

A Brief Analysis of the Dilemmas and Solutions of Divorce Cooling-Off Period in Judicial Practice

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Abstract— The cooling-off period of divorce has attracted much attention since it was embodied in the Civil Code, focusing on its time cost restriction on the freedom of divorce and the price of the system itself. Value positioning is misleading. Before the implementation of the Civil Code, with reference to foreign legislative examples, pilot courts implemented a flexible hearing system for family disputes, especially for registered divorce. It can be seen that the system was set up before the registration of divorce in line with the trend of international legislation. However, there are many challenges in applying the divorce cooling-off period system in judicial practice. In view of this. Through the longitudinal study of divorce cooling-off period. The solution to the difficulties of the system of cooling-off period of divorce in judicial practice.

Keywords— Divorce cooling-off period, Freedom of marriage, Impulsive divorce.

I. THE THEORETICAL BASIS OF DIVORCE COOLING-OFF PERIOD SYSTEM

A. Concept and characteristics of divorce cooling-off period system

Marriage was a state of life approved by the social system at that time. Men and women form families because of marriage. They are members of each other's family and should love, respect and tolerate each other. In the family affairs agent, should be equal mutual aid, unity and harmony. The Marriage Law and the Marriage and Family section of the Civil Code both affirm the act of freedom of marriage, and affirm that the freedom of divorce is a supplement to the freedom of marriage, and is the final solution to the irreconcilable family conflicts. In order to set up "irreconcilable final solution of family conflict" more reasonably, the divorce cooling-off period system is set up in the engagement divorce procedure. The divorce cooling-off period system refers to a legal system in which the state organ sets up necessary administrative mediation procedures when the husband and wife agree to divorce, and whether to dissolve the marriage relationship after reviewing the legal period. It has the following characteristics: First, the divorce cooling-off period system fully embodies the high degree of integration of private nature and public nature of marriage life.

The divorce behavior is the voluntary behavior of husband and wife. However, due to the influence of impulse divorce, reckless divorce, lifestyle choice of family life and other factors, and according to the experience, Chinese lawmakers have added the divorce intervention system in the amendment of the civil Code, namely the occurrence of perceptual divorce behavior, and establish the rational thinking of the time corridor.

Second, the divorce cooling-off period is the pre-procedure for handling divorce formalities through administrative procedures.

Registered divorce is a legal system in which marriage is dissolved through non-litigation procedures within the legal scope. Therefore, a cooling-off period in the divorce

registration process is equivalent to a countdown to divorce. However, there is also a view in the academic circle that there should be a legal reason that does not apply to the divorce cooling-off period on the premise that the divorce cooling-off period is recognized as a necessary procedure for divorce registration. To prevent the spread of family tragedy.

Thirdly, the application of the divorce cooling-off period system must comply with the legal conditions and procedures. The divorce cooling-off period is set within 30 days after divorce registration, which is conducive to the parties' careful consideration. If both parties still claim to terminate their marriage 30 days after the divorce registration is accepted, the marriage registration authority will still accept the claim. According to the Civil Code, the cooling-off period is only applicable to divorce registration and should meet the following conditions: first, the couple is willing to divorce; Second, the couple sign an uncontested agreement on the division of the couple's property and the right to support their children. 3. The husband and wife go to the marriage registration office to handle relevant matters; After the legal time limit.

B. The need for a divorce cooling-off period

1. Meet the legal requirements of the freedom of marriage

According to the historical process of marital status and the development of social economy, the composition of marriage and family has roughly experienced the process from completely free union to relatively free union, from disorderly cohabitation to relatively fixed process. Each change has trans-era significance for the construction of marriage and family, and is also a reasonable choice made by human beings after they gradually understand the objective laws of society and the physiological laws of men and women. Human beings want their families to have a sense of inheritance, which is important for careful marriage. At the same time, in the case of some irreconcilable family problems, the method of dissolving marriage recognized by the social system at that time was put forward. It is of great significance to set up a reasonable cooling-off period for administrative divorce cases by referring to the judicial practice experience of pilot courts before the Civil Code and foreign legislative examples. After a fixed period of

reflection, the decision is made to continue or dissolve the marriage. Therefore, the establishment of divorce cooling-off period conforms to the legal requirements of the freedom of marriage.

