

Legal Grounds for Divorce in China: Origin and Evolution

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The Chinese Marriage Law 2001 stipulates two kinds of divorce: registered divorce and litigated divorce. In this paper, the different grounds and procedures related to these two types of divorce will be examined and the judicial statistics and empirical experience about the legal system of grounds for divorce in practice will be explored. Compared to litigated divorce, the easier registered divorce predominates in terms of number. While the sole legal requirement for litigated divorce is that the marriage has broken down irretrievably, this breakdown needs to be evidenced by specific facts. The facts listed in Marriage Law 2001 are mostly fault-based. However, they are not in line with the situation in practice and increase the difficulty of litigated divorce. The legislative reform for the legal grounds for divorce in the Chinese Civil Code (2021) has been undergone in order to strike a balance between protecting people's autonomy to divorce and assisting people to make divorce decisions.

Keywords: Legal Grounds for Divorce, Registered Divorce, Litigated Divorce, Fake Divorce, Chinese Civil Code, Marriage Law 2001

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I. INTRODUCTION

The legal grounds for divorce is one of the most controversial and far-reaching issues in family law, which reflects a jurisdiction's inherent cultural values towards the marriage regime and socio-legal context. It is hard to say that a marriage which has irretrievably broken down benefits anyone as well as society in whole. Reasonable grounds and procedures for divorce are vital and necessary in order to liberate people from an unhappy marriage. From ancient to modern times, in China, the grounds for divorce have undergone several important changes.¹ Nowadays, one of the most significant questions is whether the current legislation for divorce grounds reflects the reality regarding judicial practice and satisfies the needs of modern society.

This paper will examine the legislation and judicial practice with respect to the grounds for divorce in the Chinese family law and analyse the fundamental reasons for the legislative reform for the divorce grounds system in the Chinese Civil Code (2021).² Based on this, the author will attempt to deepen the understanding of Chinese divorce law as well as its underlying ideology. Also, she put forward several suggestions for the application and improvement of the divorce grounds system.

II. THE GROUNDS FOR DIVORCE IN CHINESE MARRIAGE LAW

In China, the Marriage Law, enacted in 1980 and amended in 2001, is definitely the most important law in the family law field. Marriage Law 2001 (ML 2001) incorporates all the rights, obligations and responsibilities of family members (both in intact and separated families), and divorce law forms Part IV of it. In terms of the divorce grounds and procedures in China, there are two kinds of divorce: registered divorce and litigated divorce. These two types of divorce have entirely distinct grounds and procedures.

A. Registered Divorce

Registered divorce is uncontested, which means that both parties agree on all of the divorce-related issues. According to Article 31 of ML 2001, in the case of a

registered divorce, the only requirement is the mutual consent of both parties.³ The couple jointly applies for a divorce and the Marriage Registration Authority issues a certificate of divorce after checking and confirming that both parties are indeed willing to divorce and have made proper arrangements for their children and property.⁴ However, the Marriage Registration Authority does not execute a substantive scrutiny of the parties' agreement to ensure whether such agreement follows 'proper' practice.⁵ Chen, Shi and Zhang's empirical research confirms this point; it also reveals that the practical difficulty faced by the Marriage Registration Authority in examining the agreements substantively, is mainly due to an insufficiency of qualified office staff.⁶ In other words, in a registered divorce, if the couple can agree and present said divorce agreement to the Marriage Registration Authority, the divorce is guaranteed.⁷

However, there is a highly debated phenomenon in China recently in the context of registered divorce. Many couples opt for divorce, particularly in the bigger cities, even if they are happy with their marriage. This phenomenon is called the "fake divorce" by some. The reason why these couples apply for a divorce is that it is easier to buy a second property, rather than because they truly wish to end their relationship. After buying a second house, it is common for the parties to remarry and live together, just as they did prior to the divorce.⁸ In this case, the motivation to divorce lies in the potential financial benefits that a divorce may bring.

From 2010 to 2011, 46 cities in China began to issue policies to restrict the purchase of property. These policies were adopted to regulate and control housing prices and demands, which, coincidentally, resulted in upward surge of fake divorces by couples, all of whom were trying to make full use of the loopholes in such new property policies.⁹ In 2013, the State Council of PRC issued a notice on "Improving Work Quality on the Regulation and Control of the Real Estate Market," which created an abnormal surge in the number of divorces across China. For example, the number of divorced couples in Beijing was increasing from 38,243 (2012) to 54,536 (2013).¹⁰ In addition, a survey carried out by CHINA YOUTH DAILY reveals that 85.7% of people think that there are fake divorces around them.¹¹

This situation is, on the one hand, driven by the booming property market in China, especially in the first-tier cities. On the other hand, it is due to the house buying rules in China which treat married couples as a single unit who may face higher deposits, loan interest rates and tax rates if they plan to buy a second

or third property. By divorce, however, a couple is treated as two independent individuals, so that each is able to regain the second or third property as a first-time buyer.¹² Regardless of the widespread existence of fake divorces, there is a clear consensus among scholars that fake divorces may have numerous detrimental outcomes for both individuals and society.¹³ The fake divorce is a fraud and waste of social public resources.¹⁴ What is more, the fake divorce is somewhat of a gamble, as some may renege on their commitment to remarry their former spouse after having bought the property and their spouse will sue them for fraud. In practice, there is a lack of consensus on how to deal with such situations.¹⁵

