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The Modern Divorce

Joshua Viney

Abstract:

This thesis sets out to explore divorce law and current reforms. It proposed five themes. Firstly, that no-fault divorce law could be adopted. Secondly, that voluntary mediation may pose several benefits. Thirdly, that the two main aims of the current law have not been met. The stability of marriage has not been buttressed and the current procedure is frequently unjust and may exacerbate bitterness, distress and humiliation. Fourthly, that the law could seek to avoid conflicted aims, focussing solely on providing an economically accessible process with minimum bitterness, distress and humiliation. Fifthly, that the current reforms of the law may be conflicted, repeating past mistakes.

The Modern Divorce

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2011

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Acknowledgements

I decided to embark upon this because I strongly believe the law is a mess. Having spent the past year solely studying the area, I am convinced that substantial, rather than piecemeal reforms are necessary. In an ideal world, this may spark some form of debate, in a less than ideal world, a contribution to my personal thoughts is far by enough.

I wish to thank Andy and David, without who this thesis would never exist. Your guidance and hard work were unparalleled. I also wish to thank Tim, your constant support, advice and proof readings were consistently excellent as always. Tom, Henry and Alice, you kept me laughing. Benny, you were brilliant and I should never stop telling you as much. Any mistakes are of course are my own.

‘It is idle to imagine that in a matter where great forces of human passion must always be pressing with all their might against whatever barriers are set up, those barriers can be permanently maintained in a position arbitrarily chosen, with no better reason to support them than the supposed condition of public opinion at the moment of their erection’

Cosmo Lang, Leader of the Minority in the *Gorell Commission*, 1912.

To Sophie, you are incredibly hard to get rid of.

Abbreviations

BDH – Bitterness, Distress And Humiliation 162

Introduction

This thesis seeks to explore divorce law, questioning the role of fault and what the aims of a modern divorce law could encapsulate, applying this analysis to current reforms and reform proposals. It postulates that the law should be concerned primarily with the termination of marriage and that conflicted aims, either between providing a process with minimum bitterness, distress and humiliation and protecting sanctity of marriage or coercing divorcees into mediation,¹ may distort the practical application of the law, often with negative consequences or higher costs. A divorce is frequently referred to as a single event. In reality, however, it is many events. To illustrate this one may highlight the parties' decision to divorce, a divorce petition, the obtaining of a decree nisi and absolute, ancillary relief and the property related consequences of breakdown and, where children are present, arrangements to settle residence, as separate stages in 'a divorce'. This thesis will focus on the legal process required to acquire a divorce.

Divorce is an extraordinarily relevant social phenomenon. As it stands, one in three marriages will end in divorce by its 15th wedding anniversary and in 2009 alone there were 113,949 divorces.² In comparison, the average number of divorces between 1901-1905 was 812 – a rough increase of 14,000% in slightly over a century.³ Meanwhile, despite numerous attempts at reform, the current law is slightly under four decades old and has been subject to both procedural reforms and attempts at legislative reform.⁴ This thesis is particularly pertinent as divorce law is, once again, currently subject to both proposed and procedural reforms. In 2010 a Family Justice Review was initiated.⁵ After a call for evidence, it published its interim findings in March 2011 and will submit a final report in the autumn.⁶ The interim report suggested restructuring the current administrative procedure into an online

¹ Buttressing the 'sanctity of marriage' and providing a divorce with minimum 'bitterness, distress and humiliation' are two phrases used by the Law Commission - who set them as the first and second aim of the Divorce Reform Act 1969: Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Law Com No 3123, 1966) para 15. They are relied upon extensively within the thesis.

² Office for National Statistics, *Divorces in England and Wales 2009* (2011).

³ O.R. McGregor, *Divorce in England - A Centenary Study* (Heinemann 1957) 51.

⁴ The introduction of the Special Procedure in 1973, discussed in the second chapter, significantly changed the process of getting a divorce. Subsequent to this, divorce law was the subject of further investigations culminating in the failed Family Law Act 1996, discussed in the fourth chapter at length.

⁵ Home Office, *Family Justice Review - Interim Report* (March 2011).

⁶ *ibid* 3.

application.⁷ To date, no empirical research into the proposal has been conducted. Meanwhile, in February 2011, Practice Direction 3A, a ‘Pre-Application Protocol for Mediation Information and Assessment’, supplementing the Family Procedure Rules 2010, was released.⁸ It came into force on the 6th April 2011. The Protocol requires, as a necessary pre-condition to divorce, that couples attend a meeting to consider whether they may be able to solve any disputes through mediation.⁹ Again, as this has been introduced so recently, there exists no empirical research on the scheme. The relevancy of a modern analysis of divorce law is therefore abundantly clear.

To better comprehend the components of ‘a modern divorce’, this thesis will be comprised of the following sections. Initially, in the first chapter, it will outline the development of divorce up until the current law, found in the Matrimonial Causes Act 1973 and the Special Procedure, also initiated in 1973, before outlining the current reforms. It describes this evolution through an investigation into the religious, legislative, judicial, administrative and, now, maybe a digital phase of divorce. In doing so it simultaneously provides both a foundation to the thesis, whilst also demonstrating how differing aims to divorce law, aside from the dissolution of marriage, have been included within the law and altered. Specifically, it identifies the changing priorities between protecting sanctity of marriage and providing a humane¹⁰ and acceptable socio-economic process.¹¹

These changing priorities shall be further analysed in the second chapter, which contains a theoretical discussion of fault-based divorce. Within this it will consider arguments in favour of fault, which rely upon justifications relating to the sanctity of

⁷ *ibid* 226.

⁸ Family Procedure Rules 2010 (SI 2010/2955(L17)).

⁹ S 4.1.

¹⁰ The thesis shall refer to the word ‘humane’. By this it means to depict issues relating to the divorce process itself. Specifically, providing a liberal process with minimum bitterness, distress and humiliation.

¹¹ This thesis shall also frequently use the broad term ‘socio-economic’. This is to depict both fiscal issues, such as the cost of the divorce to the divorcees and the subsequent economic position of the parties. With regard to economics, there is noticeable change within the development of divorce law between providing an accessible divorce and then a divorce which does not impact, fiscally, in a negative fashion upon one of the divorcees. It also relates to the social impact of the divorce such as on the community, relationships, employment and housing.

marriage;¹² socio-economic benefits;¹³ contractual motivations;¹⁴ potential psychological benefits¹⁵ and tort-based arguments.¹⁶ It concludes that the arguments in favour of fault, evident in the current divorce law and previous legislation governing divorce, may be reliant upon outdated social conceptions and may have poor practical applicability. This allows the chapter to propose that fault could be abandoned in future reforms.

The third chapter follows the observations reached in the preceding chapters with an analysis of the attempts to provide a no-fault reform. This includes an investigation into the Booth Committee and the Family Law Act 1996, and contributes to the conceptualisation of a modern divorce in two ways. Firstly, by suggesting the Family Law Act 1996 failed due to an unsuccessful attempt to merge the concepts of no-fault divorce with protecting sanctity of marriage, which resulted in theoretical and practical flaws throughout the Act. It allows the thesis to suggest that by convoluting its objectives in such a fashion, a divorce law may encounter practical difficulties. Secondly, through its analysis, it finds little reason to criticise no-fault divorce as a concept, reinforcing the belief that a no-fault model could be adopted by future reforms.

With this conclusion in mind, the fourth chapter moves on to assess the aims of the current law, asking if the law has met the aims laid down and what the aims could

¹² Report of a Group Appointed by the Archbishop of Canterbury in January 1964, *Putting Asunder – A Divorce Law for Contemporary Society* (Society for Promoting Christian Knowledge 1966); R.M. Redman, 'Marriage Should be the Traditional Protected Relationship, Not the New Concept of, "I'll Love you Until you Get Ugly"' (1987) 10 *Family Advocate* 8; G. Grisez, *Way of the Lord Jesus: Volume 1: Christian Moral Principles* (Franciscan Herald Press 1983).

¹³ R. Deech, 'Divorce – A Disaster?' (2009) *Family Law* 1049; S. Fitzgibbon, 'Marriage and the Good of Obligation' (2002) 47 *American Journal of Jurisprudence* 41; J. Eekelaar and M. Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31(4) *Journal of Law and Society* 510; L. Weitzman and M. Maclean, *Economic Consequences of Divorce – The International Perspective* (Clarendon Press 1992).

¹⁴ R. Rowthorn, 'Marriage and Trust: Some Lessons From Economics' (1999) 23 *Cambridge Journal of Economics* 661; L. Weitzman, *Marriage Contract* (Free Press 1981); M. Brinig and S. Crafton, 'Marriage and Opportunism' (1994) 23 *Journal of Legal Studies* 869; S. Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy and Public Affairs* 189.

¹⁵ S. Day Sclater, *Divorce: A Psychosocial Study* (Ashgate Publishing 1999); G. Davis and M. Murch, *Grounds for Divorce* (Clarendon Press 1988).

¹⁶ T. L. Perry, 'No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts' (1991) *Ohio State Law Journal* 55; P. N. Swisher, 'Reassessing Fault Factors in No-Fault Divorce' (1997-1998) 31 *Family Law Quarterly* 269.

now entail with regard to a modern divorce. In doing so it evaluates the aims of the law as outlined by the Law Commission in its 'Reform of the Grounds of Divorce: The Field of Choice' Report published in 1965.¹⁷ These aims included buttressing the stability of marriage and providing a fair divorce with minimum bitterness, distress and humiliation. The Law Commission also included the subsidiary aims of avoiding injustice to an economically weaker spouse and circumventing a negative impact to any relevant children. This section argues that the current law fails to buttress the stability of marriage, whilst providing a process that is predisposed to create unfair situations that may cause bitterness, distress and humiliation not only for the parties but also for any relevant children. This also acts as a practical demonstration of the theoretical limitations of fault-based divorce. It concludes that future reforms may seek to avoid convoluted aims and focus on the dissolution of marriage, whilst providing a fair, economically accessible system that causes the minimum bitterness, distress and humiliation. However, whilst it does so, with recognition of the first chapter, it is also cognisant of why protections of sanctity of marriage are still evident within the law.

The chapter then moves on to apply this conclusion to the recent procedural and proposed reforms to the law. It suggests that the reforms may be repeating the same mistake as the Family Law Act 1996, albeit from a different perspective: namely coercive mediation. Tentatively, it proposes that if the divorcees are coerced into mediation, then the implications of failed mediation may not be constructive towards achieving a divorce with minimum bitterness, distress and humiliation. Given the conclusions of the thesis, mediation would appear helpful in some instances, however, making it mandatory for all cases would appear to be inappropriate.

Following these observations, the thesis advances its overall hypothesis that a modern divorce law, with a clearly composed rationale, could focus on providing a procedure that is solely dedicated to the dissolution of a marriage through a no-fault procedure. This will hopefully minimise the law's contribution towards the naturally occurring bitterness, distress and humiliation. It aims to demonstrate that convoluted and alternative aims to the law are, as borne out of the thesis' analysis, prone to creating

¹⁷ Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Law Com No 3123, 1966).

unsatisfactory practical implications. This is underlined, and perhaps explained by the need for a clearer theoretical justification within the law. Practically, this is further evidenced by the fourth chapter's analysis of the aims of the law and investigation into the attempted reforms. This hypothesis may contribute to the dialogue surrounding divorce reform for the future.

Chapter 1. The Development of Divorce Law

Synopsis

This chapter outlines the evolution of divorce law in England and Wales, leading up to the current law and reforms. This will be investigated with regard to relevant legislation, case law and procedure. The chapter contributes both a foundation to the thesis and an outline of how the law has altered over time, providing the initial first steps towards the thesis - exploring how the law has wrestled with differing aims and societal concerns over divorce, rather than focusing on the dissolution of marriage. It suggests that the law has, unsurprisingly, been overtly influenced from two broad areas – religious motivations on the one side, and socio-economic concerns on the other. This will then lead onto the second chapter, which provides a theoretical analysis of fault within a modern day perspective.

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1. Introduction

The modern concept of divorce has developed over a considerable period of time, undergoing several stages such as a religious, legislative and judicial phase. Within the past half century it has adjusted into an administrative role and now, owing to the preliminary suggestions of the Family Justice Review, it may, in the future, take on a more digitalised character. Throughout the law's development it is broadly possible to identify a consistent fluctuation within the purpose of divorce. This chapter will analyse the evolution of the law within these phases, up until modern day.

The chapter contributes towards the thesis in two ways. Firstly, it provides a background to divorce law, outlining its development and the current status quo. This is both necessary and useful with regard to the analysis undertaken in the following chapters, especially with regard to the modern reforms, which may be contrasted with divorce law's historical progression.

Secondly, it broadly explores the changing emphasis behind the purpose and operation of divorce law; tracking the depreciating levels of protection accorded to sanctity of marriage and the advancing prominence given to socio-economic and humane arguments over the last two centuries. This analysis will lead onto a theoretical discussion in the second chapter, which will examine the strength of differing arguments concerning the purpose of divorce law and the relevancy of fault based provisions to restrict access to divorce.

It concludes that Cosmo Lang, quoted in the opening pages of this thesis and an unlikely source of inspiration, given he led the minority against reforming divorce law in the Gorell Commission in 1912, unwittingly provided the best argument for removing the sanctity of marriage from divorce. Once the initial steps were taken to allow for an accessible divorce process through judicial means, the Rubicon was crossed and the question of whether a divorce should be allowed, on the basis of issues relating to the sanctity of marriage, was diminished. The chapter suggests this was due to increasing social accessibility and the growing prominence of arguments focusing upon the socio-economic impact of divorce and whether its procedure was acceptable or not. This dichotomy, between sanctity of marriage and socio-economic

concerns, has continued and developed up until modern day, providing fertile grounds for further analysis, allowing the thesis to query whether provisions protecting marriage are beneficial, constructive, or actually harmful. This gives the thesis the capacity to suggest a more modern concept of divorce.

2. The Phases of Divorce Law

When broadly assessing the development of divorce law, it is possible to isolate select phases, such as a religious, legislative, judicial and administrative phase. In truth, compartmentalising them in this fashion is an oversimplification; the religious processes continued well into the 19th century, overlapping what this thesis terms the ‘legislative’ phase. However, a general evolution can be evidenced which is illuminating when identifying the changing influences upon the law.

The religious phase of divorce was in existence up until the Matrimonial Causes Act 1857.¹⁸ In the twelfth century, the Roman Church’s doctrine of Christianity had ‘hardened into settled doctrine’.¹⁹ However, whilst McGregor may label it a settled doctrine, it was, in practice, anything but settled. With regard to the law of matrimony, those above the age of seven could marry without parental consent and, what is more, they could do so simply via a verbal agreement by stating ‘we are now man and wife’.²⁰ However, whilst this may not have been legally formalised, Probert has recently cast doubt on the disorganised conception of marriage, arguing that the majority of marriages did accord to certain attributes, such as the use of a clergyman.²¹

The sacrament that surrounded marriage meant that the modern concept of divorce did not exist and thus the only possibility was an ecclesiastical divorce, or divorce *a*

¹⁸ This is a general statement, there are still considerable religious elements within divorce, evidenced clearly in judicial decisions in the 20th century as per Sir Jocelyn Simon in *Bull v Bull* [1965] 3 W.L.R. 1048. However, as a general trend, the official role of religious institutions within the divorce process ended after the Matrimonial Causes Act 1857.

¹⁹ N 3, 1.

²⁰ O.R. McGregor, ‘The Morton Commission: A Social and Historical Commentary’ (1956) 7(3) *The British Journal of Sociology* 173.

²¹ R. Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (CUP 2009) 21.

mensa et thoro (divorce from bed and board), in circumstances of adultery, cruelty or heresy.²² In other circumstances nullity could be granted, pronouncing the marriage void.²³ This could be due to either flaws in the marriage ceremony or within the union itself, examples of this include duress or if the marriage was within the prohibited degrees of consanguinity.²⁴ As Gibson notes, the laws of nullity were of ‘awesome complexity’.²⁵ Any resemblance of a modern day divorce was therefore firmly controlled by the Church, which dogmatically upheld the indissolubility of marriage, albeit allowing for a practical solution in difficult situations, circumstances providing.²⁶ One can clearly identify a schism between the Church’s belief that, on the one hand, marriage was an indissoluble bond and, on the other, that forcing individuals to live together was impractical or, in some circumstances cruel. Already, even in the twelfth century, it is possible to highlight a conflict within the early concept of divorce between religious perspectives and social necessity.

Following the Reformation, Rome’s direct influence upon the concept of marriage was diminished, reducing the protections granted to it, signifying a bold move towards divorce.²⁷ Despite this, England was ‘unique’ in the sense that it was the only Protestant country to not allow divorce.²⁸ Arguably, stemming from this emerged the Parliamentary divorce model or as this thesis has termed it the ‘legislative divorce’ phase. This essentially provided what an ecclesiastical divorce, or divorce *a mensa et thoro*, would not – permission to remarry, which was naturally of great importance.²⁹

An early example of this can be seen in the Roos Act of 1670, granting Lord Roos the right to marry again. There is some debate over whether this was the ‘first’ divorce Act, as he was granted an ecclesiastical divorce beforehand, which naturally did not permit remarriage in itself.³⁰ It was not until the divorce granted to the Earl of

²² N 20, 172. In practice this acted in a similar fashion to a modern day judicial separation, as per section 17 of the Matrimonial Causes Act 1973.

²³ C.S. Gibson, *Dissolving Wedlock* (Routledge 1994) 10.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ That there was evidence of adultery, cruelty or heresy.

²⁷ S. Cretney, *Family Law in the Twentieth Century – A History* (OUP 2003) 161.

²⁸ S. Wolfram, ‘Divorce in England 1700-1857’ (1985) 5(3) *Oxford Journal of Legal Studies* 157.

²⁹ L. Stone, *Road to Divorce – England 1530-1987* (OUP 1990) 301.

³⁰ R. Phillips, *Untying the Knot – A Short History of Divorce* (CUP 1991) 37.

Macclesfield in 1698 that a divorce was obtained without a prior ruling from an ecclesiastical court, perhaps being granted the title of the ‘first’ divorce Act.³¹ Despite this, it became custom,³² and then a standardized requirement of the House of Lords,³³ to receive a divorce *a mensa et thoro* and damages for adultery from the common law courts before receiving a Parliamentary divorce. The common law claim, for ‘criminal conversations’ was undertaken by a husband, against a man who had committed adultery with his wife, despite ‘the fact that it was neither criminal nor a conversation in the usual sense of the word’.³⁴ This predominantly occurred from 1760-1820 in the King’s Bench.³⁵

The move to a legislative model of divorce is largely of historical interest. Typically, they are remembered as being reserved for the elite,³⁶ however, as Wolfram noted, in the latter stages of the phase, the Parliamentary divorce was not the sole ‘prerogative of the aristocracy’.³⁷ Nevertheless, they were exceedingly rare; only 325 ever took place,³⁸ of which merely four were obtained by women,³⁹ the first of which was in 1801.⁴⁰ To put this in perspective, this was over a 187-year period, 1670-1857. As an aside, to claim that it was a legislative divorce is a slight misnomer. As mentioned above, a common law claim for ‘criminal conversations’ and an ecclesiastical court ruling were normally pre-requisites to a Parliamentary divorce. However, the title is fitting, as it was Parliament that legally dissolved the marriage. Given the requirements for a Parliamentary divorce, namely, an ecclesiastical divorce, a common law claim and an Act of Parliament, it is clear that the process was impacted upon by both religious and social influences.

³¹ N 29, 317.

³² J. Masson et al, *Cretney’s Principles of Family Law* (8th edn, Sweet & Maxwell 2008).

³³ N 20, 175.

³⁴ N 29, 233.

³⁵ *ibid.*

³⁶ N 28, 162.

³⁷ *ibid.*

³⁸ There appears to be some discrepancy between the exact number of Parliamentary divorces granted, whilst Phillips quotes 325, the Morton Commission quoted 244, a significant difference – Home Office, *Royal Commission on Marriage and Divorce 1951-1955* (Cmnd 9678, 1956) 4.

³⁹ N 30, 66.

⁴⁰ The first female divorce Act was obtained in 1801 – the Addison/Campbell Divorce Act 1801.

The move towards a judicially administered divorce model began in the mid 19th century. A Royal Commission ‘to enquire into the law of divorce, and more particularly into the mode of obtaining divorces *a vinculo matrimonii*’ was established in 1850.⁴¹ It published its report in 1853, highlighting the extreme economic difference between a divorce in England and Scotland, which respectively cost roughly £700-800 and £20-30.⁴² Following this the Matrimonial Causes Act 1857 was enacted, providing individuals with the ability to dissolve their marriages and obtain a divorce by decree through the newly created Court for Divorce and Matrimonial Causes, which was subsequently transferred to the multi-talented Probate, Divorce and Admiralty Division of the High Court following the enactment of the Supreme Court of Judicature Act 1873. Under the 1857 Act the husband could petition for divorce on the basis of the matrimonial offence of adultery, whilst the wife’s petition had to include not only adultery, but be combined with desertion, cruelty, incest, rape, sodomy or bestiality.

The change that the Act brought about was not therefore one of principle, as the Parliamentary divorce offered divorce on similar grounds to a judicial divorce. Instead, it changed the procedure. A Court for Divorce and Matrimonial Causes was established, transferring the duties of the ecclesiastical courts and replacing the concept of a divorce *a mensa et thoro* with judicial separation.⁴³ At the same time common law claims for ‘criminal conversation’ were replaced by a claim against a co-respondent. Ironically, with the aim of making the divorce process easier on an fiscal scale, the Act adopted the, socially, more damaging adversarial methods of the ecclesiastical courts, requiring a high standard of proof in regards to adultery⁴⁴ and even employing the skills of special investigators.⁴⁵ The Act, despite being largely a procedural reform, was nonetheless a profound change. The move reflects a vital transition from the previously religious-legislative dominated process. Importantly, one can highlight both the strong socio-economic motivations behind the Act and the retention of elements of the previous phases, such as adversarial techniques, claims against co-respondents and investigatory practices. The socio-economic elements are

⁴¹ N3, 17.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ N 27, 175.

⁴⁵ *ibid* 178.

clearly evident with regard to the cost of a divorce and its accessibility. As mentioned previously, a Parliamentary divorce was essentially reserved for the elite. By judicialising the process, the economic requirements were lowered,⁴⁶ widening social access to divorce to those outside of the aristocratic elite. However, it was not ‘divorce for all’; as mentioned, there were differences with regard to gender, restricting petitions and perhaps exacerbating prevalent economic differences between the sexes, meanwhile, obtaining a divorce still had a significant cost, and as noted by Phillips, in a sample by the London *Times* between 1860 and 1919, working men only accounted for one sixth of divorces.⁴⁷ Whilst the process was drastically altered, the retention of the ecclesiastical courts techniques would appear to reinforce religious principles.

Summarily, the differential treatment within the Act, in regards to petitions by the husband and wife, such as requiring that a wife combine an adultery petition with evidence of desertion, cruelty, incest, rape, sodomy or bestiality, led to increasing pressure for reform.⁴⁸ This was combined with the fact that the majority of the population still found the cost of the process inaccessible.⁴⁹ However, this pressure was, as Stone noted:

‘hampered by a series of accidents and miscalculations, bitter divisions in public opinion, suspicion or downright hostility by many women’s organizations, direct opposition by the clergy of the Church of England, and the lack of full support by any political party’.⁵⁰

Three separate unsuccessful reform attempts occurred prior to any substantial improvement to the law,⁵¹ namely, the Hunter Bill, the Russell Bill and the Gorell Commission. These are of note, as the pursuit of change naturally built up political pressure on the subject.

⁴⁶ N 30, 129-30. The costs were reduced to a fifth of the price of a Parliamentary divorce.

⁴⁷ *ibid* 130.

⁴⁸ N 29, 392.

⁴⁹ *ibid* 393.

⁵⁰ *ibid* 392.

⁵¹ The law was eventually reformed by the Matrimonial Causes Act 1923.

Dr Hunter stimulated the first reform attempt in 1892, introducing a Bill into Parliament to alter the grounds for divorce. His reasoning seemed to resurrect that of the 1853 Royal Commission, arguing ‘that intermarriage between the English and the Scots was so common that it would be sensible for the law of the two countries to be the same’.⁵² As Scottish law allowed for divorce for either spouse for adultery or desertion, this would have aligned the law in England and Wales as such, thereby removing gender-based discrimination. Hunter went on to highlight that this had not increased the rate of divorce in Scotland.⁵³ However, he failed to convince Parliament that they would not be endorsing collusive divorce by consent. Subsequently the Act was not passed.⁵⁴

The second attempt was launched by the Second Earl Russell, who introduced a Bill into the House of Lords in 1902. The Bill made allowances for divorce to either spouse for adultery, cruelty, living apart for three years, living apart for one year with consent, sentence of penal servitude of three years or longer and incurable insanity.⁵⁵ It also aimed to make divorce more accessible for those with an income of less than £500, allowing these divorces to be tried in a county court.⁵⁶ The Bill failed twice, arguably due to Earl Russell’s personal interest.⁵⁷ Famously the Earl, his wife and her mother, had been involved in numerous legal disputes, culminating in the Earl’s imprisonment for bigamy.⁵⁸

A third attempt was launched by Sir John Barnes, the country’s senior divorce judge, an advocate of reform, who denounced the law as ‘full of inconsistencies, anomalies, and inequalities amounting almost to absurdities’.⁵⁹ Following the election of the Liberals in 1906, Barnes, now Lord Gorell,⁶⁰ stimulated the appointment of a Royal Commission on Divorce and Matrimonial Causes in 1909. However, the Commission failed to achieve consensus on religious and social matters.