2. It conforms to the trend of international marriage legislation

The divorce rate remains high and even increases year by year, which is a common problem facing human marriage and family. This high divorce rate is likely to cause adverse social effects, such as unstable marriage and family life, the emergence of family-oriented cohabitation concept. In response to these disturbing factors, countries are responding to the reform of marriage and family legislation. The revision of the Civil Code directly changed the Marriage Law and related judicial interpretations into the marriage and family part of the Civil Code, and directly placed necessary restrictions on the freedom of divorce, which is in line with the current situation of international marriage. And family legislation. In common law countries, the divorce cooling-off period is many years earlier than in China. Even before the civil law talks, there were no clear provisions on the cooling-off period for divorce in any law, which only involved local regulations and documents and had pilot effects. The cooling-off period of divorce in this Civil Code accords with the trend of international marriage legislation in content. However, due to the rich experience of foreign legislation, our regulations are insufficient.

3. It can suppress the rising divorce rate in our country

According to data from the Ministry of Civil Affairs' 2015-2019 survey, China's marriage rate continues to decline while the divorce rate continues to rise. By comparing marriage and divorce data collected by the Ministry of Civil Affairs in 2018 and 2019, the marriage rate was 6.6 percent, a decrease of 0.700 points over the previous year; The divorce rate was 3.4 percent, up 0.2 percentage points from the previous year. A total of 4.71 million couples went through divorce procedures in accordance with the law, an increase of 5.4 percent over the previous year, of which 4.047 million were registered by civil affairs departments and 653,000 were decided or mediated by courts. According to statistics from the Ministry of Civil Affairs, we can see that the number of divorces registered by civil affairs departments is six times that of lawsuits and mediation. According to foreign legislative experience and China's pilot experience, setting a cooling-off period in divorce registration can give both men and women more time to think. In a limited amount of time, more families could be brought back together.

II. THE DIFFICULTY OF DIVORCE COOLING-OFF PERIOD IN JUDICIAL PRACTICE

A. The cooling-off period lacks conditionality

In our country, the divorce cooling-off period has experienced the germination period, the development period, the comparative analysis period and the norm period. The Civil Code provides a legislative basis for the standardization of cooling-off periods. However, since the issuance of the Civil Code, the pre-registration procedure of divorce has become the focus. Article 1077 of the Civil Code clearly states that divorce has a cooling-off period of a specific period, but the academic thought and one-size-fits-all rules are too absolute, especially when there are serious situations such as domestic violence and

abuse in the marriage, the application of marriage is not conducive to saving the interests of the damaged parties. Therefore, the lack of cooling-off period conditions have the following harm: first, there is no room for the application of divorce cooling-off period, does not conform to the general circumstances of legal exceptions. In particular, no relief measures have been taken for those who have suffered significant damage to their marriage and family life. There is no doubt that the injured party faces secondary risks in terms of marital property preservation and personal health and safety. Second, the continuous existence of abnormal family status has resulted in the dissolution in essence and the close combination in form. Divorce coolness naturally avoids impulsive divorce, so it is inevitable for those involved in the divorce decision to be considered, and undoubtedly increases the time cost of divorce registration, especially for both parties who are separated, and even for a person living abroad, setting a cooling-off period for divorce also increases the cost of money. Complex administrative divorce procedures and extra time and even monetary costs can make a small number of nominally unviable marriages disappear.

B. It remains to be seen how effective the cooling-off period is in relation to divorce registration procedures

The divorce cooling-off period has been mentioned in the Marriage Registration Ordinance of 1994, and the academic circles call it the germination stage of divorce cooling-off period. After several years of implementation, the relevant provisions in the Marriage Registration Regulations were repealed in 2003, until the Civil Code reaffirmed the divorce cooling-off period. This process from nothing to nothing, from nothing to nothing and from nothing to nothing gives the author reason to ask how the effect of cooling-off period application is related to divorce registration procedures. In order to prevent imprudent divorce and resolve marriage crisis, many beneficial attempts have been made in judicial practice, such as divorce by appointment, divorce by trial and divorce waiting period designated. All these attempts provide judicial experience for establishing a new divorce cooling-off period system. In particular, on the working mechanism of pilot divorce, full consideration should be given to issues such as the distribution of property between husband and wife and the custody of minor children, and corresponding assistance should be given to one party in financial difficulties after divorce. Although divorce is indeed a "private matter" that no one has the right to interfere in, we have to re-examine the measures adopted after the Civil Code institutionalized and normalized the divorce cooling-off period. The system. Article 1077 of the Civil Code is just the normalization of the cooling-off period system, but whether the need to register in the cooling-off period will be the joint property of the couple, lest one party transfer, conceal, custody of minor children should be considered, considering the difficult side after divorce, financial help and other issues are of no use. Therefore, it is necessary to investigate the relationship between divorce cooling-off period and divorce registration procedures.