B. Litigated Divorce

A litigated divorce proceeding is contested. It occurs in two situations: firstly, the petitioner applies for a divorce but the respondent does not consent to end the marital relationship; and, secondly, both parties agree to a divorce but the terms of the divorce are disputed, including but not limited to the custody of children, children support, and the division of the marital property and any debts. Once the parties enter into a dispute concerning divorce-related issues, they need to go to court for divorce litigation. As stated in Article 32(2) of ML 2001, when a contested divorce petition is filed, the court should first offer mediation. If mediation fails to bring about reconciliation between the two parties, then the marital affection is thought to have broken down irretrievably,¹⁶ and a divorce shall be granted. That is to say, mediation is the mandatory procedure before delivering a sentence. According to the legislative interpretation of the National People's Congress of PRC,¹⁷ mediation is an effective way to help the parties to reduce their conflicts and strengthen their sense of family responsibilities.

1. The Grounds for Divorce

The sole ground for divorce under ML 2001 is that the marriage has broken down irretrievably. If the court is satisfied that the marriage has broken down irretrievably, a divorce can be granted. Originally, Article 17(1) of ML 1950 stipulates that once mediation fails, the divorce shall be granted, which preliminarily establishes the criterion for divorce as the breakdown of the marriage.¹⁸ Meanwhile, Article 25 of ML 1980 explicitly emphasizes that the ground for litigated divorce is that the marriage has broken down irretrievably, which is also reemphasized by Article

32(2) of ML 2001.

Regarding irretrievable matrimony breakdown as the sole ground for divorce is based on a three-fold justification. First, it is widely believed that a harmonious marital relationship between couples is the foundation of a marriage. As a result, if the marriage has broken down irretrievably, it has become a marriage in name only, so that it is meaningless to seek to continue with it. The second point is related to the first point, as the dissolution of a marriage that has irretrievably broken down is deemed beneficial to both parties and the society. This will reduce the possible hostility and pain for both parties and their children that would stem from a “reluctant marriage.” Third, since people can enter into a marital relationship freely, their autonomous decision to divorce should also be respected; in other words, people enjoy the basic right to marry and divorce.¹⁹

Despite having established the ground of the irretrievable breakdown of the marriage in litigated divorce, ML 1980 fails to provide any specific facts under which circumstances a marriage shall be deemed to have broken down irretrievably.²⁰ Article 32 (3) & (4) of ML 2001 lists six specific facts, on the basis of people’s common sense as well as judges’ judicial experience, to help judges to decide whether a marriage has irretrievably broken down. In this case, there is no need for petitioners to prove the causes for breakdown precisely. Once one of these facts is satisfied, the marriage will be presumed to have irretrievably broken down in the majority of cases. Nevertheless, there are some exceptional circumstances in which the specific facts listed have occurred, but the judges nevertheless do not consider that the marriage has broken down irretrievably or regard it as remediable. Under these circumstances, a divorce will not be granted.²¹

Four of these facts are fault-based, while two are no-fault based. The first fault-based fact is that either party has committed bigamy or has lived with a third party stably and continuously. These two types of behaviour differ from adultery, which means that adultery (sexual intercourse alone) is insufficient under this provision. The second is that either party has deserted the other party or other family members. In China, couples have a legal obligation to support each other financially and take care of each other physically. They should not desert each other. In this context, desertion means that one party refuses to pay regular maintenance to or look after the other party. The third is that either party commits domestic violence or abuse against the other party or other family members. The fourth is that either party has

incurable bad habits, such as drug addiction or gambling.²²

In contrast, there are two no-fault-based facts. The first fact is that the parties have lived apart for more than two years. It is available in different situations either when both parties consent to live apart because they do not have a good relationship, or when one of the parties disagrees with the separation, but his or her spouse insists on leaving the marital home.²³ The second is that either party has been declared missing by the court and the other party applies to divorce him or her.²⁴ A declaration of missing is a legal procedure which is enshrined in Article 40 of the General Rules of Civil Law. According to Article 40, if a person has been untraceable for more than two years, he or she can be declared by the court to be a missing person.²⁵

Apart from the specific facts outlined above, there is a ‘special’ provision in Article 32(2) stating that, if other situations can be presented to prove that the marriage has broken down irretrievably, a divorce shall also be granted. In practice, whether the marriage has broken down irretrievably or not depends on the judge’s discretion. The scope of “other situations” is sufficiently extensive, including serious mental illness suffered by one party or criminal offense conducted by one party, which has seriously damaged the couple’s mutual relationship, etc.²⁶

