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RESEARCH ARTICLE

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Comments and reflections on Chinese divorce registration system

Abstract The Regulations on Marriage Registration promulgated in 2003 advocates the ideas for autonomy of private law, such as "autonomy of individual will", "self responsibility" and "self-determination right", ushering a new era of Chinese divorce registration system from supervision by employed institution to self responsibility, however, such issues also result in excessive freedom and insufficient restriction. In setting up the divorce registration system, therefore, it shall also be considered for the protection of disadvantaged parties and minor children so as to ensure the fairness and justice of law and the harmony and stability of society.

Keywords divorce registration, freedom, autonomy of will, restriction, nullity

摘要 2003 年颁布的《婚姻登记条例》张扬"个人意思自治"、"自己责任"、"自己决定权"等私法自治的理念，开创了中国离婚登记从单位监管到自己责任的新时期，但也存在着自由有余、限制不足的问题。在制度建设方面，还需要考虑保护弱势一方利益，保护未成年子女利益，以确保法律的公平正义、社会的和谐稳定。

关键词 离婚登记，自由，意思自治，限制，无效

China implements the dual system of consensual divorce system, which means that both parties who request for divorce may dissolve their marital relationship through administrative procedures at the marriage registry after they have reached a divorce agreement voluntarily, or take an action to the Court to dissolve such relationship by a divorce agreement reached after the mediation of

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the Court. The new Regulations on Marriage Registration promulgated in 2003 has ushered a new era of Chinese marriage registration from supervision by employed institutions to self responsibility. Undeniably, there are also issues in the new divorce registration system, such as excessively relax legal provisions, excessive freedom, insufficient restriction and failure to reflect the legal values of protecting the interests of the disadvantaged parties in the family.

1 From supervision by employed institutions to self responsibility — progression of Chinese divorce registration system

There are three separate regulations concerning marriage registration in China, all of which are closely related to the formulation and amendment of the Marriage Law and the development of marital relationship in China. Subsequent to the promulgation of the Law of Marriage in 1980, the Measures for Marriage Registration promulgated by the Ministry of Civil Affairs on August 15, 1986 explicitly provided for the conditions and procedures for marriage and divorce registration, and Article 7 thereof provided for the conditions and procedures for divorce registration: Where both parties intend to divorce voluntarily and have reached the agreement on children support and property treatment, they shall apply for divorce registration in person at the place where either of the applicants has his/her domicile registration. At application, ID cards or domicile certificate and marriage certificates shall be produced to the marriage registry. The marriage registry shall approve the registration after it has identified the truthfulness of the situation, issue the Divorce Certificate and take back the Marriage Certificate. On Feb. 1, 1994, the Ministry of Civil Affairs promulgated the Regulations on the Administration of Marriage Registration, which explicitly provided for the principles and authorities of marriage administration, marriage registration, archives and certificates of marital relationship, supervision and administration and supplementary provisions, and emphasized the administrative functions of the marriage registry with respect to the conducts of marriage registration of the parties. Articles 14 to 20 explicitly provided for the conditions and specific procedures for divorce registration. Compared with the Measures for Marriage Registration 1986, the Regulations on the Administration of Marriage Registration in addition with the item of "a letter of introduction issued by the employed institution of the applicant, or the villagers' committee or residents' committee at the place where the applicant live" in the certificates that should be produced at divorce registration, and added such contents as the provisions on the review period for divorce application in the procedures for divorce registration. After the amendment of the Law of Marriage in 2001, the Ministry

of Civil Affairs re-promulgated the Regulations on Marriage Registration on July 30, 2003, which has made more amendments to the Regulations on the Administration of Marriage Registration (1994), where Articles 10–14 provided for divorce registration. Compared with the Regulations on the Administration of Marriage Registration (1994), the Regulations on Marriage Registration (2003) have the following three significant changes in the provision on the divorce registration system:

Firstly, change of the value of the system. The Regulations on Marriage Registration changes the title of the Regulations on the Administration of Marriage Registration by striking out the term "administration", hence diluting the administrative color of marriage registration, while highlighting the feature of civil registration. Through the registration of the divorce agreement reached voluntarily by the parties, the marriage registry may examine whether the parties applying for divorce meet the conditions for divorce registration provided for in the law of marriage, and examine and verify the truthfulness and legality of the relevant certification documents in supporting the legality of the conducts of such registration. Registration may be made if the conditions for divorce are satisfied. According to the provisions of the Regulations on Marriage Registration and the Interim Norms on Marriage Registration Work (promulgated on September 25, 2003), the examination undertook by the marriage registry on the divorce agreement of the parties to divorce is mainly a formal examination, i.e., whether the subject qualifications of the parties are legitimate — whether they have lawful conjugal relation (for which the marriage certificate shall be produced); whether the divorce agreement is reached voluntarily — persons who are insane, incompetent or with limited civil capacity may not divorce through registration procedures; whether the contents of the divorce agreement are complete or whether the contents of the agreement include the requirements for divorce, such as the property treatment and children support. No substantive examination would be made on whether mutual affection no long exists between the parties, whether the divorce agreement is fair and whether the arrangement of children after divorce is in the best interests of children. Thus, it can be said that the Regulations on the Marriage Registration 2003 better embodies the judicial idea of respecting the autonomy of will and protecting the freedom of divorce of the parties.

Secondly, change of the means for proving marital status. The Regulations on the Administration of Marriage Registration (1994) required for the submission of the letter of introduction issued by the employed institution of the applicant, or the villagers' committee or residents' committee at the place where the applicant lives at divorce registration, the two purposes of which are as follows: Firstly, to provide the certification of marital status to certify the parties are in lawful marital status by their employed institutions or basic-level organization; and

secondly, to show that the employed institution understands the divorce of the parties and even to show that it agrees on the divorce, hence making divorce not only a private affair, but a trace of the intervention of public power. The amended provision on cancelling the submission of the certificate issued by the employed institution clears off such trace. Thus, the parities in divorce provide their marriage certificates and divorce agreement and bear the responsibilities for their marital status as well as the legal consequences of divorce thereof. The reform on the means for the certification of marital status manifests the legislative ideology of divorce registration transferring from duty standard to right standard, from the administrative mode that depends on the employed institution to the self-regulatory mode that believes in individuals and from the supervision responsibility of the employed institution to the corresponding responsibilities of the parties themselves, hence rendering the behavior of divorce completely a private affair.

Thirdly, cancellation of the period for review of divorce application. The Measures for the Administration of Marriage Registration (1994) provided that the marriage registry shall review the divorce application of the parties, approve the application, issue divorce certificates and cancel their marriage certificates within a month from the date of the acceptance of the application if divorce conditions are satisfied. The Regulations on Marriage Registration (2003) cancels the period for review of the divorce, and Article 13 thereof provides that: The marriage registry shall review the certificates and supporting documents produced by the parties to divorce registration, and inquire on the relevant circumstances. Where the parties really want to get divorced voluntarily and have reached a consensus on such issues as children support, property and debts, the registration shall issue a divorce certificate. Such provision cancels the period for review of the divorce application and does not provide for the time limitation for handling divorce registration. The clerk responsible for marriage registration shall handle the application on the spot if he or she believes that the statutory conditions are satisfied through review and enquiry. Such provision is consistent with the above-mentioned two changes — the change of the values of marriage registration system and the change of the legislative ideas of divorce registration, which emphasize the autonomy of individual will and “self-determination right”, i.e., the right based on which private affairs shall be decided by the parties at free will.

We can find from the above-mentioned analysis that after a long period when Chinese divorce registration system has been heavily intervened by public power, the Regulations on Marriage Registration (2003) adopts the guiding policy of fully safeguarding the private rights of citizens, which better embodies the principle of freedom of marriage, fully advocates the ideas of autonomy of private law, such as “autonomy of individual will”, “self responsibility” and

"self-determination right", and sufficiently safeguards the freedom of divorce. From the view of comparative law, as far as the divorce registration systems of major countries of the continental law system and the Anglo-American law system in the view of the author, Chinese divorce registration system is one of the divorce systems enjoying the highest freedom in the world.