C. The cooling-off period is not enough to save fragile marriages

The key to the divorce cooling-off period is "quiet," using a fixed amount of time to think about what caused the marriage to be in turmoil and whether that reason must not be resolved and only forced to resort to last-ditch remedies to resolve marital and family disputes, rather than a "cold." In 2016, the Supreme People's Court launched a pilot program in 118 Chinese courts. After the pilot work was carried out, there were both successful cases and unsuccessful cases. Of the 67 divorce cases accepted by the Jing 'an District People's Court in Shanghai in 2016, 27 couples remarried "calmly and prudently" through the system. Of the 160 divorce cases handled by Jinan Zhangqiu District People's Court in 2018, 32 couples got married again after accepting the "calm and prudent" system. After returning, there are still a few parties that can reconcile after the couple has withdrawn, however, there are still many families that have considered, or the couple's property, child custody issues to continue the divorce agreement, or issues that will directly overturn the divorce proceedings of the original agreement. So the cooling-off period is not enough to save a fragile marriage.

D. Cooling-off periods challenge intergenerational conflict in marriage and the family

Intergenerational conflict is the result of conflicts between two generations, especially between parents and children, on values and living habits. So intergenerational conflict still applies to family conflict, especially when it comes to divorce. The intergenerational conflict that applies to divorce mainly refers to differences between the two generations in their ideas of how marriage should work. A generation believes that as long as the family structure is intact, they should live together until they die. A generation believes that in the survival of a marriage, both men and women should be based on feelings, and when the foundation is shaken or broken, marriage should be dissolved in time. Therefore, it is believed that a happy married life should not only effectively extend the family, but also pay attention to the happiness index of marriage, the synchronization of husband and wife's career, the compatibility of husband and wife's life and other aspects. The halcyon days of divorce, when both men and women are well thought-out and more or less disturbed by the older generation, there is always a collision of ideas and lifestyles, especially in the face of irretrievable married life, which may choose a completely different approach from the previous generation. At this time, whether there will be emotional communication barriers between the previous generation, whether there will be a Waterloo event that damages the spirit of the previous generation is possible. In particular, parents have found that when calculating the equivalent cost of additional children to support their parenting programs, sometimes parents will make some demands, such as changes in lifestyle, consumption structure, etc., which are required to change the program and modern youth more or less around the phenomenon of incompatibility, which will accelerate the change in marital status. Young people calm themselves from simple communication to minor arguments to ending marriages. However, the existence of the cooling-off period, but let the pace of the quarrel stopped, so that the quarrel of marriage life

has been calm thinking, considering whether the end of the marriage can solve the nature of the quarrel. The cooling-off period is therefore a challenge to intergenerational conflict in marriage and family.

E. The cooling-off period is public power interfering with private rights

The cooling-off period is set up to suspend the controversial divorce cases, which undoubtedly sets the necessary time limit for divorce freedom, and also increases the time cost of divorce. The free time threshold stipulated in Article 1077 of China's Civil Code conforms to the spirit of the Constitution. On the one hand, through this article, the Civil Code stipulates the application conditions, specific period and legal effect of the divorce cooling-off period, which makes the application of the divorce cooling-off period more standardized. On the other hand, clarifying the terms of reference of the statutory body enforcing the cooling-off period will not easily alter the legislative intent of setting it. However, we must realize that the freedom to divorce is a fundamental right granted by law and should be respected by the judiciary, no matter what restrictions are placed in front of it. The divorce cooling-off period exists only to reduce impulse divorces and thus their adverse effects on families and society. Therefore, from the legislator's point of view, it is emphasized that citizens should exercise their divorce right prudently and maturely. However, during the divorce cooling-off period, domestic violence occurs, forcing the other party to fulfill the marital obligations and maliciously increasing the family debt. Most netizens also raised doubts about such issues, arguing that the setting of a divorce cooling-off period would increase the degree and duration of victimization. In such cases, however, the injured party has the right to request the intervention of the public authorities to protect its legitimate rights and interests. Therefore, the cooling-off period is the interference of public power over private power.

