the breach of contract is adopted, then the mental damage of the non-fault party will not be compensated, and the vulnerable spouse will not be fully protected in the special marriage relationship.

Therefore, in the Marriage Law, the divorce damage compensation system can be perfected by establishing a special infringement of the right to spouse, which is an urgently needed guarantee system. [7] The concept of spousal right originated from Anglo-American law system and existed in the consensual marital relationship between the husband and wife. Spousal right mainly refers to the rights of the husband and wife to be equal to each other and to enjoy the spouse's loyalty, companionship and help and the corresponding obligations arising therefrom. Although the concept of spouse right is not explicitly stipulated in the Marriage Law promulgated in 2001 in China, the legal community also has different understandings and views on the definition of spouse right. The relevant provisions and implementation of spouse right have yet to be clarified and improved.

E. Clarifying the criteria for divorce damages

Article 28 of the "Interpretation of Marriage Law (I)" clearly states that there are two aspects of compensation for divorce damages: one is compensation for material damages; the other is compensation for mental damages, but it is still a principled provision. In practice, it is not specific enough. In judicial practice, the standard may be affected by the professional quality and discretion of different judges. The circumstances, amount, and whether to include the expected benefits for the damage or loss of husband and wife's common property should be specified on a case-by-case basis; with regard to the claim for compensation for personal injury, when the fault party compensates for the personal injury caused by the fault party, the fault shall be the entire duration of the marriage, including the period of divorce proceedings; with regard to compensation for mental damage, Article 10 of the Interpretation of Compensation for Mental Damage stipulates that when determining the standard of divorce moral damages compensation, the extent of the fault of the faulting party, the severity of the plot, the means and methods, the duration and social impact, and the degree of damage to the non-fault party should be considered. The serious fault of the fault party causes special damage to the non-fault party which is difficult to rely on medical measurement. When setting the standard for compensation for mental damage, the minimum amount shall be determined to play the role of prevention and warning.

V. CONCLUSION

Freedom of marriage is a basic right of citizens, and divorce is a legal form of the demise of marriage relationships. Marriage is a basic right of citizens, and divorce is a legal form of the demise of marriage relationships. With the ever-increasing divorce rate in today's society, the establishment of the divorce damages compensation system in the Marriage Law is a major progress in maintaining the stable development of society. The divorce damage compensation system can not only effectively protect the legal rights and interests of spouses without fault in marriage, but also play a significant role in preventing serious fault behaviors in marriage. Due to the

complexity of China's national conditions and the multifaceted nature of social life, this system has not yet played its full role and effect in judicial practice. It needs to be further promoted and improved in the future judicial practice process. Measures need to be carried out at all levels to make up for the lack of social morality and the absence of relevant systems in Criminal Law, so as to ensure a stable and good marriage relationship and safeguard the fairness and justice of the law.

REFERENCES

- [1] Jiao Shaolin. On Establishing a System of Liability for Tort Between Husband and Wife, *Modern Law Science*, No. 5, 2006. (in Chinese)
- [2] Xue Ninglan. Improvement of China's Divorce Damage Compensation System, *Applicable Law*, No. 10, 2004. (in Chinese)
- [3] Huang Songyou. Understanding and Application of Judicial Interpretation of Marriage Law, Beijing: China Legal Publishing House, p. 102, 2002. (in Chinese)
- [4] Wang Weiguo. The Principle of Liability for Faults: The Third Boom, Beijing: China Legal Publishing House, p. 260, 2000. (in Chinese)
- [5] Chen Wei. Some Issues on the Application of the Law on Divorce Damage Compensation, *Research on Legal Business (Journal of Zhongnan University of Economics and Law School)*, No. 2, 2002. (in Chinese)
- [6] Yang Lixin. On the Liability for Mental Damages Violating the Right of Spouse, *Law Science*, No. 7, 2002. (in Chinese)
- [7] [US] Harry D. Gloss. *Essentials of American Family Law*, translated by Chen Wei, Southwest University of Political Science & Law Press, 2005, p. 96. (in Chinese)