

Research on the Divorce Cooling-off Period in Chinese Civil Code

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Abstract— *The divorce rate in China has been on the rise for many years and the new Civil Code has added a new regulation for a cooling-off period for divorce in the Marriage and Family section. The addition of the cooling-off period has attracted widespread attention and debate in academic circles. This article compares the views on the cooling-off period, discusses its positive aspects and shortcomings, and concludes with suggestions and possibilities for solutions. It is hoped that this analysis will contribute to the progress of legislation and the resolution of real problems in society.*

Keywords— *Civil Code; Marriage law; Divorce; Cooling-off Period.*

I. INTRODUCTION

Over the years, China's divorce rate has continued to climb, and according to the Ministry of Civil Affairs' 2019 bulletin, China's divorce rate has risen to 3.36 per thousand, which is already more than half of the marriage rate of 6.6 per thousand. Referring to the social service statistics released in 2018 compared to the Ministry of Civil Affairs, the number of people getting married in China has fallen for five consecutive years and the number of people getting divorced has increased, but the national divorce marriage rate was still 37% in 2018. Overall, the overall situation of marriage among China's current marriageable age population is not optimistic. Considering that China's population is ageing at a rapid pace and the number of newborns is decreasing year after year, the demographic structure can no longer be adjusted directly and effectively by simply liberalizing the two- and three-child policies. It is imperative that marriage regulations and family planning policies are adjusted and reformed.

II. LEGISLATION OF THE DIVORCE COOLING-OFF PERIOD IN THE NEW CHINESE CIVIL CODE

A. Regulation background

In response to these problems, China's new Civil Code in 2021 will include significant changes to the divorce system. The most important is the introduction of a cooling-off period for divorce: "Within 30 days from the date of receipt of the application for registration of divorce by the marriage registration authority, any party who does not wish to divorce may withdraw the application for registration of divorce from the marriage registration authority. Within thirty days of the expiration of the period stipulated in the preceding paragraph, both parties shall apply in person to the marriage registration authority for the issuance of a divorce certificate; if they fail to do so, the application for divorce registration shall be deemed to be withdrawn."

Statistics show that the stability of post-80s and post-90s marriages is decreasing, and the number of "flash marriages" is increasing, as is the number of "flash divorces", a hasty and impulsive way of behavior that has a significant impact on society. The provision of a cooling-off period for divorce has

the potential to mitigate and curb this trend. It has also generated considerable academic debate and, although there are many foreign systems relating to divorce cooling-off periods or similar, it is the first of its kind in China. This article will discuss the controversies surrounding the legislation on divorce cooling-off period provisions in marriage law in the context of the current Chinese society and analyse whether this system is effective in addressing the high divorce rate faced at this stage.

B. Reflection of the importance attached to free will in law of marriage

Firstly, the importance attached to free will in the Marriage and Family Part of the Civil Code reflects the progress made in China's marriage legislation. The Chinese Civil Code unifies the formerly separate Marriage Law and the Adoption Law into a single volume, bringing together the Marriage and Family Division as a whole and enhancing the logic of the law. In the institution of marriage, the freedom to marry and the freedom to divorce are both rights protected by law. Marriage is the foundation of the family, so the main purpose of the marriage law when it was first established was to ensure that the free will of the marriage itself was genuine and to protect legal marital relationships and maintain the stability of the family. Marriage law does not guarantee that the motives of the parties for marriage and divorce are not impulsive and rash but rational; nor does it guarantee the sincerity of the feelings of the parties to the marriage and maintain the mutual fidelity of the spouses in the marriage. The changes to the marriage statute are therefore progressive from the point of view of the logic and fundamental purpose of the marriage statute. As divorce requires respect for the will of both spouses, the provision of a cooling-off period for divorce has a clear effect in avoiding impulsive divorce and can, to a certain extent, prevent the occurrence of "long delays without a divorce".

There have been many other specific legal and regulatory advances, such as the definition of relatives, close relatives and family members, the provision of financial compensation for divorce of a full-time wife, and the amendment of the prohibition of marriage to a situation of "voidable marriage". I will not repeat them all here.

