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Citation for final published version:

Thompson, Sharon and Sandberg, Russell 2017. Common defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17. *Family Law* 47 (April), pp. 425-451.

Publishers page:

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Common Defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17

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The Divorce (Financial Provision) Bill 2016-17 and Arbitration and Mediation Services (Equality) Bill 2016-17 share several commonalities. Both are Private Members Bills currently before Parliament that have been introduced repeatedly in the House of Lords. Both had a second reading debate on the same day (27th January 2017). Both were received favourably by the Lords and passed to Committee stage. And most importantly, when both Bills were debated, research findings as to the consequences the proposed legislation would have on Family Law in England and Wales was largely unacknowledged. In this article, we discuss what was not considered but should have been in each of the Lords' Second Reading debates and the implications of these omissions.

Divorce (Financial Provision) Bill

Baroness Deech's Divorce (Financial Provision) Bill has three main components: equal division of net matrimonial assets (that is, deferred community of property), the curbing of periodical payments to a maximum of five years (unless this would lead to 'serious financial hardship') and binding prenuptial agreements (subject to standard procedural safeguards such as independent advice, cool-off periods and disclosure). Each component seeks to reform the law of financial provision on divorce pursuant to the Matrimonial Causes Act 1973 in order to clean up its 'antagonistic and inflammatory' nature and make it more certain (*Hansard*, HL Deb vol 778, col 945, 27 January 2017). Baroness Deech's proposals would indeed bring more certainty, something that judges, practitioners and academics agree is especially pressing since the removal of legal aid from Family Law. However, closer scrutiny of Deech's arguments is vital in order to determine what would be lost by introducing the legislative provisions she is proposing. Though she notes that most 'people prefer the certainty of misery to the misery of uncertainty' (*Hansard*, HL Deb vol 778, col 948, 27 January 2017), she does not explain what certain misery means, nor does she acknowledge the potentially harmful consequences of reform as detailed in academic research.

One of Baroness Deech's most persuasive assertions is that her Bill follows a legal system with proven success – Scotland. She argues England and Wales should seek to emulate success of the Family Law (Scotland) Act 1985 by dividing matrimonial property equally and by making prenuptial agreements binding. The 1985 Act's effectiveness is supported by Mair, Mordaunt and Wasoff's insightful research, which indicates broad satisfaction among Scottish practitioners with the legislation (Mair, Mordaunt and Wasoff, *Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce* (Nuffield 2016)). The appeal of the Scottish experience is therefore unsurprising. But, although comparative perspectives can be invaluable, transposing the approach of another jurisdiction onto one's own must not be done before understanding the context in which the system operates. Whilst Scotland recognises contracts that look very much like prenuptial

agreements, such contracts are different not least because they have evolved to opt out of a default system very different to that in England and Wales. Furthermore, Mair, Wasoff and Mackay (*All Settled? A Study of Legally Binding Separation Agreements and Private Ordering in Scotland: Final Report* (ESRC 2013)) describe factors such as long established recognition of marriage-related contracts as contributing to a ‘settlement-friendly’ environment in Scotland that is very different from the legal landscape in England and Wales.

As a result, any comparison between English and Scottish law must be sensitive to jurisdictional differences. This is not to say Baroness Deech’s account of the benefits of equal division of post-marital assets is unimportant. Cooke, Barlow and Callus (*Community of Property: A Regime for England and Wales?* (Nuffield 2006)) have also acknowledged the attractions of the certainty achieved by this property regime. Yet, although Baroness Deech repeatedly emphasises fair division of assets through equal sharing (*Hansard*, HL Deb vol 778, col 947, 27 January 2017), Cooke et al’s research reminds us that even if equal division seems equivalent to fairness in the public mind, this is not necessarily the case in practice (2006, p. 36). Ring-fencing non-matrimonial property and removing judicial discretion from property adjustment would result in a double blow to the non-moneyed spouse because it would remove flexibility to divide non-matrimonial property so that spousal needs are met and it would remove flexibility to recognise the value of non-financial contributions to the family in long marriages.

A further blow to the non-moneyed spouse is in clause 5(c) of the Bill, which limits periodical payments to a maximum of five years unless serious financial hardship can be established. Recent research indicates that women take longer than men to recover economically on relationship breakdown at all levels of wealth (Fisher and Low, ‘Recovery from Divorce: Comparing High and Low Income Couples’ (2016) 30(3) *IJLPF* 338), and Deech’s proposed curb on maintenance will only exacerbate this inequality. This provision would bring an end to the non-discrimination principle championed in *White v White* [2010] UKHL 54 by prioritising financial contributions and would see a return to the pre-*White* era whereby the non-moneyed spouse would be required to produce a budget of her needs so that it could be assessed whether five years of periodical payments is ‘reasonable’. This is clearly in line with the outmoded pre-*White* mentality that the breadwinner’s assets are his alone.