⁵² N 27, 202.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid* 204.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid* 207.

⁶⁰ Barnes was handed a peerage, allowing him a voice in Parliament.

The majority, led by Lord Gorell, put forward three points. Firstly, they passionately argued that there should be equal access to divorce, stating:

‘We can conceive nothing more likely to produce a sense of injustice and hardship, nor more calculated to bring the law into contempt among the people, nothing more inimical to the morality and the best interests of the country than that a system of judicature should remain unaltered which affords opportunity of redress to those who possess the means to use it, but by reason merely of cost and inconvenience, denies it to those who... have less means of escape therefrom, without recourse to law, than their richer brethren’.⁶¹

Secondly they proposed that ‘divorce should be regarded as merely a legal mopping-up operation after the spiritual death of a marriage’.⁶² This was a pioneering concept at the time as it displayed a separation between the religious and legal conclusion to a marriage. Thirdly, they asserted that ‘there is no necessary correlation between the number of divorces and the level of sexual immorality’.⁶³ They proceeded to argue that marriage should be dissoluble on grounds of adultery and where there has been ‘other grave causes’,⁶⁴ such as desertion for three years, cruelty, incurable insanity after five years confinement, habitual and incurable drunkenness, and imprisonment under a commuted death sentence.⁶⁵

In contrast, the minority, which included Cosmo Lang, who was, at the time,⁶⁶ the Archbishop of York, ‘seized on the absence from the Majority Report of any underlying principle which could justify the changes the majority recommended’.⁶⁷ The minority had two main arguments. Initially they believed that ‘any extension of the causes for divorce beyond female adultery was against the express words of Christ’.⁶⁸ They further argued that the proposals would:

⁶¹ Home Office, *Report of the Royal Commission on Divorce and Matrimonial Causes* (Cmnd 6478, 1912) para. 61.

⁶² N 29, 393.

⁶³ *ibid.*

⁶⁴ N 61, para. 48.

⁶⁵ N 27, 212.

⁶⁶ Cosmo Lang went on to be Archbishop of Canterbury (1928-1942).

⁶⁷ N 27, 212.

⁶⁸ N 29, 393.

‘create a habit of mind... [which] would lead the nation to a downward incline on which it would be vain to expect to be able to stop half way. It is idle to imagine that in a matter where great forces of human passion must always be pressing with all their might against whatever barriers are set up, those barriers can be permanently maintained in a position arbitrarily chosen, with no better reason to support them than the supposed condition of public opinion at the moment of their erection’

In hindsight, given the transformative reforms to divorce law over the past half century, the latter statement was extremely insightful, especially as Lang was the leader of the minority. Evidently, one can identify clear areas of tensions within the Gorell Commission. Most prominent are the arguments concerning the socio-economic impact of divorce and sanctity of marriage.

In regards to reform, Cretney notes that the fact that the Commission was divided ‘furnished the Government with more than adequate grounds for refusing to introduce legislation’.⁶⁹ At this point the history of the Commission transforms into a tragedy. Lord Gorell died in 1913, allegedly due to ‘the strain of presiding over the Commission’.⁷⁰ His son, the Second Lord Gorell, introduced a Bill, but withdrew it due to pressure caused by Baron Brayne, a Roman Catholic, who threatened to initiate wrecking amendment.⁷¹

After the Great War, reform was to be found in the Matrimonial Causes Act 1923, sponsored by Lord Buckmaster, to allow a wife ‘equal footing’⁷² by allowing her to petition, solely, under the matrimonial offence of adultery without the need to evince an aggravating factor. However, as Probert highlighted, the motivation for reform went beyond providing equality. The double standards of the law meant it ‘was riddled with contradictions’.⁷³ A specific issue concerned judicial interpretation. Probert argued that the success rates for husbands and wives petitions were ‘virtually

⁶⁹ N 27, 213.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² N 3, 29.

⁷³ R. Probert, ‘The Controversy of Equality and the Matrimonial Causes Act 1923’ (1999) *Child and Family Law Quarterly* 33.

identical',⁷⁴ demonstrating that extensive levels of judicial interpretation were required to allow for the fact that a wife had to demonstrate aggravating factors. One may add to Probert's analysis by questioning petition rates, asking whether the initial rate would be affected by the additional requirements placed upon a petitioning wife, refocusing the question back upon equality. Yet, despite this observation, there is a strong argument for the belief that equality was not the only motivation for reform.

The reform movement continued with the enactment of the Matrimonial Causes Act 1937, which allowed either spouse to petition on the grounds that the other party had committed adultery, deserted the petitioner for three years, treated the petitioner with cruelty or was incurably of unsound mind.⁷⁵

The key points of the Act were the introduction of the provisions for desertion, cruelty and unsound mind. This was a development on the previous law, which focused solely on adultery. Sir Alan Herbert, the main proponent of the Act, had several motivations. In the preamble of the Act it was stated that the Bill was:

‘expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy, and the restoration of due respect for the law’.⁷⁶

During the passage of the Act, Herbert combined the rational argument that there were ongoing significant levels of collusion,⁷⁷ with the compassionate argument that the law should facilitate a ‘humane and honest divorce’.⁷⁸ Indeed his approach was so striking that Redmayne titles her article on the Act ‘The Matrimonial Causes Act

⁷⁴ *ibid.*

⁷⁵ N 27, 250.

⁷⁶ Matrimonial Causes Act 1937.

⁷⁷ N 27, 229-233. Collusion was rife. Famously, it could include a ‘hotel-divorce’. In this instance, a husband would find an obliging woman who would occupy a hotel room with him. Afterwards, the husband would write a letter to his wife and detail the ‘affair’ and, humorously, enclose the hotel bill.

⁷⁸ *ibid* 236-237.

1937: A Lesson in the Art of Compromise'.⁷⁹ Through these arguments he aimed to convince the neutrals and pacify his opposition, which included groups such as the Mothers' Union, the Anglican Parish clergy and MPs with significant levels of Catholic constituents. In contrast to the Gorell Commission, Cosmo Lang, now the Archbishop of Canterbury, and William Temple, the Archbishop of York, retained a neutral stance, dividing the Anglican Church.⁸⁰ This is pertinent with regard to the concept of what a modern divorce could entail. The following chapters will query whether modern divorce law should still be based on this compromise. Do both sides of the argument retain enough merit to warrant a compromise? Beyond Herbert's political endeavours, it is also clear that there was growing social pressure for change; as Redmayne notes, society had evolved, women's roles were changing, granting them more financial independence along with attitudes towards sex, marriage and birth control.⁸¹ So perhaps it is fair to argue that Herbert facilitated a compromise, which was further encouraged by changing social attitudes.

With this in mind, one may highlight the numerous influences that went into the formation of the Act. Perhaps the most interesting aspect of Herbert's approach, from the modern perspective, is the concept that divorce law should facilitate a humane and honest process, introducing the notion of conciliation.⁸² Whilst Herbert's model of conciliation was more in line with the modern day conception of reconciliation,⁸³ the belief that divorce law could have alternative aims, and conceivably counteractive ones, is relevant to the current law and attempted reforms.⁸⁴ This is also particularly appropriate to this thesis, as it demonstrates the shift in priorities between sanctity of marriage and providing a humane divorce. Furthermore, it shows the growing complexity of the motivations behind divorce law - an important theme for the thesis which is discussed in greater detail in the following chapter.

⁷⁹ S. Redmayne, 'The Matrimonial Causes Act 1937: A Lesson in the Art of Compromise' (1993) 13(2) Oxford Journal of Legal Studies 183.

⁸⁰ N 29, 399.

⁸¹ N 79, 185.

⁸² N 27, 236-237.

⁸³ *ibid* 237.

⁸⁴ Discussed in greater detail in the final chapter.

The concept of conciliation was again targeted in 1937 by the *Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction*.⁸⁵ The Committee argued that the role of conciliation/reconciliation was not a role for the courts.⁸⁶ In turn this focused the debate on to informal methods of encouraging conciliation/reconciliation.⁸⁷ The informal method received patronage from both the 1947 Denning Report,⁸⁸ which argued ‘reconciliation [procedures] should be attempted in every case where there is a prospect of success’,⁸⁹ and the Morton Report,⁹⁰ which advocated the expansion of skilled counselling to aid reconciliation.⁹¹

The Morton Report, officially known as the Royal Commission on Marriage and Divorce,⁹² was a significant investigation and the third Royal Commission concerning divorce in a century. Its formation was motivated as a response to Eirene White’s introduction of a reform Bill,⁹³ which would have allowed a husband or wife to divorce, provided they had lived apart for seven years, and had no prospect of reconciliation.⁹⁴ The Commission’s objective was to inquire into the law and matters affecting relations between husband and wife and to consider whether any changes should be made to the law or administration.⁹⁵ The remit of the Commission is significantly outside this thesis’ research topic, as it considered the law relating to property rights and marriage. However, it is noteworthy as it concerns divorce.⁹⁶

⁸⁵ Home Office, *Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction* (Cmnd 5122, 1936).

⁸⁶ *ibid* para 14.

⁸⁷ N 27, 236-300.

⁸⁸ Home Office, *Final Report of the Committee on Procedure in Matrimonial Causes* (Cmnd 7024, 1947).

⁸⁹ N 27, 236-302.

⁹⁰ Home Office, *Royal Commission on Marriage and Divorce 1951-1955* (Cmnd 9678, 1956).

⁹¹ N 27, 236-304.

⁹² N 90.

⁹³ N 20, 185.

⁹⁴ *ibid*.

⁹⁵ N 90, 1.

⁹⁶ It is perhaps relevant to provide some analysis of Royal Commissions. Of note, they have the advantages of providing an independent source of analysis that allows special interest groups to be represented, however, equally, this independence may be impaired, initially, by the objectives of those who appointed the Commissioners. Meanwhile, the formation of a Commission may be simply to delay or post-pone a decision of the Government; further influencing its independence. P. Aucoin, ‘Contributions of Commissions of Inquiry to Policy Analysis: An Evaluation’ (1989) *Dalhousie Law Journal* 179.

The Report was of colossal proportions, taking four years to prepare and totalling 417 pages. In short, whilst it covered ‘a considerable variety of topics and [dealt] extensively with a large number of technical problems’,⁹⁷ it did not suggest any far reaching reforms to the law. Stetson identifies this result as a symptom of its ‘apparent failure to understand the changes in marriage and family life in the last century’,⁹⁸ highlighting that it was frequently ‘callous and strict’⁹⁹ and had the *modus operandi* that ‘marriage should be monogamous and for life and that its mission was to strengthen marriage’.¹⁰⁰ Given the above discussion on society’s evolution with regard to the Herbert Act, this was a surprisingly narrow minded approach. However, it would seem that like Herbert, the Morton Commission were balancing differing interests, of which the most powerful opponent to change was the Church of England.¹⁰¹ Therefore, like with the Herbert Act, one may ask is this balance still necessary?

With regard to substantive reforms, the Commission concluded that ‘we are, with one exception, all agreed that the present law based on the doctrine of the matrimonial offence should be retained.’¹⁰² However, the Commission was divided upon whether an additional ground based on irretrievable breakdown should be introduced.¹⁰³ Those against the introduction of the ground felt it would gravely detriment the well being of the Community.¹⁰⁴ Therefore, rather like the Gorell Commission before it, the Morton Report produced a stalemate. It is notable that this equilibrium was reached, not due to religious concerns as in the Gorell Commission, but socio-economic ones. Indeed, whilst the Commission states that that it had considered evidence from religious institutions,¹⁰⁵ it was primarily concerned with the profound impact divorce has upon

⁹⁷ O. Kahn-Freund, ‘Divorce Law Reform?’ (1956) 19(6) *The Modern Law Review* 578.

⁹⁸ D.M. Stetson, *A Woman’s Issue – The Politics of Family Law Reform in England* (Greenwood Press 1982) 162.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ J.H. DiFonzo, ‘No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce’ (1994) 31 *San Diego Law Review* 533.

¹⁰² N 90, 13.

¹⁰³ *ibid* 14.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid* 7.

the ‘well being of the community and the happiness or misery of many of its members’.¹⁰⁶

Overall, there is evidence to support the argument that during the evolution of divorce law, there were fluctuations within the emphasis given to certain arguments. Of note is the emergence of both socio-economic and humane concerns to temper the weight granted to the sanctity of marriage. This is particularly evident within the judicial phase and the Matrimonial Causes Act 1857, 1923 and 1937. Of these, the socio-economic elements of the 1857 and 1937 Acts stand out, equally so does the humane focus of the 1937 Act and the following Morton Commission. It would seem clear that the sanctity of marriage was by the 19th century no longer the sole focus of the law, however, it would appear fair to conclude that the role of the Church of England was still prominent with regard to reform. This is evident within the Gorell Commission, the creation of the Herbert Act and the Morton Commission. As mentioned above, this poses the question – should this balance still exist in a modern divorce and what would be the merits of abandoning it?

3. The Current Divorce Law

The modern law on divorce was created by the Divorce Reform Act 1969 and then consolidated in the Matrimonial Causes Act 1973, which governs divorce today. Within the Acts one can clearly identify a divide between protecting the sanctity of marriage and providing a humane system. This is evident both in the reform process prior to the enactments and their provisions.

The motivation for the introduction of the Divorce Reform Act 1969 is generally linked to the 1966 Report of the Archbishop of Canterbury who, after appointing a committee, published ‘Putting Asunder’.¹⁰⁷ This favoured the removal of the concept of ‘matrimonial offence’, instead focussing on ‘irretrievable breakdown’.¹⁰⁸ It suggested that there should be an inquest into the breakdown of the marriage and, as

¹⁰⁶ *ibid* 7.

¹⁰⁷ Report of a Group Appointed by the Archbishop of Canterbury in January 1964, *Putting Asunder – A Divorce Law for Contemporary Society* (Society for Promoting Christian Knowledge, London, 1966).

¹⁰⁸ *ibid* 33.

an analogy, compared the proposed system to a ‘coroners investigation’.¹⁰⁹ This stimulated the newly created Law Commission to issue a Report titled ‘Reform of the Grounds of Divorce: The Field of Choice’, which argued that the law should aim:

- “(i) To buttress, rather than to undermine, the stability of marriage; and
- (ii) When regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.”¹¹⁰

The Law Commission went on to suggest that a petition should be granted on the proof of a period of separation.¹¹¹ The two bodies are evidently approaching the question of divorce from differing perspective. Whilst both retain clear religious elements, the Law Commission placing buttressing the stability of marriage as its first aim and Putting Asunder requiring a ‘coroners investigation’, it would appear that the latter is more concerned with protecting marriages. This was highlighted by the Law Commission which, in contrast to ‘Putting Asunder’, argued that the:

‘basic weakness... of the proposals [of Putting Asunder]... is that they call for an elaborate, time-consuming and expensive investigation to satisfy the court that the marriage has irretrievably broken down. The realities of the situation are that unless the marriage has broken down the parties would not be before the court’.¹¹²

It was agreed, between the Law Commission and the Archbishops committee that breakdown should be the sole ground for divorce and that this should be inferred from establishing one of five facts. The result of this was the Divorce Reform Act 1969. In accordance with the earlier focus of the current chapter and as a statement of the modern law and with a view to conceptualising a modern divorce in the following chapters, one may immediately highlight the split within the Act, between the sanctity

¹⁰⁹ *ibid* 67.

¹¹⁰ N 17, para 15.

¹¹¹ *ibid*.

¹¹² *ibid*.

of marriage and a humane divorce. The sanctity of marriage was given priority as the first aim of the law over the second objective – a humane divorce.

The Act outlines that divorce shall be granted, only after the expiration of three year of marriage – subsequently amended to one year,¹¹³ on the sole ground of ‘irretrievable breakdown’.¹¹⁴ This is demonstrated by one of the five aforementioned facts being established by the petitioner - adultery,¹¹⁵ unreasonable behaviour,¹¹⁶ desertion,¹¹⁷ two years separation with the respondent’s consent¹¹⁸ and five years separation without the respondent’s consent.¹¹⁹ The initial three facts are fault based; the latter two are not. The procedure outlined dictates that the court has a duty to enquire into the facts alleged by the petitioner,¹²⁰ and that if it is satisfied, the court should then grant a divorce.¹²¹ This should take the form, initially, of a *decree nisi* and then,¹²² after a period of six weeks,¹²³ a *decree absolute*.¹²⁴ However, it is open to the High Court to fix a shorter time frame.¹²⁵ The judiciary, under section 10, may refuse a *decree absolute* if the parties fail to comply with a religious divorce¹²⁶ or if financial situations are not adequate.¹²⁷ The facts above are built upon in section 2 of the Act.

3.1. A Critique of the Current Law

The statutory framework outlined above does not represent the majority of divorce cases.¹²⁸ In 1973, the Conservative Government introduced an administrative process

¹¹³ S 3(1). This was amended by the Matrimonial and Family Proceedings Act 1984 to one year.

¹¹⁴ S 1(1).

¹¹⁵ S 1(2)(a).

¹¹⁶ S 1(2)(b).

¹¹⁷ S 1(2)(c).

¹¹⁸ S 1(2)(d).

¹¹⁹ S 1(2)(e).

¹²⁰ S 1(3).

¹²¹ S 1(4).

¹²² S 9.

¹²³ Matrimonial Causes (Decree Absolute) General Order 1972.

¹²⁴ S 1(5).

¹²⁵ *ibid.*

¹²⁶ S 10A(2).

¹²⁷ S 10(2)(a).

¹²⁸ N 27, 382.

ironically named the ‘special procedure’¹²⁹ – it is, in fact, far from ‘special’, given that it is now used in over 98% of cases.¹³⁰ Summarily, the Labour Government expanded this to all undefended divorce petitions in 1976. The special procedure is a process whereby the parties can petition for divorce, either on their own or through a solicitor, without a court process - aside from a collective mention in court at the end of the procedure. If the petition is defended, then the case may go to court, if it is not, then it will avoid a court process. Either way the initial procedure is still administrative; however, it may or may not enter the courts. The process itself is described in greater depth below, however, initially one can highlight the turn from a judicial process to an administrative model.

There are several facets of the current legislation that contribute towards this thesis. Initially, one may highlight the division between the sanctity of marriage and providing a humane divorce process. This division is evident broadly with regard to the fault factors and the tests required to fulfil them; the fault facts themselves can be seen as an attempt to guard marriage. Meanwhile, the Act’s initial requirement that the marriage be at least one year old can also be seen as a protection. As Freeman stated ‘is it necessary? Does it really prevent ill-considered marriages and hasty and ill-thought out exits therefrom? If not, why not?’¹³¹ More specific protections can be identified within the statute itself both within the fault and no-fault provisions.

Section 1(2)(a) concerning adultery was relied upon in 16% of cases in 2009.¹³² Section 2(1) places a time limit of six months on the use of paragraph (a) where ‘it became known to him that the other had committed that adultery, the parties have lived with each other for a period exceeding, or periods together exceeding six months’. Initially one can highlight a restrictive time period, which can be seen as protecting marriage. The procedural bar also requires that the parties are living with each other, which would seem to be an irrelevant requirement. How would living together affect the fact that adultery has been committed? It would not, however, it

¹²⁹ *ibid* 381.

¹³⁰ C. Gibson, *Dissolving Wedlock* (Routledge 1994) 175-80 in S. Harris-Short and J. Miles, *Family Law – Text, Cases and Materials* (OUP 2007) 379.

¹³¹ M. Freeman, *Understanding Family Law* (Sweet & Maxwell 2007) 102.

¹³² N 2.

would implicate that the marriage may have been reconciled, acting as a further safeguard of the marriage.

Section 1(2)(b) states that breakdown may be demonstrated if ‘the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent’. Unreasonable behaviour is the most commonly relied upon fact, being the basis of 48% of cases in 2009.¹³³ Like section 2(1), section 2(3) stipulates on issues relating to time, stating that that if the parties have lived together for a period of, or culminating in, six months, the fact that they have done so will be disregarded. Once more, this may be seen as a method of protecting marriage.

The 1973 Act details the fact of ‘desertion’ in section 1(2)(c) as ‘the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition’. Desertion is the least used fact, with only 435 cases being based on it in 2009.¹³⁴ Section 2(5) outlines that the court shall not take into account any one period, not exceeding six months, or numerous periods not collectively exceeding six months. Again, this has the same safeguarding effect.

With regard to the no-fault provisions, one may highlight the varying time periods as protective instruments. Section 1(2)(d) outlines that irretrievable breakdown can be demonstrated if ‘the parties to the marriage have lived apart for a continuous period of at least two years immediately proceeding the presentation of the petition... and the respondent consents to the decree being granted’. Section 2(7) provides that the respondent must consent to the petition.¹³⁵ Meanwhile, section 2(6) states that they shall be treated as ‘living apart unless they are living with each other in the same household’. The courts, in the case of *Mouncer v Mouncer*,¹³⁶ required a clear separation, arguing that by sharing some domestic responsibilities and meals, the question of separation was blurred.¹³⁷ Clarity can perhaps be found in the case of

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ They must have been given such information as will enable him to understand the consequences to him of consenting to a decree being granted and the steps which he must take to indicate that he consents to the grant of a decree

¹³⁶ *Mouncer v Mouncer* [1972] 1 W.L.R. 321.

¹³⁷ *ibid.*

Hollens v Hollens,¹³⁸ where a separate household was found, given that the parties had not spoken, eaten or slept together for the period, demonstrating that one can live under the same roof and have a ‘separation of households’. This was further qualified in *Santos v Santos*,¹³⁹ where the parties had never lived together, requiring the court to take a more holistic view of the term focusing on the minds of the parties. As a result the courts may look to both physical and mental elements. It must be questioned, at this point, whether the strict interpretation of paragraph (d) is still relevant today. With the rising cost of house prices and rent, combined with the economic disadvantages of divorce, it is very difficult for potential divorcees to ‘live apart’. What is more, the ‘admirable’¹⁴⁰ efforts of the parties in *Mouncer* – living together to care for their child – should surely be prioritised in a society where single parents and absent parents are regularly criticised for social problems.¹⁴¹ This comment is strengthened by the fact that paragraph (d) was used in 25% of cases in 2009 and remains the second most popular fact to rely on.¹⁴² Given the practical problems and ramifications of the provisions designed to protect marriage within the fact, which will be analysed in greater detail in the coming chapters, combined with the facts popularity, one may heavily question the necessity of the provisions.

Lastly, irretrievable breakdown can be demonstrated via section 1(2)(e) where ‘the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition’. Therefore, this paragraph does not require affirmative ‘consent’, as in paragraph (d). Yet, this is, like paragraph (d), subject to section 2 (6), thereby, the comments in relation to the related case law above are equally relevant. When the Divorce Reform Act 1969 was being passed, Lady Summerskill labelled the Bill a ‘Casanova’s Charter’,¹⁴³ voicing fears over the final fact forcing a divorce upon parties. Given that the percentage of cases that relied upon paragraph (e) in 2009 was only 10%, their fears seem to have failed to materialize.¹⁴⁴ However, despite this, protections were offered, as paragraph (e) is also subject to section 5, which allows a respondent to oppose the decree on the basis

¹³⁸ *Hollens v Hollens* (1971) 115 S.J. 327.

¹³⁹ *Santos v Santos* [1972] Fam. 247.

¹⁴⁰ N 36.

¹⁴¹ M.E. Lamb, *The Role of the Father in Child Development* (Wiley 1976).

¹⁴² N 2.

¹⁴³ N 27, 373.

¹⁴⁴ N 2.

of the divorce resulting in ‘grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage’.¹⁴⁵ Whilst the fact is relatively unpopular, the requirement to wait five years is a serious factor to consider. It is clearly aimed towards protecting marriage and may have adverse affects upon individuals. This will be analysed at length in the coming chapters.

Evidently there are numerous statutory provisions that seek, at the expense of providing a divorce, the protection of the marriage. The impact and justification of the use of fault and the provisions surrounding them will be investigated in the following chapters.

4. The Special Procedure – The Administrative Phase

The chapter shall now detail the reasoning behind the introduction of the special procedure, before moving on to explicate the procedural steps.

