

On Effect of Marital Loyalty Agreement

Yang Yuyu

Jinan University JM

Abstract — The loyalty agreement between husband and wife is not regulated by civil law, but by family morality. Autonomy of will does not apply to the regulation of personal relations between spouses. The civil law of China does not recognize the contract of couple identity.

Key words: *couple's duty of fidelity, autonomy of will, contract, morality*

1. INTRODUCTION

Marital loyal agreement is an arrangement on personal relations reached between husband and wife before or after marriage, aiming to guarantee that the couples will not violate the couple's duty of fidelity¹ agreed between them, in the responsibility form of penalty or compensation. To violate the duty of fidelity shall be narrowly defined as an act that the husband or wife has sexual relationship with any third party.

Marital loyalty agreement, depending on its content, can be divided into three types: (1) divorce compensation agreement. Both parties agree that "both parties will try to sustain their marriage relationship. The party proposing divorce shall pay compensation for the other party". This agreement is invalid from its inception due to its violation of the legal principle

¹. "couple's duty of fidelity mainly refers to marital obligation of fidelity, that is, single married couple sex life. Wu Changzhen, *Marriage and Inheritance Law*, China University of Political Science and Law Press (2007), P150.

of free marriage; (2) agreement on compensation for extramarital affairs. Both parties agree that "they will respect and love each other and be responsible for their family, spouses and children. If marriage breaks up because one party has an affair (extramarital sexual behavior), the party who has an affair shall compensate for the other party". (3) agreement on compensation for night absence. Both parties agree that "the party who stays out all night shall pay certain sum for the other party based on the absent time", that is, agreement on night-absent fee. It may also be divided into prenuptial and postnuptial loyalty agreement according to the concluding time.

2. Marital Loyalty Agreement Shall Not Be Regulated by Civil Law

2.1 Marital Loyalty Agreement Shall Not Be Regulated by the *Contract Law*

As Article 2 of the *Contract Law of People's Republic of China* states, "For purposes of this Law, a contract is an agreement reached between natural persons, legal persons or organizations with equal standing with an aim to establish, alter, or terminate a relationship of civil rights and obligations. An agreement regarding any personal relationship such as marriage, adoption, guardianship, etc. shall be governed by provisions of other laws". This clause clearly excludes the possibility of "marital loyalty agreement" with personal identity to be governed by the *Contract Law*. Although couple loyalty agreement is presented in the form of contract, it does not

pertain to contractual debt under contract law.

Loyalty agreement is surging in judicial practices. It is premised on divorce litigation. The court judgment of compensation for disloyalty is also based on that “divorce is granted”. By now, there has been not any case of supporting disloyalty compensation when divorce is not granted. If the *Contract Law* applies, one party may file an action for breach of agreement and claim for damages without litigating for divorce resulting from the failure of the other party to perform duty of loyalty. The aforesaid circumstance are not back up by law, which demonstrates that the couple loyalty agreement shall not be regulated by the *Contract Law*.

2.2 Marital Loyalty Agreement Shall Not Be Regulated by *Marriage Law*.

As Article 4 of the *Marriage Law of People’s Republic of China* stipulates, “Husband and wife shall be loyal to each other and respect each other; family members shall respect the old and cherish the young, help each other, and maintain the marriage and family relationship characterized by equality, harmony and civility”. The loyalty duty stated herein is moral duty, but not legal duty. “Husband and wife shall be loyal to each other”, but not “must be loyal to each other”. “Shall” is indicated as an recommendation, while “must” as legal duty. An agreement concluded when one party take this moral duty as a consideration to exchange with the other party cannot be construed as one containing specific civil rights and obligations.

Legal remedies may apply only when one party violates the duty of loyalty to the extent of bigamy or cohabitation of a married person with any third party. As described in the Article 46 of *Marriage Law* of China, “A no-fault party shall have the right to make a request for damage

compensation under any of the following circumstances bringing about divorce: (1) bigamy; (2) cohabitation of a married person with any third party; (3) domestic violence; and (4) maltreatment and desertion of one family member by another”. Extramarital affairs are excluded from the four circumstances for the no-fault party to claim damage compensation. In judicial cases, it’s more reasonable that the people’s court’s support of marital loyalty agreement shall be included in the range of claiming compensation for divorce mental damage. The *Marriage Law* leaves space for couples’ private life from its introduction. Such acts as extramarital affairs of husband or wife are not encouraged by the *Marriage Law* and not prohibited by it. Disloyalty is immoral and shall be regulated by marriage morality.