Baroness Deech’s justification for this is that the ‘divorcing wives of oligarchs’ are being awarded ‘£83,000 per annum [for] cocktail dresses – a sum that would provide 19.7 million water purification tablets for Africa’ (*Hansard*, HL Deb vol 778, col 946, 27 January 2017) whilst other ex-wives are struggling. This gendered gold-digging trope is consistently used to justify the protection of the moneyed spouse’s property to the detriment of the non-moneyed spouse. The effect of this is to disproportionately harm women (see S Thompson, ‘In Defence of the “Gold-Digger”’ (2016) 6(6) *Oñati Socio-Legal Series* 1225). Refuting this, Deech says women *want* this reform, because there is now equality in work and education. There are indeed more female principal breadwinners than ever before but importantly, this does not mean modern division of labour in the home is equal. Indeed, limiting financial provision in a

way that affects caregiving spouses reinforces structural inequalities between men and women in the family.

Finally, the Deech Bill would introduce binding prenuptial and postnuptial agreements. It arguably makes sense that legislation seeking to introduce deferred community of property would also require a provision enabling couples to contract out of its one size fits all approach. However, clause 3 of the Bill would make nuptial agreements binding with almost no exception, an approach more extreme than in jurisdictions where such agreements are enforced (see, e.g, S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart, 2015) chapter 3). The clause incorporates procedural safeguards at the drafting stage but there is no facility to account for changes in circumstances after the agreement has been signed. Unlike the Law Commission's recommendations (Law Com No 343, *Matrimonial Property, Needs and Agreements* (HMSO, 2014)) the Bill contains no requirement for spousal needs to be met. Deech's case for binding prenups is supported by a YouGov poll ('Survey Results: Prenups' 2010) indicating public appetite for reform. But no mention is made of Barlow and Smithson's research, which presents a more nuanced picture of public opinion than YouGov and demonstrates that understanding the effects of binding prenups can change the perception of those surveyed ('Is Modern Marriage a Bargain: Exploring Perceptions of Pre-Nuptial Agreements in England and Wales' (2012) 24 *CFLQ* 304.). Despite the clear need for reform and the Bill's laudable intentions, the wider ramifications of these proposed reforms merits closer attention. There is a risk that these changes may exacerbate gendered inequalities between spouses both during marriage and on separation by rejecting judicial flexibility to that properly values caring contributions in favour of procedural certainty.

Arbitration and Mediation Services (Equality)

Baroness Cox's Arbitration and Mediation Services (Equality) Bill was first introduced into the House of Lords in June 2011 and has been repeatedly reintroduced with slight amendments since. Although the letter of the Bill does not single out religion let alone Islam, it is clear from the debate, briefings and examples given in the Bill that the focus is very much part of the concerns about the operation of religious courts and tribunals, especially those applying Sharia law, which are also manifest in the current Home Office's Independent Review into Sharia and a Commons Home Affairs Committee Inquiry on the topic. The concerns about Sharia escalated following the lecture by the then Archbishop of Canterbury, Dr Rowan Williams on 'Religious and Civil Law in England' in February 2008 (published in (2008) 10 *EccLJ* 262). In recent years there have been a number of academic studies of the topic. However, although we now know a great deal about the operation of the most visible Sharia tribunals, we still do not know how representative they are. The number of such tribunals, let alone the existence and quantity of more informal means of religious based adjudication, remains unknown. As the then Home Secretary Theresa May noted in March 2015, there are many anecdotal suggestions 'of sharia law being used to discriminate against women' but while 'we know we have a problem, but we do not yet know the full extent of the

problem' (<<http://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values>>).

Providing a legislative solution without full sight of the problem is therefore tricky and while the aims of Baroness Cox's Bill in prohibiting gender discrimination are entirely laudable, the Bill as currently drafted would have little legal effect. It seeks to amend both the Arbitration Act 1996 and the Equality Act 2010 to make it clear that discrimination on grounds of sex is unlawful in relation to arbitration and mediation. It is questionable whether such provisions are necessary given that such safeguards are already present in both statutes. However, even ignoring this point, the Bill would have little effect upon religiously based dispute resolution. Existing research (e.g. G Douglas et al, 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' (Cardiff, 2011) <<http://www.law.cf.ac.uk/clr/research/cohesion.html>>) has underlined that most religious tribunals studied do not operate under the Arbitration Act 1996 and that any mediation services provided are separate from judgment of the tribunal. There are some religious tribunals who do operate under the 1996 Act for certain purposes but these are the exceptions to the rule. The evidence we have suggests that religious tribunals are mostly concerned with questions of religious status: their role does not fit under the Bill's description of 'providing a service in relation to arbitration'. The tribunals studied said that they were providing a religious rather than legal function. Such tribunals were being used by adherents in order to obtain licence to remarry within their faith. Of course, it is unknown whether this is as equally true to the tribunals and other informal forums not studied. Yet, it is difficult to see how any rulings of such bodies could be described as arbitration or mediation as regulated under the Arbitration Act 1996.

