Challenge to Divorce Law in England

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Note: This article was written in January 2017, Since then the reform discussed in this article has been rejected by Parliament.

Introduction

Significant change may be on the horizon in England and Wales in respect of our divorce law. Unlike many jurisdictions, the only way at present for a couple to divorce without waiting for at least two years of separation is to blame the other party for the irretrievable breakdown of their marriage, either alleging unreasonable behaviour or adultery. Many argue that the practice of alleging fault is outdated and unnecessary. There is a strong voice calling for reform, to allow divorce on the basis of mutual consent. Further reform is actively being implemented with online divorce systems being piloted. This article discusses the proposed reforms and objections, and provides a comparison with our neighbours across the sea in France, where it could be argued that divorce has effectively adapted to meet both changing societal attitudes and the public purse.

Proposals for Reform

A change to the law allowing couples to divorce without having to attribute blame or having to wait for a period of separation to pass (at least two years) has been sought by opponents of the current law for years. The current campaigner for reform is Member of Parliament Mr. Richard Bacon, whose "No Fault Divorce Bill" proposes amendment to the current legislation to allow a joint petition to be presented to Court on the basis that both parties agree their marriage has broken down.

The arguments for no fault divorce can be summarised as follows:

1. There is no "intellectual honesty" in the current law. This was the view expressed by the President of the Family Division of the High Court, Sir James Munby, who says that many couples have to fabricate examples of the other party's unreasonable behaviour to get a divorce quickly, which makes a nonsense of the law. A YouGov survey found that *"more than 27% of couples citing behaviour admitted that their claims were not true but were the easiest way of getting a divorce"*.

2. The existing law is out of sync with the current Government's intentions to encourage couples to resolve their divorce and financial matters by way of alternative dispute resolution (usually mediation) and without needing to engage in expensive litigation which causes an already strained Court system to bow under the pressure. The need to allege fault only increases the chances of a divorce petition being defended and litigated.

3. There is a plea for change by numerous family lawyers in England and Wales, who experience every day the difficulties caused by the need to acknowledge fault (increased hostility, the potential for costly negotiations regarding the examples of behaviour and so on), which do not help when trying to navigate already challenging proceedings in an efficient and cost-effective manner.

4. There is also a desire for reform in the general public. Many couples do not realise that there is a need to attribute fault when seeking a divorce without having already been separated for some years. It can therefore be a nasty surprise to find out that you have to come up with a list of unpleasant things to say about your spouse, especially if you are trying hard to maintain an amicable relationship. Further, the distaste with which many people view the current divorce law is a reason for not getting married.

5. The proposed reform does not remove any of the existing grounds for divorce; it merely opens up another option. A party seeking a divorce can still rely on the spouse's intolerable behaviour or adultery in support of a belief that the marriage has ended.

6. The current fault-based options do not generally affect the division of the assets and liabilities in the financial proceedings. The time spent arguing over who did what is wasted, given that allegations in a divorce petition are not considered when deciding what capital and income orders should be made.

Arguments against no fault divorce are:

1. Allowing this reform (and also the new online divorce system) would make separation and divorce easier, which could lead to an increase in the number of divorces. This could then lead to destabilisation of the family unit and the

consequent long term negative effects. Whilst it is acknowledged that a system which reduces acrimony would assist in the short term, the long term impact of increased divorces is problematic.

2. Divorce should not be an easy process. It should be unhurried and measured so that couples give their marriage everything they have got before deciding it is at an end. If it is easy to divorce then couples may not make full use of counselling or relationship therapy. (At present, there is no separation in English law between divorce and financial matters; generally financial proceedings cannot be instigated until a divorce petition has been issued which means that it is often necessary to push ahead with a quick divorce so that, for example, the family home can be sold under a Court order and both parties can afford to re-house without experiencing economic difficulties caused by waiting for two years).

France

Where a proposed reform presents so much controversy it can often assist to look overseas and see how other jurisdictions have fared when implementing similar provisions. Being one of our closest neighbours, but one with an entirely different legal system (the Romano-Germanic civil law system as opposed to common law), France is an obvious example. In France, a jurisdiction where mutual consent has been one of four grounds for divorce since 1975, a process of modernisation of the institution of divorce is also being carried out. It aims to simplify and accelerate divorce proceedings and 'unclog' the Courts.

France has moved more quickly than England and Wales. Divorce on the basis of mutual consent is already available to couples so long as they agree on both the principle of getting divorced and the consequences of the divorce (financial and personal). The parties are required to draft a 'convention' (a contract which deals with all the consequences of a divorce including finances and children matters) reflecting their agreement. France then goes a step further. Even where there is a lack of agreement on all the consequences of the divorce, couples still may make use of separate divorce provisions that are available without having to blame the other party or having to wait two years, so long as they agree that in principle their marriage has broken down. Previously, to utilise this ground the parties had to make a statement that their life together had become intolerable. One of the first steps towards a modernised divorce system was taken on 26 May 2004 when legislation was brought in which removed the need to state that the couples' life together had become intolerable. It is argued that this amendment in the law has gone a long way in pacifying the relationship between the parties and has led to a faster and smoother divorce process.

The French have also moved forward in ways that the English jurisdiction have thought about but not yet reached consensus on. For example, it was decided that there should be less intervention by the judiciary in cases of divorce by mutual consent. The number of appearances in front of a judge was reduced to one single appearance right at the end of the process, simply to allow a judge to approve the convention. Then, from January 1, 2017, couples wishing to divorce on the basis of mutual consent found that this ground has been replaced by an even more contractual version where all judicial involvement has been removed.

Importantly, these changes have not been made without safeguards being put in place. The changes were not the result of a rash decision on the part of the French. The convention still needs to be checked by each party's lawyer (previously one lawyer for both parties could be used) and then reviewed by a Notaire in order for it to be enforceable. The Notaire plays a greater role, taking responsibility for ensuring that the convention is in the proper form and that the reflection period of 15 days between the parties receiving the draft convention and signing it has been respected.

Conclusion

The two jurisdictions of France and England/Wales are arguably too different in some respects (for example the division of assets on divorce) for worthwhile comparisons to be drawn. However, this cannot be said to be the case with divorce proceedings. Both jurisdictions suffer from a need to reduce pressure on the Court system, and also a desire to provide couples with a mechanism for formally ending their marriage which does not increase acrimony or lead to unnecessary legal costs. France has in many ways adapted to meet these needs whilst England drags behind. In France, there does not appear to have been an opening of the floodgates following the changes to its law, which is the concern of many opponents of no fault divorce. The appetite for change is currently strong in England and Wales. It is hoped that the experience of our French neighbours can be drawn upon as a useful resource by those who are continuing their efforts for reform both in Parliament and in the family law profession.

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