

Consider allowing no-fault divorce to remove blame game when couples split

Such divorces remove acrimony and help families heal after a marriage breakdown

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For The Straits Times

The lively mini-debate on the Family Justice Courts and divorce law in The Straits Times Forum pages in recent months comes in the aftermath of a Workplan for the Family Justice Courts (FJC) event.

(These included "Family justice framework can be enhanced" by Ian Chan Eng Kiat on May 26 and "System that focuses on marriage recovery counselling needed" by Patricia Tan on June 19).

During that event, presiding judge of the FJC Debbie Ong had said the family justice system will move from an adversarial to a problem-solving approach, and seek to deliver "therapeutic justice" (TJ).

"TJ is a lens of 'care', a lens through which we can look at the extent to which substantive rules, laws, legal procedures, practices, as well as the roles of the legal participants, produce helpful or harmful consequences," she said.

Such TJ seeks to allow a divorcing couple to address the family's legal and non-legal issues in a way that helps the family function better.

At that event, Justice Ong also opined that "divorce proceedings... are less about rights and wrongs than having to address the consequences of family breakdown".

She added that parties going through divorce should not be allowed to "dig up evidence to show the worst of the other party... and allowed to allege what a bad spouse and poor parent the other party has been... Our system should ensure that the whole divorce journey allows for healing from hurts".

Although much work has already been, and will continue to be, put in by the Family Courts, counsellors,

social workers and lawyers towards lessening the acrimony involved in any family break-up, there is one piece in the system that has not undergone any review since 1980. This is the law of divorce itself.

PROOF OF FAULT

Under the divorce law introduced in 1980 for non-Muslims, there is only one ground for divorce: irretrievable breakdown of marriage.

The court can find that the marriage has broken down irretrievably only if the applicant (this would be a better term than "plaintiff", used in the current law, which casts the parties as adversaries) can prove one or more of five "facts".

Three of these facts are fault-based (adultery, behaviour, desertion). The other two relate to periods of separation – three years, if both spouses agree to the divorce, and four years, if they do not.

There is therefore an incentive for parties to use the fault-based facts since they are able to get their divorce more quickly, or if running separate households is not an option.

No other facts can be relied on, such as mutual agreement to divorce or incompatibility, to show that the marriage is beyond salvation.

It is now time for us to review our divorce law, especially the need to retain the remaining fault-based facts. It is too simplistic to attribute marriage failure to just five facts.

Justice Ong has noted that "marriage is an intimate relationship where alleged 'faults' are not always easy to ascertain, especially when spouses had a continuous dynamic relationship during marriage in which how one spouse acts may impact how the other acts or reacts".

What is more important is to ensure that the parties have thought carefully about the decision to divorce, and to support

them through the process.

In that respect, Singapore law has already done admirably, with a slew of recent changes.

Spouses with minor children who are not able to agree to a divorce or how to settle what the law calls "ancillary matters", which relate to their finances and their children, will need to attend a mandatory two-hour parenting session before they are allowed to apply to court for a divorce.

In that session, they will learn the implications of their decision and be encouraged to prioritise the well-being of their children.

Even before they reach this step, there is help available from government-funded counsellors and social workers to see if it is possible to save the marriage.

After the parties file for divorce, there are court processes to encourage them to come to amicable settlements, where possible.

When divorces do happen, the statistics in Singapore show that nearly 90 per cent of them are settled without any need for adjudication by the Family Court. But that still leaves about 600 cases every year that need to go through the court system and its painful consequences.

APPROACH OF CURRENT NON-MUSLIM DIVORCE LAW

Another unwelcome effect of the fault-based system is that it can trap parties in a marriage which has clearly broken down.

When one party no longer has any wish to continue in the marriage, should the law erect hurdles to require the marriage to continue? What kind of marriage will that leave?

Abandoning the fault-based facts is in line with Justice Ong's call to eliminate opportunities for the divorce process to exacerbate conflict that further damages any remaining goodwill and cooperation between the spouses in bringing up their children.

Why is that? By focusing on adultery, behaviour or desertion by the offending spouse, the law requires the past to

be brought up just to satisfy the court that the relationship is no longer functioning.

Such allegations worsen the acrimony and do not help the parties to heal. They poison the chance for them to make agreements about their future and the future of their children.

If reconciliation is not possible, we should help the parties move on with their lives, not get more embittered by what the law requires.

In fact, no-fault divorce is already available and is being made use of by 43 per cent of cases who use the fact of living apart to show irretrievable breakdown of marriage. There is no need to show what "caused" the parties to separate, which can even be by mutual agreement.

So the question to be asked is why this possibility should not be made more widely available.

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wish to attribute blame for the marriage breakdown is the belief that it may gain them an "upper hand" in other matters relating to their divorce. This may explain the use of the fault-based facts.

In 2018, out of the more than 5,000 non-Muslim divorces, only 43 per cent relied on separation, while the majority (57 per cent) still chose to allege some kind of fault by the other spouse to obtain the divorce (behaviour was used by 54 per cent as the basis for divorce).

But the truth is that fault rarely makes a difference after the ground for divorce is satisfied.

In financial issues, the court will consider misconduct only if it would be "inequitable to disregard it", which is quite a high threshold.

In matters relating to children, the court will consider what is in the child's best interests, not what mummy or daddy did.

Having made all the allegations against the other party, the temptation is great for the parents to involve their children in this turning point of their lives.

At best, some parents may do so in an attempt to help the children "understand" what is happening between mummy and daddy, but this is always ill-advised because the information is one-sided, or the children are not prepared for the information.

At worst, children are drawn into the conflict between their parents, fuelling even more litigation between the parties and destroying ties between the children and one of the parents.

On the other hand, the argument for retaining fault is that it deters divorce because it makes spouses think twice.

Studies conducted overseas do not find any evidence of this.

Our closest neighbour, Malaysia, allows divorce by mutual consent of the husband and wife under their law for non-Muslims, without apparent problems.

So instead of causing greater marriage instability, removing blame can instead help parties to reduce conflict and litigation. This, of course, does not in any

way mean that families should no longer be helped to stay together.

On the contrary, we must do what we can to emphasise the commitment in marriage and provide support to families in distress.

But once it is clear that the breakdown is irreparable, we should do what we can to reduce hostility and encourage positive parenting.

THE WAY FORWARD

Reforms are currently under way to change the law in England and Wales through the Divorce, Dissolution and Separation Act, which will no longer require couples to make allegations about spousal misconduct or to live separately for a number of years in order to get a divorce.

Singapore's current divorce law is based on one adopted more than 50 years ago in the United Kingdom. It may be worthwhile to ponder over the developments in that jurisdiction to think of what is right for ours.

Interestingly, a provision allowing for divorce by mutual agreement was proposed by the Singapore Government in 1979.

All that was required was consent by both parties and satisfaction by the court that provision would be made for the wife and for the support, care and custody of the children of the marriage.

The Select Committee set up to consider the legislation did not agree, so the proposal was dropped.

The law in England and Wales is coming round to what Singapore considered 41 years ago!

With the current emphasis on healing and welfare of children, we should think about the following issues: Should we remove all the fault-based facts in our law of divorce? How will irretrievable breakdown of marriage be proved in that case? How can we change the perception of court proceedings as a venue for contestation and conflict? Should there be more legal measures to ensure that parties have given serious thought to divorce and its consequences?

The provision suggested 41 years ago should be reconsidered. Unfortunately, the truth is that marriages can and do fail for various reasons.

Ending a marriage should not be made more difficult than it already is, and the law should not encourage couples to play the blame game.

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