3. Effect of Marital Loyalty Agreement

“Some acts goes beyond the regulation by law and thus the consequences arising therefrom are not within the governance by law. There is not a uniform term for such acts, which are generally referred to as pure “affectionate acts” or “acts beyond the social level” by scholars. Although they are in similar forms with legal acts – such as inviting friends to have dinner together, or several mothers promising to take care of each other’s children – but these acts are not intended to establish rights, because the expresser of the will are not likely to grant the other party of legal claim right, for such acts are not legal ones, which cannot be judged from the perspective of legal acts. These acts are under regulation of specific specifications (social and moral norms) so that laws shall not intervene even though one party seeks legal protection for the other party’s breaching of agreement. Only when these acts are involved in serious infringement will they be regulated by law of torts.

In fact, marital loyalty agreements are mostly prepared when the couple are in affectionate love. Maybe both parties originally intend to maintain family stability and to uphold integrity. Such agreements does not mean to form a contractual relationship between both parties. Thus they are not established as civil juristic acts, let alone taking effect. Although not encouraged by law, “Extramarital affairs” , merely a matter of morality, shall not restricted by law. As Article 37: Paragrah1 of *Constitution* of China states, “Personal freedom of citizens of the People’s Republic of China is not inviolable”. It follows that personal freedom is a legal right, but not a contractual entitlement. Having sex willingly with a compatible party of opposite gender is in the domain of personal freedom and thus is a fundamental right, which is not supposed to be restricted for the purpose of protecting other rights. The loyalty agreement is to have basic personal rights of both parties (particularly personal freedom) restricted or even deprived. Therefore, it is essentially against the constitution.

Not recognizing the legal force of “loyalty agreement” is not to encourage extramarital affairs. That “extramarital affairs are immoral” is definitely a mainstream moral standard. But moral problems need to be regulated by morality, while laws may have to leave space for private life. Legal professionals must keep sober-minded when facing impact from the public. They cannot expand interpretation of laws and aggravate punishment to the fault party just because of their objection to immoral acts, or people will lose much personal freedom when laws go too far. In similar cases of foreign countries, the judges will remedy the affected party in other ways instead of taking extramarital affairs as a direction for court decision, although they are sympathetic with the

affected party.

4. Conclusion

It is difficult to guarantee that signing loyalty agreement is a reflection of both parties’ real intention. As long as one party persists in signing loyalty agreement, the other party can do nothing else – unless terminating their relationship, suspicion will be raised, which may cause latent trouble. To say the least, the agreement may be concluded completely based on their willingness and fully reflects their real thoughts at that time, but it only reflects the then thoughts, so that it’s hard to ensure the commitment to marriage will stay the same with time passing by and their affection changing. Provided that “loyalty agreement” is granted with legal force, it may be reduced to a judge of their “emotion game” or a tool for claiming money when the court continues to forcibly enforce the agreement, if one party violates the marital emotional agreement while the other party keeps claiming compensations as they remain in marital relation. This will deteriorate the marriage on basis of pure love and mutual trust. Feelings are not to be judged or regulated by law, just as the law scholar Yang Chenguang put it, “Marriage is not insured by a ‘loyalty agreement’. After all, marriage bases itself on love. Law can only play its part outside a home”. Hence, legal problems shall be resolved through legal means while moral ones handled in moral manners.

References:

- [1] Zhao Min, Legal Analysis of the Effect of “Loyalty Agreement” [J]. *Journal of Guangxi Administrative Cadre Institute of Politics and Law*, 2010 (3)
- [2] Chen Su, Does Marital Emotional Agreement

- Have Mandatory Enforcement? [J], *People's Court Daily*, Jan. 11, 2007
- [3] Guo Zhanhong, Judicial Reflections on Husband and Wife Signing Loyalty Agreement [J], *Journal of Ningbo University (Liberal Arts Edition)*, 2010 (2)
- [4] Zhang Chi, Discussion on Marital "Loyalty Agreement" [J], *Legal & Economy*, 2010 (3)
- [5] Xu Shousong, Can Law Interfere in Extramarital Affairs? – Reflections on the 'Case of Compensation for Disloyalty' [J], *People's Court Daily*, Jan. 11, 2003
- [6] He Zhi, Case Studies & Application of Marriage Law [M], People's Court Press (2004): P543 – 544
- [7] Wu Xiaofang, Study of Problems in Current Marriage & Family Cases [J], *The People's Judicature (Application)*, 2010 (1)
- [8] Qiang Yin, On Efficacy of Husband-and-Wife Loyalty Agreement [J], *Theory Research*, 2010 (11)