

Research on China's Divorce Cooling-off Period System

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Abstract: *The divorce cooling-off period officially implemented in 2021 is facing internal and external pressures from the imperfect system itself and lack of credibility. Only from the perspective of multi-track comparison of cultures, doctrines, norms, and cases, can we unearth the complexity of divorce during the social transformation period with the characteristics of compressed modernity, and make a reasonable choice in the value judgment deviation of marriage evaluation factors and the conflict between the private and public nature of marriage. The specific improving plans of the divorce cooling-off period can include the different applications of the duration of the divorce cooling-off period, the establishment of supporting systems, and the determination of personal and property relations between the couple during the divorce cooling-off period, etc. However, no matter what the legislators finally choose, they should follow Immanuel Kant's humanistic concept with "human is the end, not the means", and require the state to be modest in intervening in marriage.*

Keywords: *Divorce cooling-off period, Registration divorce, Protection of marital rights, Social transformation*

1. Introduction: The Controversial System of Divorce Cooling-off Period

With the domestic divorce rate increasing year after year^[1], the *Marriage and Family Edition of Civil Code of the People's Republic of China* officially came into effect in January 2021, and its article 1077 established the divorce cooling-off period system applicable to registration divorce at the legislative level for the first time: "(1) Since the marriage registration authority receives the divorce registration application, if either party is unwilling to divorce within 30 days, it may withdraw the divorce registration application to the marriage registration authority. (2) Within 30 days after the expiration of the time limit specified in the preceding paragraph, both parties shall apply in person to the marriage registration authority for a divorce certificate. If no application is made, the application for divorce registration shall be deemed to have been withdrawn."

Long before the law was announced, several media had launched a public vote on whether to support the establishment of a divorce cooling-off period system in December 2019. According to the statistics of the *People's Daily*, a total of 208,600 people participated in this voting, of which only 57,800 people clearly expressed their support, accounting for 27.7% of the total; and the number of people who clearly expressed their opposition as high as 117,000, accounting for 55.6% of the total^[2]. In May 2020, immediately after the publication of the draft law, it became a focus of social discussion, sweeping all domestic social and self-media platforms including Tik Tok, Sina Weibo, WeChat Moments, and Qzone. Although the Legislative Affairs Committee of the Standing Committee of the National People's Congress explained that the legislative purpose of setting up the divorce cooling-off period system is limited to "preventing rash divorce" rather than preventing people from divorcing^[3], the domestic public still criticizes the divorce cooling-off period system far beyond its affirmation. Moreover, legislators firstly "presumed" the people's subjective intention to divorce as an irrational action, which is even more despised by the people as self-righteous and paternalistic encroachment. After all, in extremely private relationships such as marriage, the parties are personally involved and the exclusive authority to judge whether it is good or bad. *China News Network*, *Sanlian Life Weekly*, and other media took advantage of the opportunity to launch a voting campaign again, and the results of the voting showed that the number of people who opposed the legislation of a divorce cooling-off period was still obviously dominant^[4]. In addition, the *Interpretation of the Supreme People's Court on the Application of the Civil Code of the Marriage and Family Edition of People's Republic of China (1)*^[5], which came into effect on the same

day, does not make any supplementary explanations to Article 1077.

The reason why article 1077 is hard to form credibility at present is not only the conflict between the public and legislators in the value cognition of "freedom of marriage" and "happiness of marriage", but also the oversimplification of the legal provisions and the lack of supporting systems, which cause the public's deep concern about their personal and property safety. Under the circumstance that Article 1077 has taken effect, only by thoroughly examining the internal logic of the construction of divorce cooling-off period system, weighing the value choices behind it, and drawing on international experience, can we find the legitimacy basis for China's divorce cooling-off period system and provide improving programs to make it more practical in line with the legitimate interests of individual citizens.

