

A study on the protection of personal rights in the process of divorce

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Abstract: *As one of the most basic and prevalent units in society, the happiness and peace of the marital family has an important impact on the stability of society as a whole. With the increasing number of divorce cases in China, domestic violence has now also become one of the main causes of divorce proceedings, and the physical threats present in divorce disputes are bound to infringe on the personal rights of the injured party. To a certain extent, it can also cause irreparable damage to the physical and mental health of even minor children within the family. Therefore, in response to divorce cases caused by domestic violence, China has fully carried out the reform of family trials and implemented the protection of the personal rights of the injured party through the personal safety protection order system stipulated in the Law against Domestic Violence. This article starts from the current situation of divorce in today's society, takes domestic violence as the starting point, takes the right to life and health and the right to personal freedom as the main research objects, combines the habeas corpus system, analyses the necessity of the protection of personal rights of the spouses in the process of divorce and its causes, and then proposes corresponding countermeasures and legal measures to the above problems, and finally achieves the legislative purpose of protecting the personal rights of the injured party.*

Keywords: *Domestic violence; Habeas corpus system; Divorce; Personal rights*

1. Introduction

With the gradual liberalization of human thinking, divorce has gradually become accepted as a status quo in social life. An unhappy marriage is no longer a shackle that confines both spouses. However, according to statistics on divorce cases in recent years, domestic violence is also at the top of the list of the most common causes of divorce, such as infidelity, personality disagreements, and in-law relationships. ^[1]Victims who are at risk of domestic violence in their marital homes cannot avoid the possibility of continued threats of violence during the proceedings, even if they go to court to initiate divorce proceedings. Damages in a divorce dispute can be claimed in the divorce proceedings. A damage system is only an ex post facto mechanism to compensate the injured party for the damage that has already occurred utilizing monetary compensation. Still, it is simply ineffective in punishing the threat of violence to which the parties may be subjected during the divorce process.

Similarly, the divorce remedy system established in legislative practice to achieve relative freedom of divorce and to protect the legitimate rights and interests of the injured party in the process of divorce is based on the financial protection of the "results" of domestic violence, not on the "process" of domestic violence. "It is still unable to effectively resolve the dilemma of the threat and fear of continued violence against the injured party during the divorce process and does not mention anything about the physical dangers that may be suffered during the divorce process. Therefore, if there is no corresponding remedy for the parties' rights in the divorce process, it is difficult to achieve freedom of divorce if there is only economic relief, which may even lead to the injured party risking their life to initiate divorce proceedings. In China's judicial practice, judges often focus on the reasonable division of property and the maintenance of minor children and often overlook the threat of violence that parties may face during the divorce process. Among the structure of personal rights, the right to life and health, which is an essential basis for the enjoyment of other rights, is the most basic right of a natural person and should be adequately protected and respected at all times and in all places. However, there are still imperfections in the application of the system in specific cases, which should be further refined in future judicial practice to give full play to the positive value of the system, safeguard the personal rights of the injured party, and at the same time guarantee the smooth conduct of divorce proceedings.

2. Analysis of the need for habeas corpus protection in the divorce process

2.1. The current situation of violent "attacks" during divorce in China

Firstly, there are many divorce cases in which domestic violence leads to divorce. Under the background of free love, the situation of marriages arranged by parents in the past no longer exists, and the autonomy of the union has been respected to a greater extent. Still, even so, there is no guarantee that every family will always be happy and satisfied in the future. With the progress of social life, China's divorce rate has been rising year by year. According to the relevant departments, the number of divorced couples in the first three quarters of 2019 has reached 3.105 million pairs, an increase of 206,000 pairs compared to last year, and what is even more amazing is that the divorce rate has been rising for 15 consecutive years since 2002. Of these, 78.52% of couples applied to the court for divorce because of a breakdown in their relationship, and 15.87% were the result of domestic violence.[2] Of the divorce disputes arising from domestic violence in China, 92.45% of them are due to domestic violence against women by men, such as beating and verbal abuse. In cases where divorce proceedings are initiated due to domestic violence, even though the injured party uses legal means to defend her rights, due to omissions in judicial practice and imperfections in the relevant legislation, it is still difficult to avoid the threat of violence during the divorce proceedings, and the personal rights of the injured party remain under the shadow of intimidation and violence. The rights of the injured party continue to be overshadowed by intimidation and violence. As you can imagine, marital unrest is bound to negatively affect society.