2 Adequate freedom and insufficient restriction — reflection on Chinese divorce registration system

The freedom of divorce is a relative freedom within the statutory scope. The intervention of law in the freedom of divorce shall reflect the in-depth moral orientation of legislators and the intervention of the state in the freedom of divorce shall be provided for through a clear and due legislative way. The principle of proportionality shall be observed between the due reasons for intervention and the measures for implementation of intervention, and the supervision is necessary. (Panel, 2002) Between the freedom of divorce of the parties and the intervention of public power, how to delimit the scope of freedom in law, how public power intervenes in marriage and family, what means of intervention shall be used and what is the bottom line are the challenges faced by the marriage and family laws of countries throughout the world.

Since the mid 1990s, marriage and family laws have been deeply affected by the doctrine of intervention of welfare states, and many states have selectively intervened in the field of divorce through legislation and judicature, whereby, on the one hand, the right of divorce freedom of citizens are protected as possible and the autonomy of will of the parties are fully respected to free them from the arbitrary intervention of the state and others; and on the other hand, special attentions are given to the maintenance of the rights and interests of the disadvantaged parties in a family so as to change the unequal situation formed in history. Divorce is not merely a private affair, as its force will affect the other party, children and the society. Thus, many states, though allowing consensual divorce, provide for restrictive clauses so as to maintain the stability of marital relations and avoid rash divorce. Such restrictive provisions are mainly in the following three aspects:

Firstly, the exercise of the right to request for divorce is restricted within certain time limits. Some states provide that the divorce application is only allowed to be submitted after the marriage has reached certain time limit. Though states provide for different time limits, such time limit is less than a year. Article 230 of French Civil Code provides that divorce registration may not be applied for within 6 months upon marriage. (French Civil Code, 2005) The law of divorce of the Netherlands and the civil law of Mexico provide that divorce can

only be petitioned one year after marriage.

Secondly, the period for consideration of divorce is established. The divorce procedures shall be officially initiated after a certain period for consideration upon submission of the application for divorce. For instance, Article 231 of French Civil Code provides: If both parties insist on divorce, the judge shall tell them their application shall be re-submitted after 3 months of consideration. If no application is re-submitted within 6 months upon expiration of the period for consideration, such joint application shall be null. In Belgium, Austria and Sweden, the period for consideration is 6 months. Paragraph 3 of Article 19 of Russian Federal Family Code provides: The domicile registry shall handle divorce and issue a divorce certificate a month upon submission of the divorce application. (Russian Federal Family Code, 2002)

Thirdly, the couple shall have no minor children. Paragraph 1 of Article 19 of Russian Federal Family Code provides: The divorce registration of a couple without any common minor child shall be handled at the domicile registry, while the divorce of a couple with any minor child shall go through litigation proceedings. Mexican Civil Code also requires that the couple applying for divorce registration shall have no common minor child (Article 272). Article 1628 of Macao Civil Code provides that a couple without any common minor child may file an application for divorce with the competent civil registration bureau and the divorce shall be announced by the head of the civil registration bureau, which is of the same legal validity with the ruling of a court.

Among the states that implement consensual divorce, on the one hand, they emphasize that the divorce registration shall stick to the principles of respecting the autonomy of the will of the parties and protecting citizens' right of divorce freedom, and make specific provisions to guarantee the realization of such principles; and on the other hand, they have provided for specific procedures, conditions and even restrictive conditions for divorce registration. Thus, it is clear that in the category of law, even the consensual divorce with free will of both parties is not an absolute freedom but a relative freedom within the limits of law. Moreover, to ensure the agreement reached by the parties voluntarily comply with the principles of fairness and justice in the interest of minor children, though consensual divorce is adopted by more and more states, there are still relatively fewer states that apply consensual divorce by administrative registration procedures. Major states of the continental law system and the Anglo-American law system either apply consensual divorce by judicial proceedings as divorce procedures parallel to the judgment of divorce, or only recognize the judgment of divorce proceedings. They hold that the legal act to dissolve status relationship is of considerable importance for individuals, society and the state and only judges who have received professional education on law and reached the professional level may confirm the dissolution of status

relationship.

