

Research on Consortium in Chinese Law

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Abstract—Consortium encounters a certain number of problems in the field of juridical practice for the reason that lacking of articles which regulating consortium. The legislation problems are caused by lacking of theoretical research. To solve the problems of Consortium, studying on the Consortium theory firstly is necessary. After the theoretical issues are solved, the legislation problems can be overcome by using the theoretical achievements. As the article of Consortium is amended, the problems of juridical practice can be resolved.

Keywords—Marriage Law; Consortium; Right of Relief; Legislative Suggestion

I. INTRODUCTION

CONSORTIUM is the most important right in Chinese Marriage Law. In the judicial practical, it cannot protect this right of subject. Some people think it is common because the family affair people should be adjusted by ethically. But Consortium is a kind of civil right, when study on it, should obey the find-solve problem mode. Firstly find the practical problem, and then legislative problem, at last the theoretical problem. To solve the problem, dealing with theoretical problem should be put into the first, then the legislative problem can be solved by the theoretical achievements, at last the practical problem can find the solution after the legislative problem solved.

II. ANALYSIS THE PROBLEMS OF CONSORTIUM

There are plenty of issues in both juridical practice and legislation field that due to the lacking of theoretical research. The juridical practice problems including refusing accept and hear cases, hard to judge cases, similar case with different judgment and so forth. Such juridical practice problems that reflect legislation problems which are lacking of relative provisions and detailed provisions focus more on protecting privacy rights, failure coordination between Marriage Law and Civil Law and so on. The reason for legislation problems is that lacking of theoretical research. Therefore, the Consortium study begins from the Marriage Law theoretical research.

A. Problems in juridical practice

In China, there are certain number of Consortium cases or disputes especially disobey the duty of loyalty are refused by courts or Mediation organization. In Chinese Marriage Law

and judicial explanation, if a husband or wife disobeys the duty merely and not sue for divorce, he or she is immunity from suit. As we all know, the trend of crime of adultery is no criminal responsibility. But the fact is that the victims in Consortium cases always suffer from both property damage and psychological trauma, the civil case should be accepted regardless of whether they sue for divorce. The second problem in juridical practice is hard to judge cases. The evidence of Consortium cases always involve privacy of both parties. The defendant probably defense the plaintiff by invasion of privacy during the evidence collection, and vice versa. If the evidence lost the competency, the case will be hard to judge or the plaintiff (defendant) lost the lawsuit. Similar case with different judgment is the third problem in juridical practice. The similar case facts in different cities or province have different judgments. For instance, the loyalty agreement case, according to the written judgment, judges from different province give different results. In Haina province, the judge ensured the validity of loyalty agreement but the judge in Shandong province regarded the agreement as invalid contract. Facing with the similar situation, the judge in Henan province ensured some articles in the loyalty agreement and denied some unbalance articles.[1]

B. Legislation Problems

In China, every case should obey the articles of the statute law because Chinese law belongs to continental law system, which means discretionary power of judges is strictly limited. The problems of practical field are highly possible caused by the legislation problems, which are lacking of necessary articles and system, failure coordination between Marriage Law and Civil Law.

Lacking of necessary articles and system is a common problem in Chinese law system, not only the Marriage Law, but also the Property Law, Tort Law, Contract Law and so on. Focus on the Consortium in Marriage Law, it includes duty of loyalty, duty of cohabitation(indirect), duty of support, agency of family affairs, right of independent name, right of chose domicile ,right relief and so forth. It seems like specific and systemic, however, when people read up every single article of Consortium, they can easily find that the neither do the Consortium articles specific nor systemic. Firstly, sue of martial tort is forbidden unless the sue including the divorce. Then, the duty of loyalty (the couples should be loyal, respect each other...Art.4)was put in the first chapter in Marriage Law without detailed regulation. This is the reason that different courts give different judgments on the issue of loyalty agreement. In addition, there is no Consortium system in

Marriage Law. To be specific, the duty of cohabitation was not directly written in the Marriage Law, disobey the duty is a condition for divorce (Article 32). Besides, Looking at the articles arrangement, specific rights or duties are arranged in different chapters: duty of loyalty in Chapter 1, right of chose domicile in Chapter 2, right relief in Chapter 5, other rights and duties were all in Chapter 3. It is difficult for the judges, lawyers and parties to seek, apply and relief.