Furthermore, according to Article 22 of the First Judicial Interpretation²⁷ on the implementation of Family Law issued by the Supreme Court of PRC, the fault of the petitioner shall not become an obstacle to divorce. That is to say, it is unnecessary for petitioners to have “clean hands.” The only issue the court needs to consider is whether or not the marriage has broken down irretrievably. In this regard, the question of which party is at fault for breaking down the marriage (if it exists) will not affect the court’s decision concerning whether to grant a divorce.²⁸

2. The Grounds for Prohibiting Divorce

In addition to the legal grounds for divorce, there are two particular factual bases for prohibiting divorce that are worth considering in detail. Firstly, according to Article 34 of ML 2001, a husband cannot apply for divorce during his wife is pregnant, within one year after she has given birth to a child, or within six months after she has terminated a pregnancy. This rule aims to protect the rights of women, who will probably be mentally and physically vulnerable on account of their pregnancy. Yet,

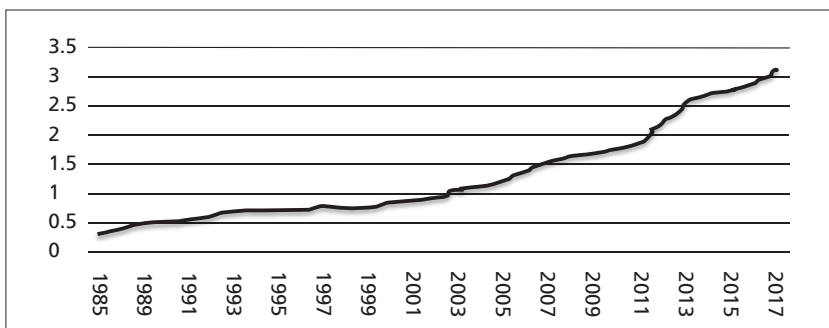
the husband is also entitled right to a divorce by Article 34 in certain exceptional cases, where the court believes that there are more significant rights to be protected than the wife's rights during pregnancy. Thus, in these cases, the judges are given considerable discretion to decide whether or not to grant a divorce.²⁹ Nonetheless, which cases are 'exceptional' are not referred to with any specific examples.

Secondly, the spouse of a soldier in active service cannot be granted a divorce unless the soldier consents to this, although the court has discretion to grant a divorce if it holds that the soldier is at grave fault.³⁰ As stated by NPC, the principal justification for this provision lies in the state's policy on the special protection of soldiers in active service, who are enduring the particular missions and responsibilities to safeguard the citizens of the state.³¹

III. THE DIVORCE RATES AND GROUNDS IN CHINA: STATISTICAL ANALYSIS

China had a relatively lower divorce rate in 1985 - only 0.44 divorces per 1,000 population. However, the divorce rate had risen to 0.96 divorces per 1,000 population by the year 2000, which is over double the level in 1985. Since then, the divorce growth has accelerated, increasing by around 1 percentage point over 10 years. In 2017, the divorce rate rose as high as 3.2 divorces per 1,000 population and this upward trend seems to be continuing (Chart 1).

Chart 1: The Divorce Rates in China from 1985 to 2017³²



Sources: The Ministry of Civil Affairs of PRC (1985-2017)

Index: Number of Divorces per 1,000 Population

As shown in Table 1, from 2001 to 2002, the proportion of litigated divorces slightly exceeded that of registered divorces. Nevertheless, since 2003, the proportion has reversed and the number of recent registered divorces exceeds that of litigated divorces. The primary reason for this change is that the State Council of PRC enacted the Regulation of Marriage Registration³³ in 2003, which greatly simplifies the process of applying for a registered divorce.³⁴

Table 1: Registered Divorce and Litigated Divorce from 2001 to 2017

Year	Registered Divorces: Number (thousand) (%)	Litigated Divorces: Number (thousand) (%)	Total: Number (thousand) (%)
2001	528 (42.2)	722 (57.8)	1250
2002	573 (48.7)	604 (51.3)	1177
2003	691 (52)	640 (48)	1331
2004	1046 (62.8)	619 (37.2)	1665
2005	1184 (66.3)	601 (33.7)	1785
2006	1291 (67.5)	622 (32.5)	1913
2007	1457 (69.4)	641 (30.6)	2098
2008	1609 (70.9)	659 (29.1)	2269
2009	1802 (73.0)	666 (27.0)	2468
2010	2010 (75.1)	668 (24.9)	2678
2011	2207 (76.8)	667 (23.2)	2874
2012	2423 (78.1)	681 (21.9)	3104
2013	2815 (80.4)	685 (19.6)	3500
2014	2957 (81.3)	679 (18.7)	3637
2015	3149 (82)	693 (18)	3841
2016	3486 (83.8)	672 (16.2)	4158
2017	3704 (84.7)	669 (15.3)	4374

Sources: The Ministry of Civil Affairs of PRC (2001-2017)

In recent years, registered divorce has constituted the vast majority of divorces (83.8% in 2016 and 84.7% in 2017). It means that, in most cases, couples can reach

an agreement to end the marital relationship, rather than to contest the divorce. Moreover, it should be stressed that although the number of litigated divorce is smaller and the proportion is decreasing, it still accounts for a certain proportion of divorces. There are a few respondents (18% in 2015 and 15.3% in 2017) who are willing to spend money and time contesting a divorce petition.