4.1 The Impetus behind the Special Procedure

Two main forces influenced this ‘fundamental change’.¹⁴⁶ Firstly, a report by Elston, Fuller and Murch¹⁴⁷ highlighted the shortcomings of the aforementioned undefended divorce hearings.¹⁴⁸ These included administrative problems such as: questioning the overuse of the county courts,¹⁴⁹ the minimal benefits of an adversarial procedure in undefended divorces,¹⁵⁰ and the lack of practical benefits of court hearings, especially when 85% of them lasted less than ten minutes.¹⁵¹ Meanwhile, from the perspective of the divorcees, Elston et al demonstrated that the procedure frequently made them feel embarrassed and nervous.¹⁵² One petitioner went so far as to describe the court scene

¹⁴⁵ Section 5 is discussed in greater detail, with regard to economic disadvantages in the law, in the fourth chapter.

¹⁴⁶ N 27, 382.

¹⁴⁷ E. Elston, J. Fuller and M. Murch, ‘Judicial Hearings of Undefended Divorce Petitions’ (1975) 38(6) *Modern Law Review* 609.

¹⁴⁸ N 27, 381.

¹⁴⁹ N 147, 609.

¹⁵⁰ *ibid* 610.

¹⁵¹ *ibid* 626.

¹⁵² *ibid* 615.

as a ‘Gilbert and Sullivan comic opera’.¹⁵³ Given the second aim of the Law Commission in 1966 was ‘to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation’, it would seem illogical to continue such a impractical and damaging divorce model at the expense of the second aim. This was an interesting development with regard to the dichotomy between the two aims – protecting the sanctity of marriage and providing a humane divorce process. Evidently, the Government at the time felt that protecting marriage at the expense of a humane process was not the correct approach.

Secondly, the ‘burdensome’¹⁵⁴ cost of Legal Aid was, like it is today,¹⁵⁵ a driving force in regards to reform. The introduction of the ‘special procedure’ allowed the Government to cut Legal Aid for undefended divorce petitions. However, as Freeman predicted,¹⁵⁶ the cost of the ancillary proceedings meant that the savings were never made, as the ‘savings in connection with the process of dissolution were outweighed by greatly increased expenditure in dealing with financial disputes’¹⁵⁷ which were still covered by Legal Aid.¹⁵⁸ Again, one may highlight economic concerns influencing divorce reform. This has been a consistent theme since the introduction of a judicial process. Naturally the area has changed to a degree; in 1857 it was the cost to the individuals applying for the divorce, in 1973, it was the cost to the Government.

Incidentally, the Special Procedure’s introduction also made divorce more fiscally accessible for the entire population, reducing the cost of a divorce from the rough figures of £100 to £12.¹⁵⁹ Therefore, it had the added benefit of being a more suitable process in many instances, whilst also pertaining a more reasonable cost.

¹⁵³ *ibid* 616.

¹⁵⁴ N 27, 382.

¹⁵⁵ Family Law, ‘Legal Aid Bill Goes Before Public Bill Committee’ (*Family Law*, 12 July 2011) <<http://www.familylaw.co.uk/articles/LegalAidBill12072011-632>> accessed 27 September 2011.

¹⁵⁶ M. Freeman, ‘Divorce Without Legal Aid’, (1976) 6 *Family Law* 258.

¹⁵⁷ Law Society, *32nd Annual Report of the Law Society on the Operation and Finance of the Legal Aid Scheme* (Law Society, 1981/1982) paras 77-106.

¹⁵⁸ N 156.

¹⁵⁹ I. Smith, ‘Explaining the Growth of Divorce in Great Britain’ (1997) 44(5) *Scottish Journal of Political Economy* 525.

4.2. The Special Procedure – The Process

The procedure itself is non-specifically outlined in Part 5 of the Family Procedure Rules 2010, which sets out that ‘subject to rule 14.10(2) and (3), the forms referred to in a practice direction, shall be used in the cases to which they apply’.¹⁶⁰ Practice Direction 5A outlines the relevant forms to carry out a divorce petition. This chapter will now illustrate this process.

When forming a petition, all petitioners must initially complete Form D8. The form requires details of the marriage, petitioner, respondent and any children. Beyond this it allows the petitioner to list any particulars such as allegations of adultery, unreasonable behaviour and desertion. Attached to the D8 Form is a ‘prayer’. The prayer of the petition is a ‘request to the court’. This allows the petitioner to stipulate whether they are requesting a judicial separation, costs and ancillary relief. The courts provide guidance for the D8 Form.

If the petitioner and respondent have children then a Statement of Arrangements for the Children - Form D8A - must also be filled in. The form outlines that:

‘Before you issue a petition for divorce or dissolution try to reach agreement with your spouse/civil partner over the proposals for the children’s future. There is space for him/her to sign at the end of this form if agreement is reached’.

The form requires the details of the children of both parties, other children of the family and children that have been born to either of the parties but are not treated as such. It then requires the arrangements for the children, such as where they live and their educational, childcare and maintenance needs.¹⁶¹ This must be submitted to the court with a marriage certificate and an administrative fee of £300.

¹⁶⁰ Rules 14.10(2) and (3) concerns adoption and are not relevant.

¹⁶¹ Further to this it requests the details of contact between the children and respondent, health and care and court proceedings that may have occurred or are ongoing.

Following this the court must give the respondent: notice of proceedings, a copy of the petition, the Statement of Arrangements for the Children and an Acknowledgement of Service – Form D10. Three events may then follow this. The respondent may ignore, contest or accept the petition. Meanwhile, they may amend the Statement of Arrangements for the Children or submit their own version. If they ignore the petition then the petition must be served on the respondent by a bailiff.

If they contest the petition then the petitioner must wait 29 days. If the respondent continues with the defence of the petition then the proceedings may now follow the judicial route.¹⁶²

If it is not contested then the petitioner is able to apply for directions to trial. 98% of divorces are not contested.¹⁶³ In these instances the court informs the petitioner with a notice of issue of petition – Form D9H. Following this the petitioner sends to the court an Application for Directions for Trial – Form D84. At the same time they must complete an Affidavit in Support of a Petition – Form D80. This demonstrates one of the five facts outlined in the section 2(1) of the Matrimonial Causes Act 1973. There are five forms available: D80A, D80B, D80C, D80D, D80E. Each form reflecting its respective fact – adultery, unreasonable behaviour, desertion, two years separation with consent and five years separation without consent.

Following this the petition is then put on the special procedure list. A judge then considers whether the documents are satisfactorily completed, whether there has been irretrievable breakdown and whether the Statement of Arrangements for the Children is satisfactory. The judge may then grant a decree nisi and the court will send a Certificate of Entitlement to a Decree, Form D84A. This outlines when the decree nisi will be pronounced. The court may request that the petitioner and respondent appear to answer minor questions. After the pronouncement of a decree nisi the petitioner must then wait six weeks and send a Notice of Application for Decree Nisi to be made Absolute, Form D36. Providing this, the courts will then grant a Decree Absolute and the marriage will be legally dissolved.

¹⁶² If they do not continue with the defence, then the court can be asked for directions for trial.

¹⁶³ N 130.

From a judicial perspective, Lord Waite, in *Pounds v Pounds*,¹⁶⁴ gave an apt description of its workings:

‘In routine cases... the registrar gives directions for trial by entering the cause in the special procedure list and thereafter considers the evidence filed by the petitioner. If he is satisfied... he will make and file a certificate to that effect...The actual process of pronouncement of the decree has become reduced to a very brief ceremony of a purely formal character in which decrees are listed together in batches for a collective mention in open court before a judge who speaks or nods his assent. The right to a decree absolute six weeks thereafter is automatic, on the application of either party.’¹⁶⁵

What is clear from the above description, both of the procedural process from the divorcees point of view and that of the judiciary, is that the process itself has become highly administrative. Arguably, a petition may still be contested, thereby retaining a link to the judicial model. However, as mentioned above, instances of a contested petition are extremely rare, only occurring in 2% of cases.¹⁶⁶ It would seem therefore that, in practice, the process of gaining a petition has become an administrative one. Given this distortion of the law, this leads the thesis to ask in the following chapters what a modern divorce law could entail and whether an administrative process is appropriate.

5. The Current Reforms

Questions over the administrative nature of the current divorce process are particularly pertinent as, with the release of the interim findings of the Family Justice Review on the 31st March 2011 and the arrival of the Pre-Application Protocol for Mediation Information and Assessment Meetings in April 2011, the future of the divorce process was laid open to change.

¹⁶⁴ *Pounds v Pounds* [1994] 1 W.L.R. 1535.

¹⁶⁵ *ibid.*

¹⁶⁶ N 130.

Whilst the chapter will not engage in an analysis of the reform attempts, as this will be undertaken in the fourth chapter, an explanation of the workings of the reforms and reflections on their historical context is relevant to the foundations of the thesis.

5.1. The Family Justice Review 2011

Shortly following the release of the Protocol, the Family Justice Review, formed by the Labour Government in 2010, released its preliminary findings.¹⁶⁷ The Review concerned numerous areas of Family Law, however, within Annex R it gave a short but significant focus to the reform of the procedure concerning a divorce petition.¹⁶⁸

The Report proposed that an individual or a couple, when considering a divorce, should go to an information hub or an ‘online divorce portal’,¹⁶⁹ which would explain the process and possible grounds for divorce. The application may then be completed online either jointly or individually, allowing issues concerning children, finances and religion to be arranged.¹⁷⁰

The form will then be submitted to a processing centre along with identification and a fee.¹⁷¹ This will be received by an administrator who will check the application, acknowledge to the petitioner that they have done so and then serve the petition on the other party.¹⁷²

Like the current system the respondent may contest or accept the petition. If it is accepted and there are unresolved issues then the administrator will issue notice for divorce and direct the parties towards information concerning services to resolve issues.¹⁷³

If the petition is contested then ‘the processing officer will transfer the application to the applicants local court for judicial consideration. The judge will then examine the

¹⁶⁷ N 5.

¹⁶⁸ N 5, 226.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

case and determine whether the notice of divorce should be issued.’¹⁷⁴ It is unclear from the Review what this properly entails. On plain reading it would seem to indicate that there would be no courtroom appearance.

5.2. The Pre-Application Protocol for Mediation Information and Assessment Meetings 2011

In Spring 2011 a Protocol for Mediation Information and Assessment was released. This supplemented the Family Procedure Rules 2010 and came into force on the 6th April 2011.

The Protocol outlines that married couples who are considering a divorce will be expected to reflect on ‘whether the dispute may be capable of being resolved through mediation... [and] to have attended a Mediation Information and Assessment Meeting’.¹⁷⁵ This is a necessary pre-condition to a petition for divorce. If the divorcees fail to do this they ‘may’ be referred by the court to a meeting with a mediator.¹⁷⁶ The procedure for the Information and Assessment Meeting is outlined in Annex A of the Protocol. It provides that the applicant to family proceedings should contact a family mediator to arrange for a meeting.¹⁷⁷ The details of the respondent are required and they are contacted to discuss willingness and availability to attend a meeting.¹⁷⁸ The parties must then attend the meeting, either together or separately.¹⁷⁹ Public funding may be available; if it is not then the funding of the meeting is allocated to the party or parties.¹⁸⁰ If the parties continue with the proceedings then a Family Mediation Information and Assessment Form must be completed and signed by the mediator.¹⁸¹

Parties will be excused from attending the meeting only under circumstances listed in Annex C. These include situations where the mediator has determined that the case is

¹⁷⁴ *ibid.*

¹⁷⁵ S 4.1

¹⁷⁶ *ibid.*

¹⁷⁷ Annex A, S 2.

¹⁷⁸ Annex A, S 5.

¹⁷⁹ Annex A, S 6.

¹⁸⁰ Annex A, S 7.

¹⁸¹ Annex A, S 9.

not suitable for mediation.¹⁸² It also includes circumstances where a party has made an allegation of domestic violence against another party,¹⁸³ which has resulted in a police investigation, or if civil proceedings for protection have been issued within the past 12 months. Bankruptcy of one of the parties¹⁸⁴ or if the situation is urgent will also suffice.¹⁸⁵ An urgent situation is described as one where there is a risk to life, liberty or physical safety,¹⁸⁶ or if any delay caused by attending the meeting would cause a risk of harm to a child, miscarriage of justice or unreasonable hardship.¹⁸⁷

5.3. The Current Reforms – A Historical Perspective

The reforms are of note, with regard to a historical perspective, as they emphasise the administrative nature of the special procedure. What is more, they appear to have little to no relation to issues revolving around sanctity of marriage, whilst the administrative, and even digital, emphasis would appear to indicate support for socio-economic considerations.

However, this is partly based on speculation, the information given on the Family Justice Review was scarce and there was equally little justifications provided by the Pre-Application Protocol. What justifications were given shall be assessed within the final chapter, which considers what the aims of a modern divorce law could be. Nevertheless, on face value, it provides a stark comparison to previous reform attempts and a change of tone to the material discussed earlier.

6. Conclusion

This chapter has outlined and analysed the evolution of divorce law within England and Wales up until present day. Its examination not only introduced the law as a foundation to the thesis, but also outlined the changes regarding the emphasis placed on divorce law – what its purpose was and has become. This shift in the aims of the

¹⁸² Annex C, S 1.

¹⁸³ *ibid.*

¹⁸⁴ Annex C, S 5.

¹⁸⁵ Annex C, S 10.

¹⁸⁶ Annex C, S 10(a).

¹⁸⁷ Annex C, S 10(b).

law is relative to the hypothesis as it demonstrates the origins, and limitations, of many of the arguments for the retention of the current law.

Initially the chapter isolated the changing role of the sanctity of marriage within the construction of divorce laws. This can be seen as having an extraordinary level of protection up until the Matrimonial Causes Act 1857. On the facts, the inaccessibility of a Parliamentary divorce ensured that, until the Act was introduced, divorce was simply unattainable for the majority of the population. Indeed, the fact that only 325 Parliamentary divorces ever took place over a 200-year period puts this in context.

Once the 1857 Act had been introduced and as further reforms were enacted this protection was further reduced. Cosmo Lang's statement, quoted at the beginning of the thesis, is extremely poignant. Essentially, he argued that once the floodgates were opened, public opinion would dictate divorce law. It would appear that Lang's comments were too late, once the initial step towards widespread divorce had been taken, through the Matrimonial Causes Act 1857, socio-economic and humane arguments became ever more relevant; as evidenced by the Dr Hunter's Bill, Lord Russell's attempted reform, the Gorell Commission, the Herbert Act 1937 and the Divorce Reform Act 1969. This will be discussed in greater detail in the following chapter with regard to the theoretical arguments concerning fault.

This division is still evident within the current law, which encompasses numerous elements seeking to protect marriage, whilst also proffering the aim of reducing bitterness, distress and humiliation. As will be discussed in the following chapters, it is these inconsistencies within the law and the failure to simply focus on dissolution that produces a process that has opportunities to create unfairness, bitterness, distress and humiliation, whilst also doing so in economically inaccessible manner.

Finally, by outlining the current reforms, it became apparent that the protections for sanctity of marriage may be further reduced if the suggestions of the Family Justice Review 2011 are followed, which would digitalise the current process, further emphasising its administrative nature.

Chapter 2. Fault

Synopsis

This chapter will outline the theoretical debates regarding fault within divorce law and provide two separate conclusions. Firstly, building upon the previous chapter, it will argue that the evolution of the law mirrors the changing strengths of the respective theoretical arguments concerning fault. Specifically, that the strength of the traditional arguments, concerned with the sanctity of marriage, has waned as society's conception of marriage as a religious institution has altered. Secondly, it suggests that fault may have little theoretical justification within the modern day divorce. This will set the foundation for the third chapter, which will explore the attempted no-fault reforms, leading to the final chapter's assessment of what the aims of a modern divorce law could now be.

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1. Introduction.

The previous chapter concluded that, during its evolution, the purpose of divorce law was clearly determined by two broad influences. Specifically, it isolated the motivations of protecting the sanctity of marriage and providing a humane divorce, which included making socio-economic considerations. It hypothesised that as divorce law has progressed the states' incentive to protect the sanctity of marriage has diminished whilst socio-economic concerns have become more prominent. This chapter seeks to provide an analysis of these separate motivations, building upon the last chapter, whilst also going on to consider alternative arguments.

The law has evolved from a purely fault based system into the current mixed fault and no-fault approach. Many of the arguments for restricting access to divorce link to fault, setting higher requirements to reduce the number of divorces. The chapter shall therefore provide an analysis of fault, linking it to numerous arguments by academics and politicians alike, who seek to alter divorce law to achieve certain objectives, such as the protection of marriage or for socio-economic, contractual, psychological or tort-based motivations.

It will begin with an analysis of the traditional sanctity of marriage arguments, concluding that the contention is reliant upon society's conception of marriage. As this has changed - marriage becoming progressively less of a religious institution - the strength of the argument has waned. Following this, the chapter shall investigate socio-economic concerns. It argues that restricting access to divorce is likely to be as if not more damaging, than a divorce itself. It then proceeds to assess contractual arguments, concluding that an analogy of a contract is misleading. With regard to psychological arguments in favour of the use of fault, it finds that whilst they have some merit, they would not justify the use of fault for all divorces. Finally, whilst assessing tort-based arguments, the thesis concludes that it would be difficult to justify using tort-based principles and that it would be exposed to practical limitations.

Its conclusion, that the waning strength of certain arguments mirrors the development of the law and that fault-based divorce could be abandoned, is not a new one, being

reached by the Law Commission in 1988. However, the modern day analysis provides a new layer to the Law Commission's work. This allows the thesis to move on to question no-fault reforms and whether the objectives of the current law have been met and what they could now be.

2. Fault

A purely fault based system requires that, for a divorce to be granted, one of the parties must have committed a 'fault', or what was originally known as a matrimonial offence. The concept of 'fault' is arguably narrow-minded; it does not focus on both parties or take a holistic approach to the end of the marriage. In England and Wales, this has always included adultery and, traditionally, a behaviour based element.¹⁸⁸ The current law, outlined in the Matrimonial Causes Act 1973, contains three fault grounds, specifically, adultery, unreasonable behaviour and desertion.

It is interesting to note the level of continuity, in regards to fault, in the evolution of divorce. Evidently, adultery has remained a common element. However, equally, it is possible to draw parallels between the concept of 'unreasonable behaviour' and 'cruelty'. Naturally, these are two very different forms of behaviour. As already underlined, there is no requirement to be morally blameworthy under the current law.¹⁸⁹ Contrastingly, in an ecclesiastical divorce, morals were relevant; frequently cases turned into questions of good versus evil.¹⁹⁰ Furthermore, the levels of behaviour deemed to be 'cruel' were much higher. An evident example being the case of *Boteler v Boteler*, where the courts took three years to give a ruling in a case where the husband had regularly fathered illegitimate children, and by default committed adultery, infected his wife with gonorrhoea, not once but twice, and assaulted her.¹⁹¹

Whilst fault has always been a part of the divorce process in England and Wales, the justifications for this status quo are diverse. These can be divided into traditional,

¹⁸⁸ As discussed in the previous chapter, an ecclesiastical divorce provided for a divorce on the grounds of adultery, cruelty or heresy.

¹⁸⁹ *Gollins v Gollins* [1964] AC 644.

¹⁹⁰ L. Stone, *Broken Lives – Separation and Divorce in England 1660-1857*, (OUP, Oxford, 1993) 36.

¹⁹¹ *ibid.*

socio-economic, contractual, psychological and tort-based motivations. The chapter shall now analyse these - concluding that there exists little justification to maintain or expand upon the use of fault.

3. Traditional Arguments

The term ‘traditional’ refers to the emphasis and value placed upon the sanctity of marriage. It is rare to find a modern proponent of the traditional perspective with regard to divorce reform, however, its influence is, perhaps oddly, still recognisable within divorce law.¹⁹² Indeed it is easier to find other sources of ‘traditional’ viewpoints, within other areas of family law, such as with regard to same-sex marriage,¹⁹³ Covenant Marriages¹⁹⁴ and pre-nuptial agreements.¹⁹⁵ Therefore, the dearth of academic commentary means this section of the chapter is reliant, largely, upon historical resources.

The methods for supporting the traditional perspective have varied with each reform of divorce law. A simplistic explanation would be that the use of fault sets requirements of the couples, which if they are not met, will restrict a divorce petition. As mentioned above, this argument has been a relevant consideration within each attempt to reform the law. As will be discussed the traditional motivations behind divorce law are becoming increasingly irrelevant with regard to a modern divorce.

Naturally, due to the religious elements of divorce, the evolution of the process has been severely affected by religious attitudes to marriage. The ecclesiastical courts were still a necessary part of the process until the Matrimonial Causes Act 1857. Despite the Reformation and the move toward the concept that a marriage was

¹⁹² Examples of supporters includes: R.M. Redman, ‘Marriage Should be the Traditional Protected Relationship, Not the New Concept of, “I’ll Love You Until You Get Ugly”’ (1987) 10 Family Advocate 8; G. Grisez, *Way of the Lord Jesus: Volume 1: Christian Moral Principles* (Franciscan Herald Press 1983) 848.

¹⁹³ G.W. Dent, ‘The Defence of Traditional Marriage’ (1999) 15 Journal of Law and Policy 581; G.W. Dent, ‘Traditional Marriage: Still Worth Defending’ (2003) 18 Brigham Young University Public Law Journal 419.

¹⁹⁴ H. Flory, ‘“I Promise to Love, Honor, Obey... and Not Divorce You”: Covenant Marriage and the Backlash Against No-Fault Divorce’ (2001) 34 Family Law Quarterly 133.

¹⁹⁵ The final sentence of Baroness Hale’s dissenting judgement in *Radmacher v Granatino* [2011] 1 AC 534 reads ‘marriage still counts for something in the law of this country and long may it continue to do so’.

dissoluble, the traditional arguments relating to divorce can be seen within each reform. Of note, the Royal Commission ‘to enquire into the law of divorce, and more particularly into the mode of obtaining divorces *a vinculo matrimonii*’,¹⁹⁶ outlined that there was a ‘mysterious reverence of the nuptial tie’.¹⁹⁷ It went on to recommend that dissolution should be allowed for adultery only on the basis of a high standard of proof.¹⁹⁸ An example of this attitude can be found in the 1861 amendment to the Act, attempting to minimise cases of collusion, by providing the courts with wide inquisitorial powers.¹⁹⁹ Interestingly this was a point of contest between the Archbishop’s Group and the Law Commission, as ‘Putting Asunder’ advocated an inquisitorial approach, akin to a ‘coroners investigation’,²⁰⁰ whilst the Law Commission felt this would be ‘elaborate, time-consuming and expensive’.²⁰¹

In regards to later reforms, as mentioned earlier, the Gorell Commission was divided largely on religious grounds. Subsequently, the Church of England’s move to a neutral stance, in regards to reform, was then largely credited for the enactment of the Herbert Act. Famously, the Archbishop of Canterbury triggered the Divorce Reform Act 1969 by publishing ‘Putting Asunder’.²⁰² The approach of the Archbishop’s Group was echoed by the Law Commission, who prioritised the first aim of the Act as: to buttress, rather than to undermine, the stability of marriage. Evidently, the role of the Church of England was crucial up until the introduction of the current law.

This attitude continued and, in the attempted reform of the law, via the Family Law Act 1996, discussed in greater detail in the following chapter, the opening statement of the Government by Lord Mackay stated:

‘I personally believe strongly in the value of the institution of marriage and I believe that it is a divinely appointed arrangement fundamental to the wellbeing of our community... Seeking to prevent the breakdown of

¹⁹⁶ Home Office, *Royal Commission to Enquire into the Law of Divorce, and more Particularly into the Mode of Obtaining Divorces a Vinculo Matrimonii* (Cmnd 1604, 1853).

¹⁹⁷ *ibid* 1.

¹⁹⁸ *ibid* 18-21.

¹⁹⁹ N 27, 178.

²⁰⁰ N 107, 67.

²⁰¹ N 17.

²⁰² N 107.

marriages is an objective, which goes far beyond the scope of the law... I believe that a good divorce law will support the institution of marriage by seeking to lay out for parties a process by which they receive help to prevent a marriage being dissolved'²⁰³

He then concluded with a passage from the Bible:

‘when the Pharisees said to Jesus that Moses permitted a man to write a certificate of divorce and then to divorce his wife, Jesus replied that Moses permitted it because of their hardness of heart’²⁰⁴

Given the discussion above, it is clear that religious elements have always played a strong part in divorce reform. Arguably this is a natural reality, a marriage is traditionally a religious concept and it would appear to be logical that a divorce would retain this religious link. Indeed, in *Manby v Scott*²⁰⁵ it was held that marriage was:

‘A holy state...ordained by Almighty God in Paradise before the fall of man, signifying that mystical union which is between Christ and His Church’.²⁰⁶

However, this requires marriage to be purely seen in a religious context, which as will be argued below, it may not always be construed as.

Theoretically, the jurisprudence on this is convoluted. Lord Penzance, offered a classic description of marriage in *Hyde v Hyde*²⁰⁷ where he stated ‘marriage, as understood in Christendom, may... be defined as the voluntary union for life of one man and one woman to the exclusion of all others’. One can place emphasis on his use of Christendom. However, marriages are governed by law, through the Marriage Act 1949; its public element therefore cannot be denied. Meanwhile, it is possible to have a civil ceremony, removing the religious element to the marriage. Indeed, in

²⁰³ Lord Chancellor’s Department, *Looking to the Future – Mediation and the Ground for Divorce* (Stationary Office, 1993) iii.

