

Research on the Cooling-off Period System of Divorce with Chinese Characteristics

Zitong Feng

Law School of Liaoning Normal University, Liaoning, China

Abstract

With the ringing of the New Year bell, the first Civil Code in Chinese history has come into effect and been implemented for one year. In this year, many new laws and regulations have been widely and profoundly practiced in China. Among them, the controversy and discussion on the cooling-off period of divorce stipulated in Article 1077 of the Civil Code has never stopped in theoretical and practical circles. The author will discuss the legal thinking of the game between public power and private power in the cooling-off period of divorce, as well as the existing problems and improvement measures of the system, and explain and express it in combination with relevant international legislative examples.

Keywords

Chinese Civil Code; Cooling-off period of divorce; Private rights; Suggestions for improvement.

1. The Concept and Value of Divorce Cooling-off Period System in China

With the adjustment of divorce registration procedure in the Notice of the Ministry of Civil Affairs on Implementing the Provisions on Marriage Registration in the Civil Code of the People's Republic of China, that is, divorce registration needs to go through five links: "application-acceptance-cooling-off period-examination-registration (certification)", which deepens the thinking and discussion on the cooling-off period of divorce in the implementation of the Civil Code. Therefore, in order to promote the implementation of the cooling-off period of divorce in the Marriage and Family Compilation of the Civil Code, To accurately understand the legislative meaning of divorce cooling-off period clause and realize the legislative expectation goal of divorce cooling-off period system, it is necessary to analyze various value conflicts behind this system from the perspective of legal philosophy, and provide theoretical support for seeking a solution path of value balance.

At present, the reasons for supporting the establishment of marriage cooling-off period system mainly lie in opposing rash divorce, maintaining the stability of marriage and family, protecting the interests of minors and building an equal, harmonious and civilized marriage and family relationship; On the contrary, Opponents of this system question whether the cooling-off period of divorce is contrary to the basic principle of autonomy of private law, Whether the basic right of natural person's freedom of marriage is restricted, whether the system of divorce cooling-off period can really achieve the expected purpose of reducing divorce rate, and whether there is an uncoordinated conflict between the calmness of divorce cooling-off period, the urgency of protecting minors and the severity of marital domestic violence.

This paper attempts to explore the basic principles and development laws of marriage system, Base on that reality of China's economic and social development and cultural background, Drawing lessons from the successful experience of divorce system in other countries, Actively explore the ideas and methods of value balance in the implementation of the cooling-off period system of divorce, Highlight the emotional role and function in the process of divorce dispute

resolution, Embedding the implementation of divorce cooling-off period system into the legal essence of people's right to pursue a better life, promoting the combination of the implementation of divorce cooling-off period system with people's desire and pursuit for a better life, and integrating the legislative meaning of divorce cooling-off period system into the overall construction of a harmonious society.

2. Thoughts on China Based on Relevant International Legislation Cases

In my opinion, the high divorce rate is a common social problem faced by all countries in the world. To solve this problem, different countries have different solutions to solve the high divorce rate. The timing of setting the "cooling-off period" in different countries, the applicable objects, and the treatment of special circumstances such as domestic violence and minor children are all worth learning. Article 8 of the British Family Law clearly stipulates the "time limit for consideration", which is usually set at 9 months, and the court will extend the time limit for consideration appropriately according to different circumstances. In December 2007, the system of divorce consideration period was formally established in the Korean Civil Code. The consideration period for divorce of couples without children is one month, and that of couples with children is extended by two months. If violence will affect one party, it can be exempted. Article 231 of the French Civil Code provides that if the spouses insist on divorce, the judge shall indicate to the spouses that their application should be refiled after a three-month consideration period. If a new application is made within 6 months after the expiration of the consideration period, the joint application will become invalid.

3. Jurisprudential Thinking Based on the Game Between Public Power and Private Rights

Starting from the legislative principle, the opposition to the cooling-off period of divorce holds that the law should be based on the premise of protecting and respecting civil liberties, and the legitimate wishes and claims of individuals based on their full civil capacity should not be restricted by law. This restriction may bring not only time cost, but also psychological cost. Therefore, the appropriateness and rationality of the cooling-off period of divorce are questioned, that is, only because of the mediation and possible "cooling-off" of impulsive divorce with a small proportion, the majority pays for the minority. But in fact, marriage is relatively free. All freedoms and rights must be exercised within the limits prescribed by law, and marriage is protected and restricted by law. From the general provisions of the Legislative Law passed in March 2000 on the basic principles of legislation in China, we can see that the four basic principles of legislation are the principle of constitutionality, the principle of rule of law, the principle of democracy and the principle of science. Among them, the principle of rule of law emphasizes that "legislation should proceed from the overall interests of the country in accordance with the statutory authority and procedures, and safeguard the unity and dignity of the socialist legal system." Because marriage itself has public interest, the principle of national legislation is not only to protect individual freedom, but also to maintain the rule of law of the whole society. Any individual freedom is based on the rule of law, so it has its rule of law and rationality from a wider range and cost and benefit.

4. On the Existing Problems of the Cooling-off Period System of Divorce in China

As far as the current situation is concerned, the cooling-off period system of divorce in China is still in its infancy. Because there is no repeated investigation in long-term practice, there is only a framework system and no in-depth discussion on specific application problems, and effective

and reasonable solutions have not been given when dealing with different cases. Social groups fail to understand the significance behind the cooling-off period system of divorce, and the system lacks corresponding precise matching, which are the reasons why this new system has always been controversial in the process of implementation.