Table 2: The Facts of Irretrievable Breakdown in Litigated Divorce Cases of First Instance across China (Jan. 1, 2016 - Dec. 31, 2017)³⁵

Facts	Emotional Incompatibility	Domestic Violence or Abuse	Missing or Leaving	Bad Habits	Bigamy or Adultery
Proportion	77.51%	14.86%	10%	6%	3%

Sources: The Supreme People's Court of PRC (2017)

As shown in Table 2, from 2016 to 2017, the fact that the two parties are incompatible in emotional relationships constituted the largest proportion (77.51%) of litigated divorce cases of first instance across China, far exceeding the second largest fact of domestic violence or abuse, with only 14.86%.

Similarly, empirical research on 2,884 litigated divorce cases of first instance in Shandong Province in 2002 reveals the absolute predominance of emotional incompatibility (55.8%).³⁶ Moreover, in an empirical survey on 1,547 litigated divorce cases in Shanghai's courts in 2007, 64% of the couples divorced due to emotional incompatibility. Bigamy (and adultery) and separation accounted for the second and third largest percentages, at 7% and 6%, respectively. Other facts, such as either party having a mental or physical illness or committing a criminal offence also play a role in divorces.³⁷

IV. LEGISLATIVE REFORMS OF THE DIVORCE GROUNDS IN THE CHINESE CIVIL CODE

A. Reform of Registered Divorce

In the registered divorce procedure, it appears that divorce is extremely quick and easy,³⁸ which mainly emphasizes the autonomous decision-making of the

parties. Essentially, as marriage is based on mutual consent and trust, no law can force parties to continue living together if neither of them has the intention to do so.³⁹ However, the oversimplified divorce grounds and procedure have led to the overwhelming predominance of registered divorces within the total divorce accounts overall (as shown by the above statistics), which is causing growing concern about the increasing prevalence of hasty decision-making in divorce. At the same time, it is easy for speculators to access extra benefits under the guise of “fake divorce.” More seriously, some research has shown that the rare limitation on registered divorce under the current law has increased the divorce rate to certain extent.⁴⁰

Keeping this in mind, several considerations and reflections on this matter are presented.⁴¹ Foremost, there is a board consensus that people’s autonomous right to divorce shall be assured by the law.⁴² Inferring from this principle, the legislature should seek to assist people to make a proper divorce decision and avoid precipitated decision-making. This is based on the idea that divorce is not only a purely individual choice but, to some extent, also a public issue stemming from the underlying responsibilities associated with protecting the children involved and maintaining social stability.⁴³

In response to this problem, the legislation is being reformed. The Chinese Civil Code adds a new statutory provision on the “cooling-off rule” within the registered divorce procedure. Article 1077 of the Civil Code provides:

Either party could withdraw the divorce application within 30 days from the receiving of the divorce application by the Marriage Registration Authority. The two parties could joint apply for a formal divorce certificate at any time after the expiration of the above 30 days. If they fail to apply for a formal divorce certificate after the expiration of 30 days from the earliest date on which they could have applied, the divorce application they submitted shall be considered withdrawn automatically.

Accordingly, a 30-day waiting and cooling-off period is compulsory, only after which can the divorcing couple file for a formal divorce certificate. While some critics argue that the effectiveness of the cooling-off rule remain uncertain, particularly for those who have a strong will to get divorced,⁴⁴ the legislature accepted the reform of stipulating a cooling-off provision in the Civil Code. In short, the legislature agreed upon that time is needed for the couple to calm down

and carefully consider the ultimate meaning of divorce, which may contribute to striking a balance between the autonomy of the divorce and the stability of the family.⁴⁵ Furthermore, although the key solution to “fake divorces” lies in the housing policies and housing supply, it is demonstrated that a cooling-off period may help to alleviate the problem of fake divorces, since the time and cost of fake divorces would certainly increase during the 30-day colling-off period, which is not a small obstacle for some people.⁴⁶

Clearly, the main purpose of the cooling-off rule is to reduce the number of hasty divorce decisions, which has been affirmed by the legislature.⁴⁷ The statistics on the 216,559 registered divorces that took place in Beijing from 2004 to 2011 show that, 16.7% of the marriage lasted for one to three years, while 9.1% of the marriage lasted less than one year, of which 49.5% lasted less than six months.⁴⁸ A survey in Guiyang City in 2004 showed that 90% of remarried couples evaluated their former spouse as a good partner, which shows that the “immediate effect” of registered divorce should be changed under the current law in order to prevent impulsive divorce.⁴⁹ An officer of the Marriage Registration Authority in Sichuan Province stated that precipitate divorce is common today and some couples requested a divorce as soon as they were slightly unhappy with the marriage and later regretted for it.⁵⁰ In early 2012, the Marriage Registration Authority of Cixi City in Zhejiang Province tried out a one-week cooling-off period. The survey shows that, during the three-month trial period, only 314 out of 650 couples who filed for divorce actually decided to obtain a formal divorce certificate after the one-week cooling-off period. Indeed, the number of divorces was reduced by more than half owing to the cooling-off period.⁵¹