As a type of consensual divorce, Chinese divorce registration system is basically the same as the provisions of other countries on conditions and procedures, but what deserves attention is that most countries that allow for consensual divorce have added some special restrictive conditions besides general conditions and procedures and many countries provide that consensual divorce shall be subject to substantive examination by the registry or the court. However, after change of the way to prove marital status, cancellation of the provision on the period for review of divorce application and the substantive examination of divorce, Chinese Regulations on Marriage Registration (2003) only focus on safeguarding the freedom of divorce, without consideration of the rights and interests of the disadvantaged parties in the family at divorce, and there is no provision on the measures for protection and relief of the party who has not truthfully expressed his or her will of divorce and the minor children who have no options. Thus, the author holds that the Regulations on Marriage Registration (2003) offer too much freedom without sufficient restrictions. In practice of divorce through registration are mainly the following issues:

Firstly, rash divorce is on the increase. Since the implementation of the Regulations on Marriage Registration which simplifies the procedures for divorce registration on 1 October 2003, the number of divorce through registration has increased sharply. The civil affair departments across China handled divorce registrations of 691,000 couples in 2003, 118,000 more than that of the preceding year; 1.04 million couples in 2004, 349,000 more than that of the preceding year; 1.1184 million couples in 2005, 144,000 more than that of the preceding year; and 1.291 million couples in 2006, 147,000 more than that of the preceding year.[1] The total increase reached 758,000 couples for those four years with the trend on the rise.

Take Shanghai for example. In 2005, 100,297 couples registered for marriage and while 30,745 couples went through divorce registration in Shanghai. Compared with 2004, under the influence of the traditional saying that “it is unlucky to get married in the year of rooster”, the number of marriage registration decreased by 22,741 couples and approximately 18%, while the number of consensual divorce increased by 12%, 3,369 more than that of the preceding year, and averagely there were 84 couples got divorced every day. While the number of divorce registration increased substantially, the rate of resumed marriage rose considerably. The number of resumed marriage reached 3,301 couples in 2005, accounting for 3.29% of total marriage, increased by approximately 22% than that of the year 2004.[2]

[1] Statistics Report on the Development of Civil Undertakings (2002–2005).
[2] www.eastday.com, 2006-2-14.

According to the report of Guiyang Evening News, from January to October 2004, about 263 couples went through registration to resume their marriage in three urban districts of Guiyang City, approximately tripled the number of the preceding year obviously on the rise. The increase of the registration for resumption of marriage is mostly attributed to the imprudence in handling divorce registration and most of those resuming marriage were at the age of 30 and 50. Among them, more than 90% chose to resume their marriage because they felt after divorce that the "original spouse" was better. According to the introduction of the clerks at the marriage registration agencies, the reason why many couples who resumed marriage got divorced formerly was not that mutual affection no long existed, but that impulsive decisions were triggered by disputes on trivia. After departing from each other for a certain period, he/she recalled the good points of the spouse, and hence chose to "resume the marriage".[3]

Secondly, due attention has not been paid to the interests of minor children. At the time when rash divorce increases, children pay a high price. In Chinese divorce of registration system, no full consideration and earnest care are given to the rights and interests of children after the divorce of their parents. Though there are provisions in Chinese divorce of registration procedures requiring the parties to divorce to reach consensus on the issues concerning the interests of the children including the party directly responsible for bringing up the children and the expenses of parental support after divorce, the Regulations on Marriage Registration neither requires that the parties shall reach the agreement on children support in the best interests of children and conducive to their healthy growth, nor asks the marriage registration clerks to review on the legitimacy of the agreement. Thus, there is actually no assessment and supervision on whether the agreement on children support after parents' divorce complies with the relevant provisions of the law of marriage or whether it is conducive to the healthy growth of children. Moreover, there is no provision on whether it is necessary to take consideration of the desire of minor children in the agreement at divorce registration. In the litigation proceedings of divorce, according to the provisions of the judicial interpretation of the Supreme Court, as for which party the children above the age of 10 will live with after the divorce of their parents, the court shall take into account the desire of the children at mediation and ruling in favor of their mental and physical health.[4] However, in divorce registration, the Regulations on Marriage Registration has not made any provisions on whether children have expressed their opinions on the change of life concerning

[3] Guiyang Evening News, 2004-11-5.
[4] Article 5: Several opinions on handling the issues concerning children support in the trial of divorce cases by the courts, issued by the Supreme Court of China.

their material interests and whether the agreement reached by the parties has considered the desire of the children. In the actual life, the most majority of parents will not solicit opinions from the standpoints of their children. Obviously, that is a big defect in the Regulations on Marriage Registration.

