

Obstructing the Right to Divorce Freedom? Comparison of Divorce Barriers in the UK And China

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Abstract

The decision to establish a cooling-off period for divorce in China has sparked widespread discussion in society. Through historical research on China's divorce system, it has been found that the barriers to divorce in China are constantly increasing. The comparison of the barriers to divorce between China and the UK highlights the differences in legislation and judicial practices that affect the freedom of divorce between the two countries. Intervention measures such as the fault divorce system and the cooling-off period for divorce indicate that China's divorce barriers are increasing; In contrast, the UK has shifted towards a no-fault divorce system, providing more freedom for individual divorce. Despite these changes, the difficulty of divorce in China is lower than in the UK.

Keywords: China, United Kingdom, divorce barriers, fault-based divorce, no-fault divorce, cooling-off period

1. Introduction

If my husband and I have irreconcilable conflicts and want to divorce. If we live in China, before 2021, we can choose a divorce by agreement, if the situation is not severe enough to require litigation. We only need to submit a written application and a divorce agreement to the Civil Affairs Bureau, and after the government accepts and scrutinizes the documents, the divorce can be registered.¹ However, after 2021, in addition to the existing procedures, we must go through a 30-day cooling-off period before the government approves our divorce

registration.²

This is much luckier than the UK before 2022. Had we lived in the UK, it's almost impossible to achieve a quick separation. Where we both agreed to divorce, we would need to live apart for two years before applying to the Family Court for a divorce. However, where one of us disagree with the divorce, we have to live apart for five years before being able to divorce. We may also have to blame each other for faults, making things very unpleasant. ³ Fortunately, after 2022, with the new marriage law (Divorce,

¹ Marriage Law of the People's Republic of China. (People's Republic of China) National People's Congress Standing Committee, Order No 31, 10 September 1980.

² Civil Code of the People's Republic of China 2020. (People's Republic of China) National People's Congress Standing Committee, Order No 1077, 28 May 2020.

³ *Family Procedure Rules 2010* (UK) s7.

Dissolution and Separation Act 2020) the fault factor has been completely removed, we don't need to blame each other, and after filing a petition and then going through a minimum of 20 weeks of reflection, we can get a divorce order. And we can get a divorce order with a minimum of 20-weeks reflection after applying.¹

It is clear from the above that the divorce procedures in China and the UK are very different. The evolution of these differences is quite interesting, which I will discuss next, as the divorce systems in China and the UK have developed in opposite directions. China has gradually tightened from a law established in the 1950s, which recognized that divorce was governed by the no-fault principle, to the current combination of fault and no-fault principles.² The UK, on the other hand, has gradually relaxed from its initial adherence to fault-based principles to fully recognizing no-fault divorce in 2022.³

My thesis is that barriers to divorce threaten individual freedom in terms of the right to divorce. While marriage laws uphold the freedom to marry, divorce is now restricted, for instance, the divorce cooling-off period and fault-based divorce laws. Though they are both state interventions aimed at addressing the increasing divorce rates.⁴ Therefore, I think the setting of barriers to divorce is a collision of two values, namely the freedom of marriage and the primacy of the family, and a contest between public power and private rights. High divorce rates result from various factors, and the solution should focus on guidance and support rather than creating barriers to divorce.⁵ The establishment of a divorce cooling-off period is an inappropriate use of civil law paternalism, which excessively interferes with marital freedom.⁶ I will argue that the divorce laws in

China and the UK have both positive and negative aspects, and they should learn from each other to better protect the individual's right to divorce freedom.

To support my thesis, I will provide a legal analysis of the gradually tightening barriers to divorce in China, including an analysis of its judicial practice. Similarly. And I will provide a legal analysis of the gradually relaxing barriers to divorce in the UK. Also comparing the differences between China and the UK in the development of their divorce systems, including what China and the UK can learn from each other to better protect individual rights.