2. Value judgment deviation of marriage evaluation factors

Voluntary, duration, and happiness are the three core elements of marriage evaluation. In the case of registration divorce, the divorce cooling-off period system forces both parties to maintain a legal marital relation for at least 30 days, which indicates that the divorce cooling-off period system puts the importance of marital duration above voluntary. In addition, the cooling-off period system does not examine the specific reasons for divorce and then applies to all cases of registration divorce without distinction. For example, it does not examine whether the parties were divorced due to obvious unhappy reasons such as domestic violence, spouse's addiction to drugs, or gambling. It indicates that the cooling-off period system also puts the importance of marital duration above happiness. This idea of "duration is the supremacy of marriage" can be traced in Chinese traditional culture. According to the *Doctrine of the Mean* (《中庸》), the Confucianists believe that marriage is sacred, which is the result of the destiny of nature, while sacredness means that marriage has the characteristics of predestination and permanence^[6]. The *Preface to the Book of Changes* (《周易 序卦》) is even more straightforward: "The essence of marriage stands against relationship in a short time, and that is why a couple shall accept it with perseverance." In addition, led by the ancient "divorce letter system", the traditional Chinese culture also stigmatized the divorced party, thus strengthening the moral abduction of the duration of the marriage. Even with the evolution of social pattern and language, these ancient books are only favored by a few people up to now, but there are still some common sayings similar to the above-mentioned meanings: "It's better to demolish ten temples than to destroy a marriage" and "It's better to persuade to make peace than to separate". Such common sayings are widely circulated. However, there are obvious flaws in the above-mentioned value judgments of the divorce cooling-off period system.

First of all, as far as the relation between marriage duration and marriage voluntary is concerned, marriage is a contract that can be performed and terminated rather than a contract of selling oneself. The only source of its legitimacy is "mutual voluntary". No one is obliged to serve another at the cost of involuntary marriage. As a representative of the civil law system, Germany's contemporary marriage law is based on the "Personales Eheverstandnis"^[7], emphasizing that the essence of marriage is the emotional relationship between husband and wife, and this spiritual connection is more important than the legal connection^[8]. Under the influence of the humanistic view of marriage, the *German Civil Code* has implemented the change from the principle of fault to the principle of rupture, that is, the plaintiff is no longer required to provide evidence that the defendant is at fault in the marriage relation, as long as one party has no feelings for the other party, the divorce can be carried out, which further respects the individual right of parties' choice to the marriage. Although article 1079 of the *Civil Code of the People's Republic of China* also takes "emotional rupture" as the only reason for the court to grant a divorce, in the registration divorce procedure in which both parties express their unwillingness to maintain the marital relation with the other party, article 1077 of the civil code simply and rudely challenges the voluntariness of the parties by extending the duration of the marriage, which exposes the systematic contradiction in the elements of divorce in China's marriage law. Secondly, in terms of the relation between marital duration and marital happiness, there is no corresponding relation between the duration of marriage and the value of marriage. A long-term marriage may not necessarily be a happy marriage, and it may be a long-term mutual or one-way torture instead. In some cases, both husband and wife have no feelings for each other, and their maintenance of marriage relation may only be to give their children a complete family in form or to avoid the increasing personal economic pressure after divorce, or they dare not divorce under threats of the other party. In 2021, Bill Gates, the co-founder of Microsoft, divorced his wife, Melinda Gates, ending a 27-year marriage. Their divorce with global concern happens to be an example of the non-correspondence between marital duration and marital happiness. If we pay our attention to the field of crime, we will find that among the growing number of "Vietnamese brides" in China, many of them are abducted and sold to China and forced to marry the buyer^[9]. Their marital

duration is more clearly not corresponded to marital happiness.

The above concept of "duration is the supremacy to marriage " inherited from traditional Chinese culture has revealed a lack of consensus and declining status in the current criticism of the divorce cooling-off period system. The individual feelings of the parties to the happiness degree in marriage have gradually become the most important factor in evaluating the marriage value. The modernization process that unties marriage and sacredness is also called the "deinstitutionalization" of marriage by American sociologist Andrew Cherlin. Deinstitutionalization means that marriage is no longer subject to people's inherent views, including the evaluation of premarital sex and divorce conditions ^[10]. It is a way for people to freely pursue individual happiness and there should be different characteristics according to the different individual needs. Andrew Cherlin believes that the rising divorce rate and the declining average marriage age in China are the manifestations of deinstitutionalization ^[11]. The demographer Ronald lesthaghe even regards deinstitutionalization as a change that is attached to the irreversible second demographic transformation.

In summary, duration is only an accessory of voluntary and happiness, which cannot justify the legitimacy or value of marriage.

