

# ***Study on the Protection of Marital Conjugal Rights under the Threshold of China's Civil Code***

TAI HIULO<sup>1,a,\*</sup>

<sup>1</sup>*China University of Political Science and Law, Changping District, Beijing, 102249, China*  
*a. dxl18137806033@163.com*

*\*corresponding author*

**Abstract:** The family is the cornerstone of society and an important support for social stability. The stability of the relationship between husband and wife is not only related to the happiness of each family, but is also closely linked to the harmony and tranquillity of society as a whole. The protection of the rights and interests of spouses is a core element in safeguarding the immediate interests of both spouses and in building mutual trust and goodwill, and it is also a key element in maintaining a long-term stable relationship between husband and wife. The purpose of this paper is to clarify the connotation and extension of the rights of husband and wife, and to analyse the dilemmas and challenges faced by the current legal system in the protection of the rights and interests of husband and wife. On this basis, it proposes a series of recommendations for improving the relevant laws and regulations in the light of the omissions in the legal system, with a view to providing victims with more solid and powerful legal protection and ensuring that their legitimate rights and interests are fully safeguarded and protected.

**Keywords:** conjugal rights, legal remedies, legislation

## **1. Introduction**

Spouse's right is an indispensable part of the legal system of marriage and family. It involves the protection of the rights and interests of both spouses, and relates to the harmony and stability of family relations. However, in real life, the phenomenon of infringement of conjugal rights occurs from time to time, which is both the misfortune of the individual and the sorrow of the society. This is an important issue concerning family harmony and social stability, which should not be delayed, while the harsh provisions of the Marriage and Family Part of the Civil Code and the shortcomings of the provisions of the Personality Rights Part have led to the lack of a perfect legal remedy system for the infringement of conjugal rights and interests at this stage. This highlights the urgency of revising and improving the norms of the Personal Rights Section of the Civil Code and clarifying that conjugal rights and interests can be remedied by supplementing the application of articles 1168 and 1183 ( I ) of the Civil Code.

## **2. Legal basis for the protection of the rights and interests of spouses**

### **2.1. Legal Definition of Conjugal Rights and Attributes of Rights**

The concept of conjugal rights was first developed by English jurists and refers to the right of spouses to demand each other's companionship, affection and assistance[1] . The concept has been refined over time through academic research and studies. Nowadays, a more complete definition of conjugal right should be defined in terms of its content and nature as the basic identity right of the spouses to ask for each other's companionship, love and help, which occurs between them based on the legal marriage relationship, and which is equally and exclusively enjoyed by both spouses and cannot be infringed by any other person. Further interpretation of the attributes of the right of spouse can be summarized as follows:( I )The right of spouse is a right of identity. "The right of identity has an inseparable relationship with its identity, and is a right that ends with the identity, so the right of identity is in principle an exclusive right vested in one person." [2]conjugal right is a kind of identity right of civil subjects based on the establishment of marriage relationship, which is used to safeguard the specific identity rights and interests between husband and wife. (II) Conjugal rights are exclusive. conjugal right only occurs between husband and wife with marriage relationship, and exclusively belongs to the person who has the specific kinship identity relationship of spouse. (III) Conjugal rights are relative and absolute. As one of the types of identity rights, conjugal rights are relative in their connotation of mutual companionship, mutual support and mutual fidelity; conjugal rights are exclusively enjoyed by the spouses, and have a reciprocal nature, so that any third party outside the marital relationship has the absolute, inactive obligation not to infringe upon the rights and interests of the spouses.

### **2.2. The status and relevance of the protection of the interests of spouses in the system of marriage law**

As the cornerstone of society, the family has a bearing on the peace and development of society as a whole. The protection of the rights and interests of spouses in family-marriage relations is one of the core elements in maintaining family stability. The protection of the rights and interests of spouses not only reflects respect for individual dignity, but also maintains the ability of both spouses to share family responsibilities on the basis of equality and mutual love, and lays a solid foundation for the spouses to pursue the trust and expectation of sustained, stable and happy life. For a long time, in both common law and civil law countries, the prevalence of patriarchalism has led to the loss of women's status as independent personalities, and their rights and interests are easily ignored and infringed upon as subordinates of their husbands, who are in a disadvantaged position of being dominated and disposed of. With the development of the human rights movement and the popularization of the concept of equal rights, the independent status of women as persons of character has been increasingly emphasized by society. The emphasis on the protection of the rights and interests of spouses, especially female spouses, is intended to ensure that both spouses in a marriage are in an equal position and enjoy equal rights and obligations, and to prevent the rights and interests of the weaker party from being unfairly treated or jeopardized.