Thirdly, there lack legal remedies for the party who has not truthfully expressed his/her will. One of the most important conditions for consensual divorce through registration procedures is that both parties to the agreement express their wills truthfully and voluntarily. The complete civil capacity of both parties and the truthful expression of wills of both parties with consensus is the precondition for the effectiveness of the agreement. However, in practice, there are many circumstances resulting in the untrue expression of the wills of the parties, such as where a party is a person without capacity of civil conducts or a person with limited civil capacity; where the agreement is reached by menace or fraud of a party; where false expression of wills are made by both parties through conspiracy to cheat the marriage registry; or where a party fails to express his/her will to divorce in person. For those circumstances, if the marriage registry has not discovered them in a timely manner and handled the divorce registration on the spot, the divorce will have legal force immediately. In this regard, Article 21 of the former Regulations on the Administration of Marriage Registration provided: "Where any of the parties applying for marriage registration obtains marriage registration by cheating, the marriage registry shall cancel the marriage registration… for the parties to divorce, it shall announce the nullity of the dissolution of marital relationship, take back the divorce certificates and impose penalties no more than RMB200 on the parties concerned." The Regulations on Marriage Registration (2003) repeals such provisions while no provision has been made on how the party being cheated or harmed can obtain remedies. The author holds that law shall not do nothing for the party who is harmed due to untrue expression of his/her will at divorce, but provide certain remedies for protecting the legitimate rights and interests of the party.

3 "Self responsibility" not equal to laissez-faire — on improving the legislation of divorce registration

3.1 The period for consideration of divorce shall be provided conditionally

The reason why the Regulations on Marriage Registration (2003) repeals the period for review of the divorce application is that legislators believe that as divorce agreement shall be reached before the application for divorce registration, both parties have thought over divorce during the formation of the divorce agreement, and hence it is unnecessary to set up a period for review of the

divorce application. Besides, divorce is a private affair between the parties concerned and generally, they are not willing to let everyone know their marital affairs, and thus, for the purpose of protecting their right of privacy, mediation is unnecessary. At least, it is unnecessary to have a special time for mediation. (The Supreme Court of China, 2003) The author holds that marital relationship is different from general social relationships. On the one hand, it is a very important status relationship beyond comparison by other social relationships in terms of depth and broadness, and its establishment and dissolution will be of a big impact on individuals, family and the society, and hence the parties may prudently treat it and think it over. On the other hand, the closeness and emotional factor in marital relationship may lead to the impulsion of both parties who may even apply for divorce only for a small disagreement. Thus, there are in fact two possibilities for the situation of a couple before divorce: One is that the decision for divorce is firmly made upon repeated considerations and negotiations, and the other is that the decision for divorce is made rashly in rage and even in a rush without serious consideration. For the former, divorce registration can be handled at the spot to enable the parties dissolve their unfortunate marriage as soon as possible, while for the latter, a period for consideration shall be given to the parties to prevent them from sufferings caused by rash divorce at impulsion.

Therefore, premises shall be established in the provisions on handling divorce registration on the spot. The clerks for marriage registration shall undertake review and mediation of the application for divorce registration of the parties and then, if the clerks confirm that the parties do want divorce voluntarily and have reached a consensus on the issues concerning children support, property and debt, the registration may be approved at once and divorce certificates may be issued. In case the clerks believe the parties apply for divorce from impulsion without adequate consideration, they may disapprove the registration and give them one month period for consideration, and then if the parties insist on divorce, divorce registration procedures can be handled. The provision on a period for consideration of divorce may allow the parties to make a serious and calm consideration on the divorce agreement that have been reached and ensure they fully understand the divorce itself as well as the consequences thereof and are able to bear the corresponding liabilities provided for in the agreement.

As discussed above, the period for consideration of divorce is the provision of most countries that allow for consensual divorce, though the length of the period may vary. For example, such period is one month in Russia, two months in Sweden and six months in France. Considering the specific circumstances and legislative traditions of China, the author believes that one month of such period is appropriate for the national conditions.