The aforementioned surveys demonstrate that a sufficient period would provide the chance for the couples to reconsider their decision to divorce, including the impacts of the divorce on themselves and their children, as well as making registered divorce slightly more difficult is of importance. Once the apparent ease of divorce is altered, the soaring divorce rate is likely to be slowed down to some extent.⁵² In fact, the requirement of a minimum timeframe for the divorce process may serve to alleviate the possible harm associated with the uncomplicated ground (mutual consent) and procedure (no minimum period for granting the divorce) of registered divorce. Even in this case, however, the autonomy of divorce would not be restricted just because of the 30-day cooling-off period.

In addition, as Article 1077 of the Civil Code only provides a relatively simple statutory regulation on the cooling-off regime, several corresponding systems should be established for the application of the Civil Code in the future. For instance, during the cooling-off period, there should be some relevant professionals to provide psychological counseling and professional guidance for both parties. Another example is the restriction of applying for cooling-off regime in some exceptional circumstances. More specifically, if there are special circumstances that make the 30-day cooling-off period dangerous to the parties (for example, one party has a tendency to domestic violence), the cooling-off period should not be applied.⁵³

B. Reform of Litigated Divorce

As mentioned in Part II, if the divorce is contested, the party who wants a divorce shall file for a litigated divorce in the court, rather than to the Marriage Registration Authority. Today, the proportion of litigated divorces cannot be overlooked which is 16.2% (2016) and 15.3% (2017). (Table 1). The Supreme People's Court of PRC shows that, among the litigated divorce cases of first instance across China in 2016-17, 91.09% of the respondents disagreed with the divorce.⁵⁴ Under this circumstance, the decision to divorce lies in the hands of the judge, who shall decide whether he or she is satisfied that the marriage has irretrievably broken down, in line with the supporting particulars. In the same period, 65.81% of the litigated divorce petitions in first instance courts were dismissed, which was a little increase from the period of 2014-2016 (63%).⁵⁵ Hence, it seems that, under the litigated divorce system, where one of the parties contests the divorce, divorce is more difficult.⁵⁶ This raises significant questions: (1) Should the law frustrate a personal decision to divorce to such an extent if his or her spouse disagrees to divorce?; (2) Does the ground for litigated divorce need some reform?; and (3) If so, in what way?

Although the sole ground for a litigated divorce under the ML 2001 is the irretrievable breakdown of the marriage, it should be evidenced by particular facts. However, the facts listed in Article 32 of ML 2001 are mostly fault-based, which is not in line with the international trend away from fault.⁵⁷ More specifically, an excessive fault-based divorce legal system may compel one party to the marriage to pay close attention to and collect evidence about the other party's

misdeeds in daily life. Under the guidance of this provision, if one party intends to divorce without the consent of the other party, the main act he or she may have to undertake is to recount all wrongdoings of his or her spouse during the marriage.⁵⁸ Obviously, this kind of action will increase family conflict and produce bitterness for both parties, which reduces the possibility of reconciliation and saving the marriage. Ma identifies that most divorced males and females thoroughly did not prefer the fault-based system because it forced each of them to focus on the past and to condemn their former spouse.⁵⁹ Furthermore, although divorced, the parents are equal to the eyes of their children. If the parents are capable of harmonizing and maintaining a high-degree of co-operation in the course of divorce process, the suffering that divorce causes to their children might be alleviated.⁶⁰ In addition, for children's best interests, encouraging parents to maintain their relationship as harmonious as possible, instead of intensifying their possible hostility focusing on excessive fault, would be the right direction to develop the divorce law.

Looking at the empirical evidence, Table 2 and other relevant statistics above indicate that the no-fault-based fact that the two parties are incompatible in emotional relationships undeniably covers the largest proportion of litigated divorces, accounting for more than half of all cases in practice. What is more, several facts that play an important role in reality, such as adultery and mental or physical illness of either party, are not listed in the current law. As a consequence, in judicial practice, the facts employed to prove the irretrievable breakdown of a marriage, listed in ML 2001, fail to match the real situations, leading to a certain degree of disconnection between law and practice.

