

Exploring China's System of Restricting Divorce Freedom Based on the Civil Code

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Abstract—Nowadays, the divorce demography remains high, and it is increasing year by year in China. The rise of the divorce demography not only affects the stability of the family to a large extent, but also threatens the economic and social development. In response to this problem, China has issued many legal documents to restrict the freedom of divorce, the most representative of which is the Civil Code, which stipulates a calm period for divorce, which has aroused a lot of attention and discussion. The regulation on the calm period of divorce effectively prevents the occurrence of impulsive divorce, but there are still many problems with this regulation. And to some extent, it interferes with the freedom of marriage. In response to the differences and existing problems in the current system, analyze the limitations on the freedom of divorce for military spouses and the limitations on divorce freedom procedures, and propose improvement suggestions based on domestic and foreign legislative experience. In the face of the calm period system that has caused widespread controversy, it needs to be further applied at different levels. Only in this way can we better solve the problem of the high divorce demography and promote the harmonious development of society.

Keywords— Freedom of divorce; Restriction system; Divorce cooling off period

I. INTRODUCTION

The divorce demography is rising all over the world, and China is one of the fastest countries in the world. Therefore, to some extent, it is a common consensus to impose some restrictions on the divorce demography. The Civil Code came into effect in 2021, in which a "calm down period for divorce" was established, which to some extent can have certain constraints on both spouses, thereby reducing their emotions and ensuring their relationship. However, the constraints on divorce behavior cannot conflict with marital freedom, so it is necessary for us to delve into the constraints on divorce behavior in order to find a balance between freedom and constraints. Currently, there are varying degrees of constraints on the marital life of both spouses, and there are also different constraints on the marital life of both spouses. The Civil Code stipulates that men with "special status" status, as well as men with "special status" status, have conflicts with current legal provisions and legislative deficiencies. In terms of the constraints on divorce litigation, the main issues discussed were the application of the unacceptable calm period for divorce and the length of the unacceptable time.

At present, China's divorce system still faces many problems, such as strict restrictions on divorce procedures, insufficient protection of women's rights and interests, and inadequate regulations on the divorce system. Social changes are reflected in changes in the marriage system, therefore, the law should comply with the trend of society and include proviso clauses for military spouses to expand restrictions on them. To protect the legitimate rights of the disadvantaged party, the guiding principle of "the right to divorce enjoyed by men in extraordinary times" should be established. Starting from judicial practice, a detailed explanation was given on the exclusion of the calm period system, and it was classified and improved accordingly to achieve a balance between freedom and restriction; Based on the relationship between husband and wife, try to reduce the divorce demography and maintain the stability of the relationship between husband and wife.

II. CHINA'S FREEDOM OF DIVORCE RESTRICTION SYSTEM

A. The Meaning of the System of Restricting Divorce Freedom

People have always advocated freedom of marriage and freedom of divorce, and the restriction of divorce freedom seems out of place. Many scholars even mentioned in their works that restricting divorce freedom is unreasonable and does not have a sufficient theoretical basis, which hinders the progress of the law. But as people enter the information age, their attitudes towards marriage are gradually updated and open. According to the Statistical Bulletin of Social Service Development issued by the Ministry of Civil Affairs from 2001 to 2022, since the beginning of the new century, China's divorce demography has increased year by year. Except for a few years, the "divorce demography" in other years has increased. Scholars have begun to pay attention to the study of the system of restricting freedom of divorce, which includes two aspects: rights and procedures. The main target of this system is divorce behavior. Prior to this, people had focused more on the strict terms of divorce. Fan Lijun mentioned in her work that even if both parties meet the legal conditions for divorce, in order to better protect the rights and interests of vulnerable groups, divorce needs to be restricted. However, in comparison, the meaning of the divorce freedom restriction system is more extensive, which not only restricts the rights of special groups, but also includes some procedural restrictions. In a broad sense, it covers all provisions that restrict divorce behavior, whether it is an ancient system or a modern church system, which falls within its scope. However, in a narrow sense, it mainly refers to limiting the right to divorce, such as restricting the rights of spouses of active military personnel with special identities, or introducing some procedures, such as the divorce cooling off period system.