²⁰⁴ *ibid* v.

²⁰⁵ *Manby v Scott* (1663) 1 Mod 124.

²⁰⁶ *ibid*.

²⁰⁷ *Hyde v Hyde* (1866) LR 1 P&D.

2009, civil ceremonies accounted for 67% of all ceremonies, increasing from 62% in 1999.²⁰⁸ It would seem reasonable to observe that the majority of marriages are seen not necessarily as religious, but as civil acts. Furthermore, the trend over the past ten years would seem to indicate that this attitude is becoming increasingly common.

This conclusion highlights the main flaw of the traditional argument – that it is reliant upon the weight society places upon the religious elements of marriage. As societal conceptions of marriage turn from viewing it as a religious institution into a civil one, then the strength of the argument dramatically decreases. An important contextual point concerns the recently released Family Justice Review, which included no religious references.²⁰⁹ The panel itself is made up of a number of individuals, none of who have an official religious background, although some of them naturally may be religious.²¹⁰ Meanwhile, the Interim Report makes no reference to religion in the context of divorce. Whilst this is an interim report, the lack of any religious background may indicate a move away from the traditional perspective. Given that the traditional argument has played a role in every reform, and attempted reform, of the law, including the Family Law Act 1996; this is an interesting development.

It would seem that Lang's statement, emphasised in the previous chapter, may be correct. The traditional argument is grounded in society's conception of marriage as a religious institution. With this in mind, it would appear that any traditional argument offered in support of fault might lack strength, as it is reliant upon a changing social attitude, and one that is now becoming increasingly in the minority.

4. Socio-Economic Arguments

Socio-economic concerns relate to social and economic issues that emerge following a divorce. From a social perspective, the arguments may range from protecting social morals to protecting children of the marriage; meanwhile, from an economic perspective they can relate to the cost of the divorce itself and the economic impact of the separation. Like the traditional arguments, socio-economic contentions have also

²⁰⁸ N 2.

²⁰⁹ N 5.

²¹⁰ *ibid.*

been a consistent area of concern with regard to reform.²¹¹ The 1857 reform of divorce law was, as mentioned above, partially stimulated by the fiscal differences between the cost of a divorce in England and Scotland, £700-800 and £20-30 respectively.²¹² This bias was also one of the inspirations behind Dr Hunter, Lord Russell and the Gorell Commission's respective reform movements. Lord Gorell evocatively stated:

‘We can conceive nothing more likely to produce a sense of injustice and hardship, nor more calculated to bring the law into contempt among the people, nothing more inimical to the morality and the best interests of the country than that a system of judicature should remain unaltered which affords opportunity of redress to those who possess the means to use it, but by reason merely of cost and inconvenience, denies it to those who... have less means of escape therefrom, without recourse to law, than their richer brethren’.²¹³

Indeed, socio-economic concerns continued into the current law, however, arguably it was now more focussed, not upon the disparity between the availability of divorce to the rich and poor, but to the socio-economic impact of divorce on the “casualties” of the present system²¹⁴ - often economically weaker individuals, frequently the wife and any children.²¹⁵ This turn has reflections of the traditional approach analysed above. Whilst they may be similar, in the sense that they want to restrict divorce through strict fault based laws, their motivations are very different.²¹⁶ Primarily, one can highlight a moral thread that is distinct from religion, which runs through their arguments. Baroness Deech is strongly of the opinion that:

²¹¹ S. Fitzgibbon, ‘Marriage and the Good of Obligation’ (2002) 47 *American Journal of Jurisprudence* 41; J. Eekelaar and M. Maclean, ‘Marriage and the Moral Bases of Personal Relationships’ (2004) 31(4) *Journal of Law and Society* 510.

²¹² N 3, 17.

²¹³ N 61, 61.

²¹⁴ L. Weitzman and M. Maclean, *Economic Consequences of Divorce – The International Perspective* (Clarendon Press 1992) 3.

²¹⁵ N 17, 20-26.

²¹⁶ R. Deech, *Divorce Dissent: Dangers in Divorce Reform* (Centre for Policy Studies 1994) 20.

‘Over the last 40 years or so we have abandoned, in terms of approbation/disapprobation, law and categorisation, any pressure to conform to basic, long unchallenged tenets of private morality’.²¹⁷

This attitude was echoed by Fitzgibbon, who suggested, from a secular perspective, that the marriage connotes obligations.²¹⁸ This, he argued, is fundamentally a good thing as it provides enduring personal and social benefits.²¹⁹ Baroness Deech argued that the ‘reintroduction of fault, at least in maintenance proceedings, might send a message that behaviour in marriage is a serious issue’.²²⁰ Meanwhile, Baroness Young maintained:

‘The message of no fault is clear. It is that breaking marriage vows, breaking civil contract, does not matter. It undermines individual responsibility. It is an attack upon decent behaviour and fidelity. It violates common sense and creates injustice for anyone who believes in guilt and innocence’.²²¹

Baroness Deech supplements this moral argument with a socio-economic perspective, arguing that divorce is harmful in numerous ways.²²² She highlights the material costs of a divorce, claiming divorces cost within the wide figure of £20-40 billion a year.²²³ Within her costs she lists Legal Aid, welfare, extra housing for single parents, the running of the courts and children’s extra needs.²²⁴ On top of this she outlines the impact on third parties such as children, highlighting harms to their education, psychological development and employment opportunities, whilst raising the probability of using drink and drugs, relationship breakdown and abuse.²²⁵

²¹⁷ R. Deech, ‘Divorce – A Disaster?’ (2009) *Family Law* 1049.

²¹⁸ S. Fitzgibbon, ‘Marriage and the Good of Obligation’ (2002) 47 *American Journal of Jurisprudence* 41.

²¹⁹ *ibid* 43.

²²⁰ N 217, 1053.

²²¹ Baroness Young, HL Deb 29 February 1996, vol 569, col 1638. in J. Herring, *Family Law*, (4th edn, Longman 2009) 139.

²²² N 216, 12-13.

²²³ N 217, 1053.

²²⁴ *ibid*.

²²⁵ *ibid*.

The concept that divorce is socially damaging is not new. This was one of the main messages of the Report of the Committee on Procedure in Matrimonial Causes.²²⁶ The Finer Report on one-parent families then reiterated this,²²⁷ highlighting that despite court-based reconciliation having ‘small success’,²²⁸ it was still a necessary policy. However, its second suggestion was to increase the use of conciliation procedures, which have ‘substantial success’.²²⁹ This point will be returned to subsequently. It would seem that, on face value, that there are strong arguments for restricting the divorce process to certain fault based circumstances. However, this may be a rather narrow minded approach - warranting an investigation into Fitzgibbon, Baroness Deech and Young’s private morality arguments.

4.1. Theoretical Considerations

There is a distinction between what is private and what is public morality. Baroness Deech’s belief that we should be encouraging people, privately, to act in a certain way is disputable on the basis that many in modern society derive their morality from individual agency.²³⁰ The counter-argument to this is that society does use the civil system to encourage private morals, via tort law for example. However, torts frequently mirror criminal actions, providing private, rather than criminal, remedies. An example of this would include assault and battery. Whilst some behaviour may be against civil or criminal law and qualify within the ‘unreasonable behaviour’ bracket, it is not a requirement. Neither is adultery illegal, perhaps thankfully, given the level of petitions submitted under the fact. The private morality argument pertains that married couples should be held to a standard that is neither against civil or criminal law. The potency of this is that, by refusing a divorce, the individuals may be significantly damaged.

Further to this, Eekelaar and Maclean undertook an empirical analysis of Fitzgibbon’s argument. They investigated the reasons of 39 respondents as to why they married,

²²⁶ Home Office, *Final Report of the Committee on Procedure in Matrimonial Causes* (Cmnd 7024, 1974) para 4.

²²⁷ Home Office, *Report of the Committee on One-Parent Families* (Cmnd. 5629, 1974).

²²⁸ *ibid* 185.

²²⁹ *ibid*.

²³⁰ E. Hasson, ‘Wedded to ‘Fault’: the Legal Regulation of Divorce and Relationship Breakdown’ (2006) 26(2) *Legal Studies* 278.

exploring the couples' perceptions of responsibilities between each other and their perceptions of their own rights within the relationship.²³¹ They concluded their research with the observation that 'being married was consistent with a range of attitudes, both to marriage itself, and also to the relationship within it'.²³² Given these range of attitudes, it would appear difficult to apply a general moral argument in favour of using fault law. One may therefore cast doubt upon assertions of private morality.

Secondly, it assumes the seemingly condescending belief that people do not take marriage seriously. To take the decision to divorce is a life changing decision; surely the general presumption must be that is not undertaken lightly? Thirdly, significant private actions will always be relevant in issues such as residence where someone's conduct, such as molestation, may lead to a different residence outcome.²³³

4.2. Resulting Practical Considerations

To advance a private morality argument is to inadvertently advocate courtroom divorces. Allowing undefended petitions to proceed without a court hearing may undermine any situation where the party is held to account for the fault. Although the publicly available fact that the divorce was granted on the basis of a party's fault could be interpreted as being held to account. It also does not provide for a situation where the fault alleged can be investigated. From the above description of the special procedure and specifically Elston, Fuller and Murch's work,²³⁴ these investigations were impractical, expensive and frequently damaging. Meanwhile, if the petition is defended then the respondent must have a chance to defend himself, or herself, fully.

In regards to Baroness Deech's economic arguments, several points can be made. The debate can initially be split into two – the economic and the social cost of the process. Concerning the price of the process, a practical point may be raised. If fault were to

²³¹ J. Eekelaar and M. Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31(4) *Journal of Law and Society* 533-38.

²³² *ibid* 537.

²³³ A. Bainham, 'Men and Women Behaving Badly: Is Fault Dead in English Family Law' (2001) *Oxford Journal of Legal Studies* 219.

²³⁴ N 147, 609.

be prioritised and made more relevant, then expenditure would increase, perhaps exponentially. It would require significantly more court time. A strong counter argument is that the cost of the divorce process, not the subsequent proceedings such as ancillary relief, would be substantially reduced by introducing divorce on demand, removing any judicial or legal expense. On the other hand, making the process inaccessible would reduce applications. However, these arguments raise questions over what the cost to the individuals would be, outside of the divorce process.

It is important to appreciate the social cost of retaining or introducing a higher level of fault. There are two areas that require attention – the economic and personal impact of divorce. With regards to economics, the cost to the individual, outside of the divorce process, is unlikely to be reduced by prioritising fault. If the parties were to separate then their expenditure on housing, childcare, extra children's needs and welfare could still be relevant. Indeed, they may actually be worse to individuals, as a single parent may not have maintenance support. The impact on individuals, personally, will be dealt with under 'psychological' impact.

Overall it would seem that using fault-based laws to restrict access to divorce might increase the risk of causing higher economic and social costs. The justifications for doing so appear to be limited and are evidently debatable, as they may rely upon assumptions and conflate private and public morality arguments. Furthermore, it would seem that providing a process to match the theory would be impractical and likely to exacerbate any social or economic issues arising from a divorce.

5. Contractual Arguments

Linked to socio-economic and traditional arguments are contractual arguments.²³⁵ These rely upon the concept that a marriage is a contract, warranting protections to uphold it.²³⁶ Broadly, it may be seen as a cross between the socio-economic and traditional points of view. A general example of this can be seen in Baroness Young's

²³⁵ L. Weitzman, *Marriage Contract* (Free Press 1981); M. Brinig and S. Crafton, 'Marriage and Opportunism' (1994) 23 *Journal of Legal Studies* 869; S. Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy and Public Affairs* 189.

²³⁶ R. Rowthorn, 'Marriage and Trust: Some Lessons from Economics' (1999) 23 *Cambridge Journal of Economics* 661.

aforementioned statement that ‘the message of no fault is clear. It is that breaking marriage vows, breaking civil contract, does not matter’.²³⁷

Rowthorn, a proponent of the contractual line of reasoning, has argued that ‘no-fault divorce has undermined the notion of marriage as a contract, thereby reducing the security offered by marriage and promoting opportunism by men’.²³⁸ From a similar perspective Brinig and Crafton have stated that without fault there is ‘no incentive other than a moral obligation or a feeling of affection to prevent either party from engaging in post-contractual opportunism’.²³⁹ This seems inline with the arguments proffered by Lady Summerskill, discussed earlier, that the fifth fact of the Divorce Reform Act - five years separation without consent - made the Act a Casanova’s Charter, leaving women exposed to financial hardship, allowing their husbands to leave them impoverished. Indeed Rowthorn goes on to state:

‘When no-fault divorce has been introduced in Western countries, it has normally been imposed retroactively, without choice, on all couples who were married under the previous fault-based system. This sometimes caused severe hardship to individuals, especially women, who had lived their entire married lives with one set of expectations only to find their marital contract arbitrarily rewritten to their disadvantage by the state.’²⁴⁰

In response it is submitted that, in regards to the gendered issue that Rowthorn raises, an interesting comparison exists with Ireland. Ireland reformed their divorce law in 1996, allowing, for the first time, a court to dissolve a marriage contract, permitting the parties to remarry. Shannon highlights that there:

‘was a fear prior to the referendum in Ireland that a large amount of men would be the first to make applications for decrees of divorce in an attempt to ‘impoverish their spouses’. It is interesting to note that the latest statistics

²³⁷ N 221.

²³⁸ N 236.

²³⁹ M. Brinig and S. Crafton, ‘Marriage and Opportunism’ (1994) 23 *Journal of Legal Studies* 879.

²⁴⁰ N 236, 686.

show that women outnumber men by approximately two to one in bringing an application to divorce'.²⁴¹

Before commenting on this it is important to note that Ireland introduced no-fault divorce, evidenced by a separation period of at least four years within a five-year period. Whilst Ireland has significant social differences to England and Wales, for example a much higher Roman Catholic population, this would seem to reduce the gendered dimension of Rowthorn's argument.

Both Rowthorn and Brinig and Crafton's arguments may be criticised with regard to their principles. As stated by Ellman and Lohr, with reference to Brinig and Crafton, although it is equally applicable to Rowthorn, their arguments depend 'upon their particular definition of "opportunism" – a definition that follows from their particular vision of the terms of the marriage contract'.²⁴² This line of inquiry is similar to that undertaken earlier in this chapter with regard to socio-economic arguments concerning private and public morality. It would appear that these commentators might be assuming that certain standards of private morality are the intentions of all parties to every marriage.²⁴³

Typically the law has been uncomfortable importing normal contractual principles into relationships. Indeed, in *Jones v Padavatton*,²⁴⁴ it was held that whilst family members could enter legally binding contracts in regards to family affairs, there was a presumption against such intention. Furthermore, in *Sutton v Mishcon de Reya*²⁴⁵ a distinction was made between a contract for sexual relations and a contract between persons who were cohabiting in a relationship that involved such sexual relations. One of the strongest examples of the courts unwillingness to imply contractual principles into relationships can be found in Lord Justice Atkin's judgement in *Balfour v Balfour*,²⁴⁶ where he stated:

²⁴¹ G. Shannon, *Family Law* (3rd edn, OUP 2008) 35-36.

²⁴² I. Ellman and S. Lohr, 'Marriage as Contract, Opportunistic Violence, and other Bad Arguments for Fault Divorce' (1997) *University of Illinois Law Review* 741.

²⁴³ *ibid.*

²⁴⁴ *Jones v Padavatton* [1969] 1 W.L.R. 328.

²⁴⁵ *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch).

²⁴⁶ *Balfour v Balfour* [1919] 2 K.B. 571.

‘to my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts been though there may be what as between other parties would constitute consideration for the agreement’.

However, he does go on to state, ‘they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences’.²⁴⁷ Naturally in a marriage the parties do intend there to be legal consequences. Yet, this does not detract that ‘marital contracts’ must be viewed distinctly from traditional contracts as they are relationship based. The traditional vows state:

‘I... take thee... for my wedded wife [or husband], to have and to hold, from this day forward, for better, for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death do us part’.²⁴⁸

Whilst this is a wide definition, it does not account for a plethora of events, which may occur within a marriage, such as any subsequent children. This point is expanded upon by Fitzgibbon, who reasons that, beyond events such as childbirth, many marital ‘obligations’ are not mentioned at the wedding,²⁴⁹ these include living with the spouse, supporting her materially or helping with babies.²⁵⁰ This argument links in with Dewar’s belief that as family law concerns love, social life and feeling, it should be ‘characterized as chaotic, contradictory or incoherent.’²⁵¹ Perhaps the best answer is to consider Cohen’s comment that:

‘Some might object to the characterization of marriage as a contract. They observe that marriage seems more like status than contract. That is, it is the state that defines and specifies most of the explicit rights, duties and privileges of marriage, rather than the parties. They also note the absence of substantial specific obligations voiced at the time of formation. How could this be a

²⁴⁷ *ibid.*

²⁴⁸ Church of England, *The Book of Common Prayer – And Administration of the Sacraments and Other Rites and Ceremonies of the Church* (Oxford University Press 1962) 301.

²⁴⁹ N 218, 45.

²⁵⁰ *ibid.*

²⁵¹ J. Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 *The Modern Law Review* 468.

contract if there are virtually no specific, explicit duties? These objections are not fatal to the concept of marriage as contract. They do no more than highlight the peculiarities of this contract'.²⁵²

If one is determined to see a marriage as a contract, then it is most definitely a peculiar one. Given its distinctive nature, it would not be out of place for reforms in the law to be able to have a retroactive affect.

From a different perspective, Fitzgibbon, mentioned above, has suggested that a contractual metaphor is too 'narrow' and does not cover the 'entire story',²⁵³ instead preferring the concept of a fiduciary relationship.²⁵⁴ Whilst this would appear to fit his model of matrimonial 'obligations',²⁵⁵ as has already been discussed with reference to Eekelaar and Macleans research, this may be casting a general assumption about which 'obligations' married couples should adhere to.²⁵⁶

From a more social, but still contractual perspective, Cohen has proffered the view that during a marriage a woman loses her value as 'young women are valued as mates by both old and young men'.²⁵⁷ This imbalance provides:

'the opportunity for strategic behaviour whereby one of the parties, generally the man, will perform his obligations under the marriage contract only so long as he is receiving a net positive marginal benefit and will breach the contract unless otherwise constrained once the marginal benefit falls below his opportunity cost'.²⁵⁸

This argument seems to have a cynical edge, indeed, Cohen continues stating 'the wife typically lacks the resources with which to bribe her husband to stay in the

²⁵² L.R. Cohen, 'Marriage: the long-term contract' in A.W. Dnes and R. Rowthorn (eds) *The Law And Economics of Marriage & Divorce* (CUP 2002) 24.

²⁵³ N 218, 45.

²⁵⁴ *ibid.*

²⁵⁵ See above with reference to socio-economic arguments in favour of fault.

²⁵⁶ J. Eekelaar and M. Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31(4) *Journal of Law and Society* 533-38.

²⁵⁷ N 252.

²⁵⁸ N 252, 25.

marriage even if wished to do so'.²⁵⁹ This appears to take an overly pessimistic view of relationships, ignoring the strong emotional ties between married couples. However, it must be highlighted that Cohen is referring to 'the opportunity' to behave in a certain way, not making generalisations, although he seems close to doing so.

It would seem that the argument for introducing fault on the basis of contractual motivations lacks foundations. It is overtly projecting contractual principles into an alien situation. The rigid concept of a contract is difficult to align within the broad definitions of a relationship, moreover the notion that failing to do so provides for opportunism equally ignores the individual conceptions of a relationship. Meanwhile, any contractual arguments based on social perspectives, as put forward by Cohen appear to overlook factors other than material benefits. Combined, this analysis may reduce the tenacity of contractual justifications for fault.

6. Psychological Arguments

The use of fault can have a profound personal impact upon individuals. The significance of divorce was a pertinent question in the 20th century, strongly evidenced by Herbert's Act, which referenced providing a humane and honest divorce. Meanwhile this was evident within the focus of the Law Commission, in the creation of the current law, upon reducing bitterness, distress and humiliation; and in the creation of the failed Family Law Act 1996 – discussed in greater detail in the following chapters. The debate is not clear cut, whilst the aim of earlier reforms, such as the Herbert Act and the Divorce Reform Act 1969, were upon balancing different arguments relating to fault, it would seem that the debate has taken a new turn and is now polarised between two distinct arguments over the impact of fault-based divorce.

On the one hand, it has been argued that fault can provide a strong psychological benefit, allowing the parties to apportion blame and move on. On the other hand, fault has been criticised for increasing bitterness, distress and humiliation. The modern debate has therefore become one of potential damage against potential utility. The chapter initially queries whether there is a demand for fault from individuals,

²⁵⁹ *ibid* 26.

questioning two separate surveys. It then moves on to analyse issues around the terms ‘innocence’ and ‘blame’, before critiquing whether the law should seek to create a psychological benefit.

Initially, it would seem astute to recognise that a harmonious divorce is not common, indeed, as Day Sclater notes, it is a rare find.²⁶⁰ Two individuals who have bound their lives together legally, and often through their children, religion and assets, have made the decision to separate. It is perhaps natural to expect there to be some form of conflict within this process. The question turns to the statements above, and whether a fault-based divorce can benefit or damage the divorcees psychologically.

6.1 Is There A Demand For Fault?

There are several arguments which support the concept that fault is beneficial. Davis and Murch, in their survey ‘Conciliation in Divorce’, which was undertaken between 1982 and 1984,²⁶¹ found that many respondents valued the fault element;²⁶² and sought to allocate responsibility.²⁶³ Specifically, the survey found that 42% believed there was equal responsibility between the spouses for the breakdown, whilst 7% claimed responsibility and 46% attributed responsibility to their spouse.²⁶⁴

Of note, is that the 46% regards situations where a spouse thought the other spouse was primarily or totally responsible. There is a wide difference between ‘primarily’ and ‘totally’. For example, a situation where a husband was not attentive, and then his wife committed adultery, could be interpreted as either ‘equally responsible’ or that the wife was ‘primarily’ to blame. It would seem to be a highly subjective area, casting doubt over the actual figure in regards to allocation of responsibility. Nonetheless, it is relevant enough to be an issue. Richard’s added to this view commenting that:

²⁶⁰ S. Day Sclater, *Divorce: A Psychosocial Study* (Ashgate Publishing 1999) 181.

²⁶¹ G. Davis and M. Murch, *Grounds for Divorce* (Clarendon Press 1988) 27.

²⁶² *ibid* 85-86.

²⁶³ *ibid* 49-51.

²⁶⁴ *ibid* 49.

‘Blame, accusation, and strong feelings of injustice are the normal divorce and they get in the way of couples making reasonable arrangements about children and money. Neither legal fiction of the lack of fault or imposed orders do anything to relieve the situation, rather the reverse’.²⁶⁵

In contrast to these findings the Law Commission public opinion survey, in 1990, found that 72% agreed ‘that it was good that anyone who wants a divorce can get one sooner or later’²⁶⁶ and that 71% ‘found the present five year period too long’,²⁶⁷ whilst 83% agreed ‘that it was good that couples who did not want to put the blame on one of them did not have to do so’²⁶⁸ and finally 84% agreed that it was ‘good that one could begin proceedings immediately if the other had committed adultery or behaved intolerably’.²⁶⁹ Immediately, one can distinguish the two sets of statistics on the basis that Davis and Murch were questioning actual divorcees, whilst the Law Commission was simply taking account of public opinion. In this regard it is difficult to see the two sets of statistics in the same light, as the study groups would be likely to have different perspectives of the process. Meanwhile, the Law Commission statistics merely show that 83% of participants thought it was ‘good’ that couples did not *have* to allocate blame, if they did not want to do so. It would appear that these statistics do not depreciate the value that some of the participants, in the ‘Conciliation in Divorce’ study, placed in blame.

Stemming from Davis and Murch’s work, three issues would seem to be of importance: the question of innocence, the necessity of adjudging guilt and the relevancy of a psychological benefit to divorce law.

6.2 Innocence

With regard to ‘innocence’, Davis and Murch commented that certain parties felt that they were ‘innocent’ and that this was aggravated by the fact that they then had the

²⁶⁵ M. Richards ‘Divorcing Children: Roles for Parents and the State’ in M. Maclean and J. Kurczewski (eds) *Families, Politics and the Law: Perspectives for East and West Europe* (Clarendon Press 1994) 312.

²⁶⁶ Law Commission, *Family Law - The Ground for Divorce* (Law Com No 192, 1990) 4.

