

# Divorce Cooling-off Period System in the Marriage Part of Civil Code

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**Abstract:** According to statistics released by relevant authorities, the divorce rate in China has been on the rise in recent years. The growing impulse often causes the increase in the number of divorce cases. As an important measure to improve the marriage system, the divorce cooling-off period system, to some extent, reshapes the marriage and family, and emphasizes the responsibility and significance of the family. This has received extensive attention.

**Keywords:** Cooling-off period; Divorce; Civil Code

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## 1. Introduction

Overall, the content of this article is in line with the legislative guiding ideology of “guarantee for divorce freedom and opposition to wanton divorce”<sup>[1]</sup>. However, there are still some unclear specific scope of application, single setting during the cooling-off period, and insufficient supporting measures, which need to be further improved. To effectively prevent wanton divorce and impulsive divorce, better safeguard the legitimate rights and interests of both parties in marriage, and promote a harmonious society are important issues to be solved in the legal reform of marriage and family in China. On the basis of voluntary principle, in order to protect the legitimate rights and interests of minor children and prevent domestic violence, it is necessary to establish a family dispute settlement mechanism involving multiple subjects.

## 2. Quotation

The “cooling-off period” is a concept proposed in a guideline on family trial reform issued by the People’s Supreme Court in July 2018. On May 28, 2020, the divorce cooling-off period was officially incorporated into the Civil Code<sup>[2]</sup>. The importance of establishing such a system in our country has been demonstrated by the fact that it prevents wanton divorces, maintains the stability of marriage and the family, and promotes social harmony and stability. However, I believe that whether this system violates the principle of “freedom of marriage” and whether it can achieve good social benefits still need to be discussed.

## 3. Overview and significance of the divorce cooling-off period system

### 3.1. Concept of the divorce cooling-off period system

The divorce cooling-off period system refers to a process in which the government forces a couple to take a cooling-off period and make a decision after thorough consideration when their relationship is in crisis or even divorce disputes arise. Divorce is a legal action in which men and women dissolve their marital

relationship and terminate their rights and obligations through agreement or litigation. In order to further carry forward the Chinese traditional virtues, reflect the socialist core values as well as harmonious and stable family relationships, it is necessary to promote freedom of marriage and monogamy under the premise of basic principle of at the same time, considering the demand of social development as well as amendment of and addendum to the marriage law, such as the divorce cooling-off period system. In practice, rash divorces because of the simplified divorce registration procedures are detrimental to the stability of the family. Therefore, a cooling-off period of 30 days has been established, during which either of the parties to the marriage has the right to go to the marriage registration office to withdraw the divorce application.

### **3.2. Significance of the divorce cooling-off period system**

Maintaining family stability and social stability is the legislative intention of Marriage and Family Part of the Civil Code. The establishment of the divorce cooling-off period system can reduce the phenomenon of “flash marriage and flash divorce” and further control the divorce rate in China. In our country, the cooling-off period system has certain function and significance, which can alleviate the conflicts between husband and wife and effectively avoid impulsive divorce. During the cooling-off period, both parties can conduct self-reflection and find out the root cause of their problems. It is beneficial to control the rising divorce rate in China, promote the stability of marriage, family and society, safeguard the legitimate rights and interests of marriage parties and minor children, and promote the harmony of family. The advantages of the divorce cooling-off period system are: giving the parties a cooling-off period of 30 days at the same time, and giving the parties the initiative to divorce. Divorce is a private affair, so third parties or the public should not intervene. Divorce involves not only the custody of children, but also the division of the couple’s joint property and the repayment of the couple’s joint debt. The divorce cooling-off period is designed to give couples who are preparing to divorce more time to deal with these issues carefully and calmly. At the same time, the cooling-off period system can also help the judicial organ to identify the fact of the emotional breakdown of the divorce parties, so as to further enhance the rationality of the judgment. Of course, the divorce cooling-off period system in the application should be case-specific and must not be mechanically applied.