B. Differences between the System of Restricting Divorce Freedom and the System of Restricting Divorce

Prior to this, the theoretical community had focused more on limiting the divorce system. For the divorce system, free divorce was not initially recognized. At that time, the fault divorce system was widely adopted, and divorce could only be granted if legal conditions were met, such as committing serious crimes or incurring unforgivable faults. This system originated in Europe, with the church as the center, The church adopts the principle of not allowing divorce based on interests, emphasizing the sanctity of marriage. With the development of practice and the openness of people's concepts, people have begun to further understand and interpret marital relationships from a legal perspective. They believe that marital relationships are actually a contract that contains the rights and obligations of both parties, but cannot be dissolved. Therefore, a restrictive divorce system has emerged. Although both parties are allowed to divorce at this time, relevant conditions must be met, For example, when there is a breach of contract or fault, a breach of the loyalty obligations of both spouses, a violation of public order and good customs, a violation of relevant legal provisions, and so on, although various regions have adopted restrictive divorce systems, many local systems have irrationality. Compared with Western countries, China's system has its own characteristics, mainly reflected in the following aspects: firstly, it focuses on traditional society, Secondly, it mainly targets women. Its content mainly includes the following aspects: firstly, its main restricted object is the wife, and the system stipulates that the wife is not allowed to seek divorce, and only the husband has this right. Secondly, even if the male partner has this right, there are corresponding restrictions on its use, which must be approved by the parents. In addition, the husband must also meet the legal requirements when filing a divorce. In this context, the rights between the wife and husband are unequal. The husband has the right to restrict divorce, but for the wife, this right is completely prohibited, mainly because in traditional society, women's low status does not have universal human rights. The system of restricting divorce freedom is different, and its content mainly includes two aspects. On the one hand, it targets individuals with specific identities, and on the other hand, it introduces specific procedures, mainly targeting divorce freedom, which is applicable to modern society. In this context, the rights of both husband and wife are equal, enjoying marriage freedom and divorce freedom. As long as both parties reach a unified opinion on divorce matters, Marriage can be dissolved through divorce agreements, but there are also many special situations in real life. For example, the divorce of certain individuals with specific identities may result in unfairness for them. In real life, pregnant women or military personnel are generally classified as individuals with specific identities. To further protect the interests of these groups, corresponding restriction systems have been introduced for divorce behavior.

In summary, it can be seen that there are fundamental differences between these two systems. Firstly, restricting the rights of both men and women in the divorce system is unequal. Even if the man has the freedom to divorce, it needs to be restricted by many conditions, while the woman has no freedom to divorce at all. In the system of restricting the

freedom of divorce, the premise for its existence is the equal rights of both men and women, ensuring the freedom of divorce of both parties. It only restricts the divorce behavior to a certain extent and does not interfere with the human rights of both parties. In the process of distinguishing between the two systems, it must be clear that freedom of marriage must be guaranteed and cannot directly interfere with the human rights of both parties, However, restricting the freedom of marriage has its rationality and necessity, and exploring it has its legitimacy.