## **3. Dilemma of our legal system in the protection of conjugal rights interests**

### **3.1. Lack of protection of spouses' rights and interests in relevant legislation**

Marriage has a positive purpose and is protected by dissipation. The positive purpose of marriage derives from the consent of the spouses to enter into marriage, which creates a trust and expectancy interest in mutual companionship and support between the spouses. The continuation of marriage

means that the positive purpose of marriage is not lost and is expected to be realized continuously, so the claim of damage to trust and expectancy interests is subject to the dissolution of the marriage; the negative protection of marriage is based on the intimate relationship between the spouses and its objects include the conjugal rights arising from the marital relationship and the interests inherent in the independence of personality. The obligation to protect the marriage is influenced to some extent by the purpose of the marriage, so that both spouses are required to make concessions and sacrifices to their conjugal rights and inherent rights to a certain extent. If the concessions are so drastic as to seriously jeopardize the inherent interests of one or both spouses, the purpose of the marriage is rendered meaningless and the marriage is dissolved.

Article 1091 of China's Civil Code - Marriage and Family does not distinguish between the protection of these two types of interests, which has led to confusion in theory and judicial practice. According to the general opinion of the recent academic circles, the object of adjustment of this article is the trust and expectancy interests of one of the spouses in the marriage relationship, which to a certain extent neglects the protection of the conjugal rights and other inherent interests of the person in the marriage relationship; moreover, although Article 1901 of the Civil Code stipulates the four situations in which the rights and interests of the spouses have been violated and their remedies for damages, the conditions for its application are strict: only the spouse of the "no-fault party" is entitled to the protection of these two types of interests. In addition, although Article 1901 of the Civil Code provides for four cases of infringement of conjugal rights and their relief in the form of damages, the conditions for its application are strict: only the "no-fault party" whose conjugal rights have been seriously infringed upon can claim for it when filing a lawsuit for divorce, thus neglecting the protection of the conjugal rights and interests of the no-fault party, who is unwilling to divorce in reality.

It can be seen that conjugal rights, as the core content of the relationship of rights and obligations between husband and wife, have not been clearly stipulated in the relevant laws of China, and there is still an obvious lack of ways to remedy the damage to the rights and interests of spouses.

### **3.2. Gaps in the scope of civil rights regulated by article 1001 of the Civil Code**

Article 1001 of China's Civil Code uses the concept of "identity rights" rather than "personal rights" to stipulate that "the protection of the identity rights of natural persons arising from their marriage and family relations shall be governed by the relevant provisions of Title I, Title V and other laws; in the absence of such provisions, reference may be made to the relevant provisions on the protection of personality rights in this Title according to their nature". For the protection of identity rights of natural persons arising from marital and family relationships, etc., the relevant provisions of Title I, Title V of this Law and other laws shall apply; if there are no such provisions, the relevant provisions of this Title on the protection of personality rights may be applied by reference according to their nature. Article 112 of the Civil Code uses the concept of "personal rights" rather than "identity rights" to stipulate that "the personal rights of natural persons arising from marriage, family relations, etc., shall be protected by law". The author believes that identity rights are personal rights. The author is of the view that the right of identity is a subordinate concept to the right of person, which includes the right of personality and the right of identity, and it is indisputable that the right of identity and the right of personality in marriage and family should be protected by the law, so that the use of the term "right of identity" as a constituent element for the application of the law in article 1001 of the Civil Code is not well thought out.

### **3.3. Uncertainty as to whether conjugal rights are remediable under the law of tort liability**

According to Article 1001 of the Civil Code, when protecting the personal rights of natural persons arising from marriage, family relations, etc., the legislator seems to have intentionally excluded Title VII, Tort Liability, from the scope of priority and reference application. Comparative law, "the damage of divorce and the damage of general torts separate, individual express provisions, is the common tendency of most countries"[3] because the purpose of the legislation of tort law is different from the protection of the rights and interests of husband and wife, for two reasons: First, the general torts to adjust the damages between independent individuals, the subjects often do not exist between the particular. The first is that the general tort regulates the damages relationship between independent individuals, and there is often no special bond between the subjects. The more long-term and intimate personal and property relations between husband and wife put forward a higher obligation of tolerance to the spouse. German law, spouses "only mutual and handle their own affairs of the same duty of care"[4] that is, with a specific light negligence rather than tort law usually abstract light negligence[5] as the standard, into the marriage of husband and wife in a certain limit to transfer part of their own rights and interests in the family, general tolerance and immunity from conjugal torts to maintain a stable family relations in the expectation of interests; Second, the spouse's relationship with the family, the spouse's relationship with the family, the spouse's relationship with the family. Secondly, the modern civil law theory is that the right of identity between husband and wife is essentially a kind of right of mutual request[6], and it is relative in nature. As a "claim in a weak sense"[7], it has strong personal and moral attributes, and is "even less effective than a claim"; it is neither applicable to the relevant provisions of the law of debt, nor can it be legally enforced by the provisions of the law of debt, for example, the right to cohabitation of spouses does not have the same effect as the right of spouses to claim the right of spouses to live together. For example, the right of spouses to claim cohabitation does not have the possibility of compulsory performance.

For these reasons, the general rules of tort appear to be insufficient to regulate the relationship of damages between spouses.