Taking all these into consideration, the legal grounds for litigated divorce should be reformed. To begin with, it is widely accepted that the irretrievable breakdown of the marriage is the sole ground for litigated divorce.⁶¹ A question may arise on whether the law should list specific facts to prove that the marriage has broken down irretrievably and, if so, what those facts are. The proposal to remove the currently listed facts used for evidence is opposed by many academics, who hold that removing all supporting particulars and only retaining the sole ground under Article 25 of ML 1980 is indeterminate and vague, thereby relying too heavily on the discretion of judges.⁶² This sole ground is so subjective that it is difficult to implement effectively. If one party insists that the marriage be over, but the other is reluctant to divorce and strongly intended to save the marriage,

it is hard for judges to make a decision without any particular reference.⁶³ This problem can be solved when specific facts are added to Article 32 of ML 2001 on the basis of Article 25 of ML 1980.⁶⁴

From this viewpoint, adding some no-fault-based facts may be a feasible route to reform the Chinese divorce legal system. Article 1079 of the Chinese Civil Code provides a new fact as the ground for litigated divorce, which states that: "After the period of one year's separation from the date on which one party's first-time divorce petition is dismissed by the courts, if either party files for divorce again, the divorce shall be granted by the courts."⁶⁵ This is a no-fault-based fact to prove irretrievable breakdown, which is vital, especially for the party who insists on the divorce. Even if an initial divorce application is defended by the other party and rejected by the court, the second-time divorce application shall be granted as long as the two parties have lived apart for more than a year. Article 1079 (5) aims to mitigate the unreasonably difficult process for litigated divorce. Notably, an empirical study on litigated divorce cases in a basic level court in Zhengzhou city in 2011-12 shows that, of the cases where the divorce application was dismissed by the court, 85% of petitioners would file for divorce for a second-time.⁶⁶ In this case, more lenient conditions should be provided for these petitioners, who could prove the irremediable breakdown of the marriage to some extent through the second-time application after a one-year separation period. Several deputies to the NPC suggest that a separation period of one year is too long for the parties who apply for divorce for the second time, because of the poor ability of some people to afford a second home to live separately for that period and the age of remarriage.⁶⁷

Then, manifestly, the most common legal deficiency in practice (when two parties are incompatible in emotional relationships) is definitely imperfect. Consequently, this fact shall be stipulated in the Chinese Civil Code.⁶⁸ Although the conduct of both parties is neither faulty nor even unreasonable, if they are unhappy with the marriage and get along in such a discordant way, then their marriage appears irremediable enough. In such circumstances, one party's persistence in maintaining the marriage is fruitless, just because the other party does not want to live with him or her any longer and their marriage exists only nominally.⁶⁹ In judicial practice, mental or physical illness and criminal offences shall also be enshrined; there is no justification for their omission.⁷⁰ Although

the Chinese Civil Code does not enumerate the above facts one by one, they should be stipulated in the judicial interpretation of the Civil Code to be issued by the Supreme Court of PRC.⁷¹ Specifically, these facts could be included in the provisions of the judicial interpretation considering “other situations” stipulated in Article 1079 (3) of the Chinese Civil Code, which is replica of Article 32 (3) of ML 2001.

Finally, it is worth emphasizing that, even if one of the specific facts in the Chinese Civil Code listed above is proved, if the court is convinced that the marriage has not irretrievably broken down, a divorce should not be granted. These facts merely provide a reference for judges to make a decision, rather than to constitute decisive, compulsory elements for granting the divorce. In theory, judges can be convinced that a marriage has irretrievably broken down based on other sorts of facts. Obvious evidence to confirm this point is the existence of the “other facts” clause in Article 1079 (3) of the Chinese Civil Code, which permits other situations to be presented to prove irretrievable breakdown. Due to the disconnection between the facts explicitly listed in the law and those in practice, however, the majority of practical cases actually fall into the “other facts” clause. As mentioned above, considering that the very high rates of divorce applications are dismissed, judges appear to hold conservative attitudes to apply for the “other facts” clause. More specifically, in judicial practice, judges would not convince that a marriage could be finished by referring to the facts that are not explicitly stipulated in the Article 1079 (3) and (4) of the Chinese Civil Code.⁷² In order to solve this problem, more detailed references should be added in the judicial interpretation of the Chinese Civil Code. Meanwhile, in practice, judges should be more flexible to interpret the facts that are not stipulated in the law, considering the legislative intent of Article 1079 (3).⁷³

V. CONCLUSION

The legal grounds for divorce fully reflects the underlying ideology and purposes of Chinese family law which are to protect people’s autonomy and right to divorce and to impel people to consider divorce seriously.⁷⁴ These two objectives should be balanced in the course of reforming the Chinese Civil Code for divorce. Furthermore, the Chinese Civil Code should be improved in accordance with these

objectives.

It seems that registered divorce and litigated divorce in ML 2001 are going in two opposite directions, respectively. The ground and procedure for registered divorce are too easy and thus might inappropriately stimulate a hasty divorce, whereas those of the litigated divorce procedure are too difficult because the sole ground is the irretrievable breakdown of marriage. There are too many fault-based factors listed in ML 2001 as ‘guidelines’ for proving irretrievable breakdown, so that the implementation of the divorce is getting more difficult practically. Moreover, the current statutory provisions on divorce can neither reflect the actual situations, nor serve the practical needs well.