3. The conflict between the private and public nature of marriage

Whether the child is an adult or not, the parents' divorce usually poses a threat to the mental health and economic status of the child before he or she enters in the job market. Even though the psychological impact of parents' divorce on their children is hidden and varies from person to person, the sensational case, *People's Procuratorate of Linyi City v CHEN Wenhui and others* ^[12], in which a prospective college student died of heart failure after being defrauded, has informed society in a sad way of the vulnerability of the unemployed children when their economic situation deteriorates. Therefore, if couples are allowed to divorce without properly handling the children's upbringing issue, their children who should be taken care of by their parents are likely to be in a dangerous situation of being helpless, which undoubtedly violates the common moral concept of mankind. Given this, Article 1568 of the *German Civil Code* stipulates that when the broken marriage must be maintained to protect the vital interests of minors, the court can temporarily reject the couple's divorce application. And the *California Family Law Reform Act* stipulates that when couples with minor divorce, the reason for divorce shall be based on the principle of fault ^[13]. Part of the protection measures for the rights and interests of offspring can reasonably interfere with the marriage relation that only belongs to the couple. This restriction shows that the freedom of divorce is not absolute but relative, and this relativity comes from the public nature of marriage ^[14]. In fact, a marriage has already revealed some of the characteristics of publicity since its conclusion. Whether it is the "escorting" of the six etiquettes in traditional Chinese marriage, the "three bows" in the wedding ceremony ^[15], the "wedding feast" still widely existing in modern Chinese marriage, or the wedding ceremony in the church in Western weddings, the thank-you party after the ceremony ^[16], all reflect the cultural habits that the conclusion of marriage needs to be witnessed by others. After the domestic de facto marriage system was abolished in 1994, marriage must be registered in the Civil Affairs Bureau to have corresponding legal effect. No matter "looting marriage", "price marriage", "betrothal marriage" ^[17] or free marriage, the marriage relation has been one of the objects of state management since ancient times.

As far as the divorce cooling-off period system is concerned, its intention to maintain the publicity of marriage is mainly manifested in two aspects: one is to increase the time cost of both parties in the registration divorce to reduce the divorce rate; the other is to maintain the stability of family contribution in the national economy through the reduction of the divorce rate. However, both intentions lack rationality to varying degrees. First of all, the key to answering whether the divorce cooling-off period system is justified to regulate the divorce rate is to answer the degree to which the state can interfere in marriage, that is, where is the boundary between public and private nature when the opposing parties are the state and citizens? Two unmarried persons living together in the name of husband and wife does not violate any laws. At the same time, according to Article 1071 of the *Civil Code of the People's Republic of China*, their illegitimate children enjoy the same rights as children born in wedlock. Even if one of the two married persons does not call the other as a spouse, or does not live with the other party, or does not give birth to offspring for the other, the State shall not be entitled to force him or her to do things mentioned above. The reason is the weak power of the state in the face of the personal relation in marriage. Which means it can only do administrative confirmation behavior instead of administrative permission behavior in the divorce registration affairs ^[18]. The essence of the resultant data on the divorce rate should be the attitude of each individual among the married persons on whether they are going to continue the

existing marriage, rather than the state replacing the married person in deciding whether their marriage should continue or not. The rising divorce rate does not necessarily mean that people are disappointed in marriage. On the contrary, it may also be that people choose to get rid of dissatisfied marriage to pursue a truly happy marriage. Even if a citizen no longer believes in love or marriage and chooses to be single until he or she dies, it is also an exclusive choice for his or her life after thorough consideration. As Nieng Yan, a professor at Princeton University in the United States and a foreign academician of the American Academy of Sciences said: "I don't get married, and I don't owe anyone an explanation." In all, the state's manipulation of divorce rate is not justified.

Second, there is no correspondence between the decrease in the divorce rate and the stability of the family's contribution to the economy. In recent years, one of the most important reasons for the rapid development of China's economy is the low labor cost, and the price of commodities and the cost of starting a family for young people are also increasing rapidly with the economic development. Without the financial support of their parents, the family expenses such as housing loans, car loans, children's education fee, parents supporting cost, and so on cannot be borne by young people who are new to work within a few years. At this time, compared with cohabitation, marriage is no longer the beginning of creating a better life at the economic level, but luxury with risks and huge costs. Therefore, the phenomenon of late marriage, late childbearing, and even non-marriage or infertility is increasing among urban youth. ZHAO Qingxie, a professor of Seoul University in South Korea, called the phenomenon of dislocation between the level of national economy and the quality of citizens' life "compressed modernity" and explained: "Compressed modernity refers to extreme compression of time and space required for political, economic, social and cultural changes, which leads to the coexistence of historical and cultural factors of different nature in a dynamic form, and forms a social situation where a complex and fluid social system is formed^[19]." During China's social transition period, the divorce rate is only a statistical result of multiple factors, including the economy, acting on marriage. The statistical result that the law regulates the divorce rate by delaying time does not change the economy itself as one of the key factors. On the contrary, only by solving the high marriage cost for young people from the perspective of the social economy itself can it provides positive energy for their marriage.