III. THE PROBLEMS IN CHINA'S SYSTEM OF RESTRICTING DIVORCE FREEDOM

A. *Restrictions on the Freedom of Divorce for Military Spouses*

1. There are legal conflicts in restricting the freedom of military spouses to divorce

One of the main contents of the divorce freedom restriction system is the restriction of special status. Due to the special status of military personnel, in order to better protect their rights and interests, Article 1081 of the Civil Code clearly stipulates that restricting the divorce rights of military wives is not allowed unless they meet the legal requirements. However, this provision is unreasonable. Firstly, it conflicts with the Constitution, which clearly stipulates the protection of human rights and freedom of marriage. From this, it can be seen that freedom of marriage cannot be restricted in any way and the right of both spouses to get married and divorce needs to be guaranteed. The Constitution is the fundamental law with the highest effectiveness, and no laws, regulations or other provisions can contradict each other. However, the above legal provisions are suspected of violating them. The freedom here also has clear provisions. Without prohibition by law, it is freedom. As long as it does not harm the legitimate rights and interests of others, does not harm social public welfare, does not violate public order and good customs, it is freedom. Marriage freedom is also included, and both spouses have the freedom to marry and divorce, which is a right stipulated by law and should not be deprived in any form. Article 1041 of the Civil Code clearly stipulates gender equality, Further emphasis was placed on the right to freedom of marriage. In military marriage, the rights of men and women are clearly unequal, and the restrictions on women's divorce rights do not belong to the system of restricting divorce freedom, but rather a typical system of restricting divorce. In addition to the provisions of the Civil Code, the Chinese Law on the Protection of Women's Rights and Interests also clearly stipulates that women have the right to freedom of marriage. From this perspective, the restrictions on the divorce rights of military sister-in-law conflict with many laws. Although this provision is mainly aimed at protecting the rights and interests of military personnel, such obvious logical loopholes should not exist. In response to this issue, legislators need to further consider and improve it accordingly.

2. Defects in legislation restricting the freedom of divorce for military spouses

There are also legislative flaws in the provision restricting the divorce of military wives. The Civil Code clearly stipulates that unless a military member commits a major fault, their wife does not have the right to divorce. However, this provision is not comprehensive. Firstly, it does not explain major faults, which has led to difficulties in application in practice. It should include issues such as domestic violence, gambling, bigamy, etc. However, from actual cases, military personnel have been in the military, with strict discipline, limited personal time, and upright thinking. It is generally difficult to have a fault situation, so in this case, legal conditions are difficult to achieve. If military personnel oppose divorce, their spouse's right to divorce will not be realized, which also infringes on their spouse's right to divorce freedom.

In addition, this provision also violates the principle of fairness. Although military personnel are very great and have made great sacrifices for the country and the people, they should be given special care. However, this does not include emotional aspects. In terms of emotions, it emphasizes the agreement between husband and wife, which is voluntary rather than legal payment. In addition, according to the principle of consistency between rights and obligations, the party who enjoys more rights should pay more obligations, and the benefits come with risks. Soldiers serve the country and the people, and in this process, their wives do not gain more rights and benefits, but instead need to bear more obligations and risks. Obviously, it does not comply with the principle of fairness and justice. There are many fields that enjoy military protection, and compensation should be provided to them through other means, and the goal should not be achieved by restricting the rights of their spouse. From the perspective of practical situation, due to the long-term presence of military personnel in the military, and the majority of them being male, military sister-in-law not only needs to balance work and family, but also needs to face the storms of life alone. The rights and obligations are clearly unequal, and in this context, the law also restricts their right to divorce freedom, which will further increase the living difficulties of military sister-in-law and greatly hinder military personnel from finding a partner. Therefore, in the context of practical life, This regulation has many irrationality and needs to be optimized.

B. Limitations on Freedom of Divorce Procedure - Divorce Calm Down Period

1. Applicable situations are not differentiated

According to the data, the current divorce demography is increasing rapidly, with the number of divorces exceeding 4.3 million in 2022. In order to limit the divorce demography and prevent impulsive divorce, China has introduced the system of divorce cooling off period. However, there are many discussions on the system in the theoretical and practical circles, and they believe that its setting is unreasonable. Due to the complexity of marriage and family cases, the reasons for divorce vary for each couple. Some cases are indeed due to emotional breakdown, life pain, and the urgency and necessity of divorce, while others are only due to small incidents and