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

responsibility of obtaining a divorce.²⁷⁰ Participants went on to argue that ‘if you lead a blameless marital life, you should be able to feel secure in your marital status’.²⁷¹ This seems to provide a schizophrenic message, advocating fault and concepts of ‘innocence’ and ‘guilt’, yet also criticising the burden of the responsibility of having to obtain a fault based divorce. One can question what the full ramifications of this would be? Initially it would seem to advocate either a system whereby divorce would not be allowed ‘if you lead a blameless marital life’, or perhaps they are advocating a system based on joint consent. This is understandable, however, when looking at the evidence, Davis and Murch quote two respondents saying:

‘She’s the guilty party and she’s got away without any trouble. It’s the one who has to take action and has all the trouble who has to suffer... [another respondent stated] I don’t think it’s fair that my husband’s had to do nothing and I’ve had to do everything. He’s the one who went. I’ve spent years on it.’²⁷²

Given this, it would appear that Davis and Murch, whilst portraying this as an argument in favour of retaining fault, could have overlooked that it may actually be contrary to this. The respondent seems to be highlighting the straining procedural effort to attain a divorce. On a practical note, this seems to be a slight exaggeration of reality. The special procedure is, as noted above, straight forward. Furthermore, bar financial restraints, it is possible to hire a solicitor to carry it out, removing the inconvenience. Perhaps the burden of the procedure is therefore not decidedly cumbersome. Aside from this, one may posit the question – would another process be any different? Presumably the ‘innocent’ party would still seek a divorce in a no-fault system. If this is so, then the party would have to go through the administrative hurdles of this system too, albeit these may be slightly less difficult. In other words, the onus would still be on the ‘innocent’ party to obtain the divorce. This would seem, contrary to Davis and Murch’s statement, to be against a fault system. Overall the concept that parties could somehow apportion ‘innocence’ and ‘guilt’, whilst avoiding the procedural requirements of doing so, appears to be convoluted.

²⁷⁰ N 261, 85.

²⁷¹ *ibid.*

²⁷² *ibid.*

6.3. Blame

This leads on to the question - should a divorce apportion blame? As mentioned above, there would seem to be some value to slightly under a majority of divorcees in apportioning blame. Day Scalter is firmly of the opinion that:

‘the time has come to set aside pathologised images of the divorce process, and to recognise that the future psychological health of our society rests upon an acceptance of the reality of the darker side of human nature, of its hostile and destructive aspects, which co-exist with its finer and more ‘civilised’ parts.’²⁷³

This statement is, in many regards, refreshing. It has echoes of Dewar’s logic - divorce is dealing with is the dissolution of a relationship and is likely to be emotional, with the potential to be hostile and destructive. However, it is also sweeping, leading one to question whether the use of fault would be relevant in all cases. As Elston, Fuller and Murch demonstrated, this did not seem to be the case when the judicial approach was applied to the current law, stimulating the introduction of the special procedure.²⁷⁴ Further to this, the Law Commission in 1990 assessed the implications of the law on creating bitterness, distress and humiliation.²⁷⁵ This assessment is dealt with in great detail in the following chapter. However, in sum the Law Commission found that the prevalence of fault-based claims, particularly under the grounds of behaviour, creates bitterness, distress and humiliation.²⁷⁶ This can be distinguished from adultery petitions, which tend to ‘carry less stigma and are more likely to involve agreement’.²⁷⁷ In contrast, the behaviour petitions may create hostility or exacerbate pre-existing antagonism between the parties.²⁷⁸

It was put forward that a lack of fairness, which can be commonly found in fault-based claims, results in bitterness, distress and humiliation, as the respondent ‘will

²⁷³ N 260, 184.

²⁷⁴ N 147, 609.

²⁷⁵ Law Commission, *Facing the Future – A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) 20.

²⁷⁶ *ibid* 21.

²⁷⁷ *ibid* 20.

²⁷⁸ *ibid* 21.

often resent the fact that he is being held responsible'.²⁷⁹ At the same time, the requirements for separation may also stimulate the parties to make 'more damaging allegations'.²⁸⁰

The Law Commission went on to outline the three possible types of recipients of a behaviour petition.²⁸¹ These included a collaborating recipient,²⁸² someone who received a petition 'out of the blue'²⁸³ and, lastly, a party who was guilty of violence or serious misconduct.²⁸⁴ In each situation a behaviour-based petition was alleged to have created bitterness, distress and humiliation. In the first situation this was a result of encouraging the petitioner to 'dwell on everything in the marriage and about the respondent which is bad and therefore to encourage a resentful and uncompromising attitude'.²⁸⁵ In the second situation it was argued that the respondent was 'likely to react bitterly and antagonistically to the surprise petition'.²⁸⁶ Lastly, in the third situation, it was argued that the petition could ritualize hostility that had been present in the marriage.²⁸⁷

Arguably it is the third type of petitioner – a party who was guilty of violence or serious misconduct – which is most relevant to Day Sclater's argument. The other two types would seem to be irrelevant. Whilst there may be an argument for conceptualising the darker side of human nature, it would not appear necessary to do so across the board. Meanwhile, even if the third type of petitioner were engaged then, as the Law Commission highlighted, this may run the risk of ritualizing hostility.

However, given this, one may question the practical ramifications of following this theoretical notion. For a court based system to investigate the question of blame, taking on the 'coroners' approach relied upon earlier, the parties would have to be

²⁷⁹ *ibid* 20.

²⁸⁰ *ibid.*

²⁸¹ *ibid* 21.

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ *ibid.*

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

exposed to a considerable amount of court time. This is simply not fiscally or practically an option. Furthermore, any attempt to do so would likely only be a crude attempt to deal with the situation.

6.4. Relevancy

With regards to relevancy, one can pose the question – should divorce provide a psychological benefit? Should it have a therapeutic aim? The answer to this question depends on the interpretation of a ‘divorce’. As mentioned above, a divorce can be seen as a conflict prone legal situation, dealing with the legal separation of two individuals. If this interpretation is followed then there seems little reason to provide a therapeutic element. However, there is another view, encapsulated in Day Sclater’s statement:

‘despite the emotional trauma which divorce can bring, the story is not altogether a pessimistic one; rather, divorce is not only about coming to terms with loss, but it is also about the positive rebuilding of a new post-divorce sense of self. This rebuilding process, however, involves revisiting and reinterpreting the past of the marriage from the vantage point of the present; this making sense of the past may be a pre-requisite for letting go and moving on.’²⁸⁸

To believe that once a divorce is granted, that there are no psychological implications for the parties, is idealistic, verging on naïve. There are clearly economic issues, which are exacerbated and complicated by any relevant children, which may further aggravate issues in regards to custody. These issues are pertinent because they do not dissipate for considerable periods of time, for example, at least until a child matures into an adult. Ideally the psychological state of the parties would not impact upon these issues. However, frequently, this may not be the case. Given these implications, the dual approach, of looking at the dissolution of the marriage, and the consequences would seem to be logical.

²⁸⁸ N 260, 184.

The psychological impact of blame can be seen to have a mixed impact. It would appear logical to accept Day Sclater's arguments that divorces can have darker elements to them and that they can be viewed in a more holistic fashion, with regard to rebuilding a new life. However, as an all encompassing argument for the use of fault and the apportioning of blame, it would seem ill suited, running the risk of increasing hostility. With regard to this, the above argument creates the impression that the 'psychological' argument could have sway in select circumstance.

7. Tort-Based Arguments

The belief that the legal system should pass judgment on the fault of one party is one that has been briefly discussed, however, it deserves significant attention. As the previous chapter demonstrated, within the development of the law, there has always been a strong emphasis upon fault and party misconduct. Indeed, this is particularly relevant in regards to ecclesiastical divorces, which stressed 'good vs. evil'; and which were later compounded by the cases of 'criminal conversation'.

Tort-based arguments draw comparisons between the wider concept of divorce and tort; specifically this can be found in Perry's work,²⁸⁹ which was further developed by Swisher.²⁹⁰ Perry summarises the debate, stating:

'Some have argued that no-fault divorce has hurt women economically, stripping them of bargaining power that put them in a stronger negotiating position under the system where proof of fault was required. While others contend that women are no worse off under no-fault that they were under the fault system, no one has argued that the economic interests of divorcing women are adequately protected under no-fault.'²⁹¹

Her central thesis is that if divorce is viewed as an 'accident', then 'policies and analyses drawn from tort law can provide the theoretical basis... for an alimony

²⁸⁹ T. L. Perry, 'No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts' (1991) *Ohio State Law Journal* 55.

²⁹⁰ P. N. Swisher, 'Reassessing Fault Factors in No-Fault Divorce' (1997-1998) 31 *Family Law Quarterly* 269.

²⁹¹ N 289, 55.

award'.²⁹² The focus of this argument is based on economics. Swisher, building upon Perry's work, adds a social agenda to the argument, stating that he seeks to:

‘explore the ways in which fault-based factors, when applied to serious or egregious marital misconduct that significantly contributes to the marital breakdown, may still be utilized in order to bring about enhanced social, economic, and legal protection to spouses on divorce, while concurrently establishing a greater sense of responsibility and accountability in marital relationships.’²⁹³

The economic focus of these arguments is the pertinent issue. It would seem that both Perry and Swisher may be conflating a divorce, overlooking the fact that a ‘divorce’ is many events, such as sending a petition and ancillary relief. This leaves them open to the criticism that they are advocating fault factors with regard to the economic consequences of divorce, whilst turning a blind eye to the actual divorce petition.²⁹⁴

Perhaps the only interpretation of this conflation, which would allow it to work, would be if the petition were fault based. The following decision on the petition could then bear implications upon the economic consequences in a subsequent hearing. However, following Perry's reasoning, the petition stage would have to be based on establishing whether or not there was an ‘accident’, rather than an investigation into the economic consequences of the parties' actions. This would require a further analysis of the facts.

The practical implications of this model seem strained. Initially, one can highlight that it would require a considerable amount of court time. Not only would this have economic implications, but also it may be viewed negatively by the participants, as demonstrated by Elston, Fuller and Murch.

Secondly, the arguments seem to be focussed on the behaviour of one spouse, however, this may be oversimplifying the problem, ignoring the role of the other

²⁹² *ibid* 57.

²⁹³ N 290, 276.

²⁹⁴ *ibid* 318.

spouse. Given that, in the Conciliation in Divorce' survey discussed above, 42% of participants considered they were equally responsible, and a further 46% said their spouse was primarily or totally responsible, it would appear difficult to accurately apportion blame, especially when there would be potential fiscal consequences within ancillary relief. It is also likely that this would result in an increase in the number of appeals, as it would significantly amplify opportunities for disagreement.

Thirdly, one may question whether the participants in the above survey would have responded differently if the implications of their partner's actions would have had a significant economic impact. How would this have affected their relationship? With regards to social and psychological issues, this may be particularly relevant in cases that may feature excessive conflict.

Fourthly, it would appear to have manifest punitive elements, which may give distinct advantages to petitioners. To prioritise fault in this fashion, in effect, lends significant and perhaps undue power to one of the spouses. As Dewar notes, family law concerns emotions, relationships and love.²⁹⁵ Surely, part of relationships includes making mistakes. However, in this context, once a mistake has been made, if this were to be upheld in court, then knowledge of this precedent would give considerable power to the unoffending individual. As discussed above, the concept of unreasonable behaviour has large subjective elements. Resultantly, the interpretation of unreasonable behaviour would have to be fundamentally altered to accommodate for this, failing to do so would lead to the application of, potentially, economically harmful rulings, based on the subjective opinions of petitioners. Although, this seems to have been noted by Swisher, who makes frequent reference to 'serious... misconduct',²⁹⁶ implying a higher objective standard of behaviour. Nonetheless, this punitive aspect is difficult to align with family law. Allowing this element of fault would seem to target these fundamental factors.

Ultimately, one must accept that to imply tort-based principles into divorce would be accompanied by a litany of problems, undermining its equitable motivations to provide economic and social balance. Whilst the law on divorce has strong

²⁹⁵ N 251, 468.

²⁹⁶ N 290, 318.

connections to fault in a tortious sense, it would seem to be out of place in modern society and manifestly impractical.

8. Conclusion

This chapter has demonstrated that the select theoretical arguments analysed above, which favour retaining fault within divorce, may be limited. It analysed numerous theories relating to fault. These included traditional, socio-economic, contractual, psychological and tort-based theories. It found evidence to support the belief that the arguments may be wanting.

Specifically it identified the waning influence of the traditional arguments relating to the sanctity of marriage. As an argument its reliance upon changing societal perceptions of marriage has steadily reduced its influence. This links with the findings of the previous chapter, explaining the declining role the sanctity of marriage has played within divorce law. Given this, it would appear that there is little evidence to support the use of fault on the basis of traditional justifications. The analysis undertaken seems to clash with current law, which places its first aim as buttressing the stability of marriage.

With regard to socio-economic concerns, the chapter highlighted that the arguments in favour of using fault to provide socio-economic benefits may be conflating private and public morality arguments. Nevertheless, it was put forward that fault may actually increase the opportunities for negative socio-economic outcomes. It would appear that for the law to avoid creating opportunities for these negative outcomes, a no-fault model could be adopted.

Related to both of the above concepts, contractual arguments were found wanting on the basis that family law is typically averse to imposing contracts and that practical limitations exist. As stated, it is difficult to impose the rigid confines of a traditional contract into a relationship, as many individuals may expect differing obligations. It would appear difficult to justify fault on a contractual basis.

Simultaneously, on the evidence discussed, there appeared to be both practical and theoretical limitations with regard to tort-based arguments. On the analysis undertaken, it seemed that tort-based arguments conflated a divorce petition with ancillary relief. To accommodate these tortious principles, the law would have to avoid subjective reasons for divorce and focus largely on objectivity. Meanwhile, it was raised that introducing fiscal results in such a fashion may further negatively impact upon the divorcees relationship. Therefore, there appeared little to justify the use of fault with regard to tortious principles.

Lastly, the use of fault for psychological motivations was found, in some select circumstances, to provide a benefit. Specifically, where there had been serious misconduct or violence. However, when weighed against the majority of divorces, this would not merit the overall retention of fault, and in itself, may have some internal problems.

It would seem that the arguments for fault are based on loose theoretical foundations, either due to a lack of social consensus on the subject, as with the traditional arguments, or as a result of poor practical applicability. From a theoretical perspective, it may be submitted that fault could be abandoned. This conclusion is not new, being reached by the Law Commission in 1988.²⁹⁷ However, the modern day theoretical analysis is supplementary and valuable with regard to the rest of the thesis. The following chapter shall question no-fault divorce and attempted no-fault reforms.

²⁹⁷ N 275.

Chapter 3. No-Fault: Reforming the Law

Synopsis

The previous chapters concluded that the modern law, contained within the Matrimonial Causes Act 1973 and based on a mixed fault and no-fault system, has developed to contain broadly divided motivations, split between seeking to protect the sanctity of marriage and providing a fair system with minimal bitterness, distress and humiliation. Furthermore, it suggested that fault based divorce, when placed under modern analysis, lacked theoretical justification.

This chapter shall turn the debate onto no-fault, concentrating on the failed Family Law Act 1996. The chapter contributes to the thesis in two ways. Firstly, it broadly argues that the Family Law Act 1996 failed due to a divide both in regards to its objectives and theoretical impetus - between protecting the sanctity of marriage and providing a no-fault system with minimum bitterness, distress and humiliation. This contributes towards the wider hypothesis of the thesis. Secondly, despite outlining why the Family Law Act 1996 failed, it defends no-fault divorce as a concept, identifying the failure of the Act as a result of a theoretical divide which caused practical problems.

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1. Introduction

This chapter is concerned with the concept of no-fault divorce. It has been demonstrated that the arguments in favour of fault may lack justification. As a starting point, the chapter adopts the criticism of fault as support for no-fault divorce. As stated, the criticism of fault as a concept and the conclusion reached was not a new one, the Law Commission's 1988 Discussion Paper and 1990 Report also reached the same observation. The result of this was an attempt, by the Conservative Government lead by John Major, to enact a no-fault reform through the Family Law Act 1996. This chapter seeks to analyse this reform attempt. It proposes that there is evidence to support the argument that the failure of the Family Law Act 1996 was the result of convoluted aims and practical problems. However, it submits that this should not undermine the concept of no-fault divorce.

This analysis shall assess each Part of the Act, adding a modern perspective to the scrutiny. Of note will be the investigation into mediation, with a view to understanding the divorce process. This is particularly relevant as mediation, is frequently associated with no-fault divorce.

The chapter shall draw out two broad conclusions. Firstly, it argues that despite the failure of the Family Law Act 1996, no-fault divorce is still a viable option for the future. Secondly, it will outline why the Family Law Act 1996 failed and suggest that a convoluted approach to divorce law is unlikely to be successful. This will contribute towards the analysis of the final chapter, which considers what the aims of a modern divorce law could include.

2. Reform Attempts

Soon after the Matrimonial Causes Act 1973 was introduced, it was placed under significant scrutiny by Elston, Fuller and Murch's study,²⁹⁸ contributing towards the introduction of the Special Procedure.²⁹⁹ Given the transformative nature of this reform, it was perhaps to be expected that further investigations into the law were

²⁹⁸ N 147, 609.

²⁹⁹ N 27, 382.

subsequently tabled. This chapter shall analyse the impetus behind the law reform process, leading up to the Family Law Act 1996 with an investigation of the 1985 Report of the Matrimonial Causes Procedure Committee and the Law Commission's 1988 Paper and 1990 Report. This acts as a necessary foundation and precondition to the analysis of the 1996 Act itself and the attempted introduction of no-fault divorce.

2.1. The Booth Committee

As Freeman stated, the special procedure was nothing short of 'revolutionary.'³⁰⁰ Therefore it is hardly surprising, that, given the fact that it was not passed through Parliament or debated openly,³⁰¹ divorce reform came back on the agenda when the Lord Chancellor, in 1982, appointed a committee to examine the procedure and practice of the courts under the Matrimonial Causes Act 1973. This was with the aim of recommending reforms that might mitigate the intensity of disputes, encourage settlements and provide further for the welfare of the children, whilst having regard to simplification and saving costs.³⁰² In 1985 the Report of the Matrimonial Causes Procedure Committee,³⁰³ chaired by Justice Booth, was published, arguably taking the first step towards reform.

Following the Lord Chancellor's directions, the Booth Committee put forward numerous suggestions concerning divorce procedure.³⁰⁴ Amongst these, important 'First Steps' were outlined, including renaming a petition to an 'Application for divorce' whilst referring to the parties as the Applicant and Respondent.³⁰⁵ Arguably, these suggestions were not 'radical', however, they do indicate a new direction in regards to divorce reform, away from adversarial traditions. Whilst it did not suggest no-fault divorce, this new direction could be linked to a growing movement. Building on this, it was proposed that no particulars of behaviour should be given in an Application under section 1(2)(b) Matrimonial Causes Act 1973,³⁰⁶ and that the

³⁰⁰ N 156, 258.

³⁰¹ N 27, 382.

³⁰² Home Office, *Report of the Matrimonial Causes Procedure Committee* (Stationery Office, London, 1985) 1.

³⁰³ *ibid.*

³⁰⁴ *ibid* 91.

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

parties should be able to file a joint statement of arrangements for the children.³⁰⁷ This would have departed from the current process under the special procedure, outlined in the previous chapters, which requires that the statement of arrangements be filled in by the petitioner and then sent to the respondent. It deals with issues such as where the children will live and be educated, their childcare and maintenance needs and contact issues. Beyond administrative matters, the Booth Committee suggested that there should be an initial hearing before a registrar,³⁰⁸ at which point conciliation should be available.³⁰⁹

2.2. The Law Commission Paper And Report

Following the Booth Committee, the Law Commission, in 1988, published a Discussion Paper.³¹⁰ This outlined the current law and the background to the development of modern divorce law.³¹¹ It then moved on to critique the law based on the original objectives of the law and suggested a no-fault system.³¹² The Law Commission found that the law ‘falls well short of the objectives it set out to fulfil’³¹³ and two further objectives the Law Commission had added. It set out to question whether these objectives were met, investigating:

- ‘(a) Does the law buttress the stability of marriages?
- (b) Does the law enable the “empty legal shell” of a dead marriage to be destroyed?
- (c) Does the law promote “maximum fairness”?
- (d) Does the law promote “minimum bitterness, distress and humiliation”
- (e) Does the law avoid injustice to an economically weak spouse, usually the wife?
- (f) Does the law adequately protect the interests of the children of failed marriages?’³¹⁴

³⁰⁷ *ibid* 92.

³⁰⁸ *ibid*.

³⁰⁹ *ibid*.

³¹⁰ N 275.

³¹¹ *ibid* Part II.

³¹² *ibid* Part III.

³¹³ *ibid* 28.

³¹⁴ *ibid* 10.

It then went on to consider alternative models, analysing a fault-based model and then, under the umbrella term ‘no-fault’: breakdown,³¹⁵ separation,³¹⁶ mutual consent³¹⁷ and unilateral demand models.³¹⁸ Similar concepts to mutual consent and breakdown can be found in the current law. The unilateral demand model allows either party to petition for divorce without any requirements, aside from administrative ones. In short this would be the special procedure, without the requirements to fulfil one of the five facts of the current divorce law. The separation model provides for divorce based on a period of separation, two years separation with consent, as found in the current law, being an example of this and the notion of ‘irretrievable breakdown’ reflecting the breakdown model, albeit with the fault facts. The Law Commission proceeded to suggest that, of the potential proposals, two no-fault options were most realistic: divorce after a period of separation and divorce after a period of transition, allowing them to reflect and make the necessary arrangements for the future.³¹⁹

Shortly after the Discussion Paper, the Law Commission released a Report titled ‘Family Law – The Ground for Divorce’.³²⁰ The composition of the Law Commission was significantly altered, only Mr. Trevor Aldridge and Professor Brenda Hogget, later Baroness Hale, remained, whilst the other three Commissioners had left. The Report went further than the Law Commission’s previous efforts, adopting a more socio-legal attitude when critiquing the current law, rather than a legally based critique, as described above. The Report found that the law was confusing and misleading,³²¹ discriminatory and unjust,³²² distorted party bargaining positions,³²³ provoked unnecessary hostility and bitterness,³²⁴ did little to save the marriage³²⁵ and could make things worse for the children.³²⁶ The Law Commission outlined what it believed were the objectives for the law. This is an important distinction to outline.

³¹⁵ *ibid* 29.

³¹⁶ *ibid* 30.

³¹⁷ *ibid* 31.

³¹⁸ *ibid* 32.

³¹⁹ *ibid* 45.

³²⁰ N 266.

³²¹ *ibid* 5.

³²² *ibid* 6.

³²³ *ibid* 7.

³²⁴ *ibid*.

³²⁵ *ibid*.

³²⁶ *ibid* 8.

The previous Discussion Paper had outlined, mainly, the Divorce Reform Act 1969's objectives and, beyond this, the two new objectives discussed above. In contrast, the Report outlined similar, but unique, objectives:

- ‘(i) It should try to support those marriages which are capable of being saved.
- (ii) It should enable those which cannot be saved to be dissolved with the minimum of avoidable distress, bitterness and hostility.
- (iii) It should encourage, so far as possible, the amicable resolution of practical issues relating to the couple's home, finances and children and the proper discharge of their responsibilities to one another and to their children.
- (iv) It should seek to minimise the harm that the children of the family may suffer, both at the time and in the future, and to promote so far as possible to continued sharing of parental responsibility for them.’³²⁷

This can be contrasted with the previous objectives of the Law Commission in its 1966 Report of buttressing the stability of marriage and providing a process with maximum fairness and minimum bitterness, distress and humiliation.³²⁸

When one compares the two Reports, the 1990 Report advocating individual marriages, the 1966 Report supporting the stability of marriage itself, it is clear that they have very different objectives. The emphasis in the 1990 Report is, clearly, more concerned with creating a humane process, where divorce was unavoidable. In contrast, the 1966 Report seems to aim to provide an idealised divorce law – attempting to avoid divorce all together and then, when it ‘regrettably’ occurs, to provide a suitable process. It is a fine, but important, distinction, especially when considering the Governments subsequent proposals below.

The Law Commission's Report, similar to the Discussion Paper, then went on to outline potential models for reform.³²⁹ It concluded that a no-fault option was preferable and:

³²⁷ *ibid* 10.

³²⁸ N 17.

³²⁹ N 266, Part III.

- ‘(i) that irretrievable breakdown of the marriage should remain the sole ground for divorce; and
- (ii) that such breakdown should be established by the expiry of a minimum period of one year for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable’.³³⁰

The Report suggested that the party or parties should make a statement that their marriage had broken down which would be followed by a minimum period of reflection of a year.³³¹ Beyond this, the Report, like the Booth Committee, dedicated a significant amount of time to a discussion of procedure.³³² Similarly, it suggested numerous procedural changes, largely with the aim of providing neutrality, such as referring to the parties as ‘husband’ and ‘wife’ rather than ‘petitioner’ and ‘respondent’.³³³ At the same time the Report suggested that opportunities for counselling, conciliation and mediation should be outlined and encouraged.³³⁴ It would seem from both the Law Commission Paper and Report that no-fault divorce should be the reform model.