III. DIVORCE COOLING-OFF PERIOD IN JUDICIAL PRACTICE FACING DIFFICULT SOLUTIONS

A. Clarify conditions for cooling-off periods

Regarding the cooling-off period, Ma said, "It is necessary to examine whether a person who divorces through administrative procedures has a marital crisis or marriage death, and there is no need to apply the cooling-off period rule to a dead marriage." In this regard, many scholars hold the same view. Specifically, the cooling-off period prior to divorce registration no longer applies if the persecuted party has suffered domestic violence, abuse, abandonment, etc. I also agree with this view, because persecution that ignores the above three conditions and is allowed to develop freely during the cooling-off period may cause the perpetrator to respond to violence with violence and the injured party to suffer more persecution. Or even lose the chance to defend themselves. In this regard, the methods to clarify the conditions of cooling-off period are as follows: First, we can learn from the provisions of the UK on the cooling-off period for divorce and improve the supporting system and conditions, such as increasing marriage. Mediators provide counselling and psychological assistance;

We will increase professional mediation institutions to resolve conflicts between parties involved. Second, we can learn from the provisions of the divorce review period in South Korea, that is, when one party suffers or has suffered domestic violence, abuse, abandonment and other circumstances, and the other party goes to the marriage registration department for divorce, the review period should be waived. Third, through the Supreme Court's interpretation of the cooling-off period, improve the specific application conditions of the cooling-off period. In judicial practice, in order to let the parties fully and calmly consider whether to continue the marriage, the local set up relevant mediation counseling institutions. If local conditions do not permit, the mediation function of relevant local departments (such as civil affairs departments or residents' committees or villagers' committees) can be increased.

B. Adjust the application effect of cooling-off period and the interface function of divorce registration procedure

The cooling-off period is designed to prevent hasty and impulsive divorces, so giving both parties time to think helps them make a prudent decision. According to Article 1077 of the Civil Code, the cooling-off period for divorce is 30 days, which contains two meanings: first, any party has the right to withdraw the divorce application within 30 days from the date of accepting the divorce registration; 2. Both parties shall apply for the issuance of divorce certificates on the spot at the same time within 30 days after the expiration of the time limit for accepting divorce registration. No other person can act as an agent. If one party fails to apply for issue of divorce certificate on the spot or within the time limit, the application for divorce registration shall be deemed to have been withdrawn. This paper guarantees the importance of negotiation in the quiet period of divorce to the standardization of procedures. In order to make people think about whether to end their marriage or even experience life after divorce, the system of specifying the waiting period for divorce and trial divorce can be further improved. According to Article 1077 of the Civil Code, the waiting period for divorce is 30 days after the divorce is registered. Is a one-size-fits-all outcome reasonable? We recall that the Marriage Registration Ordinance (1994) clearly stipulates that a review procedure should be established prior to the registration of a divorce. The Marriage Registration Ordinance (2003) abolished this requirement. In 2008, with the emergence of the proposal to "establish a marriage counseling system", judicial practices across the country have put forward the provisions of the divorce cooling-off period, some put forward 3-6 months, and some put forward no more than 3 months. Months, some proposed three months, and the draft civil code proposed that divorce applications be accepted and registered after 30 days. The deadline was discussed again in 2008, and the final civil code set 30 days after the filing of divorce applications. So the argument of 30 days through judicial practice should be supported. However, in order to better adjust the effectiveness of the cooling-off period and the connection function of the divorce registration process, the divorce system should be tested during the cooling-off period. The application of this system shall be handled according to the divorce registration, including the provisions on the division of

the couple's common property, the negotiation of the custody of children, and the right relief, except for the couple who have not applied for the divorce certificate temporarily. First, the couple's common property should be registered and put on record during the cooling-off period to avoid one party transferring and concealing the property. Once the above situation is found, the other party may apply for a new division of the couple's joint property, or may file a civil claim for damages caused to the other party. Second, the guardianship of minor children should be considered. In accordance with the provisions on the relationship between parents and children, with reference to the principle of minor children growing up, the negotiation on the issue of minor children guardianship and child support should be temporarily settled in accordance with the principle of fully considering the intention of minor children over the age of 8, and visitation should be provided. Third, consider offering financial help to the spouse who is struggling after the divorce. The party filing for divorce usually handles domestic matters and has no other income. On the basis of the above factors should be fully considered in the cooling-off period, the parties should also be given financial help after the division of the couple's common property.