impulsive divorces. For these cases, specific analysis should be conducted, and indiscriminate application during the calm period of divorce can lead to unnecessary social conflicts. The current law in China mainly applies to the cooling off period of divorce in negotiated divorce, where both parties reach an agreement on the main matters and register for divorce. At this time, a cooling off period is required before entering the review process. If there is a dispute between the couple regarding specific matters of divorce, the purpose of divorce can be achieved through litigation. Compared to negotiated divorce, using litigation divorce is time-consuming and labor-intensive, and it will affect the reputation of both parties, so as a last resort, couples tend to divorce through agreement, and the calm period of divorce is an unavoidable system. In real life, many cases where one spouse has significant faults are ultimately handled through registering divorce. However, the setting of the calm period has caused many obstacles to people's divorce. In 2021, the case of a woman falling from a building in Hefei, Anhui Province, attracted widespread attention. The main cause of the case was the breakdown of the relationship between the couple, which had been a long-standing feud. Eventually, an agreement was reached to divorce, but when the wife thought she could escape the bitter sea, she was told that there was a one month period of divorce calmness, and she ultimately chose to jump off the building with her two children. This case is sufficient to demonstrate the irrationality of setting a calm period for divorce.

2. Lack of flexibility in setting the cooldown period time

The time limit for the calm period of divorce is clearly stipulated in the Chinese Civil Code. Both spouses need to calm down for 30 days, and then have 30 days to make a decision on whether to divorce. Only by completing the divorce procedures within this time limit can the marriage relationship be officially terminated. However, in reality, such regulations lack flexibility. Many scholars in the theoretical community have put forward opinions on the 30 day cooldown period. Professor Liang Comexing mentioned in his work that a one month cooldown period is reasonable and can allow both spouses to fully consider, calmly think, prevent impulsive divorce, and make a decision to revoke or not after reflection. Therefore, he agrees with the 30 day rule. However, Chen Wei Classroom put forward a different opinion. He believed that the one month cooling off period was too short, and the decision one month later could not rule out the situation of impulsive divorce. In order to further control China's divorce demography, a three-month cooling off period should be set to give people enough time to consider. From this, it can be seen that the theoretical community has many views on the setting of the cooldown period, and the current 30 day cooldown period is too rigid and needs to be dynamically adjusted.

IV. SUGGESTIONS FOR IMPROVING THE SYSTEM OF RESTRICTING DIVORCE FREEDOM IN CHINA

A. Suggestions for improving the divorce system for military spouses

1. Add a proviso to the freedom of divorce for military spouses

In the field of marriage and family, the freedom of divorce for military spouses should be restricted based on emotional factors. Although it can promote the integrity of military marriage families, it is a violation of the rights of spouses. Based on this, if Article 1081 of the Civil Code is amended to read: "If the spouse of an active duty soldier requests a divorce, they shall obtain the consent of the soldier, except for cases where the soldier has a major fault or the court deems it necessary to accept it", such legal provisions can be in line with legal principles and practical life. The major faults stipulated by current laws are generally difficult to appear in real life, which makes it impossible for a military spouse to divorce as long as they do not agree, severely limiting the divorce rights of military spouses. Therefore, a new clause is added that "if the court deems it necessary to accept", and the right to divorce freedom is granted to the spouse again. This proviso clause can better solve the conflict between the special protection system for military marriage and other legal issues. If the military personnel do not agree, they can bring a lawsuit to the court. Whether the court's relationship has broken down is also in line with China's divorce principle. At the same time, it is necessary to clarify the situation where it is necessary for the court to accept it and adapt it to the Chinese standard of "marital breakdown". If the spouse of a military member indeed has difficulties in actual life, the court should allow the parties to file a divorce lawsuit. If a military subordinate lacks understanding before marriage with a soldier, resulting in disharmony in personality and values after marriage, and cannot reconcile, they should also be allowed to file a divorce lawsuit.