In 1993 the Government responded to this by creating a Consultation Paper entitled ‘Looking to the Future – Mediation and the Ground for Divorce’.³³⁵ The differences in tone and direction between the Law Commission’s Report and the Consultation, beyond the broad framework of no-fault divorce based on a period of separation, is surprising. Immediately the tone was set when the Lord Chancellor, in the foreword, outlined that ‘I personally believe strongly in the value of the institution of marriage and I believe that it is a divinely appointed arrangement fundamental to the wellbeing of our community’.³³⁶ Meanwhile, the objectives laid out in chapter one included: to support the institution of marriage and to include practicable steps to prevent the irretrievable breakdown of marriage, whilst ensuring that the parties understand the practical consequences of divorce before taking any irreversible decision; then, where

³³⁰ *ibid* 20.

³³¹ *ibid* 53.

³³² *ibid* Part V.

³³³ *ibid* 52.

³³⁴ *ibid* 54.

³³⁵ N 203.

³³⁶ *ibid* iii.

divorce is unavoidable, to minimise the bitterness and hostility between the parties and to reduce trauma for the children and to keep to the minimum the cost to the parties and the taxpayer.³³⁷

This can be compared to the aims of the 1966 Report detailed above and contrasted to the 1990 report, which clearly did not place supporting the institution of marriage as the first aim. Equally, when critiquing the current law, the Consultation, in contrast to the Law Commission, raised the traditional argument discussed in the previous chapter, that the ‘present system allows divorce to be obtained quickly and easily without the parties being required to have regard to the consequences’,³³⁸ implying arguments concerning the sanctity of marriage and the socio-economic disadvantages of divorce. This is confirmed by the fact that the Consultation raises the belief that it is not ‘difficult’³³⁹ to get a divorce, indicating that it could be more difficult.

The Consultation was set out in a similar way to the Law Commission Report. It outlined the current law,³⁴⁰ laid out the objectives of the law,³⁴¹ critiqued the law,³⁴² discussed the options for reform³⁴³ and proffered some suggestions for how it might work.³⁴⁴ The Consultation was not directed at proposing reform, simply outlining possible reforms. However, the possibilities were confined to its objectives, which, as the above paragraphs should have made clear, were vastly different from the Commissions.

In 1995 the Government outlined its proposals (the Proposal) in ‘Looking to the Future – Mediation and the Ground for Divorce.’³⁴⁵ The Government retained all of the objectives listed above in the Consultation.³⁴⁶ It then went on to outline its proposals:

³³⁷ *ibid* 1-2.

³³⁸ *ibid* 18.

³³⁹ *ibid* 18.

³⁴⁰ *ibid* Chapter 2.

³⁴¹ *ibid* Chapter 4.

³⁴² *ibid* Chapter 5.

³⁴³ *ibid* Chapter 6-7.

³⁴⁴ *ibid* Chapter 8-11.

³⁴⁵ Lord Chancellor’s Department, ‘Looking to the Future – Mediation and the Ground for Divorce’, (Stationary Office, 1995).

³⁴⁶ *ibid* 18.

‘It should be possible to obtain a divorce in England and Wales on the sole ground that the marriage has irretrievably broken down. The breakdown of marriage should be demonstrated by the passing of time for reflection and consideration, in order for the couple to address what has gone wrong in the marriage, whether there is any hope of reconciliation, and, in the event that they decide that the breakdown is irretrievable, to make proper arrangements for living apart before a divorce order can be made. The Government proposes that the minimum period of time for reflection and consideration should be twelve months. In practice the period may be longer in a significant number of cases, because some couples will elect not to apply for divorce immediately after the period has ended, and in other cases the divorce order will be delayed because arrangements for children property and finance have not been made’.³⁴⁷

Following this, the Family Law Act 1996 was passed. One can trace the reform movement from the Booth Committee to the introduction of the Act. Within this, the changing aims of divorce law proposals are pertinent to the why the Act failed.

3. The Family Law Act 1996

The Family Law Act 1996 embraced no-fault divorce. It was set out in several different Parts, the first outlining the general principles of the Act to be utilised by a court or any person when implementing the second or third. The principles outlined in section 1 included:

- (a) that the institution of marriage is to be supported;
- (b) that the parties to the marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
- (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end –

³⁴⁷ *ibid* 14.

- i. with minimum distress to the parties and to the children affected
 - ii. with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
 - iii. without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
- (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

Immediately, one may highlight the focus on the sanctity of marriage. The first and second principles of the Act are to support marriage and take all practical steps to save it. Given the current law's aim is simply to buttress the stability of marriage, which is not explicitly mentioned in the Matrimonial Causes Act 1973, this has a significant traditional emphasis. The following provisions are also noteworthy. There is little difference between the second aim of the *Field of Choice*; minimum distress is clearly the same; also, promoting a good continuing relationship may be equated, albeit loosely, with reducing bitterness. However, the focus on avoiding the risk of violence to either party, or any children, and any unreasonable costs, are clear modifications. However, perhaps it is important to note that, whilst many Acts have good 'aims', it is the influence of the objectives upon the substance of the Act that will have a direct impact. Given Part I overarches the substantive provisions of Part II and III, this is pertinent.

Part II outlined the process of divorce and separation. The Act kept the concept of irretrievable breakdown,³⁴⁸ but combined it with a no-fault divorce model. This was to be demonstrated by three factors.³⁴⁹ Firstly, by the submission of a statement of breakdown,³⁵⁰ after attending an information meeting.³⁵¹ Secondly, instead of the

³⁴⁸ S 3(1)(a).

³⁴⁹ S 5(1).

³⁵⁰ S 6.

³⁵¹ S 8(2).

‘facts’ that were in the Matrimonial Causes Act 1973, the Family Law Act 1996 required a period of time – for reflection and consideration – to demonstrate irretrievable breakdown.³⁵² This was set at nine months, beginning with the fourteenth day after the day on which the statement was received.³⁵³ A further six months would be added to this period if there were children under sixteen.³⁵⁴ Thirdly, an application for a divorce order acted as a final demonstration of irretrievable breakdown. For this to occur, section 3(1)(c) and section 9 required that the parties had solved any questions concerning their finances and children. Meanwhile, the parties had to declare that the marriage could not be saved as per section 5(1)(d). Part II also provided for the introduction of information meetings within section 8. These were designed as a ‘device for providing objective information face to face in the most expedient, comfortable and cost-effective manner.’³⁵⁵ Part III dealt with mediation, how it was provided for and the provision of legal aid.

The Act was not fully implemented. As it stands today, Part I and Part III have been brought into force. Yet, after two sets of pilot schemes, both for mediation, which was directed by Davis,³⁵⁶ and the information meetings, which was directed by Walker,³⁵⁷ Part II was not carried forward. The Lord Chancellor issued a statement that the Act would be deferred and then, in 2001, that it would not be implemented.³⁵⁸ The Act is theoretically and practically divided, clearly supporting the institution of marriage and providing an end to the marriage with ‘minimum distress’. The following analysis of the Act will demonstrate how this schism in its objectives contributed towards the failure of the Act. It also provides relevant analysis with regard to modern day reforms. As it failed for such a myriad of reasons, it is, perhaps easiest to examine the arguments within an assessment of each Part of the Act.

³⁵² S 7.

³⁵³ S 7(3).

³⁵⁴ S 7(11).

³⁵⁵ J. Walker, ‘Information Meeting Revisited’, (2000) 30 Family Law 332.

³⁵⁶ G. Davis, ‘Family Mediation – Where Do We Go From Here?’ (2001) Family Law 265; G Davis, ‘Can Mediation Reduce Expenditure On Lawyers’ (2001) Family Law 186; G Davis, ‘Mediation and Legal Services – The Client Speaks’ (2001) Family Law 110; G. Davis, ‘Reflections in the Aftermath Of The Family Mediation Pilot’ (2001) Child and Family Law Quarterly 371.

³⁵⁷ N 355, 330.

³⁵⁸ N 345, para 2.13.

4. Part I: The Sanctity Of Marriage And No-Fault – Mixed Messages

Part I, outlining the general principles of the Act, was implemented in 1996. As this underlies and forms the basis of the Act, any criticism directed towards it can also be interpreted as a broad appraisal of the Act itself. Initially, the strongest criticism is that the Family Law Act 1996 was convoluted between liberal and conservative maxims. Predominantly, this was manifested in two linked areas - the debates over the role of marriage and the use of fault.

In regards to the sanctity of marriage, if one examines the Divorce Reform Act 1969, and the aims of the Law Commission's Report - Reform of the Grounds of Divorce: The Field of Choice – it is clear that the support of marriage is a priority, over maximum fairness and the minimum bitterness, distress and humiliation. Evidence for this claim can be found in the Law Commission's Report where the support of marriage is the first aim, whilst the second aim explains that when a marriage breaks down it is 'regrettable', further prioritising the first aim. The way the Matrimonial Causes Act 1973 was drafted further reflects this, evidenced by section 6, which encourages reconciliation or, optionally, the supplemental provisions in section 2, which allow for time bars to prevent a party petitioning for a divorce.

The Family Law Act 1996, in contrast, seems to have put the two concepts on equal footing, compromising the liberal concept of no-fault with the traditional conservative focus on supporting and saving marriage.³⁵⁹ As Stylianou and Bailey-Harris cogently argue, this was most likely a major contributor towards the failure of the Act, producing a fragmented piece of legislation.³⁶⁰ On top of this it opened itself up to criticism from both liberals and conservatives. Perhaps an explanation for this compromise is the political background to the Act. Initially one can argue that, as it was passed by a Conservative Government, they influenced the Act ideologically. Arguably, a Conservative Government, with a small majority, was unlikely to be able to pass such a liberal reform without making some political changes to appease their

³⁵⁹ K. Stylianou, 'The Tensions between Family Mediation Principles and the Formal Legal System' (1998) Family Law 218; R. Bailey-Harris, 'Rhetoric and Reality in Divorce Reform', (1995) Family Law 618.

³⁶⁰ *ibid.*

backbenchers. Given the current coalition Government lacks a strong ideological majority; this is perhaps a relevant contrast were they to initiate any further legislative reform.

The emphasis on the sanctity of marriage is, as mentioned in the previous chapters, one of the consistent arguments for the use of the fault. However, as the earlier stages of this chapter demonstrated, the Law Commission found that fault created ‘bitterness’.³⁶¹ This was further emphasised in the Law Commission Report, which argued that it created ‘hostility and bitterness’³⁶² and that it was unfair, failing to create ‘justice’.³⁶³ Beyond this, it rejected a return to fault on the basis that it was ‘crude’,³⁶⁴ as it failed to respond to complex and sensitive issues, and that ‘guilt’ and ‘innocence’ were illogical and ineffective.³⁶⁵ Given these strong endorsements for no-fault divorce, it is hardly surprising that the Family Law Act 1996 opted for this model. The implications of this decision run throughout the Act.

‘Fault’ is an area that has been discussed at length in the previous chapter. In regards to the Family Law Act 1996, Hasson portrayed the debate as juxtaposed between the ‘idealist’ and ‘progressive’ viewpoints.³⁶⁶ However, as discussed above, there are further nuances to the fault debate, such as the psychological benefits in certain cases. To recollect the conclusions of the previous chapter; there are five main justifications for the use of fault, namely traditional,³⁶⁷ socio-economic,³⁶⁸ contractual,³⁶⁹ psychological³⁷⁰ and tort-based arguments.³⁷¹ The chapter found these justifications might be lacking, aside from the narrow circumstances where fault may provide a psychological benefit.

³⁶¹ N 275, 20.

³⁶² N 266, 7.

³⁶³ *ibid* 6.

³⁶⁴ *ibid* 11.

³⁶⁵ *ibid*.

³⁶⁶ N 230, 279.

³⁶⁷ N 107.

³⁶⁸ N 217.

³⁶⁹ N 236.

³⁷⁰ N 260.

³⁷¹ N 289.

Given this, it would seem fair to conclude that the Act had convoluted theoretical and practical objectives, drawing criticism from both an idealist and progressive perspective. From the idealist point of view the sanctity of marriage was reinforced, however, it is possible to argue that the no-fault provisions would make this position superficial. Considering Baroness Deech is willing to criticise the current partially fault based law, one can only question what her attitude would be if the law were based on no-fault. Meanwhile, from the progressive point of view, the traditional emphasis of the Act distorted the agenda of the no-fault provisions.

5. Part II: The Period For Reflection And Consideration And The Information Meetings

Part II was not implemented. It dealt with the major no-fault provisions of the Act, such as the directions for mediation,³⁷² which will be discussed in relation to Part III, the controversial ‘information meetings’³⁷³ and the ‘period for reflection.’³⁷⁴ Unusually the Government decided to trial the Act through pilot studies. These were roundly critiqued for a number of reasons. As they concern provisions for no-fault divorce, this adds another dimension to the criticism.

The information meeting took the form of an individual meeting. It was designed as a ‘device for providing objective information face to face in the most expedient, comfortable and cost-effective manner.’³⁷⁵ The aim of the meeting was to help ‘couples to understand the consequences of their actions, and the emphasis on maintaining ‘a level playing-field’ between the various services’³⁷⁶ that were on offer. On top of this ‘so that the information providers did not commit the heinous offence of giving advice, they were trained to deliver the information in a standard format which did not permit personal tailoring.’³⁷⁷

³⁷² Part II, S 13.

³⁷³ Part II, S 8.

³⁷⁴ Part II, S 7.

³⁷⁵ N 355.

³⁷⁶ *ibid.*

³⁷⁷ *ibid.*

The main criticism stems from the information meetings 'rigid'³⁷⁸ approach, which failed to cater to the different demands of clients and, frequently, devolved into the delivery of impersonal information.³⁷⁹ Meanwhile, it was raised by Eekelaar that this may be providing objective information as a means of influencing behaviour.³⁸⁰ Beyond this, and perhaps more critically given the multi-cultural society we now live in, questions have been raised over whether information meetings could cater to the needs of ethnic minorities and the victims of domestic violence.³⁸¹ Whilst Bridge offers the agreeable suggestion that more choice could have been offered to different couples, in regards to the information meeting, she fails to take her concept to its logical conclusion – that the Family Law Act 1996 itself did not cater to wider needs. What is clear, is that the failure to provide for the different demands of a range of divorcees is an essential deficiency in both the Matrimonial Causes Act 1973 and the Family Law Act 1996. Logically each divorce is different and providing a rigid structure combined with a traditionalist agenda, advocating the sanctity of marriage, is unlikely to meet everyone's basic needs.³⁸² The information meetings are one such example where an uncompromising framework was placed upon divorcees aiming to 'encourage or pressure'³⁸³ them either to reconcile or mediate.³⁸⁴ Bridge may be correct when she suggests that more choice could, or perhaps should, have been offered.³⁸⁵

The information meetings may also be criticised on a practical level. Firstly, it is possible to argue that an information meeting about divorce could occur *before* a marriage. To provide a contractual analogy, one would not enter one's company into a statistically high-risk contract without assessing the prospect of a potential breach. It is plausible to argue that couples should be provided with information before they enter a marriage. Although the counter argument to this is that the information is

³⁷⁸ *ibid* 333.

³⁷⁹ M.D.A. Freeman, 'Divorce Gospel Style' (1997) 27 Family Law 416.

³⁸⁰ J. Eekelaar, 'Family Law – Keeping us 'on Message'' (1999) Child and Family Law Quarterly 387

³⁸¹ C. Bridge, 'Diversity, Divorce and Information Meetings – Ensuring Access to Justice' (2000) 30 Family Law 646-7.

³⁸² Structurally this refers to procedural requirements such as the information meetings or mediation. Mediation will be discussed shortly.

³⁸³ N 355.

³⁸⁴ *ibid*.

³⁸⁵ N 381.

available through organisations such as *OnePlusOne*,³⁸⁶ should the parties seek it. It is also possible to highlight that the information provision argument is concurrent throughout other areas of family law, such as within the debate over pre-nuptial agreements, where it may be criticised for presupposing the risk of marriage failure on public policy grounds.³⁸⁷ Secondly, it is possible to argue that there is a conflict between providing information about mediation and providing information about legal services, on the basis that one undermines the other.

However, what is clear from the academic debate is that the notion that information could be made available to parties in the process of divorce is not disputed. What one may draw from this is that the concept of the information meetings was received positively, but that the procedure and methods for imparting information was not. Therefore, it may be suggested that if the information meetings had been modelled on a flexible basis, then it may have been met with a different response. Equally, Walker's proposition of providing an information DVD or booklet could be adapted to provide a suitable alternative.³⁸⁸

Section 7 outlined that fourteen days³⁸⁹ after a statement has been made,³⁹⁰ there will be a period for reflection and consideration.³⁹¹ This would last for a nine-month period,³⁹² and is an example of a no-fault separation model. However, the purpose of the period is not specifically attached to no-fault. Several criticisms can be levelled at both the period itself and the motivation behind it – 'for reflection and consideration'.

On a practical level, Davis makes the cogent point that frequently the 'period for reflection' will occur *before* a decision is made.³⁹³ As he mentions, it is a huge

³⁸⁶ See, for example, websites such as One Plus One, <<http://www.couplesdirect.net/MAIN/Index.php>> accessed 6 October 2011.

³⁸⁷ The public policy argument was debated thoroughly in the cases of *Macleod v Macleod* [2009] 3 W.L.R. 437 and *Radmacher v Granatino* [2011] 1 A.C. 534.

³⁸⁸ N 355, 330.

³⁸⁹ Part II, S 7(3).

³⁹⁰ Part II, S 7(1).

³⁹¹ Part II, S 7(2).

³⁹² Part II, S 7(3).

³⁹³ G. Davis, 'Divorce Reform – Peering Anxiously into the Future' (1995) 25 Family Law 564.

‘symbolic’ step to take.³⁹⁴ If one is to make a broad assertion concerning when individuals reflect and consider on whether to get a divorce, it would seem logical to observe that they would do so before making a decision rather than after. It would seem unlikely that the general population of divorcees would make a decision, only to subsequently justify it. Freeman adds to this criticism by highlighting that the extension of the period for reflection, by six months, where the divorcees have a child under sixteen,³⁹⁵ would frequently adversely affect women.³⁹⁶ Freeman goes so far as to label this ‘moral absolutism’³⁹⁷ demonstrating a situation where a ‘woman whose husband murders two of their three children must remain married to him for at least 80 weeks.’³⁹⁸ Returning to Davis’ comments, surely a divorce where children are involved is even more significant, increasing the chance of parties thinking about it? Therefore, perhaps Freeman’s 80-week number is a conservative estimate for a period that a hypothetical wife would have to remain married to her husband. One may also add to Freeman’s thesis, commenting that the provision for the extension of the period also affects fathers, not just mothers.

On the other hand, there are potential benefits to the separation period itself. Primarily one can argue that it allows parties to organise solutions to any financial matters or issues regarding any children. As mentioned above, section 9 of the Act required the parties to have done this before an application for divorce could be made. However, the time period to do this is subjective in each divorce. One party may take 24 months to arrange their affairs, another may take a week. Equally it may depend on the length of a marriage and other factors such as the presence of children and other dependents. What is clear is that the aim within the Act is not for this, but for ‘consideration and reflection’, which in view of the emphasis behind the Act, potentially entails reconciliation rather than forward planning. This is made all the more pertinent by the fact that the current special procedure takes so little time itself, roughly between 3-6

³⁹⁴ *ibid.*

³⁹⁵ Part II, S 7(11).

³⁹⁶ Part II, S 7(11).

³⁹⁷ N 379.

³⁹⁸ *ibid.*

months on average.³⁹⁹ This is a substantial difference to the 15 months expected of a parent with a child under 16.

Inherently, the period of reflection, due to the convoluted nature of the Act, is conflicted within itself. Part I outlines that the institution of marriage is to be supported, which can be seen in the period of reflection. However, it also outlines that the marriage should be brought to an end with minimum distress. There is a clear dichotomy. If the period for reflection would potentially have caused distress, and perhaps further damaged any chance of reconciliation, then how can it be deemed to be supporting marriage? This is a fundamental and inescapable contradiction. The tension that Stylianou⁴⁰⁰ and Bailey-Harris⁴⁰¹ highlighted in regard to Part I flows throughout the entire Act and is encapsulated here.

A potential solution would have been to remodel the purpose of the period and to maintain a similar timeframe as the special procedure. In regards to the purpose, for reflection and consideration, it would seem cogent that this occurs before a decision to divorce is made. The purpose of the period could, therefore be a pragmatic one, allowing the parties to prepare for the changes that will occur after a divorce and, potentially, to carry out mediation, conciliation or reconciliation should they so wish. Providing a flexible process, instead of making it a mandatory structure, may provide much-needed relevancy, increasing productivity. Equally, the timeframe is important to gauge correctly. As mentioned above, some parties may take a far longer or shorter time to organise themselves. If this is the case then a logical approach could be to make a small, but mandatory, time period, such as is the case with the special procedure, providing for those who need less time. However, allowing for an extension of the period where necessary to organise any issues relating to children or finances.

It would seem that the attempt to reconcile the support of marriage with no-fault divorce may have created significant internal tensions within the period for reflection

³⁹⁹ R. Cowdry, 'Whose Divorce is it Anyway – the Human Rights Aspect' (2004) Family Law 892.

⁴⁰⁰ K. Stylianou, 'The Tensions between Family Mediation Principles and the Formal Legal System' (1998) Family Law 218.

⁴⁰¹ R. Bailey-Harris, 'Rhetoric and Reality in Divorce Reform' (1995) Family Law 618.

and consideration. When this is combined with the conclusions of Walker's pilot study of the information meetings, which identified the meetings observed a rigid and bureaucratic structure. It is possible to hypothesise that the information meetings and period for reflection may have been misjudged, negatively influencing the Act as a whole. However, these conclusions are not a slight on no-fault divorce, merely the specific models chosen.

6. Part III: Mediation

Mediation was a seminal part of the Family Law Act 1996, and has been encouraged by governments for the past 20 years,⁴⁰² whilst dividing academic opinion.⁴⁰³ It is frequently associated with no-fault divorce.⁴⁰⁴ Mediation is not a necessary facet of any no-fault model, however, its use was a necessary precondition for the receipt of Legal Aid and encouraged for those self-funding. Therefore, it is naturally linked to the process of acquiring a divorce through the Family Law Act 1996. As a result, despite the fact that mediation would be utilised with regard to issues concerning finances and children, which is not the focus of this thesis, it was so prominent within trialled no-fault models, that an investigation into its capacities for success is pertinent.

Mediation was alluded to in Part II, with reference to attendance at information meetings,⁴⁰⁵ the financing of mediation,⁴⁰⁶ the provision of information,⁴⁰⁷ the

⁴⁰² M. Maclean, 'Family Mediation – Alternative or Additional Dispute Resolution' (2010) 32(2) *Journal of Social Welfare and Family Law* 105.

⁴⁰³ R. Dingwall, 'Divorce Mediation – Should We Change Our Mind?' (2010) 32(2) *Journal of Social Welfare and Family Law* 107; A. Bickerdike and L. Littlefield, 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' (2000) *Mediation Quarterly* 181; J. Walker, 'Is there a Future for Lawyers in Divorce' (1996) *International Journal of Law, Policy and the Family* 64; J. B. Kelly, 'Parent Interaction after Divorce: Comparison of Mediated and Adversarial Divorce Processes' (1991) *Behavioural Sciences and Law* 387; J. B. Kelly, 'Developing and Implementing Post-Divorce Parenting Plans: Does the Forum Make a Difference?' in C. E. Depner and J. H. Bray (eds), *Non-Residential Parenting: New Vistas in Family Living* (Sage 1993); J. B. Kelly, 'A Decade of Divorce Mediation Research – Some Answers and Questions' (1996) *Family and Conciliation Courts Review* 379.

⁴⁰⁴ P.L. Winks, 'Divorce Mediation: A Non-Adversary Procedure for the No-Fault Divorce' (1980) 19 *Journal of Family Law* 615.

⁴⁰⁵ S 8(9)(f).

⁴⁰⁶ S 8(12).

⁴⁰⁷ S 12(2)(a)(ii) and (b)(ii).

directions for mediation,⁴⁰⁸ adjournments⁴⁰⁹ and provision of marriage counselling.⁴¹⁰ However, it is primarily dealt with in Part III. This Part of the Act was retained. Despite this, the failure of the Act can still be connected to Part III as it is naturally linked to Part II and I. The Act outlines the provision and availability of mediation.⁴¹¹ It also provides legal aid for the process,⁴¹² however, controversially, it also outlines that a ‘person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator’.⁴¹³ Following the introduction of the Act, a pilot scheme evaluating mediation was introduced. The failure of the Act to be fully implemented can be linked with the scrutiny mediation was subsequently placed under.

Initially a definition of mediation will be given; this will be followed by an outline of its current use within divorce law and the outcomes of the pilot schemes that took place in the 1990s. An analysis will then be undertaken, questioning select issues within mediation, such as communication, agreement longevity, gender and economics, both with regard to the 1996 Act and from a modern perspective. The conclusion reached is that, where mediation is accepted voluntarily, there are a number of potential benefits.