Secondly, this regulation transplants foreign marriage law systems. Many countries around the world have similar divorce protection systems. For example, the United Kingdom and South Korea have legislated for a cooling-off period for divorce; Germany, Italy and Canada have set up separation systems; the United States has set up a waiting period of up to six months for divorce; and many countries, such as France, have directly stipulated that the only avenue for divorce is litigation. In France, when a judge refuses to accept a divorce agreement reached by the couple themselves, the parties have the next six months to re-filing a new divorce agreement.

Despite the variety of provisions on divorce in these countries, there are two core issues to focus on. Firstly, marriage and divorce are free rights of citizens and the autonomy of the parties needs to be respected within the limits of legality; secondly, the rights and interests of the weaker party on both sides should be taken into account as far as possible when enacting divorce-related legislation. Let us analyse countries with typical divorce cooling-off period legislation.

In the case of the UK divorce regime, a divorce may only be granted after one or both spouses have made a declaration of divorce, generally after a period of reflection and consideration of nine months. The declaration of divorce should include whether there is a possibility of salvaging the marriage and, if not, the agreement reached between the parties on children, property and other matters, and the parties' plans for the future. Furthermore, English law allows for the extension, suspension or cancellation of the cooling-off period, depending on the circumstances. With the help of a professional counselling service, the parties reflect together on whether there is really no way to continue the relationship and think sensibly about the upbringing of their minor children.

The basic system of divorce in Korea is similar to that in China and is divided into two categories: divorce by consent and divorce by litigation. Since 2005, Korea has had a divorce reflection period. The length of the consideration period depends on whether there are minor children or not, and is one month in the absence of minor children or three months in the case of minor children. In the case of divorce due to urgent matters, such as violence, the period may be waived.

C. Features of China's divorce cooling-off period system

The first characteristic is that the right to freedom of marriage and divorce is respected and guaranteed. Although marriage and divorce are not absolute individual rights of freedom, the relative freedom within the law needs to be protected. The original intention of the Chinese divorce cooling-off period system was to respect the wishes of both spouses as a prerequisite, and to give a period of sufficient reflection when both parties agree to divorce.

It is only applicable to divorce by mutual consent and not to divorce by litigation. A divorce by mutual consent is only applicable when both spouses have agreed to a divorce by mutual consent. Where one of the parties does not agree to the divorce, or where there are other disputes and no agreement can be reached, a contested divorce is required. In such cases, the divorce cooling-off period does not apply.

In order to ascertain the true intentions of the parties regarding the divorce and marriage. Under the previous approach to divorce under the Marriage Act, divorce was basically completed by application, and it was very easy for a couple to make an impulsive decision to divorce when they were angry because of arguments or conflicts. The divorce cooling-off period is designed to prevent irrational divorce decisions from being made in the heat of the moment and to encourage couples to think calmly and make appropriate decisions and arrangements. It is also expressly provided that if either party does not wish to divorce during the cooling-off period, the application can be withdrawn, or if the couple does not apply for a divorce certificate together at the Civil Affairs Bureau after the expiry of the cooling-off period, the application for registration of divorce is deemed to be withdrawn. This provision leaves a lot of room for couples who do not really want to get divorced, as long as they are not "uncool" couples who are still angry at the end of the month and decide to get divorced, they can generally avoid "irrational" divorce.

III. POSITIVE ANALYSIS OF THE DIVORCE COOLING-OFF PERIOD SYSTEM

A. The protection of the marital family by the divorce cooling-off period

Most scholars who support a divorce cooling-off period value the protective function of procedural restrictions on marriage and the family, which has a positive direct effect on reducing the divorce rate. A divorce cooling-off period allows couples who are voluntarily divorcing to calmly consider the outcome of the divorce, as well as having time to think about matters related to the divorce if it occurs, such as property division, child support, social implications, etc. At the same time, a divorce cooling-off period for those marriages and families that can be salvaged, considering the upbringing of children and the financial situation of the family, etc., can facilitate couples to repair their relationship and avoid the splitting of the family reducing the divorce rate.