C. Balancing the intergenerational conflict between marital freedom and family responsibility

The content of marriage freedom includes two aspects: marriage freedom and divorce freedom. Freedom of divorce is guaranteed, enabling both parties to resolve a marriage that breaks down and prevents them from living together entirely on their own terms. The cooling-off period is a restriction on the parties' freedom to dissolve their marriage. As mentioned above, during the divorce cooling-off period, both men and women's rethinking of divorce consciousness will be more or less influenced by the older generation. In particular, they accept the mediation of the older generation in the aspects of life style and conflict resolution, which can effectively ease the intergenerational conflict between the sense of freedom of divorce and family responsibility. The specific way is as follows: is to attach importance to the connotation of the consciousness of freedom of marriage. Although the cooling-off period is a restriction on the parties' freedom to dissolve their marriage relationship, it does not prevent the parties from applying for divorce by agreement. As long as the parties submit their divorce application after 30 days from the marriage registration office, they can proceed with divorce by agreement. The cooling-off period provides a chance for a broken marriage to repair itself. The second is to change the previous generation's view of marriage and family life. As a legal act, divorce is a matter of private law. The fact of divorce law also implies guardianship, protection of the interests of minor children, division of marital property and freedom of marriage. A total of 50 people were investigated and 34 valid questionnaires were collected. Among participants aged 19 to 29, 64.71 believe that "marriage is a lifelong thing, once you get into a happy marriage life, you will never get divorced easily". This concept is basically consistent with the overall social value orientation, and there is no intergenerational conflict. Of course, some argue that divorce without love is

divorce, stressing that divorce is easy, and that the cost of not divorcing accelerates the speed of hasty divorce. Therefore, the divorce cooling-off period can balance the intergenerational conflict between the sense of marital freedom and the sense of family responsibility. Third, attach importance to the relationship between marriage freedom consciousness and family responsibility. The principle of freedom of marriage is an important principle for adjusting marriage and family life. In marriage and family life, we also emphasize the integration of the consciousness of marriage freedom and family responsibility, that is, when men and women form a family, they should respect, understand, help and consult each other, because in the trifles and conflicts of values in life, they should fully listen to each other and their elders' opinions. These principles of family affairs are also well reflected in the basic principles of marriage law, which is also the best witness of the organic combination of marriage freedom consciousness and family responsibility. Therefore, the establishment of the divorce cooling-off period system should also set up a divorce mediation mechanism and divorce counseling institutions, indicating whether the consciousness of marriage freedom is an escape from family responsibilities.

D. Reasonably set limits for public power to interfere with private rights

When social and economic development, marriage and family concept and other factors affect the choice of unstable cohabitation life, coupled with hasty divorce, impulse divorce and other factors easily lead to marriage breakdown, the negative demonstration effect of marriage and family is caused. The reasonable setting of the boundary between public and private rights is the rational regression given by the state when the parties decide to divorce. It avoids the capricious behavior of the parties from the rational point of view, and tries to

maintain the harmonious family state from the perspective of family responsibility, so as to eliminate the negative impact of divorce on the family. It can be seen that the discussion on the reasonable setting of the boundary between public and private rights must be answered by legislators. The author thinks that the following two aspects should be considered: on the one hand, the application conditions and legal effect of divorce cooling-off period should be clarified, so as to make the application of divorce cooling-off period more standardized. The applicable conditions are as follows: first, the couple voluntarily divorce; Second, the couple sign an uncontested agreement on the division of the couple's property and the right to support their children. 3. The husband and wife go to the marriage registration office to handle relevant matters; After the legal time limit. The marriage registration authority that meets the above four conditions shall handle divorce registration. On the other hand, in the divorce cooling-off period, the phenomenon of domestic violence, forcing the other party to perform the marital obligations, can no longer be restricted by the divorce cooling-off period, directly choose divorce rather than broken marriage. Get rid of the feelings of unhappy married life; If one party maliciously increases the family debt, the other party has the right to appeal against the division of the couple's common property within the cooling-off period of divorce, and may also claim damages.

To sum up, starting from the theoretical basis of divorce cooling-off period, this paper focuses on analyzing the difficulties facing divorce cooling-off period system in judicial practice, and puts forward the corresponding solutions. It is necessary to find out the difficulties and solutions of divorce cooling-off period system in judicial practice, which is also the reflection of social demands in theoretical discussion.