2. Divorce Barriers in China

Both the historical development of the legislative provisions relating to divorce in China's Marriage Law and the judicial practice of divorce in China demonstrate the existence of State-imposed barriers to divorce in China's Marriage Law, which may impede the realization of some of the rights to freedom of divorce.

First, the development of Chinese legislation on divorce is analyzed to illustrate how obstacles to divorce are increasing in China and how the right to freedom of divorce is slowly being eroded. Included:

- China established the principle of no-fault divorce with the promulgation of the 1950 "Marriage Law", which is ahead of the world.⁷ China supported divorce freedom. The freedom of divorce marked by the principle of no-fault divorce transformed the solid structure of the traditional patriarchal family. It has impacted and reshaped Chinese marriage and family, causing a transformation from the traditional to the modern.
- The Marriage Law, as amended in 2001, adopts a combination of no-fault and fault-based divorces (by providing provisions for both consensual divorce and fault-based divorce, citing specific reasons for divorce or other significant reasons that make the marriage difficult to continue).⁸ This can be seen as a legislative compromise between "preserving divorce

¹ *Divorce, Dissolution and Separation Act 2020* (UK) c 11.

² Jiang Yue. (2009). On the Current Legislativeism of Statutory Grounds for Divorce in China. *Oriental Law*, 4, 21.

³ *DDS Act* (n 4) c 11.

⁴ Xia Yinlan. (2007). *Legal Reconstruction of Marriage and Family Relationships in a Harmonious Society*. China University of Political Science and Law Press, 250.

⁵ Xu Anqi. (1994). Current situation, characteristics and trends of divorce in China. *Shanghai Academy of Social Sciences Academic Quarterly*, 2.

⁶ Ma Shu. (2019). 'Freedom of divorce in the light of changes in the provisions of the Marriage Act.' Pengpai (Web Page) <https://www.thepaper.cn/newsDetail_forward_2857024>.

⁷ Marriage Law of the People's Republic of China. (People's Republic of China) National People's Congress Standing Committee, 13 April 1950.

⁸ Jiang Yue, (n 5) 22.

freedom” and “opposing hasty divorces”. In my opinion, this is an important turning point in China’s approach to fault-based divorce.

- The addition of a divorce cooling-off period in 2021 reflects the government’s stance towards the continuously rising divorce rates.¹ It can be said that government has once again strengthened the intervention of national authority in divorce. Government is trying to make people who want to get divorced more cautious. However, I will point out that this measure is an erosion of private rights by state power.

Secondly, the judicial practice of divorce in China will be discussed. When one of the spouses files a lawsuit for divorce for the first time without legal cause, the judge typically rules against the divorce. However, after six months, if the party remains resolute in seeking a divorce, even if there is no statutory cause for divorce, the judge usually grants the divorce.² In my opinion, these judicial practices also confirm the government’s intervention in individual divorces, making it more difficult for citizens with a strong desire to divorce.

Therefore, summarizing the above, it can be concluded. In China, both in terms of legislative development and judicial practice, the obstacles to divorce for citizens are on a growing trend. The setting of divorce cooling-off period and the principle of fault doctrine may bring benefits at the national level³. However, it will lead to a significant increase in the time and economic costs of divorce for individual citizens. I believe that to a certain extent it is a restriction on the freedom of divorce.

3. Divorce Barriers in the UK

The changing trends in divorce restrictions in the UK will be discussed next. The trend of its ever-relaxing divorce restrictions will be described, while it will be found that divorce is still more difficult in the UK than in China.