The Chinese Civil Code 2021 was enacted to compensate for the legal deficiencies of ML 2001 and elaborate the statutory provisions in this law. Legal system for divorce in China should be shifted to the future, emphasizing the social change and potential responsibilities of what should be done if the marriage is over.⁷⁵ Therefore, the 30-day’s cooling-off period shall be required in registered divorce for the parties to reconsider the consequences of the divorce in all aspects. It not only leads to protect the marriage, but to maintain the value of family in society.

Conversely, the reform of litigated divorce aims to relieve the impediments to divorce and provide more no-fault-based facts as evidence of the irretrievable breakdown of the marriage. This provides people with the right to autonomous divorce with less bitterness and conflicts between the parties.

Finally, the promulgation of the Chinese Civil Code 2021 is definitely not the end of legal progress. The discussions for reforming the legal grounds for divorce are expected to profoundly reflect the local customs and culture of the jurisdiction.

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1. In ancient China, the divorce process was somewhat male-dominated. The grounds for divorce included: ‘Qichu’ (the husband can dissolve the marriage unilaterally if his wife possessed one of seven kinds of fault); ‘Yijue’ (if either the husband or wife had killed or injured the other party or his/her relatives, the government can grant a divorce); and ‘Heli’ (if the couple are both unhappy with the marriage and agree to divorce, they can divorce at any time), See Min JIN, *THE TRANSFORMATION OF CHINESE FAMILY LAW IN MODERN TIMES* [中国亲属法的近现代转型] 169-74 (2010).
2. The Chinese Civil Code was issued by the National People’s Congress (NPC) of People’s Republic of China, on 28 May 2020 and was formally implemented on January 1, 2021. The Marriage and Family Law is part of the Chinese Civil Code (Book Five).
3. The ground of “mutual consent by both parties” is stipulated in both Marriage Law 1950 (the first Marriage Law of the People’s Republic of China) and Marriage Law 1980.
4. A proper arrangement or proper practice means that, after divorce, the children live with the parent who is in their best interests and the couple’s common property is fairly divided. See THE NATIONAL PEOPLE’S CONGRESS OF PRC, *LEGISLATIVE INTERPRETATION OF MARRIAGE LAW OF PRC* [中华人民共和国婚姻法释义] 127 (2001).
5. Yinan Ma, *The Cooling-off Rule is a Restriction on Hasty Divorce* [离婚冷静期是对轻率离婚的限制和约束], 4 J. CHINESE WOMEN’S STUD. [妇女研究论丛] 103-7 (2020).
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10. See Beijing Municipal Civil Affairs Bureau, http://mzj.beijing.gov.cn/art/2014/6/30/art_659_291326.html.
11. See *85.7 Percent of People Think That There are Fake Divorces Around Them* [85.7%的人感觉身边存在规避房产调控的“功利性离婚”现象] (Apr. 16, 2013), CHINA YOUTH DAILY [中国青年报], http://zqb.cyol.com/html/2013-04/16/nw.D110000zqgnb_20130416_2-07.htm.
12. For instance, residents in Shanghai can buy their first property with a 35% deposit, while the rate rises to 50% for second-time buyers. For details, see Shanghai Qingpu Government

- (Nov. 28, 2016), <https://www.shqp.gov.cn/housing/fdcjy/20180822/274396.html>.
13. Yinzhi Miao, *The Risks of Fake Divorces in Real Estate Purchase Restrictions* [房产限购规避中的假离婚风险], 7 *NEW INDUSTRIAL ECONOMY* [新产经] 60-1 (2013).
 14. Zhibo Yang, *Criminal Law and Civil Law Regulations on Defrauding Demolition Funds by Means of Falsely Married and Divorced* [虚假结婚离婚骗取拆迁款行为的刑民规制], 3 *NORTHERN LEGAL SCI.* [北方法学] 137-48 (2020).
 15. Yaodong Liu, *Research on the Legal Issues behind Fake Divorces* [虚假离婚若干法律问题研究], 2 *J. YUNNAN U. (LAW ED.)* [云南大学学报(法学版)] 45-50 (2011).
 16. There is a debate among Chinese academics and the legislature regarding the object of the breakdown: is it the marital relationship or the marital affection? Some argue against the expression of “marital affection” in ML 2001 claiming that a marriage is grounded in many mixed elements, rather than solely affection. The expression of “marital affection” is too one-sided to reflect the whole picture of the marriage. Therefore, the expression of “marital relationship” is more suitable. See Yinan Ma & Ling Luo, *The Legislative Research on the Grounds of Divorce in Litigated Divorce* [裁判离婚理由立法研究], 4 *LEGAL F.* [法学论坛] 34-44 (2014). Others claim that there is no substantial difference between the “breakdown of the marital affection” and the “breakdown of marital relationship,” both of which are expressions of the breakdown of the marriage. See *supra* note 4, at 136-7. According to the legislative interpretation, ML 2001 adopts the latter opinion. To avoid divergence and make the expressions uniform, in this paper, the “breakdown of the marriage” will be used.
 17. *Supra* note 4, at 132.
 18. It should be stressed that ML 1950 fails to distinguish clearly between registered divorce and litigated divorce. According to Article 17(1) of ML 1950, the parties can divorce immediately by mutual consent but, if one party fails to agree to the divorce, there should be mediation. Once mediation fails, the divorce shall be granted.
 19. *Supra* note 4, at 133-4.
 20. In 1989, the Supreme People’s Court promulgated a judicial interpretation entitled “Several Opinions on How to Determine Whether the Emotional Relationship has Truly Broken Down in Divorce Cases” as a guideline to help judges to check whether or not to grant a divorce in litigated divorce cases, which lists 14 facts. However, some of the listed facts are inappropriate and have been subjected to extensive criticisms. For details, see Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints’ Influence on Judicial Behaviour*, 23 *INT’L J. L., POL’Y & THE FAMILY* 83-109 (2009). For example, some facts actually fall into the situations where the marriage is void, e.g., either party suffers from a disease that is not suitable for marriage. See ML 2001, art. 10 (1). In response, ML 2001 made corresponding amendments to this problem. See *supra* note 4, at 135-6.
 21. *Supra* note 4, at 137-41.