6.1. A Definition Of Mediation

Mediation has been described as a:

‘form of intervention in which a third party, the mediator, assists the parties to a dispute to negotiate over the issues that divide them. The mediator has no stake in the dispute and is not identified with any of the competing interests involved. The mediator has no power to impose a settlement on the parties, who retain authority for making their own decisions’.⁴¹⁴

⁴⁰⁸ S 13.

⁴⁰⁹ S 14(4) (a)(d)(e).

⁴¹⁰ S 23 (3).

⁴¹¹ S 27.

⁴¹² S 26.

⁴¹³ S 29.

⁴¹⁴ M. Roberts, *Mediation in Family Disputes*, (3rd edn, Ashgate 2008) 7.

In the context of divorce, the Government, in its White Paper ‘Looking to the Future – Mediation and the Ground for Divorce’ defined it as a:

‘process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with arrangements which need to be made for the future’.⁴¹⁵

There are two factors that must be emphasised in regards to this definition. Firstly the mediator is neutral. To quote Astor, they ‘leave their own perspectives out of the equation’.⁴¹⁶ Secondly, the focus of the process is on constructing arrangements for the future. It is, therefore, not focussed on the past, but ‘forward looking’.⁴¹⁷

‘Mediation’, as a term, is frequently used to describe a plethora of different processes. It is important to distinguish it from those it is most commonly associated with. Initially, it can be distinguished from ‘reconciliation’, which seeks to encourage the parties to ‘abandon the petition and rescue the marriage’.⁴¹⁸ Whilst some have argued that mediation can have therapeutic elements,⁴¹⁹ this thesis argues that it is a distinct form of mediation – ‘therapeutic mediation’. The basis for this claim is that therapeutic mediation is focussed on trying to improve the parties’ relationship, which, inherently, has a focus on the past and present, rather than the future focus of mediation. Lastly, mediation is frequently associated with the term ‘conciliation’.⁴²⁰ However, again, this thesis argues that it can be distinguished from mediation, on the basis that conciliation routinely occurs during the current court process as, almost, a court-aid, such as in the Private Law Programme.⁴²¹ Arguably this is a form of ‘in-court-mediation’,⁴²² however, the fact that mediation is a separate process, in its own

⁴¹⁵ N 345, para 5.4.

⁴¹⁶ H. Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16 *Social and Legal Studies* 222.

⁴¹⁷ N 131, 114.

⁴¹⁸ N 221, 136.

⁴¹⁹ J. Herring, *Family Law*, (4th edn, Longman 2009) 139; M. Freeman, *Understanding Family Law* (Sweet & Maxwell 2007) 115; S. Harris-Short & J. Miles, *Family Law – Text, Cases and Materials* (OUP 2007) 32.

⁴²⁰ S. Harris-Short & J. Miles, *Family Law – Text, Cases and Materials* (OUP 2007) 32.

⁴²¹ N 32, 628.

⁴²² J. Herring, *Family Law* (4th edn, Longman 2009) 137.

right, is a vital distinction. As a result, any in-court-mediation shall be referred to as conciliation, whereas out-of-court mediation shall be referred to as mediation.⁴²³

6.2. Mediation Within Divorce Law

The current use of mediation can be separated into two categories, privately or publicly funded. However, it should be noted that the planned reforms of Legal Aid may cut all public funding for divorce disputes, including, it would seem, funding for mediation. As a result, all mediation occurring after the reforms may be private. Nevertheless, until this occurs it is still important to outline the operation of publicly funded mediation.

Mediation may be sought from many sources such as the National Family Mediation Network, which represents 40% of the mediation profession.⁴²⁴ Whilst there exists a College of Mediators, it does not have exclusive or shared authority over mediation.⁴²⁵ Although, as Webley has highlighted, it may be assisted in acquiring this by the Family Mediation Council.⁴²⁶ In general, mediators may be found in both solicitors, who, through the Law Society family mediation training, are qualified, and through the College of Mediators.⁴²⁷ The main difference, it would seem, is that the Law Society seems to focus on knowledge, whilst the College gives preference to values and skills based training.⁴²⁸

Part III of the Family Law Act 1996 has been implemented. This stipulates that a ‘person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator.’⁴²⁹ This was

⁴²³ Following this discussion, the working definition of mediation will be an out-of-court process ‘in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with arrangements which need to be made for the future’.

⁴²⁴ N 414, 48.

⁴²⁵ L. Webley, ‘Gate-Keeper, Supervisor or Mentor? The Role of Professional Bodies in the Regulation and Professional Development of Solicitors and Family Mediators Undertaking Divorce Matters in England and Wales’ (2010) 32(2) *Journal of Social Welfare & Family Law* 120.

⁴²⁶ *ibid.*

⁴²⁷ *ibid* 124.

⁴²⁸ *ibid.*

⁴²⁹ S 29.

reinforced in the Access to Justice Act 1999 which read ‘the criteria set out in the code shall reflect the principle that in many family disputes mediation will be more appropriate than court proceedings’.⁴³⁰ According to the National Audit Office, ‘between October 2004 and March 2006, 29,000 people who were funded through Legal Aid, attempted to resolve their disputes through mediation.’⁴³¹ As a result, all of those applying for Legal Aid must first attend mediation.

6.3. The Mediation Pilots

Subsequent to the introduction of the Family Law Act 1996, a pilot scheme focusing on mediation was carried out. The report concerning the pilot was organised by Gwynn Davis. The pilot had several aims, these included:

- ‘- the relative benefits and cost-effectiveness of contracting for the provision of publicly funded and quality assured family mediation services through different supplier arrangements;
- the most effective quality assurance and contracting arrangements for the delivery of publicly funded mediation services;
- the level of quality assured legal advice necessary to support publicly funded family mediation and the most cost-effective arrangements for providing it;
- the relative costs/benefits, both for the assisted person and the taxpayer, of the provision of publicly funded mediation and supporting legal advice, compared with the current arrangements.’⁴³²

Davis’ findings will be used throughout the assessment of mediation during this chapter, as they are the most relevant study to date of mediation within England and Wales. In relation to the Family Law Act, one can draw out several areas of analysis. Of note is the client feedback concerning ‘attitudes to negotiation’ where they found that only 11% of informants were not willing to negotiate, but that 59% believed their

⁴³⁰ S 8(3).

⁴³¹ National Audit Office, *Legal Aid and Mediation for People Involved in Family Breakdown* (Stationary Office, 2007).

⁴³² G. Davis, ‘Mediation and Legal Services – The Client Speaks’ (2001) Family Law 110.

former partner was not.⁴³³ Beyond this, and perhaps linked to these findings, was the fact that many of the subjects ‘displayed high levels of mistrust’.⁴³⁴ From these facts, it is plausible to suggest that either the parties mistrust each other, and therefore, mistakenly, believe that they will not negotiate. Or on the other hand, that they were not willing to negotiate and were trying to portray their former partner as uncooperative, rather than being seen as uncooperative themselves. Obviously, it is possible, if not likely, that there was a mix of these two circumstances.

Perhaps the most crucial area of Davis’ research concerns the client’s attitudes to mediation itself. In general they found mediation helpful. Specifically, 35% found it ‘very helpful’ and a further 35% found it ‘fairly helpful’.⁴³⁵ Meanwhile, 51% believed the mediator understood the situation ‘very well’ and 27% believed they understood it ‘fairly well’.⁴³⁶ 71% said they would recommend mediation to others experiencing a dispute about children.⁴³⁷ These statistics are positive, demonstrating that mediation could make a valuable contribution.

However, the problem that Davis identified was that 60% of clients found a solicitor ‘very helpful’ and that in 69% of cases they understood the problems ‘very well’.⁴³⁸ Obviously, these numbers are far higher than in the study concerning mediation. Not only does this demonstrate a preference for solicitors, but also that the conception of ‘solicitors as aggressive troublemakers’⁴³⁹ should be regarded as of ‘historical interest only’.⁴⁴⁰ It would seem that solicitor’s partisanship is a ‘highly valued commodity’.⁴⁴¹ Davis goes on to conclude that mediation should not be seen as a replacement for lawyers but that it could provide a valuable service to some couples.⁴⁴²

These findings appear to demonstrate that the Act’s mediation focus was misplaced. Initially, this can be seen as a criticism of mediation itself. As this chapter will

⁴³³ *ibid.*

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ *ibid.*

⁴³⁷ *ibid.*

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid.*

⁴⁴² *ibid.*

attempt to show, it is in reality a criticism of how the Act sought to implement mediation. The following analysis will therefore investigate select issues concerning mediation as a process. However, broadly it would seem that Davis' research did contribute significantly to the failure of the Family Law Act 1996.

6.4. How Does Mediation Affect Conflict, Communication And Co-operation?

Mediation is commonly associated with the benefits arising from its focus on party negotiation, namely, a decrease in conflict, and an increase in communication and co-operation. As mentioned earlier in the chapter, this is frequently associated with the 'spirit of no-fault'.⁴⁴³ Historically, the Finer Report argued that it would 'engender common sense, reasonableness and agreement in dealing with the consequences of the breakdown'.⁴⁴⁴ The Government Consultation Paper for the Family Law Act 1996 placed this concept in the centre of its argument, stating:

'it encourages couples themselves to resolve disputed issues and helps them develop their skills in negotiating their conflicts... it avoids the polarisation of the adversarial process, which can freeze parties into opposing solutions to problems'.⁴⁴⁵

It then reiterated this in its Proposal for the Act arguing it would 'improve communications... [and] help couples work together'.⁴⁴⁶ It would appear that increasing communication and co-operation and reducing conflict seems to be one of the main foundations in the arguments for mediation both with regard to previous and current debates.

When evaluating this concept it is clear that there is a dichotomy between assertions made under theoretical versus empirical research. In regards to the empirical research undertaken, many appear to have treated the mediation process itself as a 'black

⁴⁴³ N 404, 615.

⁴⁴⁴ N 227.

⁴⁴⁵ N 203, 55.

⁴⁴⁶ N 345, 38.

box',⁴⁴⁷ focussing instead on the outcome of the process. This is particularly true in regards to England and Wales where the most comprehensive study into mediation, by Gwynn Davis, focused on issues such as satisfaction levels, cost-effectiveness and success rates, rather than the inner workings of the mediation itself.⁴⁴⁸ Therefore, when analysing this aspect of mediation, one may have to rely upon international studies. The empirical arguments will be laid out below. However, there will be an initial discussion of the theory behind the assertions.

6.4.1. Theoretical Arguments

One can identify several theoretical arguments that have potentially created an image of mediation as preferable. Davis refers to this as 'the story' of mediation, associating it with 'reasonableness and compromise'.⁴⁴⁹ These can be found in a variety of sources – including religious and academic texts. The Bible makes frequent reference to mediation both in the Old and New Testament. For example, Job 9:33, which states:

‘If only there were someone to mediate between us, someone to bring us together’.

Naturally, the Bible is not an academic text; however, its influence should not be ignored, especially when one bears in mind the religious attitudes within the previous reforms of divorce law. This was particularly relevant in the aforementioned Gorell Commission and even in regards to Lord Mackay's statements regarding the Family Law Act 1996. It is also possible to highlight the largely restorative movement in the criminal justice system that developed in the 1970s as contributory to the view of mediation in its 'contemporary form'.⁴⁵⁰ Nils Christie, albeit from a criminological

⁴⁴⁷ M. Benjamin and H. Irving, 'Research in Family Mediation: Review and Implications' (1995) *Mediation Quarterly* 53 in A. Bickerdike and L. Littlefield, 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' (2000) *Mediation Quarterly* 181.

⁴⁴⁸ G. Davis, *Monitoring Publicly Funded Family Mediation – Summary Report to the Legal Services Commission* (Legal Services Commission 2000) 1.

⁴⁴⁹ J. Walker, 'Is there a Future for Lawyers in Divorce?' (1996) *International Journal of Law, Policy and the Family* 64.

⁴⁵⁰ R. Dingwall, 'Divorce Mediation: Should we Change our Mind?' (2010) *Journal of Social Welfare and Family Law* 107.

perspective, famously outlined conflicts as ‘property’,⁴⁵¹ arguing that the traditional adversarial approaches removed conflicts from individuals and placed them in the hands of the ‘professional thieves’⁴⁵² such as lawyers and judges, removing the opportunity for the parties to deal with the conflict themselves. Perhaps the strongest official indication of this movement is contained within the *Report of the Committee on One-Parent Families*, also known as the Finer Report.⁴⁵³ This documented ‘conciliation’ which, as mentioned above, is essentially synonymous with the modern concept of mediation. The Report outlined that procedures focussing on conciliation procedures ‘have substantial success in civilising the consequences of the breakdown’.⁴⁵⁴ Whilst the Report was not as thorough as some of its modern counterparts, such as the Law Commission’s Discussion and Consultation papers, it is often labelled as the ‘starting point’ in the movement.⁴⁵⁵

It is important to conceptualise divorce as a conflict situation. In a broad sense, two adults, who have legally and socially bound their lives together, are breaking that bond. The question therefore commonly turns to the level of conflict. In relation to this, mediation and the traditional adversarial process are theoretically often portrayed in very different lights. The adversarial process described in the previous chapters is, possibly from the offset, seen in a negative light. Common sense dictates that an ‘adversarial’ conflict is less likely to be productive than a ‘constructive’ conflict. It is perhaps for this reason, that mediation is seen as the antithesis to the adversarial approach. As Walker highlighted:

‘such loaded language constructs an image of the legal process as inherently hostile... By contrast, mediation is perceived as supportive, facilitative, non-conflictual: everything that is inherently ‘good’ in a dispute resolution process’.⁴⁵⁶

⁴⁵¹ N. Christie, ‘Conflicts as Property’ (1977) *The British Journal of Criminology* 1.

⁴⁵² *ibid* 3.

⁴⁵³ N 227.

⁴⁵⁴ *ibid* 185.

⁴⁵⁵ S. Roberts, ‘Mediation in Family Disputes’ (1983) *The Modern Law Review* 537.

⁴⁵⁶ N 449, 64.

Consequently, one may argue that the debate, from a linguistic point of view, is carried out using ‘loaded language’, being inherently distorted in favour of mediation.

Dingwall also lays the charge of mediation promotion at the feet of the ‘tabloid culture... [and as] part of the occupational self-interest of mediation practitioners’.⁴⁵⁷ He qualifies this with the argument that the recent National Audit Office report on mediation, published in 2007, which trumpeted the ability of mediation to make the divorce process ‘less acrimonious’,⁴⁵⁸ was heavily skewed by its reliance on evidence based on a survey of mediators.⁴⁵⁹ In regards to the tabloid culture, this has been particularly relevant of late given the release of the Protocol concerning the virtually compulsory ‘Information and Assessment Meetings’ described in Practice Direction 3A to the Family Procedure Rules 2010. This was outlined in the first chapter and will undergo analysis in the following chapter. The media response to the Protocol is relevant. In particular one can highlight the response of *The Telegraph*, which stated: ‘It’s Good for Couples Who Want to Divorce to Talk’.⁴⁶⁰ Meanwhile, *The Mirror* ran with the headline: ‘Warring Couples to be Given Mediation to Keep Them Out of Court’.⁴⁶¹ Both of these are indicative of what Dingwall was referring to in regards to the tabloid attitudes to mediation. Of note, and as will be explained in following chapters, *The Mirror* may have misread the situation - the meetings are not mediation *per se* but information and assessment meetings concerning mediation. The developments are not compulsory mediation.

6.4.2. Empirical Research

As the above discussion has demonstrated, there are numerous sources that can be credited for the development and perseverance of the theoretical belief that mediation may reduce conflict and increase communication and co-operation. However, the

⁴⁵⁷ N 450, 107-8.

⁴⁵⁸ N 431, 4.

⁴⁵⁹ N 450, 111.

⁴⁶⁰ Telegraph View, ‘Its Good for Couples who Want to Divorce to Talk’ (*The Telegraph*, 23 February 2011) <<http://www.telegraph.co.uk/comment/telegraph-view/8343808/Its-good-for-couples-who-want-to-divorce-to-talk.html>> accessed 23 February 2011.

⁴⁶¹ James Lyons, ‘Warring Couples to be Given Mediation to keep them out of Court’ (*Daily Mirror*, 23 February 2011) <<http://www.mirror.co.uk/news/politics/2011/02/23/warring-couples-to-be-given-mediation-to-keep-them-out-of-court-115875-22942555/>> accessed 23 February 2011.

question remains – do they? This is potentially difficult to answer. As the Government Consultation for the Family Law Act 1996 noted the ‘empirical evidence about mediation in this country is limited [which] is hardly surprising bearing in mind that family mediation has developed here only in the last decade or so’. Despite this statement being made in 1993, little has changed in nearly two decades. As mentioned above, Davis et al carried out pilot studies on the proposed mediation, but, their research was not focussed on the process itself, but on the satisfaction, success and cost. Apart from this study there has been a dearth of empirical research in England and Wales. As a result it is difficult to address the question directly and, to some degree, international studies must be relied upon.

International researchers also frequently treat the mediation process as a ‘black box’, analysing many different areas before and after the process but not during. However, Kelly, who was relied upon as evidence by the National Audit Committee,⁴⁶² has documented and carried out a significant number of studies and, when reporting on studies in the US and Canada. She found that ‘lengthier processes appear to promote more frequent, less conflicted communication’⁴⁶³ and that parents who engage in mediation:

‘...reported significantly less conflict, more co-operation, more child-focused communication, and more non-custodial parent participation in decision making about the children, compared with the adversarial sample’.⁴⁶⁴

Arguably, much of the research relied upon in this article seems to focus on the post-mediation relationship between the parties,⁴⁶⁵ however, merely because the aim of the article is focussed on the outcome, does not mean it cannot play a significant role in relating to the method. Meanwhile, Kelly subsequently provided an influential

⁴⁶² N 431.

⁴⁶³ J. B. Kelly, ‘A Decade of Divorce Mediation Research – Some Answers and Questions’ (1996) *Family and Conciliation Courts Review* 379.

⁴⁶⁴ *ibid.*

⁴⁶⁵ J. B. Kelly, ‘Parent Interaction after Divorce: Comparison of Mediated and Adversarial Divorce Processes’ (1991) *Behavioural Sciences and Law* 387; J. B. Kelly, ‘Developing and Implementing Post-Divorce Parenting Plans: Does the Forum Make a Difference?’ in C. E. Depner and J. H. Bray (eds), *Non-Residential Parenting: New Vistas in Family Living* (Sage 1993).

process based research study, focusing on the California Divorce and Mediation Process.⁴⁶⁶ Here, Kelly conducted a ‘multidimensional study of the comparative legal, economic, psychological, and relationship effects of mediation and adversarial divorce on the participants during and after the divorce process’.⁴⁶⁷ The longitudinal study consisted of 437 ‘mostly well educated, primarily white, and middle class’⁴⁶⁸ individuals who were questioned before, during and after the mediation process. Kelly found that the:

‘...mediation group rated their mediators as more skilful and more helpful in proposing ways to resolve disagreements and getting to workable compromises, compared to the litigation group rating of their attorneys... [and that] 76% of mediation women and 62% of the men indicated that mediation helped them to become more reasonable with each other, compared to 26 and 39% of the adversarial men and women, respectively’.⁴⁶⁹

Whilst this would seem to clearly demonstrate that mediation ‘was more effective in increasing the general level of co-operation’, there are several points that can be made.⁴⁷⁰ Firstly, by Kelly’s own admission the individuals were mostly well educated, white and middle class. Therefore, it may be difficult to transmute these findings to individuals outside the socio-economic groups assessed in the study. Its value may also be degraded, for the purposes of this thesis, due to its international focus. There are numerous international social differences that diminish its importance. Lastly, and this is perhaps the most pertinent point, the lawyers involved in the adversarial process in England and Wales and in California are distinct. They will have developed in a different social and educational system, and be practicing under unique practice directions. To make a direct comparison between the professions may consequently be tenuous. What makes this criticism particularly relevant is that Kelly’s studies were extensively relied upon by the National Audit

⁴⁶⁶ N 463, 15.

⁴⁶⁷ *ibid.*

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid* 17.

⁴⁷⁰ *ibid* 18.

Office in their assessment of Legal Aid and mediation for people involved in family breakdown.⁴⁷¹

Perhaps one way of including national research is to use Davis et al's work in conjunction with other international research. Bickerdike and Littlefield carried out a study of divorce mediation in Australia.⁴⁷² Clients were assessed over a twenty-month period and were chosen if they had been married for two years.⁴⁷³ 550 clients attended the sessions, of which 252 agreed to complete the questionnaires, whilst a further 50 couples agreed to have their session videotaped.⁴⁷⁴ Their research indicated that 'couples who engage in high levels of contentious behaviour and low levels of problem solving and who exhibit disparity in problem solving are less likely to reach successful outcome in mediation'⁴⁷⁵ whilst contrastingly 'higher levels of problem solving... [and] lower levels of contentious behaviour' were associated with agreement.⁴⁷⁶

This would appear to indicate that mediation is successful where the divorcees co-operate, communicate and have low levels of conflict and, as a result, demonstrates the impact mediation has on allowing couples to communicate and co-operate. If one combines this concept with Davis' research, which outlined the success rate of the mediation pilots, then that may be indicative of the levels of co-operation, communication and conflict in England and Wales. Davis demonstrated that agreement was reached in 45% of cases relating to children issues and 34% in relation to financial issues.⁴⁷⁷ If one were to follow this logic through, then it would be possible to argue that Davis research can provide inadvertent information on the levels of communication and co-operation within the mediation pilots.

If this were accepted, then it would appear to provide negative conclusions. However, naturally there are flaws with this argument as it is imposing the conclusions of one

⁴⁷¹ N 431, 24.

⁴⁷² A. Bickerdike and L. Littlefield, 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' (2000) *Mediation Quarterly* 181.

⁴⁷³ *ibid* 188.

⁴⁷⁴ *ibid* 189.

⁴⁷⁵ *ibid* 192.

⁴⁷⁶ *ibid* 192.

⁴⁷⁷ N 448, 10.

study onto another, plus there are variables created by the number of sessions monitored and the international elements involved. Yet, given that there has not been a study in England and Wales, it is perhaps the best, if still tenuous, use of national statistics.

To conclude, despite there being a range of theoretical arguments, there still remains a lack of valuable empirical research relating to a reduction in conflict and an increase in co-operation and communication. Whilst the results of international studies are valuable, it is difficult to transmute them to England and Wales. Building on this, when the results of Davis' study is linked with international studies the synthesis of the two is less illuminating. The only credible conclusion that can be reached from this is that there is a lack of evidence to demonstrate that compulsory mediation would reduce conflict and increase communication and co-operation across the board. However, with some individuals it does seem to produce these positive results. From Bickerdike and Littlefield's research it would appear that those who are more willing to co-operate will be more successful. Whilst they did not distinguish whether the process could encourage those who were not co-operating to co-operate, it appears to indicate that mediation would be most appropriate with those who are initially willing to do so. Overall, it would seem that mediation is a credible option that should be strongly encouraged for those who fit that description. However, the research, or lack of, does appear to negate the arguments of those who would argue for compulsory mediation. Given these conclusions, it is unsurprising that the mediation provisions within the Family Law Act 1996 were not well received. However, as stated, where individuals are willing to co-operate, mediation may provide a better process, it should therefore not be dismissed for future reforms.

6.5. Is Mediation Better In The Long Term?

The Government has, largely, trumpeted the fact that mediation can increase the likelihood of parties abiding by the terms of their arrangements. The advantages of this are numerous, as a steadfast agreement would help remove any future legal costs and the associated problems of renegotiation. The belief that mediation could increase

the chances of this occurring was outlined in the Consultation Paper – ‘Looking to the Future: Mediation and the Ground for Divorce’,⁴⁷⁸ where it was stated that mediation:

‘tends to result in longer-lasting arrangements for the parties and their children, with better prospects of renegotiating such arrangements when circumstances change’.⁴⁷⁹

Interestingly, this advantage was not reiterated in the Governments reform proposals.⁴⁸⁰ However, despite not explicitly repeating it, the proposal did document similar benefits that could lead to a more enduring settlement. These included increasing the parent’s abilities to communicate, reducing bitterness and tension and taking responsibility for their own choices.⁴⁸¹ This would appear to support the belief that mediation provides for a stronger long-term relationship.

The Government has since echoed its initial sentiments in the Consultation Document ‘Parental Separation: Children’s Needs and Parents’ Responsibilities’.⁴⁸² Furthermore, Jonathan Djanogly, Parliamentary Under-Secretary for the Ministry of Justice, recently argued that mediation was inextricably linked to the ‘Big Society’ and that it is ‘capable of giving people a sense of control over their futures’.⁴⁸³ This concept of self-control seems to reflect the previous emphasis on responsibility.

Whilst investigating the question of the long-term impact of mediation, one may query the argument that a party negotiated agreement would endure. The evidence seems to be polarised between those who argue it does provide abiding agreements and those who do not.⁴⁸⁴ On the one hand commentators such as Mantle have highlighted that ‘one half of all agreements made were still intact, six months after

⁴⁷⁸ N 203.

⁴⁷⁹ *ibid* para 7.20.

⁴⁸⁰ N 345.

⁴⁸¹ *ibid* para 5.15.