This misconception of the role of religious tribunals and the haste to assume that their activities can be covered under existing legal provisions can also be seen in Clause 5 of the Bill which seeks to create a new criminal offence of falsely purporting to 'exercise of any of the powers or duties of a court, or in the case of a purported arbitration, to make legally binding rulings without any basis whatsoever under the Arbitration Act 1996'. This proposed offence would appear to criminalise any disciplinary or judgment-making body. None of the religious tribunals studied to date falsely purported (or indeed purported at all) to have an authority equivalent to that exercised by the courts of the State – they are voluntary associations which exercise no coercive power (see *Shergill v Khaira* [2014] UKSC 33 at [47]). This again assumes that most of the activities of religious tribunals can be described as operating under the Arbitration Act 1996. Their decisions were not intended to be legally binding under State law. Although research has shown that it is possible to redraft the Bill to cover all non-statutory courts and tribunals (R Sandberg and F Cranmer, 'Appendix: Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill in R Sandberg (ed.) *Religion and Legal Pluralism* (Ashgate, 2015) 273), most commentators are agreed that greater education is needed rather than legislation, though some have contemplated a registration / inspection system for religious tribunals (R Sandberg et al, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2013) 33(2) *OJLS* 263).

At Second Reading (*Hansard*, HL Deb vol 778, col 892, 27 January 2017), many peers raised a number of legitimate concerns about the interaction between religious rules and the law of the land. Yet, the Bill as drafted will have little effect upon the operation of religious tribunals let alone these wider concerns. Part of the issue here is that we are still unsure what the problems are since we know very little about the operation of religious tribunals other than the most high profile and frequently studied institutions. However, as several peers pointed out during the Second Reading, we do know that there is a significant issue in relation to unregistered marriages within Islam in particular. The research to date has shown that a number of those who use Sharia Councils do not have a marriage legally registered under State law (in addition to the Cardiff study, see also S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001) and S Bano, *Muslim Women and Shari'ah Councils* (Palgrave, 2012)). We do not know the true extent of this issue since this research does not reveal the numbers of recognised or non-recognised marriages that are never dealt with by the Councils. However, this is concerning given that if difficulties arise in the relationship these couples have very limited remedies under English civil law and often did not realise that this was the case: they assumed that their religious marriage had legal effect under State law.

The Cox Bill seeks to deal with this issue by extending the public sector equality duty under the Equality Act 2010 to include 'informing individuals of the need to obtain an officially recognised marriage in order to have legal protection'. Although this would be a laudable first step, this would only apply to public authorities. It is therefore questionable whether this suggestion would have any significant effect for groups and individuals who have little interaction with the State. Moreover, as we have argued elsewhere (R Sandberg and S Thompson, 'The Sharia Law Debate: The Missing Family Law Context' (2016) 177 *Law and Justice* 181), this issue needs to be seen within the wider context of reforms needed in Family Law given that the situation of unregistered religious marriages has much in common with the myth of common law marriage. There is a need for reform here but this should be part of the general need to revisit the current law on the rights and protection given to cohabiting couples as well as the formalities required for marriage proposed by the Law Commission's *Getting Married: A Scoping Paper* (Law Com, 17 December 2015).

Conclusion

The Divorce (Financial Provision) Bill 2016-17 and Arbitration and Mediation Services (Equality) Bill 2016-17 have much in common. Both the Deech Bill and the Cox Bill are intended to deal with laudable concerns about the operation of the Matrimonial Causes Act 1973 and the operation of religious courts and tribunals respectively. However, the proposals they both make are problematic, especially in terms of unwitting effects that may hinder gender equality. Baroness Deech's Bill assumes an easy transplant of the Scottish model and overlooks the way in which the move to equal division would remove the flexibility that currently exists, which would run the risk of reinforcing structural inequalities between men and women in the family. Baroness Cox's Bill assumes that most of the activities of religious tribunals would be caught under the Arbitration Act 1996 and overlooks the way in which

religious tribunals are used in matrimonial matters and would do little to address the significant issues raised by unregistered marriages.

These issues are unlikely to go away. It is now improbable that either Bill will be debated at Committee stage before this Parliamentary session runs out of time. However, it is also unlikely that this is the last time the provisions discussed in this article will be debated. These are unresolved, emotive and controversial issues as shown by the fact that both Bills have been reintroduced in the Lords more than once before. However, the problem with both Bills as currently drafted is that the issues they seek to resolve cannot be dealt with in isolation. These are matters on which there is now a significant body of research and a number of reports and papers by the Law Commission, underscoring the need for a wider reform of the family law system. This is something which the Government has recognised (*Hansard*, HL Deb vol 778, col 964, 27 January 2017).

Moreover, these are also areas where education is arguably more important than legislation and where there is a need for the judiciary to explore the cases before them in a fact sensitive way, paying particular attention to the power relationship between the parties. In our work we have suggested the need for an approach combining insights from contract theory and feminism – labelled Feminist Relational Contract Theory – which we have applied in relation to both prenups (see S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart, 2015) chapters 5 and 6) and religious tribunals (R Sandberg and S Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) *OJLR* (forthcoming)). There are no easy answers to the issues raised by these Bills but the importance of these matters to people’s lives mean that the temptation of quick and attractive but ultimately flawed statutory solutions must be overcome.