2. Restrictions on the freedom of divorce for retired soldiers and their spouses

Regarding the issue of divorce among retired soldiers, appropriate attention should be paid to their marital and emotional lives. Firstly, soldiers live in the military for many years, and after returning home after being discharged from the military, it is inevitable that there will be a "pain period" due to different living habits of spouses, leading to disputes and disputes. Secondly, soldiers who have been living in the military for many years do not have a good understanding of their family's personality and temperament, which leads to a bumpy marriage life for soldiers after being discharged from the military. Couples often argue with each other. Thirdly, military personnel protect their homes and country, and injuries may occur from time to time. But after an injured or disabled soldier retires, can his wife accept his disability behavior? It is necessary to impose certain restrictions on the freedom of divorce for spouses of retired military personnel, as 'heroes should not be allowed to shed both blood and tears'. Based on the regulations on the calm period of divorce in China and the regulations on the length of marriage in the UK, it can be seen that a new provision has been added in Article 1076 of the Civil Code: if a retired soldier has been discharged for less than six months, the couple shall not apply for an agreed divorce. Firstly, limit the number of divorced parties to prevent them from impulsively divorcing due to arguments over trivial matters in their daily lives. Secondly, six months can also allow for a process of understanding and becoming

familiar with each other. Thirdly, what is restricted is agreement divorce, and there is no restriction on litigation divorce. If there is a fact of emotional breakdown between the couple, they can apply to the court, which is in line with the principle of freedom of marriage.

B. Suggestions for improving the calm period of divorce

1. Clarify the exclusion of applicable situations during the calm period of divorce

When facing divorce cases, specific problems need to be analyzed. If there are similar situations as the above cases, the calm period system may not be applicable or its time may be appropriately shortened to prevent potential tragedies. For the application standards, special documents need to be issued to determine. In addition, civil affairs departments such as marriage registration also need to conduct corresponding review and screening of specific divorce reasons to determine which system to adopt. If the relationship between the couple has not broken down and is only due to arguments or impulsive divorce, the calm period system can be applied. However, if the couple is tormenting each other and the marriage continues to exist, it will cause one party to lose hope. In this case, it can be resolved as soon as possible. Although reviewing specific reasons may increase the burden on civil affairs departments such as marriage registration, it is now entering the information age. Civil affairs departments such as marriage registration can fully utilize emerging internet technologies to achieve the purpose of review, thereby further strengthening the role of divorce calm period.

2. Grading applies to the cooldown period of divorce

Although the Chinese Civil Code clearly stipulates that the coolness period for divorce is 30 days, in reality, the law stipulates that the coolness period is 30 days, and the decision is made within 30 days. In reality, the period is 60 days, which is suitable for calming down and relieving impulses. Therefore, there is no need to extend it, which increases costs for people. However, this regulation also has certain irrationality. Chinese law stipulates that only after 30 days of calm can the review process be entered. This regulation is too rigid and the time limit set is too high. If the relationship between the couple has indeed broken down, every day they are together is torturing each other, especially in cases of domestic violence, infidelity, etc., which can easily lead to even worse consequences. If in this situation, the couple agrees to divorce, And if there is no dispute over other matters, there is no need to set a 30 day cooldown period, which can be appropriately shortened to 15 days. Alternatively, dynamic periods can be set based on specific cases, such as special circumstances such as pregnant women, infants, etc. In order to protect their rights, the duration of the cooldown period can be appropriately extended to increase operability and enhance the rationality of the system.

V. CONCLUSION

The improvement of the quality of life and the realization of personal values have made the binding relationship between marriage partners in today's society less close than in traditional society. The data released by the authoritative

department shows that the current divorce demography is still high, which not only causes widespread concern and becomes an important social problem, but also reflects the governance ability of legislators and social managers. In this context, it is necessary to study the system of restricting divorce freedom. The current system of restricting divorce freedom has many irrationality and is confused with the system of restricting divorce. This paper theoretically explores the mechanism of restricting divorce freedom in China, defines its connotation, distinguishes its differences, and summarizes the shortcomings of the current legal system in China. Based on the summary of successful experiences abroad and the current legislative situation in China, targeted solutions have been proposed to further promote the development of China's divorce freedom restriction system.

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