3.2 A couple with minor children under the age of 10 shall not apply for divorce registration procedures

To protect the interests of minor children in divorce process and enable them to share the necessary protection for their minor status provided for by their family, the society and the state, the situation of children without rights shall be fully considered in legislation and necessary protection measures shall be adopted for them. As far as children are concerned, a happy family with parents living together is an important environment for their healthy growth, but when their parents are in an extremely inharmonious situation and the marriage relationship is totally breached, divorce may be the only way out for their parents. Nevertheless, children are helpless and their destiny is under the control by their parents. Hence, they need the intervention and protection of the society and the state.

With respect to the couple with minor children above the age of 10, they shall solicit opinions from their children at consensual divorce and the agreement reached shall be reviewed and verified by the marriage registry. Since the minor children above the age of 10 are persons of limited civil capacity, they have certain capability for identification and they may make their own choices when their parents determine the direct supporting party at divorce. However, whether the agreement of the parents has considered the opinions of the children and whether it is conducive to the healthy growth of the children and in the best interest of the children shall be subject to the substantive examination of the marriage registry.

Minor children under the age of 10 are persons without capacity of civil conducts who may not express their wills and control their destinies, and hence necessary care and special protection shall be given by their parents, the society or the state.

As the divorce of registration agreement is reached by the parties to divorce with free will in China, though we may believe all parents love their children and will give consideration to the interests of their children, such presumption based on morals may not guarantee every agreement concluded by the parents is in the best interest of the healthy growth of the children. Thus, legal intervention is necessary for protecting the interests of the children at the most disadvantaged position of the family. The couples with any child under the age of 10 shall get divorced through litigation proceedings and reach an agreement on the interests of their children under the patronage of judges, whereby judges confirm whether the agreement is in the best interests of the children and conducive to their healthy growth.

3.3 The system for nullifying divorce registration shall be established

In case a divorce of registration does not satisfy the statutory conditions or violates legal provisions, the marriage registry shall announce the nullification of

the divorce for two purposes: One is to punish those divorce registrations in violation of law so as to ensure the truthfulness of the expression of wills at divorce registration and the effectiveness of the divorce agreement reached; and the other is to provide remedies for the victim or the bona fide party in an illegal consensual divorce, enabling them to have right by requesting for nullification of the divorce of registration. As the divorce registration is a civil legal behavior, according to the provisions of the General Principles of Civil Law, any circumstance that leads to the nullification of a civil behavior shall be the cause for the nullification of the consensual divorce: Firstly, the subject is unqualified. If one party or both parties are persons without capacity of civil conducts or persons of limited civil capacity, their expression of divorce shall be of no legal effect and the divorce registration is null and void. Secondly, there are defects in the expression of wills. Where one party forces the other party to agree to divorce by fraud or coercion and a divorce agreement is reached, their divorce registration shall be null and void. Thirdly, if both parties cheat the marriage registry or provide false certificates, their divorce registration shall be null and void. The petitioner to request for the nullification of the divorce registration may be the parties, interested parties, close relatives or the marriage registry. With respect to the divorce of registration by fraud or coercion, the petitioner to request for the nullification of the divorce registration shall be the party and he/she shall file a case for nullifying the divorce registration within one year after he/she knows of such fraud or coercion. The authority that announces the nullification of the divorce registration shall be the marriage registry, which shall take back the divorce certificates after the announcement, and consequently the parties resume their original status as husband and wife. If one party or both parties have remarried before the announcement of the nullification of divorce, they shall go through the procedures of divorce registration again upon such announcement, or go through litigation proceedings for divorce, and otherwise, bigamy will be constituted. In case a divorce is nullified due to the faults of the registrants of the registry for the review of divorce, besides announcement of nullification of the divorce registration, corresponding punishments shall be imposed on such registrants. If any party objects to the announcement of nullification of the divorce registration, an application for reconsideration may be made in accordance with the provisions of the Administrative Reconsideration Law; and if there is still objection to the decision of reconsideration, litigation may be initiated in accordance with the provisions of the Administrative Procedure Law.

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