Marriage Law is a part of Civil Law and the Consortium is a part of civil rights system. Sometimes the Consortium cases involve not only Marriage Law rules but Contract Law, Property Law, Civil Law and so on. Should the judge have to use the Marriage Law or they can cite the articles from other law? There is no answer in Marriage Law especially for agency of family affairs. Should the couple be regarded as a whole or individual? If regard as a whole, how to deal with debt of bad faith? If regard as individual, how to protect the right of bona fides third party? There is also no answer in the Marriage Law. Agency of family affairs sometimes involve trade, like sell the common property or purchase in installments, should the trader use the rule of Property Law, Contract Law or Marriage Law? The articles of Consortium do not regulate such issue. To be further, legislators do not take account of coordination between Marriage Law and Civil Law.

C. Problems of Theoretical Research

Lacking of theoretical research support leads to the legislation problem. Consortium is almost the most vital system in Marriage Law. Therefore, the theory of Marriage Law determines whether the articles of Consortium is general or specific, the articles of Consortium should be put together or separate and the relationship between Marriage Law and other laws. In my opinion, the theories include the status and nature of Marriage Law. Study on the status of Marriage Law can make it clear that the relationship between Marriage Law and other laws and how to arrange the system. Study on the nature of Marriage Law can help us determines whether the articles of Consortium is general or specific, and sometimes influences the structure of the whole Marriage Law. But, nowadays in China, Marriage Law problems do not solve. That is why the Consortium system has both practical and legislative problems. It is clear that study on Marriage Law theory is the key to solve the problems.

III. SOLUTION FOR CONSORTIUMS

As the theoretical problem solved, it is helpful to deal with legislation problems and then encourages the practical issue solved. Marriage Law theory influence the ideology of Consortium and its system design. It is necessary to study the Marriage Law theory includes the status and the nature of Marriage Law.

A. The Status of Marriage Law-Private Law

Marriage Law is the private law because it regulates the

civil subject with equal status. Marriage Law is a part of Civil Law. Looking back to Chinese Marriage Law enactment, in 1950s, the legislators regard the Russian Marriage Law as reference. The Russian Marriage Law is not a part of Civil Law, the legislators enact it as administrative law and regard the Russian Law as a independent legal department.[2] Before the amendment for Marriage Law in 1980, it is a administrative law. That is the reason why no Consortium system in the Marriage Law. The legislators pay more attention to how to administer the marriage and divorce ignoring focus on the couples' rights in the Marriage. It leads to that some articles are too general to cite (loyal duty) and no Consortium system for the civil subjects. Although there are three amendments for Marriage Law, do not change it from administrative law to private law. [3]It is obvious that the nature of Marriage Law is private law, I will argue it from view including both legal nexus and rule of law.

The relationship of husband-wife is civil legal relationship

The equal status of legal subject is the most important way to judging whether the legal relationship is civil legal relationship or not. The husband-wife has the equal status in Marriage Law. By investigating Consortium in the ancient law, modern law and present law, it can get the conclusion that the reforms of Consortium are from the change of Marriage Law's status and characters. To be specific, the changes are, from right of dominion to right to claim, from non-equivalence to equivalence, from integration to individual, from unfair to fair. The ancient law was base on the ideology that integration for spouse and gender inequality. In the modern law, there are numerous reforms of Consortium despite the fact that reforms were not enough. The present law completely removes the integration for spouse and gender inequality, and pays more attention to the limitation of individual freedom for spouse and the equality for result. Compared with Consortium in the ancient law, Consortium in the present law has a number of features, such as relativity, mutuality, independence and equality. [4] In present Marriage Law, the equality of husband and wife is the basic rule, husband and wife have the equal status in Marriage Law, and the relationship of husband-wife is civil legal relationship. They have the equal right and obligation, and the right and obligation should be recognized and protected by Marriage Law and Civil Law.

The rule of Marriage Law is The Specification of the Rule of Civil Law

The Marriage Law is a part of Civil Law, the rule of Civil Law is also the rule of Marriage Law. The rule of Marriage Law is more specific than the Civil Law, which is quite different from the rule of Administrative Law. China enact the newly General Provision of Civil Law that including the rule of Civil Law: the principle of equality, the principle of voluntariness, the principle of fairness, the principle of good faith, the principle of abidance by law, the principle of public order and good custom, the principle of green. They are also the principle of Marriage Law. The principle of equality is the

most important principle in Marriage Law, husband and wife have equal status is the principle of Marriage Law. The principle of voluntariness is also the principle of Marriage Law, it mainly finds expression in freedom to marry and divorce. The principle of good faith is the basic principle in Marriage Law is that duty of loyalty and the duty of support. The principle of public order and good custom in Marriage Law is that bigamy, domestic violence and maltreating are forbidden. It is clear that the right of spouse should be protected as other legal subjects in Civil Law.