## **4. Path to Improvement of the Protection of the Interests of Spouses' Rights**

### **4.1. Further Improvement of the Provisions of the Civil Code - Personality Rights Title by Reference to Remedy Conjugal Rights Interests**

The fact that the legislator has also recognized the possibility of protecting the right to identity "by reference to the provisions of the right to personality" in Article 1001 of the Civil Code - Right to Personality, means that it has recognized the similarity between the right to identity and the right to personality from a higher perspective - both are exclusive, absolute and non-property rights, and both can be remedied by means of moral damages". Both of them are exclusive, absolute and non-property rights, and both of them can adopt the remedy of moral damages, therefore, "the provisions of personality rights can be applied to identity rights"[8]. Therefore, taking into account the similarity between identity rights and personality rights as well as the cost of legislation, "personal rights" should be used to replace "identity rights", and Article 1001 of the Civil Code should be amended to read: "The personal rights of a natural person arising from marital and family relations, etc., should be replaced by "personal rights". Article 1001 of the Civil Code shall be amended to read: "For the personal rights of natural persons arising from marital and family relations, etc., .....". In order to make the application of laws and regulations smoother, it is also more in line with the legislative principle of comprehensively protecting the legitimate rights and interests of marriage and family, which is that "marriage and family are under the protection of the State".

## 4.2. Clarification of the possibility of supplementing the provisions of the Civil Code —— Tort Liability to remedy spousal rights interests

While the law of torts cannot comprehensively cover the issue of damages between spouses, it can serve to remedy the role of violated conjugal rights by supplementing its application.

Taking the controversial case of a third party interfering with marital relations as an example, some scholars believe that the spouse who is not at fault should seek relief within the framework of the Marriage and Family Law[9], i.e., the spouse who is not at fault can, in principle, only request that the spouse who is at fault be held liable for damages in the event of divorce, and has no right to request that the third party be held liable for damages in the event of infringement of the law. This undoubtedly makes the phenomenon of "third party", which has always been generally intolerable by the public, has been lightly indulged in the law. Because most of the damage caused by the presence of a "third party" is mental and rarely monetary, it is very unreasonable for the law to require that the spouse who is not at fault be able to claim damages for divorce only from the party at fault, but not from the third party who has caused him or her indelible mental damage of the same nature.

"For the protection of the personal rights of natural persons arising from marriage and family, etc., the Tort Liability Code shall not be prioritized, but may be supplemented after being prioritized and referred to"[10]. Specifically, the remedy of spouses' rights and interests may be supplemented by the application of Articles 1168 and 1183 (1) of the Tort Liability Code, whereby the spouse who is not at fault has the right to claim joint and several liability in tort and moral damages from the spouse at fault and the third party who has violated the duty of care and interfered with the marital relationship. The feasibility of this approach lies in the fact that the Tort Liability Section of the Civil Code omits the specific list of types of "civil rights and interests" in Article 2 of the former Tort Liability Law, which provides room for additional application to remedy violated conjugal rights. In addition, Article 1183 (1) of the Tort Liability Code does not limit the scope of application of the system of moral damages to cases of personality rights, so there is no institutional obstacle to the inclusion of conjugal rights in the category of "personal rights and interests of natural persons".

## 5. Conclusion

The protection of conjugal rights and interests contributes to the maintenance of family stability and the realization of social justice in many ways, not only helping to realize the interests of expectation and reliance between spouses and thus maintaining social harmony and stability, but also helping to promote gender equality and the protection of women's rights and interests and to promote innovation in social governance. Therefore, we should attach great importance to the protection of conjugal rights and interests and strengthen the formulation and improvement of relevant laws, regulations and policies.

Although strengthening the legal system is not a quick fix, we need to make continuous efforts to analyze the existing obstacles in the system and propose more precise solutions. I believe that exploration and practice will eventually lead to the improvement of China's legal system for marriage and family.

## References

- [1] David M. Walker. (1988) *Oxford Dictionary of Law*. Guangming Daily Press, Beijing. 199.
- [2] Shi Shangkuan. (2000) *Theory of Kinship Law*, China University of Political Science and Law Press, 34-35.
- [3] Lin, Xiu-hsiung. (2001) *Research on marriage and family law*. China University of Political Science and Law Press.118.
- [4] [German] Dieter Schwab. (2022) *German family law*.In:Wang, Baozhi (Eds.). *German family law*. Law Press, Beijing.154.
- [5] See Wang Zeguan. (2016) *Tort law*. Peking University Press, Beijing.298-299.

- [6] Wang Zejian. (2022) *General Principles of Civil Law*. Beijing:Peking University Press.102.
- [7] See Ran, K. P.. (2022) *The law of conjugal groups: jurisprudence and norms*. Peking University Press.241.
- [8] Wang, Lei. (2022) *Legal techniques of reference application in the personality rights section of the Civil Code*. *Contemporary Law*, 36(04):116-127.
- [9] See Ran Keping. (2020) *On the Civil Liability of the Third Person Infringing on the Right of conjugal Identity*. *Journal of Huazhong University of Science and Technology (Social Science Edition)*, 1:73.
- [10] Wang Lei. *Reference to Applicable Legal Techniques in the Title of Personality Rights in the Civil Code of 2022*. *Contemporary Law*, 36(04):116-127.