Firstly, an analysis of the UK’s legislation on divorce will reveal how the exploration of the

no-fault doctrine divorce system has led to further safeguards for the right to freedom of divorce in the UK, including:

- In 1937, Oxford University MP Herbert, as an independent member of parliament, forced the parliament to pass another amendment to the “Matrimonial Causes Act”. This amendment increased the grounds for divorce from one to four but still retained the fault-based divorce principle.⁴
- After World War II, fault-based divorce started to be questioned. By 1966, two reports of the Advisory Committee and the Law Commission recommended that “irretrievable breakdown of the marriage” should be the only legal ground for divorce.⁵ This led the UK to pass the “Divorce Reform Act” in 1969, clearly stating “irretrievable breakdown of marriage” as the only grounds for divorce.⁶ With this, the UK’s divorce law completed its transformation from “fault-based” to “breakdown-based” divorce.⁷

I believe that before 2020, fault-based divorce in the UK posed significant barriers to individual divorce freedom. For example, in *Owens v Owens* (2018), due to Tini Owens’ lack of a valid ground for divorce and her husband’s opposition to divorce, the appellate court ruled against allowing the divorce.⁸

In the wake of *Owens v Owens* (2018), the UK government has finally passed the Divorce, Dissolution and Separation Act 2020, which is truly “no-fault”. However, it is easy to see that one of the new requirements of the Act is that the minimum period for obtaining a divorce order is 20 weeks, which may also lead to problems with obtaining a final divorce order taking longer.⁹

Finally, from a legislative perspective, divorce barriers in the UK are gradually decreasing,

⁴ *Provisional Orders (Marriages) Confirmation Act 1937* (UK) c lxii.

⁵ Milford, TR, (1966). *Book Review: Putting Asunder*, 69, England: SAGE Publications Theology, 412; ‘Reform of the Grounds of Divorce, the Field of Choice, Law Commission Report On’ (1975) 38 *Modern law review* 248.

⁶ *Divorce Reform Act 1969* (UK) c 55.

⁷ Shi Lei, (2014). Research on the Modern Divorce System in England and Wales. Southwest University of Political Science and Law, 27.

⁸ *Owens v Owens* [2018] UKSC 41.

⁹ *DDS Act* (n 4) c 11.

¹ Civil Code, (n 2).

² *Understanding and Application of the Marriage and Family Section and the Succession Section of the Civil Code of the People’s Republic of China*. People’s Court Press, 264.

³ ‘How to correctly view the legislative intent of the cooling-off period for divorce’, China National People’s Congress (Web Page) <<http://www.npc.gov.cn/npc/c30834/202012/de24208909af4811b0bbd2047018dc42.shtml>>.

further safeguarding the right to divorce freedom.

4. Should China and the UK Learn from Each Other?

The differences between China and the UK in terms of fault doctrine and divorce procedures will be compared to discuss how they can learn from each other's strengths. China should learn from the UK and completely abolish the restrictions of fault-based divorce. As well as the UK should learn from China in terms of divorce procedures and simplify them. This will provide better protection for individuals' freedom of divorce.

China and the United Kingdom happen to have divorce barriers in different aspects and can learn from each other.

First, China. Chinese fault-based divorce requires both parties to a divorce to provide fault in the marriage in order for the divorce to be finalized. This undoubtedly makes divorce more difficult and leads to impediments to the freedom of divorce. Therefore, China's litigated divorce should mainly learn from the English no-fault doctrine divorce system.¹

As to how Britain should learn from China. It mainly needs to be discussed in terms of divorce procedures. By comparing the difference in time cost as well as economic cost between China's agreed divorce and Britain's compulsory litigation divorce. This will prove that despite the new divorce law in 2020, the difficulty of divorce in the UK is still higher than that in China.

5. Conclusion

This section will summarize the findings and conclusions from the above sections, including:

China's divorce barriers are showing an increasing trend of infringement on the right to divorce freedom. This includes the legislative shift from no-fault divorce to fault-based divorce, and the addition of a cooling-off period in divorce. In contrast, the UK's divorce barriers are decreasing, with legislation in 2020 completely establishing the principle of no-fault divorce.

Comparing China and the UK, it can be concluded that China's divorce procedures have more time and economic advantages, while the UK's legislative principle (no-fault divorce) is

more respect of human rights. And look overall, divorce in the UK is more difficult than China.

If both China and the UK want to better protect individual freedom in divorce, China should learn from the UK's no-fault divorce system, and the UK should learn from China's simpler divorce procedures.

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¹ DDS Act (n 4) c 11.