Secondly, in response to the above-mentioned domestic violence phenomenon, although China's legislature formally established a personal safety protection order system in Chapter 4 of the Anti-Domestic Violence Law promulgated in 2016, the implementation of protection in concrete judicial practice is still inadequate. This system aims to prevent and stop domestic violence and is one of the important measures to deal with domestic violence. Still, as the system has just been established in China, the articulation of internal procedures, the allocation of responsibilities of specific implementation organs, as well as the order of internal link operations are still not very perfect, resulting in the Lack of convenience, accuracy, and effectiveness of the system in front of the victims. To a certain extent, it cannot be timely and effective. Even if a writ of habeas corpus is issued based on the victim's application, there are still gaps in the legislation in the subsequent practical implementation and even in the interpersonal relationship between the two parties at a later stage. This shows that the establishment of the habeas corpus system. However, it provides the necessary legal shelter for the injured party when faced with the threat of violence and no longer leaves the vulnerable party in isolation, there are still shortcomings in judicial practice, which still need to be further strengthened and improved.

2.2. Nature of the writ of habeas corpus

2.2.1. The writ of habeas corpus is compulsory

The writ of habeas corpus is mandatory and issued by the national courts, so if it is not complied with, you must take responsibility for your actions. For a civil protection order to be effective, it must be based on the public authority of the government and is also guaranteed to be enforced by the public authority of the government. Although the system of protection orders varies from country to country or region to region, the common denominator is that they are enforced against any breach of the order.

2.2.2. Habeas corpus has an ex ante, preventive nature

A civil protection order has a remedial effect as a mandatory order to prevent further cases of domestic violence, mainly for the purpose of prior relief and to reduce the extended harm to the victim. A protection order enables the timely use of public authority to separate the perpetrator from the victim before domestic violence occurs and provides an opportunity for judicial access to the family to deal with such violence before it causes further harm to the victim. The low threshold of a protection order can effectively prevent the occurrence of domestic violence by allowing the victim to apply for it before it occurs, thus effectively preventing the occurrence of domestic violence; thus, its pre-emptive nature is fundamentally different from other remedies that focus on the post-event nature.

2.2.3. The writ of habeas corpus is a temporary relief measure

If the order is resisted or if the perpetrator continues to commit violence in defiance of the order, the matter will automatically proceed to the judicial process, so there is a time limit for issuing a civil protection order, after which the court will need to re-verify the issuance.

2.2.4. The simplicity of a writ of habeas corpus

Unlike ordinary judicial proceedings, civil protection orders are simple to apply for to protect the physical and psychological integrity of the victim as soon as possible, and the court does not have to go through the usual procedures of investigation and argument during the verification process, thus allowing the order to be issued much earlier.

2.3. The importance of improving the protection of personal rights in the divorce process

2.3.1. Protecting the legal rights of the injured party

In divorce disputes, abusers often disregard the dignity of the law and continue to threaten, intimidate and restrict the personal freedom of the injured party, even with other serious consequences. At the same time, in divorce proceedings arising from domestic violence, the injured party often protects himself or herself only by running away or hiding. Suppose the victim's personal rights are not protected in particular. In that case, it is very likely that unnecessary losses will be incurred outside the divorce dispute, putting the injured party in an even more difficult situation.

2.3.2. Avoiding the threat of violence against other groups

In divorce disputes involving violence, when the spouses are separated, the injured party often chooses to run away from the threat of violence to his or her relatives so that not only one of the spouses suffers from violence but also the victim's relatives and even minor children are often threatened and intimidated. Even if their relatives and children are not physically assaulted, verbal assaults and inappropriate behavior can, to a certain extent, cause psychological shadows and disrupt their normal lives. This is why it is important to protect the rights of the individual, to create a healthy environment for minor children, to protect the healthy growth of the next generation, and to minimize the negative impact on innocent people.

2.3.3. Ensuring efficient divorce proceedings

In divorce proceedings arising from domestic violence, the weaker party suffers both physical and mental injuries and cannot carry out daily life at all. Therefore, when the court hears such divorce cases, it can take effective personal protection measures against the victim by making civil rulings, etc.[3] On the one hand, this not only solves the victim's worries but also removes the obstruction of the proceedings by the abuser, ensuring that the proceedings are conducted smoothly and orderly, thus realizing the freedom of divorce.

3. An analysis of the dilemma and causes of the protection of personal rights in the process of divorce in China

3.1. The infringement of personal rights in the process of divorce is not easily detectable

Firstly, the relationship between husband and wife is a relatively private issue within the family, and the causes of divorce cases are also highly private, which leads to a certain degree of secrecy in divorce cases, and the implementation of domestic violence is often sudden, the injured party usually does not have any defenses, and there is usually no third party present. The victim of domestic violence is often reluctant to talk about it to outsiders due to traditional thinking, such as "the law does not enter the home," and chooses to tolerate it again and again. The fact that these particular cases occur in hidden places makes it more difficult for the public authorities to intervene. As a result, when the victim's right to life and health is violated, it is not possible to detect and implement effective remedies in the shortest possible time.