### **4. Problems in the divorce cooling-off period system**

Article 1077 of Civil Code clearly stipulates the divorce cooling-off period system. The system of divorce cooling-off period in China has a clear legal basis and the content is basically appropriate, but there are some shortcomings as follows:

#### **4.1. The guiding principles are not clear**

“Guarantee for freedom divorce, opposition to wanton divorce” is an important guiding ideology of the marriage law dealing with divorce. On the basis of “strengthening the divorce relief, realizing the protection of the interests of the weak,” more contents were added to the marriage law (amendment), highlighting that marriage law shall be investigated for real equality and social justice. At this point, the legislative guiding ideology of our country was formally established and perfected. However, there is no universally applicable guiding principle of divorce cooling-off period for the system except the four principles and legislative guiding ideology stipulated in Marriage and Family part of the Civil Code. Therefore, how to establish the stable guiding principle of the system of divorce cooling-off period on the premise of not conflicting with the values reflected in the principles of marriage law is a problem worth studying.

## **4.2. The scope of application is not clear**

The divorce cooling-off period system is designed to prevent wanton and impulsive divorces and to save marriages where harmonious marriage is still possible. However, the system of divorce cooling-off period has not considered the “Anti-Domestic Violence Law” to specify the system of habeas corpus, which is not conducive to protecting the legitimate rights and interests of the victims of domestic violence. In real life, there are domestic violence, maltreatment, abandonment, malicious transfer of property and a series of situations that damage the victim, and these situations seem to be difficult for the parties to exist. However, the current law does not clearly stipulate the exclusion of the application of the system of divorce cooling-off period.

## **4.3. Poor link between registration and litigation divorce system**

When the registration of divorce is closed, the situation of bilateral or unilateral insistence on divorce would result in divorce litigation. Thus, the transfer of pressure from the executive branch to the judicial branch has led to a further increase in pressure from the courts on family trials. Therefore, we need to pay attention to the analysis and solution of a problem, i.e., how to reasonably register divorce and divorce litigation? It is easy to register a divorce, but difficult to get the application approved. Divorce litigation system is complicated and thus, a success in divorce is more difficult. Although divorce rates are on the rise, it is an undeniable fact that getting divorce is hard<sup>[1]</sup>. As two legal ways of divorce in China, divorce litigation and registered divorce should reflect the freedom of marriage and complement each other. Thus, making the divorce registration system more difficult means reducing the value of freedom to divorce.

## **4.4. The relevant supporting measures are not complete**

Maximizing the benefits of a legal system generally requires the joint efforts of multiple legal systems. Only with the corresponding supporting measures can we ensure the sound operation of divorce cooling-off period system. In some marriages, mutual feelings between the two sides may have already broken, and thus they would opt for a divorce in terms of both parties. In unilateral divorce, malicious transfer of property or infringement of marriage may happen during the calm period, or problems pertaining to the lawful rights and interests of the minor children behavior may occur. The lack of relevant provision is not conducive to operate on these matters.

## **5. Suggestions on perfecting China’s divorce cooling-off period system**

The legislation of Civil Code of Marriage and Family should focus on protecting the freedom of marriage including the freedom of divorce. Therefore, we should look at the rising divorce rate objectively. It is not surprising that the cooling-off period of divorce can maintain the stability of marriage and prevent rash divorce, but this regulation still needs to be standardized in order to play a full role. Based on the analysis of relevant pilot cases in China’s practice and the statistical interpretation of relevant data, this paper puts forward some suggestions on the construction of divorce cooling-off period system stipulated in China’s Civil Code for the situation that it is not suitable for the legislative procedure.

### **5.1. Clarifying the guiding principle of divorce cooling-off period system**

#### **5.1.1. Principle of dealing with each case on its merits**

The one-size-fits-all approach is not applicable to the divorce cooling-off period system<sup>[1]</sup>. This principle is proposed in response to the practical differences encountered in the application process of the cooling-off period. The measures taken should be different according to the different conditions of the marriage parties. A cooling-off period is adopted to distinguish the parties according to whether they have dependent children, whether they are incompatible with each other or separated for a long time, and whether there is

domestic violence.

### **5.1.2. Freedom of divorce and the principle of appropriate restrictions**

Any kind of freedom is relative, not absolute, and should be within the limits of the law. Too casual an attitude towards marriage and family relations is caused by too much freedom granted for divorce. Therefore, the freedom of divorce should not only be protected by law, but also be properly restricted by law.