4. The improving plans for China's divorce cooling-off period system

4.1. The distinction application of the duration of divorce cooling-off period

At present, China's divorce cooling-off period system sets a cooling-off period of 30 days for all registration divorces but does not distinguish the length of the cooling-off period for registration divorces with special circumstances, including domestic violence and the protection of minors' rights and interests, which goes against the interest protection of the infringed party or minors. For example, the woman who suffered from domestic violence has finally persuaded the man to agree to divorce by registration, so that the woman could escape from the unfortunate marriage as soon as possible. However, when the two parties came to the Civil Affairs Bureau, they were told that they had to wait 30 days, and the man who was changeable in temperament reneged on the divorce within 30 days. Therefore, the previous divorce application was regarded as "withdrawn". At this point, the woman lost the chance of divorce by registration and had to choose the litigation divorce which costs a longer time and a higher price. According to the statistics from the National Institute of Justice Big Data, about 14.86% of couples in China sue for divorce because of domestic violence^[20]. To protect the rights and interests of the infringed party, we are supposed to learn from the United Kingdom and South Korea where the 30-day divorce cooling-off period is no longer applicable to the registration divorce with domestic violence, and the divorce application should be approved immediately when both parties submit the divorce application to the Civil Affairs Bureau.

SHEN Chen, a postdoctoral scholar at the Law School of Renmin University of China, questioned the above-mentioned improving plan: to distinguish whether there is domestic violence in marriage means to give the staff of Civil Affairs Bureau corresponding investigative powers or discretionary powers. However, the revocation right of the marriage administrative registration authority to the coercive marriage in the past law is canceled in articles 1052 and 1053 of the *Civil Code of the People's Republic of China*. This indicates that the law has the intention of depriving the discretion power of marriage registration authority. Therefore, if the staff of the marriage registration authority judges whether there is domestic violence in a marriage, it will cause a systematic contradiction of the law^[21]. Dr. Shen Chen's interpretation of the legal rules is inaccurate. Because there isn't intention of depriving the marriage registration authority of the discretionary power in the *Civil Code of the People's Republic*

of China, but only the division of labor of revocation power of coercive marriage is changed among the state's functional departments. For example, article 1078 of the *Civil Code of the People's Republic of China* requires the marriage registration authority to “find out” whether the divorce parties are voluntary to express their opinions, and whether they have reached a consensus on matters such as child support, property, and debt handling. Therefore, it won't cause a systematic contradiction in the law if the marriage registration authority is responsible for the judgment of whether the divorce cooling-off period is applicable due to domestic violence.

In addition, YANG Lixin, vice president of China Civil Law Society and professor of Renmin University of China, believes that if the children are underage at the time of registration divorce, the length of the marriage cooling-off period should be increased ^[22]. However, Articles 1076 and 1078 of the *Civil Code of the People's Republic of China* have required that couples must agree on child support matters before they can obtain a divorce approval, and the couple may not change their previous child support agreement after the expiration of the divorce cooling-off period. Therefore, only increasing the length of divorce cooling-off period cannot achieve the purpose of protecting the legal rights of minors, and it should be more appropriate to improve the plan according to the following plans.

4.2. Establishment of supporting systems

Except for 30 days to wait, there is no other supporting system in China aiming to make sure the parties divorce more prudently or protect the interests of vulnerable parties or minors. It means that if the parties still haven't thought rationally about how to deal with related matters after 30 days, the legislative purpose of the divorce cooling-off period system will be in vain. To achieve the legislative purpose of the divorce cooling-off period system within a reasonable scope and to protect the legal rights and interests of relevant vulnerable parties, it is necessary to establish supporting systems.