Secondly, gender and cultural differences still exist in today's society. Men and women are the foundation of human society. For historical reasons, feudal concepts such as the "three rules and five rules" have understood women to be ruled by men, and even in the civilized era, men are still more or less dominant. Therefore, in a small number of families, the probability of divorce due to domestic violence is relatively high if the male partner is irritable and has a tendency to be violent. The women

who are on the weaker side, due to their relatively less access to life, as well as their deeper frustration and Lack of corresponding coping skills, will, in their perception, only tolerate violence to the maximum extent in order to maintain their so-called marriage, and let it violate their personal rights indiscriminately until they are completely disappointed with their marriage and want to defend their rights through legal proceedings, they will find that for the abuser, violence The threat of violence has long been the norm for the abuser and using the law against him will only anger him more, and the victim's personal rights will only be more seriously violated. Therefore, when faced with such a dilemma, the victim will more often than not choose to remain submissive and take a passive approach to solve his or her situation.

Thirdly, special groups of people may have difficulties in seeking redress for violations of their personal rights. People with disabilities may have certain deficiencies in speech, physical, hearing, mental and intellectual abilities, which prevent them from exercising their rights equally and effectively as able-bodied people. When they face domestic violence in marriage, their own deficiencies will undoubtedly aggravate their obstacles in seeking relief, thus making them, who are already vulnerable, even more, isolated and helpless, and most of them will choose to endure endlessly and give up seeking legal shelter, resulting in such cases of personal rights infringement being even less likely to be detected.

Fourthly, there is a low level of public concern in today's society. In today's fast-paced life, people tend to ignore the living conditions of their neighbors, while with the advancement of modernization, an impenetrable wall has been established between people, and under the influence of the indifferent social concept of "more is better than less," each has been hiding in their own home. The "wall" is a wall of inaccessibility between people, and they do not pay any attention to the situation of others. In addition, both in judicial practice and at the legislative level of the relevant system, the public generally lacks concern, which leads to this kind of personal rights infringement in social marriage is not valued and not noticed, allowing the phenomenon in a state of "silence" to become more and more serious.

3.2. Deficiencies in our habeas corpus system

3.2.1. Ambiguous burden of proof

The habeas corpus system is ambiguous in terms of the burden of proof, with only Article 27 of the Law against Domestic Violence setting out the criteria to be met in order for a habeas corpus order to be granted. There are no detailed provisions on what evidence the applicant must submit and how to define the probative value of the evidence. According to Article 28 of the Law against Domestic Violence, the court shall approve or reject the application within 72 hours of receiving it; if the situation is urgent, it shall be made within 24 hours. Within the tight time frame, the applicant would undoubtedly bear a stricter burden of proof if asked to prove that he or she had been in domestic violence, and it would clearly be inconsistent with due process of law to make a categorical determination without hearing the respondent. At the same time, the victim's ability to collect evidence in the divorce process is usually weak, and it is also difficult to be preserved under the emergency situation of violence and coercion by the petitioner, coupled with the fact that marital and family disputes themselves are characterized by ethics and emotions, which makes there are many obstacles to the collection of evidence. Secondly, even if the parties overcome the difficulties and submit the collected evidence to the court, the court does not have detailed examination standards when examining the legality and authenticity of the evidence, so the legal provisions in China need to be further refined and improved in the aspect of proof.

3.2.2. Lack of specific criteria for examination

Although the standard of review is simple and concise, it may not seem complicated, but in judicial practice, there are still difficulties in implementation. The main purpose of the system is to provide proper shelter for the victim's application, not to determine the existence of domestic violence and not primarily to punish the respondent, and it can be seen that the determination of whether or not domestic violence has been suffered is not relevant for this purpose. It is, therefore, unreasonable to use domestic violence as a criterion for review and may cause unnecessary confusion to the courts on the merits. There is no necessary correlation between having experienced domestic violence and being at risk of experiencing domestic violence in the future, although in most cases, this is often the case. It is, therefore, a matter for consideration as to how the standard of review of the system should be determined.