22. ML 2001, art. 32 (3).
23. *Id.*
24. ML art. 32 (4).
25. General Rule of Civil Law, art. 40 (1).
26. *Supra* note 4, at 141.
27. According to Article 104 of Legislation Law of PRC (amended in 2015), the Supreme Court is authorized by the NPC to formulate judicial interpretations on the specific issues regarding how to implement the legislation, and judicial interpretations shall be strictly consistent with the goals and principles of the legislation.
28. THE FIRST CIVIL TRIAL COURT OF THE SUPREME PEOPLE'S COURT, UNDERSTANDING AND APPLICATION OF THE JUDICIAL INTERPRETATION ON THE IMPLEMENTATION OF FAMILY LAW [婚姻法司法解释的理解与适用] 77-80 (2002).
29. *Supra* note 4, at 147.
30. ML 2001, art. 33.
31. *Supra* note 4, at 142.
32. Jianghao Xia, *The Best Interests of the Child Principle in Residence Disputes after Parental Divorce in China*, 34 INT'L J. L., POL'Y & THE FAMILY 105-25 (2020).
33. On the basis of ML 2001, the Regulation of Marriage Registration was enacted for the purpose of providing specific guidance on registered divorce procedures.
34. Yinlan Xia, *The Legislative Research on Marriage Law in Civil Code* [民法分则婚姻家庭编立法研究], 5 CHINA LEGAL SCI. [中国法学] 71-86 (2017).
35. There are two points to declare. First, in some cases, two or more facts occur simultaneously, which is reflected in the total percentage value. Second, the statistics are from a bar chart provided by the Supreme People's Court. Here, the data on the proportion of the first two items (the parties are incompatible in emotional relationships, and domestic violence or abuse) are exact, but the data on the proportion of the last three items are read by the author from the bar chart (because the bar chart only provides the bars, without specific readings).
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37. Xu Wang, et al, Reports on Litigated Divorces in Shanghai in 2007 [2017年度上海市法院审理离婚纠纷案件大数据报告] (Mar. 14, 2018), <https://www.zhihe.com/main/article/989>.
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39. Ma & Luo, *supra* note 16.
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42. *Supra* note 4, at 125-6.

43. *Supra* note 34.
44. Diyu Xu, *Family Law in Chinese Civil Code: Ideas and Details* [婚姻家庭法的入典再造: 理念与细节], 25 CHINA L. REV. [中国法律评论] 109-19 (2019).
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47. NPC, LEGISLATIVE INTERPRETATION OF MARRIAGE BOOK OF CIVIL CODE OF PRC [中华人民共和国民法典婚姻家庭编释义] 137 (2020).
48. Ying Gao et al., *Study on the Divorce Rate and Age Distribution in Beijing in Recent Years* [北京市近年离婚水平与年龄分布的变动趋势分析], 4 BEIJING SOCIAL SCI. [北京社会科学] 34-42 (2012).
49. *Supra* note 40.
50. Sina Sichuan, *Hasty Divorce and Short-term Remarry are on the Rise* [冲动离婚、短期内复婚情况增多], Sina.com, Aug. 29, 2018, <http://sc.sina.com.cn/news/m/2018-08-29/detail-ihixzkm1913169-p2.shtml>.
51. *See The Number of Divorces Dropped by More Than Half in Cixi after the Three-month Trial of the Cooling-off Period* [浙江慈溪试行预约离婚3个月 离婚人数下降过半], XINMIN EVENING NEWS PEOPLE.COM (July 31, 2021), <http://yuqing.people.com.cn/BIG5/n/2012/0731/c210118-18635418.html>.
52. *Supra* note 34.
53. *Supra* note 5.
54. The Supreme People's Court of PRC, Judicial Statistical Report on Divorce Disputes [司法大数据专题报告离婚纠纷] (2017), http://www.court.gov.cn/upload/file/2016/12/22/16/58/20161222165843_23070.pdf.
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