B. Protection of minors in the family by the divorce cooling-off period system

Another significant benefit of the divorce cooling-off period is for the development of minors in the family. Numerous studies have shown that the family of origin is crucial for children and adolescents. The stigma of having a broken family of origin stays with children in divorced families for life. A period of calmness is vital for minor children as a de-escalation of family conflict, enabling the child's parents to think more about the child's development, rather than easily filing for divorce and working to repair the couple's relationship. An intact family is important in reducing the number of problem children, improving the temperament of children and reducing the rate of delinquency among minors. A divorce cooling-off period is beneficial to the development of minor children, which in turn protects the rights and interests of minors in the family and contributes to the overall stability and harmony of society.

C. A cooling-off period can reduce the potential for sham divorce

A sham divorce is an easy and convenient way for a couple to get a formal divorce in order to avoid legal liability, debts or other improper benefits. The most common purposes are: firstly, to avoid debts by transferring assets in bad faith through a divorce; secondly, to avoid liability through divorce; thirdly, to obtain subsidies for house demolition for homeless households; fourthly, to avoid property tax or inheritance tax; and fifthly, to avoid family planning penalties.

The new system of a cooling-off period for divorce has greatly increased the difficulty of obtaining a fake divorce. China has stepped up from the old formal examination of divorce, requiring marriage registration authorities to do their due diligence in examining whether the documents submitted by the parties are true and lawful, all of which has had a considerable dampening effect on the occurrence of sham divorce cases.

IV. THE SHORTCOMINGS OF THE DIVORCE COOLING-OFF PERIOD SYSTEM AND POSSIBLE SOLUTION

A. The "one-size-fits-all" cooling-off period in the divorce cooling-off period system

The most obvious problem with the divorce cooling-off period is that the logic of the law is "one-size-fits-all", with a uniform thirty-day cooling-off period. Different couples have different patterns of dealing with each other and their family environment, and it is obviously somewhat illogical to presume that a couple is sufficiently "cool" with each other by using an outside involvement rule.

The law does not allow 30 days to determine whether a couple is calm or not, so I believe that the divorce cooling off period should be treated separately according to the couple's specific circumstances, family conditions and surrounding issues. Firstly, a cooling-off period should be applied if the rights and interests of other members of the family are compromised as a result of a hasty divorce; secondly, a cooling-off period should also be applied if the parties are in a "flash" marriage or if they do not know each other well enough or are young. These two points will ensure that the original intent of the divorce cooling-off period legislation is fully met.

There are, of course, situations where the cooling-off period does not apply: for example, "old couples" who have lived together for many years and whose divorce appears to have been caused by trivial matters, but whose divorce is often the result of a long period of "resentment" caused by a lack of understanding between them and the quality of their lives together. The divorce cooling-off period cannot help with such a relationship. In addition, the cooling-off period should not be applied if one of the spouses is unfit for the relationship and there is an urgent need to protect the other spouse. For example, domestic violence, gambling or drug abuse by the other spouse that may endanger one of the spouses may in turn cause serious or irreparable damage and harm as a result of the cooling-off period. According to China's 2016-2017 Judicial

Big Data Thematic Report, 14.86% of couples applied to the court to dissolve their marriage due to domestic violence. Therefore, whether it is necessary to insist on the application of a divorce cooling-off period needs to be argued.

B. Conflict between the divorce cooling-off period system and "green principle"

As divorce involves many issues, including property, companies, vehicles, children, marital debts, etc., each of which requires time and energy to handle, a one-month cooling-off period is now added to the process of divorce by mutual consent. This is a lot of running around for couples who are already frazzled by the divorce because of the extra paperwork. Also, many couples who divorce voluntarily will live apart, each with their own jobs and not living in the same city. Because the procedures at the marriage registry become complicated, it can result in the need for both spouses to make appointments, take time off work and travel.

These additional procedures are in conflict with the "green principle" of civil law. The additional procedures will result in couples who are already in conflict needing more patience to negotiate when to apply for a divorce and when to apply for a divorce certificate after the 30 days have elapsed. The procedure requires two joint personal visits to the marriage registry to register the divorce, which can result in delays or frustration due to time constraints, geographical constraints, etc., resulting in a failure to obtain a certificate. The "one-size-fits-all" nature of the cooling-off period procedure can also result in many couples having to endure a month's wait.

While this may reduce the divorce rate to a certain extent, some formal marriages that could have ended smoothly, honourably and efficiently are made cumbersome by this procedure. This has also created new demands on the staff of the civil affairs department to further review whether the cooling-off period is over and whether the parties' intentions to divorce are genuine. The divorce cooling-off period is contrary to the spirit of the broad "green principle" from the point of view of procedural complexity. It does not work for those couples who really want to divorce, but adds a certain amount of hassle.