3.2.3. Vague rules on the specific enforcement authority

In judicial practice, there have been various views on the implementation of the system. Firstly, the court system is of the view that it should be enforced by the public security organs, while the public security organs system is of the view that the courts themselves should be responsible for enforcement. Secondly, Article 32 of the newly promulgated Law against Domestic Violence has clearly stated that the system is to be enforced by the people's courts, with the public security organs and committees as auxiliary enforcement agents. However, in fact, the law only provides for the main enforcement body in a preliminary and macro sense, but the law does not make further detailed provisions on how the court, the public security organs, the basic people's committee, and the villagers' committee should directly divide and coordinate their work. This has led to difficulties in judicial practice and the failure of the protection order to play its true role, and the failure of the applicant to receive timely and effective protection.

3.3. Violations of personal rights during divorce are not easily eliminated at the root

The starting point for legislation and mechanisms to address violations of personal rights in the divorce process is the promptness, speed, and effectiveness of legal measures to stop the threat of violence and protect the victim when it occurs, but the source of the violence and the post-event placement and protection of the victim are often ignored and not further analyzed and discussed. As a result, it is not possible to ensure that victims are completely free from the threat of violence in their subsequent working lives and that the vulnerable party is not provided with a place of refuge for a smooth transition afterward.[4]As a result, the protection of human rights in China is often characterized by repeated violence, and even after relief, some perpetrators may still threaten the victim with violence again at some point, without eradicating the root causes and without fully addressing the fears of the victim.

3.4. Lack of diversity in legal liability for infringement of personal rights in the process of divorce

With regard to the legal liability for infringement of personal rights in the process of divorce, articles 33 and 34 of the Law against Domestic Violence only provide for certain public security management penalties for the perpetrators of violence, and if they constitute a crime, they shall be held criminally liable in accordance with the law. At the same time, if a respondent violates the personal security protection order and does not constitute a crime, the court shall give a reprimand and may impose a fine or detention according to the severity of the circumstances. The above-mentioned punishments are limited to administrative and criminal penalties, which are too single, and the criminal provisions of our legislation on domestic violence and violation of habeas corpus are ambiguous. There are no specific rules on what acts are committed by the respondent and to what extent they are harmful, so criminal penalties are almost non-existent. As a result, legal liability is somewhat illusory, and the deterrent effect of the law is greatly diminished, preventing the perpetrators of violence from realizing the error of their actions and rectifying them. Therefore a combination of other types of punitive measures should be considered in addition to the two legal means mentioned above. In judicial practice, this can be linked to the outcome of the subsequent divorce judgment, which can have a substantial impact on and limit the personal interests of the respondent and force him or her to truly recognize his or her mistake.

4. Countermeasures and suggestions for improving the protection of personal rights in the process of divorce

4.1. Increasing public awareness while breaking the confines of traditional concepts

With the progress of the modern rule of law in China, under the basic principle of "whoever enforces the law is responsible for popularising the law," the relevant authorities should carry out the task of popularising the law in all corners and at all levels of society, vigorously promote the concept of the rule of law, and strive to make every citizen dare to take up the weapons of the law to defend their legitimate rights and interests. At the same time, it is necessary to strengthen the promotion of harmonious and friendly neighborhood relations, establish the concept of mutual care and love and mutual help among residents, break the "frozen" state of interpersonal communication and strengthen social concern so as to be able to detect and stop violence in its infancy.

4.2. Improve the legislation related to the habeas corpus system in China

4.2.1. Lowering the burden of proof on the applicant

First of all, the rules of evidence are essential for the determination of legal facts and are an important foundation in the process of judicial activities. The judge may, on a case-by-case basis, carefully sort out the evidence submitted by both parties and inform them of the consequences of unfavorable proof. At the same time, the judge must be fair and impartial in his or her interpretation of the case and treat each case and party equally. Secondly, habeas corpus may be granted once the judge's initial determination is met. This is because the system is a relief mechanism and is not intended to punish the perpetrator but to prevent and stop acts of domestic violence that are about to occur or are occurring. Therefore, the standard of proof for such cases may not be the same as that required for general cases, and in practice, some experts have suggested that the judge in a specific case may issue a protection order *ex officio*, which can be seen as a relaxation of the standard of proof for protection orders, thus truly achieving the purpose of the legislation.

4.2.2. Refinement of the examination criteria

Although the Law against Domestic Violence contains two types of examination criteria, it is considered more appropriate to consider whether the applicant is in real danger of domestic violence based on the purpose of the legislation and its operability in practice. It is further examined whether the respondent has a tendency to inflict violence on the applicant within a certain period of time in the future, such as sending threatening text messages, making phone calls, etc. It is also necessary to further examine whether the respondent has any objective factors to inflict domestic violence on the applicant within a certain period of time in the future. After the above rules have been reviewed, a decision will be made as to whether a protection order can be granted. However, it should be noted that in the process of reviewing the personal safety protection order, it should be avoided to make specific factual findings on whether or not the applicant has suffered from domestic violence, and if such findings are made directly, then whether such findings can be directly applied to the trial of the divorce case, and whether it is possible for the respondent to lose the case directly, which is a series of issues that will undoubtedly bring the burden of confusion to the court, and will also make the work of the corresponding authorities. The division of functions is not clear.