B. The Nature of Marriage Law-Ethicality

Ethicality Determines Consortium is the Relative Right

Ethicality is the nature of Marriage Law and the nature of Consortiums. Loyalty duty is the basic requirement for ethicality, cohabitation duty is the nature of marriage ethicality, duty of support is the integrated requirement for ethicality, and right of chose domicile is the stabilization requirement for ethicality, agency of family affairs and right of independent name are the individual requirement for ethicality. Ethicality determines that a man and a woman live together and give birth to next generation as a group can be called spouse. The man is husband and the women is wife, the husband-wife is the identify that established by ethicality. The husband-wife identify requires they should obey the basic requirements of ethicality, for example, loyalty, support, respect and so on. For others, they cannot marry or cohabit with the person who has spouse. Therefore, not only does the husband-wife identify recognize by the couple themselves, but recognize by other people and society. Nearly all the countries have the process of marriage and divorce registration. Consortium is the right according to special identify. The feature of identify right is that relativity, which means the right to claim. If husband wants to claim his rights of cohabitant, only can he ask his wife to live with him, compulsively cohabitation is forbidden. So, the relative right can protect the individual right of spouse, even though sometime they are regarded as an integrate.

Ethicality Does Not Means the Consortium Is Moral Adjustment Only

Ethicality is the nature of Marriage Law and the nature of Consortiums. Ethicality determines the indentify of the marriage and relativity of Consortiums. But is dose not means the consortium is moral adjustment only. The Consortium needs the legal regulation. Marriage Law is a positive law in China, there is no doubt that it is law not moral requirements. Law should protect the right of legal subject with huge number of specific articles not general rules. But in Marriage Law, legislators think the relationship between spouses should be regulating by ethicality and Marriage Law should pay attention to the marriage and divorce registration. That is the reason why some articles of Consortium are too general to cite. As the vital right in Marriage Law, the Consortium should have its own system that including the specific rights and right relief.

IV. LEGISLATIVE SUGGESTION FOR MARRIAGE LAW

After the theoretical problems solved, the legislative problems can be solved by using the newly conclusion. It is the right time that compiling the Civil Code. The Marriage Law is a part of Civil Code, the legislative suggestion is useful to the compilation. For the legislative, the legislator should balance the relation between individual right and the whole system, Marriage Law and Tort Law, rights and right relief.

A. Individual Rights-System

Marriage Law is a part of Civil Law, it should focus more on the individual right. The rights including loyalty duty, cohabitation duty, support duty and so forth. They should be written in detail which including the definition, how to deal with in different situation, how to relief and some general article is necessary. Meanwhile, the legislator should pay attention to that the Consortium is an ingrate and the internal coordination is pretty important. It is necessary to emphasize the specific rights -obligation and the system its own coordination.

B. Marriage Law-Tort Law

Consortium is a part of Marriage Law, and the articles mostly written in Chapter 3. Most regulations about Consortium are in Marriage Law. When compilation the Civil Code, the Consortium articles should still arranged in Marriage Law. Tort Law is the law that relief right, Consortium belongs to the civil rights system, therefore, Consortium should be protected by the Tort Law. The Article 2 of Tort Law, listing the specific rights that protected by Tort Law but not Consortiums. When compilation the Civil Code, adding the identify rights or Consortium in the Article Two should be take into account.

C. Right- Relief Right

Relief right is also important to rights. No remedies, no rights. As a kind of civil right, Consortium needs remedy as well as other civil rights. Not only in the Tort Law, but also should be written in the Marriage Law. The Article 46 in the Marriage is regarded as the remedy article. But it is too narrow, sues want to cite Article 46 must sue for divorce as well. In other words, the tort in marriage is not charged by the Marriage Law. As a civil right, it should be protected because the civil right is violated and the subject need the protection instead of focus on the spouse sue for divorce or not. When legislators compile the Marriage Law, it is necessary to expand the scope of protection. The Article 46 should also protect tort in the marriage.

V. CONCLUSION

Consortium problem can be solve by the practical-legislative-theoretical problem pose and the theoretical-legislative-practical solve mode. It is the right times that China is compiling the Civil Code, it is likely to be adopted by legislator. In the future, there is a huge challenge to Consortium and a lot of issue that worth to ague, for instance,

whether the clone man can be the spouse to humans? Do they have the same Consortium like human?

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