C. The imperfection of the supporting legislation for the divorce cooling-off period system

At present, China's divorce cooling-off period is only a separate piece of legislation, and there are no other supporting regulations to help divorcing couples resolve the divorce difficulties they face. It simply allows the couples involved to do their own thinking, without corresponding divorce counselling, psychological counselling and enlightenment measures. In reality, when a couple's relationship breaks down, it is often difficult for them to repair their relationship on their own, and the divorce cooling-off period legislation has instead facilitated two people to wait passively in a state of antagonistic cold war for thirty days before going through the divorce process. The cooling-off period has become an even more painful ordeal and a drain on the patience of the two

people. Therefore, the system of divorce cooling-off periods in China has yet to be matured and improved. In this regard, it is possible to draw on the experience of mature foreign countries and to tailor a suitable divorce procedure, taking into account the practical effects and actual national conditions.

D. Whether the divorce cooling-off period regulation should be extended to other situation

Some scholars have suggested that the scope of application of the divorce cooling-off period should be expanded and that the provisions of the cooling-off period should also be applied in the case of litigation divorce. According to China's 2016-2017 Judicial Bigdata Report, 77.51% of couples applied to the court for dissolution of marriage due to discord" and 34.19% of the first-instance trials resulted in the dissolution of the marital relationship between the spouses involved. In other words, a large proportion of divorce proceedings also require a cooling-off period. On the flip side, there is a role for the cooling-off period in saving judicial resources. Whether the divorce by mutual consent can be achieved in a coordinated and efficient manner in accordance with the true wishes of the spouses, as envisaged at the outset of the legislation, or whether the divorce by litigation can be achieved in a contentious situation or where one of the parties is unwilling to divorce, requires further refinement.

The current practice in contentious divorce is that the first divorce is usually sued for, and generally a judgment is granted against the divorce. There is then a six month interval between the first divorce judgment and the second, which is also referred to by some academics as a cooling off period. This type of cooling-off period is not clearly defined and conflicts with the green principle of saving judicial resources. If the two forms of divorce, namely divorce by mutual consent and litigation, were to be reorganised and harmonised, distinguishing between functions and circumstances, it might be more relevant to address the operational aspects of divorce in an efficient and accurate manner.

The 30-day cooling-off period provided for in the Civil Code does not bring about the calm and rational thinking that the legislation itself aims to achieve for families that are already clearly planning to divorce, or where the divorcing spouses are likely to have had a relatively long "cold war" before deciding to divorce. Therefore, the time requirement to calm down will not bring about any substantive change, but may lead to further arguments, domestic violence or marital rape, which may further damage the relationship and harm each other. It may even have a negative effect.

V. CONCLUSION

The divorce rate in China's major cities has been on the high side for many years, and there are three common scenarios according to the analysis of netizens' votes. Firstly, normal divorce where the couple's relationship breaks down;

secondly, divorce to isolate risk or quietly transfer property due to debt problems caused by the economic downturn; and thirdly, tax avoidance divorce caused by policies related to property tax regulation in the property market. It is easy to see that the latter two scenarios have made marriage and divorce a transaction and a tool to achieve benefits. Marriage is a special right protected by law, but when marriage is no longer pure, we should pay attention to whether the legislation has overlooked some of the key causes and strategies to address them. It is important to avoid cure the symptoms, not the disease approach to problem solving.

While the original intention of the marriage cooling-off period is undoubtedly good, it will take time to see whether it is effective in reducing the divorce rate and whether it is suitable for the development of China's economy and society, and the law will continue to be revised. Marriage is a microcosm of society, reflecting the socio-economic, demographic, price and age-related problems of people of all ages. The high divorce rate is not something that can be solved unilaterally by marriage laws alone, but requires the cooperation of different sectoral laws, taking into account the specific national and regional conditions and starting from multiple angles, using a combination of prescriptions. It is necessary for different sectoral laws to cooperate with each other, taking into account specific national and regional conditions, and to tackle the problem effectively by adopting a combinate approach to better protect civil rights.

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