4.2.3. Clarification of specific enforcement authorities

The obligations set out in the system can be divided into two categories: positive obligations and negative obligations. In the case of protection orders where negative obligations are the main means of enforcement, they should be enforced by the courts, supported by the public security authorities and the relevant committees. Where inaction is the goal of enforcement, penalties may be imposed in the form of fines, detention, or criminal liability when the perpetrator refuses to comply. This can be done by the court's internal judicial department, which examines whether the respondent has violated the protection order based on the applicant's or auxiliary authorities' reflections and thus imposes the relevant penalties. The local neighborhood committee, as a grassroots organization, should, within its capacity, give the victim a certain amount of reassurance and reassurance through visits and other means due to its relatively close contact with the person concerned.

4.3. Improving the treatment and rescue mechanism

The improvement of the current situation of domestic violence cannot only rely on the relevant legislation and institutions but should ultimately focus on the parties involved by paying attention to the psychological correction of the perpetrators to prevent the problem at the source. In the vast majority of violent cases, the violent parties are generally associated with their personality, intelligence, and bad habits, and usually have a violent personality, poor patience, a strong desire for control, and a preference for self-centredness. It is for these reasons that these violent people often lack a rational understanding of others and have psychological deficiencies. This will reduce the incidence of violence, alleviate the family conflicts between the abuser and the victim, and maintain social stability. For domestic violence shelters, legal aid agencies, committees, and other departments around the world propose to open relevant public interest hotlines, improve relevant placement places, actively provide free psychological counseling for victims and patiently listen to their relevant demands and can set up relevant psychological and emotional professional courses. Through a humane and reasonable approach, violence can be prevented at the source, and safe and secure places of refuge can be provided for them.

4.4. Appropriate punitive measures for the party at fault

The party who commits a violent attack during the proceedings can be punished by the court when deciding the divorce between the spouses, thus forming a diversified legal system with administrative penalties and criminal liability in the Law against Domestic Violence. Firstly, the party who made the threat of violence in the divorce case should have less or no share of the common property but should retain the necessary living expenses of the party at fault based on the local minimum subsistence guarantee.[5] Secondly, the party who makes physical threats based on a divorce dispute shall be responsible for most, if not all, of the maintenance of the minor children until the children live independently. Thirdly, the party who carries out the threat of violence in a divorce case may be given the option by the court to rule that he or she cannot support the minor children alone. Fourth, the use of detention should be increased. Detention is undoubtedly one of the most effective tools for people with violent behavior. Restricting the violent person's personal freedom so that he or she can truly perceive the majesty of the law in the shortest possible time and realize the distress and hardship his or her actions have caused to his or her family is the most fundamental purpose of punishment.

5. Conclusions

The introduction of the Law against Domestic Violence is of great significance and has attracted widespread attention from society. As one of the highlights, the habeas corpus system provides a legal remedy for victims of domestic violence to intervene beforehand and effectively protect the legitimate rights and interests of victims. The design and implementation of the habeas corpus system is not only a theoretical issue but also a practical one. In order to ensure the effectiveness of the habeas corpus system, more detailed consideration must be given to every aspect of the system to make it more in line with reality. It is easy for applicants to apply and for the people's courts to issue regulations. It can be said that operability is the soul of this system. If the details and operability of the provisions can be taken into account, the legislation of the personal safety protection order system in China will be more perfect, the practice will be smoother, the interests of the applicants will be better protected, and the awareness of the whole society against domestic violence will be improved. It is an effective practice to prevent and intervene in acts of domestic violence that have not yet occurred. However, there are still many problems with its implementation in reality. There is a large gap between the nature and use of the civil protection order system and those implemented in other countries and regions, and its effectiveness in the process of enforcing rights is also far less than that of the civil protection order system. China's domestic violence prevention laws are still in their early stages, and there are still many shortcomings. In the process of implementation, the shortcomings of personal safety protection rulings and personal safety protection orders should be summarised, and it is also necessary to study and analyze the civil protection orders of other countries and regions to find out their merits of them, which is important for the establishment of China's civil protection order system in the field of anti-domestic violence, and at the same time, the civil protection order system in China should be improved and enhanced effectively by combining the characteristics of China, so as to play an effective role in preventing domestic violence.

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