4.1. Failure to Fully Consider the Particularity of Marriage and Family Relations

The setting of the cooling-off period of divorce is too arbitrary in the overall operation, and it is not divided in detail according to the actual situation of husband and wife and family. It only mechanically fixes the current situation of the contradiction between husband and wife, does not fundamentally solve the problem, and easily leads to further deterioration of the problems of both parties, causing greater harm to marriage and family. Some couples have certain obstacles in getting along, expressing and communicating emotionally. Because they fail to find problems in time, and fail to carry out effective and reasonable emotional catharsis and correct emotional orientation, the communication between husband and wife is completely lost, and their feelings can only be exhausted in daily necessities.

4.2. Social Contradictions Intensified by the Inability to Divorce Have Increased

The purpose of the cooling-off period of divorce is to further communicate and ease conflicts between divorced parties during the cooling-off period. As for those divorce demands involving domestic violence and other issues, Divorce is necessary and urgent. For both parties to a marriage, The proceedings were suspended, But it did not pause the contradiction between the two sides. The cooling-off period extends the divorce procedure, It also means an increase in risks: persistent domestic violence, transfer of property, competition for custody of children, reputation and other issues are difficult to solve during the cooling-off period of divorce. These contradictions are difficult to ease only by the calm and communication between husband and wife, which will lead to further disputes and contradictions to a certain extent, with serious consequences. The cooling-off period of divorce plays a relatively poor role in easing such family conflicts and social conflicts, and there is still room for improvement.

4.3. There Is No Clear Regulation on the Protection of Minors' Rights and Interests

From the perspective of the extraterritorial Convention on the Rights of the Child and the traditional virtues of the Chinese nation, it is one of the most critical issues in divorce matters to correctly handle the legitimate rights and interests of minors in divorce. However, after the establishment of the cooling-off period system of divorce in China's Civil Code, due attention is paid to the protection of children's rights and interests during the cooling-off period, which leads to the shortcomings of the system. First, the residence of minors' children during the cooling-off period is not clear, which leads to the reluctance of some marriage parties to live with their children in practice. Especially for some parties who have the idea of divorce due to children's affairs, they even regard minor children as a drag. Second, it is not mandatory to make an agreement arrangement for child support during the cooling-off period, which leads to disputes in the process of divorce by agreement in the later period, and it is difficult to protect the rights and interests of minor children to the maximum extent.

5. Suggestions on Perfecting the Cooling-off Period System of Divorce in China at Present

5.1. Further Improve the Mediation System

According to the actual needs of resolving contradictions and disputes, practice has proved that the measures of psychology, sociology and other aspects are more effective in resolving contradictions and disputes in marriage and family. To build a systematic and independent family affairs mediation procedure and expand the depth and breadth of family affairs mediation, it is necessary to gradually build a diversified non-litigation solution platform for family affairs disputes integrating family affairs mediation centers, civil affairs and women's federations.

5.2. Strictly Control the Applicable Objects

The cooling-off period system of divorce is closely related to the person, so one-size-fits-all regulations cannot be applied to the design of its applicable objects. First of all, the object of applying the cooling-off period system of divorce must be the party who has not experienced the circumstances stipulated in Article 1079 of the Civil Code. Because the situation stipulated in this article has a great negative impact on family members and family relations, one spouse decides to divorce not because of impulse or rashness, but because the other spouse's fault behavior has caused damage to the legitimate rights and interests of one party and threatened the personal safety of one party, so there is no need to make a calm measurement. In addition, the deep reason for divorce is not that the relationship between husband and wife is exhausted, but only because of the influence of external behavior or objective facts, but the contradiction between husband and wife can no longer be reconciled through calm communication between the two parties, and there is no need to apply the cooling-off period system of divorce.

5.3. Grasp the Time Limit

Clarify the nature of the time limit for withdrawing the application for divorce registration and applying for issuing divorce certificates. There are two main time limits stipulated in Article 1077 of the Civil Code, one is the time limit for withdrawing the application for divorce registration, that is, within 30 days from the date when the marriage registration authority receives the application for divorce registration, and the other is the time limit for applying for issuing a divorce certificate, that is, within 30 days from the date when the time limit for withdrawing the application for divorce registration expires. The characterization of these two periods determines whether the systems of interruption, suspension and extension can be applied. The author thinks that it is more appropriate to define the 30-day period for withdrawing the application for divorce registration as scheduled period, while the 30-day period for applying for issuing divorce certificate can be handled with reference to the statute of limitations.

References

- [1] Zhou Anping. Problems and legislative suggestions of divorce registration system in China [J]. Hebei Law, 1999 (05): 120-122.
- [2] Xia Yinlan. Research on the Legislation of Marriage and Family in Civil Law [J]. Chinese Law, 2017 (03): 71-86.
- [3] Chen Wei. A comparative study of foreign marriage and family laws [M]. Beijing: Mass Publishing House, 2006: 392.
- [4] Zhou Jiao. On the establishment of separation system in China [D]. Xiangtan: Xiangtan University, 2018.

- [5] He Xuxi. Research on cooling-off period system in divorce registration [J]. Journal of Zaozhuan University, 2017, 34 (06): 96-99.
- [6] Guo Kaili. Research on the cooling-off period system of divorce in China [D]. Changchun: Jilin University, 2019.
- [7] Peng Chengxin. On Moral Thinking and Legal Thinking in Civil Code [J]. Oriental Law, 2020 (04): 49-73.
- [8] Wang Geya. Value Interpretation and System Cultivation of Marriage and Family Compilation in Civil Code [J]. Oriental Law, 2020 (04): 170-183.
- [9] Li Xiaoting. Research on the cooling-off period system of divorce [D]. Chongqing: Southwest University, 2019.