### **5.2. Clarifying the scope of divorce cooling-off period**

The maintenance of marital stability is not necessarily achieved through a single divorce cooling-off period system, but through strengthening the substantive examination of the registration of divorce; mediation as a solution can be regarded as the pre-procedure of divorce registration. The legislative purpose of divorce cooling-off period is to save marriage in crisis and prevent rash divorce. So, the divorce cooling-off period must not become an obstacle to the freedom of divorce, nor can it become a refuge for “dead marriage.” It should distinguish the chronic abuse, chronic drug abuse and gambling by the other partner, serious infectious disease that cannot be cured, and other marital status that may have adverse consequences. Divorce is considered if one party committed domestic violence. Due to the existence of a cooling-off period, registration of divorce cannot be immediately filed. During the cooling-off period, continued implementation of domestic violence would make the vulnerable groups suffer the infringement. Therefore, this system is applied to the annulled parties without distinction. As the victims, the legitimate rights and interests of the dead marriage, domestic violence and abandoned marriage parties cannot be protected, but instead hurting the victims. Therefore, there should be a reasonable distinction between the applicable objects. If the marriage of both parties who file for divorce becomes not rescuable or it is not possible and necessary for marriage repair, imposing a divorce cooling-off period on the parties will not only bring pain to both parties, but also increase the workload of the marriage registration department. In order to improve the feasibility and science of divorce cooling-off period system, it is necessary to apply different divorce cooling-off periods according to the status quo of marriage.

### **5.3. Additional relevant supporting measures**

China’s relevant legislation has set up a divorce mediation system, hoping to resolve the conflicts between the two parties through the assistance of a neutral third party, so as to save the marriage in crisis and maintain the stability of marriage and family. Although the Civil Code stipulates about the cooling-off period system of divorce, corresponding supporting measures are lacking; therefore, there are still some deficiencies. The duty of civil affairs department determines that it has the obligation to guide and assist social public power to intervene in family autonomy, so as to realize the interaction between the two types of intervention subjects and achieve twice the result with half the effort. In addition, the existing people’s mediation system and community voluntary service system can be brought into play, and a special mediation mechanism for divorce affairs can be set up in the marriage registration office. It is necessary to link the divorce cooling-off period system with the habeas corpus system in the Anti-Domestic Violence Law, specify the application procedures and protection measures during the cooling-off period, and better protect the personal safety of the parties concerned.

### **5.4. Focus on divorce education**

In the cooling-off period of divorce, we should pay more attention to the divorce education of both parties, and give more education to the parties in impulsive divorce and crisis marriage. Family education can help couples think, understand each other and resolve conflicts. At the same time, let them understand the

meaning of family; it is helpful to repair the broken marriage. The author believes that the development of pre-marital education plays an important role in preventing the rise of divorce rate effectively<sup>[3]</sup>. From the perspective of the public power represented by the civil affairs department, direct intervention is advisable before marriage. Pre-marital counselling should be carried out. To ensure the establishment of a good marriage relationship, it is necessary to inform the rights and obligations of the marriage relationship, so that the marriage parties fully understand their own choices, rights and obligations. Residents' committees, villagers' committees, women's federations, disabled persons' federations and other social organizations can realize the publicity and education of good family traditions through publicity and education, community activities and door-to-door visits. The community legal and psychological volunteer service activities can carry out emotional counseling to the divorce parties. Through psychological counseling channel, legal advice and psychological counseling for the parties, these conflicts may be appropriately resolved.

## 6. Conclusion

The "guarantee for freedom divorce, opposition to wanton divorce" is the guiding ideology of marriage law. Although the divorce cooling-off period system implemented the guiding ideology of opposition to wanton divorce produced good social effects, it also exposed some disadvantages in the operation of the system and had some shortcomings in the guiding ideology of guarantee for freedom divorce. It is very important to further increase the relief to the vulnerable groups, realize the fairness and justice of the law, and improve it. It is hoped that a cooling-off period can be established to reduce the divorce rate, so that the couples can treat their marriage carefully, and at the same time, the marriage freedom of the parties can be guaranteed, the legitimate rights and interests of the victims can be safeguarded, and the ultimate goal of family and social harmony and stability can be realized.

## Disclosure statement

The author declares no conflict of interest.

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