First of all, when the offspring are minors, there should be a public institution or staff, called “program supervisor”, especially responsible for paying attention to the interests of minors in family cases, so as to find out the real attitude of minors towards parents' divorce and ensure their rights and interests been served. For example, the Children and Family Court Advisory and Support Service (Cafcass) in British national affairs litigation is responsible for communicating with the children involved ^[23]. Germany even grants minor benefit assistants the right to participate in family litigation directly ^[24]. Although China's divorce cooling-off period system does not apply to litigation divorce, it can still imitate the program supervisor system. After the couple apply to the Civil Affairs Bureau for registration divorce for the first time, the Civil Affairs Bureau shall appoint a professional program supervisor to investigate for the interests of minors independently, and urge and assist the couple to reach a reasonable and legal minor custody agreement. Secondly, during the divorce cooling-off period, the Civil Affairs Bureau should appoint professionals to organize the husband and wife to hold an information consultation meeting, and systematically introduce to both spouses the risks that the divorce may bring to individuals and close relatives. Besides, the professionals shall learn one-on-one whether the parties have suffered domestic violence or other rights violations during their marriage, and answer the parties' consultations on laws or policies, and provide psychological counseling for those in need after the meeting. The total number of program supervisors and those responsible for holding information consultation meetings should be more than two, and information can be shared mutually to help the program supervisor comprehensively determine which spouse is more suitable as a minor guardian. In addition, WANG Lei, a postgraduate from Law School of Zhengzhou University believes that mediators should be arranged for both spouses as in South Korea to help couples repair their relationship or break up peacefully ^[25]. However, the reason why this plan is not suitable for implementation in China is that there is a mediation system in China's litigation divorce system. The purpose of choosing registration divorce is to divorce at the lowest time and economic cost. If the mediation system is added, the necessity of distinguishing the registration divorce from the litigation divorce will be weakened and the parties will be troubled. In addition, whether the husband and wife are willing to break up peacefully is not within the jurisdiction of the state. The purpose of adding supporting systems is to protect the legitimate rights of related persons, rather than excessively interfering in the private lives of citizens.

4.3. Determination of personal and property relations between husband and wife during divorce cooling-off period

When the divorce cooling-off period system starts to be applied in cases, the couple has formally submitted an application for divorce to the Civil Affairs Bureau. Their hostility to each other is likely having devoured the happy memories of the past. Moreover, the facts that happened between couples,

such as family violence and property transfer, are more concealed and difficult to obtain evidence later. Therefore, it is necessary to clarify the personal and property relations between husband and wife during the divorce cooling-off period so as to avoid further damage to the legal rights of individuals. The case, *People's Procuratorate of Qingpu County v WANG Weiming* ^[26], strongly proves the high possibility of personal tort when the marriage relation is about to officially come to the end. In 1997, WANG Weiming and his wife Mrs. QIAN litigated for a divorce. Before the court's approval of the divorce was delivered to both parties and was about to take effect, WANG Weiming used violent ways such as scratching and biting to rape QIAN when she was sorting clothes at home, which led to QIAN the bruise of several soft tissues, and chest hurts by scratching and biting. Therefore, during the divorce cooling-off period, the prosecutor's standard of proof should be lowered in court hearings for marital rape and violent injuries, etc. At the same time, when the aggrieved party applies for a personal safety protection order to the court according to the *Anti-domestic Violence Law of the People's Republic of China*, the court should also lower the standard of proof for the applicant. In terms of property security, it is easy for the parties to maliciously transfer their marital property. It should be stipulated that: (1) during the divorce cooling-off period, the one who was suspected for transferring property shall bear the burden of proof; (2) new debts shall be deemed as personal debts unless the creditor has evidence to prove that the appearance of the debts is very similar to the joint debts of the couple; (3) however, if the new claims are added, it is advisable to identify them as the joint property of the couple unless there is evidence to the contrary, because the properties division in the divorce agreement may not have been actually implemented during divorce cooling-off period.

5. Conclusion

China's leaky divorce cooling-off period system will inevitably be revised in the future. No matter what kind of improving plan is adopted, it must follow Immanuel Kant's humanistic concept of "man is an end, not the means", and civil marriage should not be used as a bargaining chip in the country's economy or politics. At the same time, although there is a certain public nature in marriage, the private nature is closer to its essence. Therefore, when the strength of the improving plan is enough to protect the legal rights and interests of both spouses and children, no subject should excessively interfere in others' marriage. The value guiding function of law should be superior to its social management function, so as to encourage people to pursue and manage pure marriage instead of sacrificing the happiness of marriage in the balance of interests.

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