⁴⁸² Home Office, *Parental Separation: Children’s Needs and Parents’ Responsibilities* (Stationary Office, 2004) para 2.

⁴⁸³ E. Walsh, ‘Newline Extra: The Government and Mediation’ (2011) 41 Family Law 101.

⁴⁸⁴ N 422, 139.

mediation'⁴⁸⁵ and that this should be seen as a 'cause for celebration within the mediation field... given the level of conflict often apparent between parties in dispute.'⁴⁸⁶ Herring, contrastingly argued that there is an abundance of evidence disputing this claim.⁴⁸⁷ Demonstrating this, Herring highlighted the work of Eekelaar, Maclean and Beinart.⁴⁸⁸ They argued that, in instances where the parties both consented to the application, the number of cases that had to be adjudicated – the settlement failure rate - was under five percent.⁴⁸⁹ However, on a closer inspection, it appears that Herring may have misapplied their work. The issue they are discussing is the initial success rate of the process. What Mantle researched was the longevity of the agreement. They are separate issues. This was repeated with regard to the submission of Wright's article, which Herring also provided as evidence.⁴⁹⁰ This examines the process of solicitor-led negotiation, arguing that solicitors had adopted some mediatory practices. Her study openly admits that the clients 'have not been revisited'.⁴⁹¹ Therefore how it could demonstrate the endurance of an agreement is illusive. What it does demonstrate is, sometimes, the foundations for a long-lasting agreement can be, hypothetically, insecure. However, it does not demonstrate that mediated agreements are less durable. Davis et al's study, whilst not specifically assessing the longevity of agreements, did ask parties whether they thought they could modify the agreement if necessary. 59% of informants said they thought they could modify a mediation agreement if necessary, whilst 65% thought they would be able to modify a solicitor-negotiated agreement.⁴⁹² Whilst this does not explicitly demonstrate the length of agreements, it does indicate the parties' initial views, which seems to favour solicitors.

On an international level, Kelly found, in a study based in California, that:

⁴⁸⁵ G. Mantle, *Helping Parents in Dispute – Child-Centred Mediation at County Court* (Ashgate 2001) 141.

⁴⁸⁶ *ibid* 142.

⁴⁸⁷ N 422, 139.

⁴⁸⁸ J. Eekelaar, M. Maclean & S. Beinart, *Family Lawyers – The Divorce Work of Solicitors* (OUP 2000).

⁴⁸⁹ *ibid* 16.

⁴⁹⁰ K. Wright, 'The Role of Solicitors in Divorce: a Note of Caution' (2007) 19(4) *Child and Family Law Quarterly* 481.

⁴⁹¹ *ibid* 493.

⁴⁹² N 448, 11.

‘there was significantly more compliance immediately after divorce in the mediation groups... compared to the adversarial sample... these differences were still evident at one year post divorce but disappeared at two years post divorce, in part because the adversarial group [became] more compliant over time’.⁴⁹³

Meanwhile, a study by Ellis and Stuckless in Canada demonstrated similar findings.⁴⁹⁴ What is important to stress in these situations, which Kelly may have underemphasised, is that the initial two years are potentially the most important. Logically, these are the years where many divorcees must re-establish themselves; they are undoubtedly going to be under far more pressure due to their personal circumstances. It is likely that they will have to almost ‘re-start’ their lives. This will be exacerbated if there are children. One should therefore stress the benefit of compliance within the first two years of a divorce. A failure to comply would undoubtedly only make non-recipient’s circumstances more difficult.

Adding to this point is the fact that frequently critics of mediation highlight that ‘in the long run, mediation proves no more effective at containing hostilities than any other form of divorce dispute resolution’.⁴⁹⁵ However, this statement may be misleading. On first impression it seems to indicate that hostilities between the parties in mediation cases rise. However, according to Kelly’s research, the situation is actually the reverse, and that after a period of two years, divorcees from an adversarial divorce tend to reduce their hostilities down to the level of those who have mediated. This is perhaps an example of clever phrasing by Bryan to condemn mediation, however, when seen in its true colours, acts as an exhibition of mediation’s benefits.

Overall it would seem that mediation does increase compliance initially, which is perhaps the most important time to comply from the parties’ perspective. Whilst Davis’ research does seem to provide a strong argument against this, the parties’

⁴⁹³ J. B. Kelly, ‘Family Mediation Research: Is There Empirical Support for the Field?’ (2004) 22 *Conflict Resolution Quarterly* 21.

⁴⁹⁴ *ibid* 23.

⁴⁹⁵ P. E. Bryan, ‘Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation’ (1994) 28(2) *Family Law Quarterly* 213.

initial perceptions do not seem to be reflected in reality. It would seem that one may argue that there is a significant improvement created by the mediation process. This appears to underline the conclusions reached with regard to reducing conflict and increasing communication – demonstrating that mediation, if voluntarily accepted, may be a valuable process in future reforms.

6.6. Is There Gender Equality In Mediation?

A routinely raised issue is that mediation tends to ‘perpetuate existing power relations within the family’.⁴⁹⁶ Dingwall and Greatbatch have argued that women in particular are at a disadvantage as they are ‘conflict averse’.⁴⁹⁷ The obvious danger in these circumstances is that the dominant spouse will be allowed to manipulate the process to their advantage. These situations may also be exacerbated if there are circumstances of domestic violence. Ultimately these areas are linked; as a result, it is logical to assess them in unison.

The debate is, as Herring notes, highly polarised, with researchers such as Davis and Roberts arguing that there is no gender-based disadvantage whilst others, such as Bryan and Tilley arguing the contrary.⁴⁹⁸ Bryan’s argument outlines that mediation in divorce actually entrenches a power imbalance in favour of men.⁴⁹⁹ Accordingly, this entrenchment stems from several areas, including tangible resources⁵⁰⁰ and intangible resources, such as status and dominance.⁵⁰¹ It would appear that Bryan’s emphasis on tangible resources, such as earnings, job availability, education and occupation, seems to disproportionately influence the rest of her argument. Following the development of her thesis; having more tangible resources creates an initial financial distortion between the parties, impacting on their relationship, lending the husband more status, which in turn gives him greater dominance and self esteem. It would not be unfair to

⁴⁹⁶ G. Davis and M. Roberts, ‘Mediation and the Battle of the Sexes’ (1989) *Family Law* 305.

⁴⁹⁷ D. Greatbatch and R. Dingwall, ‘The Interactive Constructions of Interventions by Divorce Mediators’ in J. Folger and T. Jones (eds) *New Directions in Mediation: Communication Research and Prospectives* (Sage 1994) 84.

⁴⁹⁸ N 422, 143.

⁴⁹⁹ P. Bryan, ‘Killing Us Softly: Divorce Mediation and the Politics of Power’ (1992) 40 *Buffalo Law Review* 441.

⁵⁰⁰ *ibid* 449.

⁵⁰¹ *ibid* 457.

say that the bulk of her reasoning relies upon the initial difference in tangible resources. Whilst this may have been true in the 1992, when she wrote the article, it is plausible to ask whether this is still relevant now? As demonstrated in the following chapter each sex is now performing roughly the same number of jobs and the pay gap is closing, albeit slowly.⁵⁰² However, there are still significant differences in the types of jobs being performed – part-time and full-time – not to mention the opportunities available to women within a job’s hierarchy. Yet, Bryan’s contention is largely based on a factor that is routinely evolving – the societal relationship between man and woman. Her argument should therefore be consistently re-evaluated as this changes. Naturally, Bryan was writing in 1992, and this must be acknowledged within any analysis. In time, it may be possible to conduct a completely gender neutral debate, focussing on the economically weaker spouse who, due to their tangible disadvantages may be at more of a risk. However, for now, it would seem that a resource-based argument still holds some weight. Economics was not the only facet of Bryan’s argument. She correctly highlighted the influence of traditional sex ideology that ‘pervades this culture and... disputants behaviours’⁵⁰³ and the significance of depression on the process.

The final, and perhaps most crucial segment of Bryan’s argument is her interpretation of ‘neutrality’. She puts forward that the power balance is initially uneven, before going on to suggest that this is entrenched by the fact that ‘mediator neutrality places the responsibility for generating alternatives and outcomes solely on the parties’.⁵⁰⁴ Essentially Bryan is proposing that ‘the ethic of neutrality and party empowerment compromises any attempt by the mediator to produce fair financial agreements through power balancing because it denies mediators the opportunity to use the only effective power balancing technique: interfering with the substance’.⁵⁰⁵ However, this potentially comes down to a question of interpretation. One may ask, is it necessary for the mediator to be able to affect the substance of a process? It is unclear from her work as to why this is. The power imbalances she reflects upon would undoubtedly affect the abilities of the parties to negotiate. However, this is surely why the multiple

⁵⁰² Commission, ‘Report on Progress on Equality between Women and Men in 2010 – the Gender Balance in Business Leadership’ SEC (2011) 193 final.

⁵⁰³ N 499, 483.

⁵⁰⁴ *ibid* 504.

⁵⁰⁵ *ibid* 515.

definitions of mediation place a heavy emphasis on the word 'assist'. If there is a power imbalance then the party must be assisted by the mediator. If one is willing to accept that there can be a power imbalance, then it would only seem logical that the mediator should be able to assist, by guiding, rather than substantiating, the process, whilst remaining within the remit of 'impartiality'. If one accepts this premise then the problem becomes not one with mediation *per se*, but with the practice of mediating, which is influenced by training, experience and the wider development of mediation as a practice.

This conclusion is reinforced by Davis and Roberts' study concerning the South-East London Family Conciliation Bureau. They found that 86% of women, in contrast to 67% of men, found the agreement reached fair.⁵⁰⁶ In their argument they supported the above deduction by stating:

'...if the mediators simply provide a forum in which parents get on with the negotiations without interference, then it might well be argued that, in cases where one party threatens to dominate, the mediation attempt will serve to perpetuate this imbalance and give it legitimacy. But some of the Bromley evidence indicates that the mediators did much more than this: they were active; they did challenge; they controlled the ebb and flow of the negotiation; in some cases, the 'weaker' party did, indeed feel empowered'.⁵⁰⁷

The authors then went on to say the intrinsic point that 'it is unreasonable, in our view, to criticize family mediation because of its failure to remedy structural inequalities in our society'.⁵⁰⁸ One can hardly disagree with this sentiment. It is unrealistic to expect a divorce law to remedy the structural inequalities within our society and to attempt to do so would likely produce an esoteric system. Reinforcing this is the fact that the alternative is hardly any better. As already discussed, the solicitor led negotiation according to Erlanger et al was 'bitter or nonexistent; terms were secured through threats and intimidation or pressure from attorneys or court

⁵⁰⁶ N 496, 305.

⁵⁰⁷ *ibid* 306.

⁵⁰⁸ *ibid*.

personnel; and in each case at least one of the parties criticized the outcome'.⁵⁰⁹ Meanwhile, Wasoff concluded that many of the participants in her research had been 'pressurized... [were] dissatisfied... [and] lost out financially'.⁵¹⁰ If one partially accepts Bryan's argument above, that there are imbalances when one spouse has an economic advantage, then it would seem logical to say that they must equally apply in these situations too. Following from this, one may propose that correctly performed mediation, could actually provide a better service. If mediation were to become more prevalent, it would seem logical to assume that market forces would ensure that the better service would become mainstream.

To conclude, it would appear that gender may have an impact upon mediation. However, Bryan's contention that a mediator cannot remedy this seems unfounded and can be countered by Davis and Robert's research, which demonstrates the advantages of training and experience. Given this, it would seem logical that any future reforms pay regard to the impact gender may have upon mediation.

6.7. Mediation And Domestic Violence – Are They Compatible?

A polarised question is whether mediation can be used in circumstances where there has been domestic violence. Domestic violence is defined as 'any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality'.⁵¹¹ It has been suggested that, statistically, roughly one third of women of women will be physically assaulted by a partner in their lifetime.⁵¹² Adding to this is the fact that 'ninety to ninety-five percent of domestic abuse victims are women and women are ten times more likely to be abused by an

⁵⁰⁹ H. Erlanger, E. Chambliss and M. Melli, 'Participation and Flexibility in Informal Processes: Cautions from the Divorce Context' (1987) 21(4) *Law and Society Review* 591.

⁵¹⁰ F. Wasoff, 'Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce' (2005) 27 *Journal of Social Welfare and Family Law* 246.

⁵¹¹ Ministry of Justice, 'Domestic Violence' (*Ministry of Justice, 12 March 2009*) <<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/about/domesticviolence.htm>> accessed 18 February 2011.

⁵¹² N. Ver Steegh, 'Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence' (2003) 9 *William & Mary Journal of Women and the Law* 148.

intimate partner than are men'.⁵¹³ It is therefore clear that this is a gendered issue. However, it is a considerable topic area, which could not be done justice by this thesis. For further reading see the following.⁵¹⁴

6.8. Are There Economic Benefits To Mediation?

Mediation is frequently linked with economical benefits. In its consultation document the Conservative Government argued that 'it tends to reduce the costs to the parties (and, where they are legally aided, to the Legal Aid Fund) because of reduced involvement of lawyers and the courts'.⁵¹⁵ In their law reform proposal they reiterated this belief stating 'family mediation will still prove to be more cost effective than negotiating at arms length through two separate lawyers and even more so than litigating through the courts'.⁵¹⁶ More recently the Family Justice Review indicated that alternative techniques, such as mediation, might be more 'cost effective'.⁵¹⁷ Before any analysis can be undertaken, one must initially differentiate between a reduction in costs and cost-effectiveness. A reduction in costs is, plainly, a financial

⁵¹³ *ibid* 149.

⁵¹⁴ K. Fischer, N. Vidmar & R. Ellis, 'The Culture of Battering and the Role of Mediation in Domestic Violence Cases' (1993) 46 *SMU Law Review* 2117; C. Germane, M. Johnson & N. Lemon, 'Mandatory Custody Mediation and Joint Custody Orders in California: The Dangers for Victims of Domestic Violence' (1985) 1 *Berkely Women's Law Journal* 175; L. Lerman, 'Criminal Prosecution of Wife Beaters' (1981) 4 *Response to Violence in the Family* 1; J. Rifkin, 'Mediation in the Justice System: A Paradox for Women' (1989) 1 *Women and Criminal Justice* 41; D. Stallone, 'Decriminalisation of Violence in the Home: Mediation in Battering Cases' (1984) *Law and Inequality: Journal of Theory and Practice* 493; C. Bethel & L. Singer, 'Mediation: A New Remedy for Cases of Domestic Violence' (1982) *VT Law Review* 7; K. Corocoran & J. Melamed, 'From Coercion to Empowerment: Spousal Abuse and Mediation' (1990) *Mediation Quarterly* 7; K. Young, *Research Evaluation of Family Mediation Practice and the Issue of Violence* (Legal Aid and Family Services, Commonwealth of Australia, 1996); F. Kaganas & C. Piper, 'Domestic Violence and Divorce Mediation' (1994) 1 *Journal of Social Welfare and Family Law* 265; C. Piper, 'Research: Family Law Act 1996, Section 1(D) – How Will 'They' Know There Is A Risk Of Violence' (1997) *Child and Family Law Quarterly* 268; E. Kruk, 'Power Imbalance and Spouse Abuse in Divorce Disputes: Deconstruction Mediation Practice Via the 'Simulated Client' Technique' (1998) 12 *International Journal of Law, Policy and the Family* 6; P. E. Bryan, 'Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation' (1994) 28(2) *Family Law Quarterly* 177; D. Greatbatch & R. Dingwall, 'The Marginalization of Domestic Violence in Divorce Mediation' (1999) 13 *International Journal of Law, Policy and the Family* 174.

⁵¹⁵ N 203, 55.

⁵¹⁶ N 345, 42.

⁵¹⁷ Ministry of Justice, 'Family Justice Review' (*Ministry of Justice*, 31 March 2011) <<http://www.justice.gov.uk/reviews/family-justice-intro.htm>> accessed 31 March 2011.

benefit set against the normal costs of a divorce. Cost effectiveness, on the other hand, is whether the cost of a service is value for money. For this reason, any question of cost effectiveness must be undertaken after an examination of mediation as a whole, allowing for an examination of the value of mediation. An assessment must therefore be carried out into the relative costs of mediation and if they are economically beneficial and, secondly, if these costs are value for money.

In regards to the first question there have been numerous studies, of which Gwynn Davis' work is of particular note.⁵¹⁸ Before these can be set out it is important to clarify several issues. Firstly, as Davis states, it is impossible to accurately compare the 'legal costs of those who engage in mediation with the legal costs of those who do not';⁵¹⁹ as they have either gone one way or the other, not both ways. This is complicated by the fact that different divorcees have a variety of disagreements such as contact, residence, ancillary or all encompassing disputes. Each one of these would require inconsistent levels of attention and distort the level of contact hours with a respective mediator or solicitor. One must also bear in mind that each divorce is unique in its own right and, the process followed may or may not be successful, complicating the cost. As a result, it is difficult to make a direct comparison. A further obstacle is that there are for-profit and not-for-profit mediators, who charge differing amounts. As there are a limited number of not-for-profit mediators, it is perhaps more logical to mainly assess the for-profit mediators. Lastly, this all may be complicated by Legal Aid, which could subsidise the cost of mediation. Consequently, a clearer scrutiny into the actual differences between mediation and solicitor led negotiation should assess Legal Aid as a separate issue. Overall, whilst averages may be relied upon, they have limited value. It is, perhaps, an area that is ripe for further empirical research, requiring researchers to go down both routes as actors, assessing the varying costs of each process, providing a more accurate selection of results.

⁵¹⁸ G. Davis and G. Bevan, 'A Preliminary Exploration of the Impact of Family Mediation on Legal Aid Costs' (1999) *Child and Family Law Quarterly* 411; G. Davis et al, 'Can Mediation Reduce Expenditure of Lawyers?' (2001) *Family Law* 186; G. Davis, *Monitoring Publicly Funded Family Mediation – Summary Report to the Legal Services Commission*, (Legal Services Commission, London, 2000).

⁵¹⁹ G. Davis et al, 'Can Mediation Reduce Expenditure of Lawyers?' (2001) *Family Law* 186.

Davis' evidence would seem to demonstrate that mediation is cheaper than solicitor led negotiation. Perhaps the best approach is to assess a comparison between the costs of mediation for couples who are mediating over 'all issues' and those who are pursuing the same route through solicitors.⁵²⁰ This avoids variables and gauges the maximum average cost of both mediation and solicitor led negotiation. In regards to those who pursue mediation, mediate and then make an agreement, one can identify the cost of the 'intake assessment',⁵²¹ the mediation itself⁵²² and the 'green form advice'.⁵²³ Davis and Bevan estimate that these cost £188, £750 and £240 respectively.⁵²⁴ The sum of this comes to £1,178. However, this figure does not necessarily reflect the current cost of mediation, as the research was carried out in 1996-98 and must reflect those prices. On the other hand, Davis did repeat this estimate in his report to the Legal Services Commission in 2000 and a further article in 2001 - quoting the price of £1,200.⁵²⁵

In contrast the National Audit Office in its report 'Legal Aid and Mediation for People Involved in Family Breakdown'⁵²⁶ stated that non-mediated cases cost £1,682 whilst mediated cases cost £752.⁵²⁷ The discrepancy between Davis' findings and the National Audit Office's indicates that perhaps the Audit Office's findings are based on not-for-profit suppliers, which Davis estimated would cost £700.⁵²⁸ However, the not-for-profit figure should be treated with trepidation. There is a limited number of these organisations and if mediation were to make the jump to mainstream it is likely that the number of for-profit organisations would rise. As a result, the National Audit Office's figure may be misleading.

What is clear in regards to both sets of figures, whether they are discrepant or not, is that mediated cases are, on average, cheaper than non-mediated cases. One can now

⁵²⁰ G. Davis and G. Bevan, 'A Preliminary Exploration of the Impact of Family Mediation on Legal Aid Costs' (1999) *Child and Family Law Quarterly* 411.

⁵²¹ *ibid* 414.

⁵²² *ibid*.

⁵²³ *ibid* 416.

⁵²⁴ *ibid*.

⁵²⁵ G. Davis, *Monitoring Publicly Funded Family Mediation – Summary Report to the Legal Services Commission* (Legal Services Commission 2000) 12; G. Davis et al, 'Can Mediation Reduce Expenditure of Lawyers?' (2001) *Family Law* 186.

⁵²⁶ N 431.

⁵²⁷ N 431, 5.

⁵²⁸ N 525.

examine whether it would be cost effective. There are two main factors that can be queried.

Firstly, the figures quoted reflect the cost of successfully mediated cases. Where, they are not successful, one must consider the cost of the mediation and the further legal fees required. The rate of success has contradictory reports. In England and Wales, the Newcastle Centre for Family Studies found that “all issues” were agreed in only 39 per cent of “comprehensive” mediations, and 19 per cent of child-related mediations’.⁵²⁹ The settlement failure rate for these statistics would therefore be 61 and 81 per cent respectively. This can be compared to solicitor led negotiation, where another English and Welsh based study demonstrated that ‘the settlement failure rate was under 5 per cent’.⁵³⁰

However, these findings can be contrasted to studies from other countries, which on the whole have been positive. Kelly has outlined that mediation ‘research across countries indicates that clients reach agreement in divorce mediation between 50% to 85% of the time, with most studies in the mid to upper range’.⁵³¹ Of note is a study carried out by Depner, Cannata and Ricci on mandatory custody mediation in California.⁵³² However, the natural flaw with this statement is that ‘other countries’ is not particularly relevant to England and Wales.

Nevertheless, it would seem that given the success rate in England and Wales is so low, implementing mandatory mediation would be unlikely to save costs for those who fail to successfully mediate. This is another, of many reasons, to encourage divorcees to choose which process will work for them.

⁵²⁹ Relate Centre for Family Studies, *Mediation: The Making and Remaking of Cooperative Relationships* (University of Newcastle 1994) in J. Eekelaar, M. Maclean & S. Beinart, *Family Lawyers – The Divorce Work of Solicitors* (OUP 2000) 16.

⁵³⁰ G. Davis et al, *Ancillary Relief Outcomes: A Pilot Study for the Lord Chancellor’s Department* (University of Bristol 1999) in J. Eekelaar, M. Maclean & S. Beinart, *Family Lawyers – The Divorce Work of Solicitors* (OUP 2000) 16.

⁵³¹ N 464, 375.

⁵³² C. Depner, K. Cannata and I. Ricci, ‘Client Evaluation of Mediation Services’ (1994) 32 *Family and Conciliation Courts Review* 306 in B. Kelly, ‘A Decade of Divorce Mediation Research – Some Answers and Questions’ (1996) 34(3) *Family and Conciliation Courts Review* 375.

However, there still remains the argument that, despite the costs, the parties may benefit from the process through an increase in communication and co-operation and a reduction in conflict. This was an area that was discussed above. However, when seen in an economic context, the discussion is diversified. One could potentially argue that, even if the parties did not come to a successful agreement through mediation, then the process could still be economically justified on the basis that it increased the parties communication and co-operation and reduced any conflict. As mentioned above this is a difficult area to judge, due to a lack of research. Yet Bickerdike and Littlefields argued that ‘couples who engage in high levels of contentious behaviour and low levels of problem solving and who exhibit disparity in problem solving are less likely to reach successful outcome in mediation’.⁵³³ From this one can imply that if the parties are not successful it is unlikely that the mediation encouraged them to communicate better. As a result, one can doubt whether mediation would be cost effective where mediation was not successful, as it would not seem to have a great impact.

Overall, it would seem that mediation is cheaper than a solicitor or court based process. One should err on the side of caution when considering the National Audit Office statistics, as they may have overlooked for-profit mediators. However, what is clear is that, where the mediation is unlikely to be a success, it is doubtful as to whether there will be any benefits which would justify the cost of the mediation and then the added cost of its failure.

6.9. Conclusions On Mediation

In regards to the Family Law Act 1996, there were significant problems concerning mediation. Davis’ effectively demonstrated that there was still a high demand for solicitors, diminishing the view that mediation could provide a panacea. Beyond this it would seem that, from the modern analysis above, compulsory mediation would seem ill advised. There are numerous issues relating to conflict, gender and economics, which all demonstrate that an across the board policy would have significant problems. Given this, the credentials of the Act were and are still

⁵³³ N 472, 192.

significantly damaged. As Part III is still active,⁵³⁴ this criticism also extends to the requirement for those applying for Legal Aid to attend mediation.

However, this is not to discount mediation as a process. As has been argued, in many situations mediation may reduce conflict and increase communication whilst improving the longevity of agreements. Furthermore, it may be cheaper than the traditional process. The above arguments demonstrate that the provision of voluntary mediation, with significant levels of uptake, would be likely to produce superior results.

7. Conclusion

The previous chapter concluded that there appeared to be few theoretical justifications for fault. In turn this chapter has discussed the attempted no-fault reform through the Family Law Act 1996.

It would seem from the above that the Act failed for a myriad of reasons. Specifically Part I of the Act induced somewhat of a schizophrenic approach, advocating the support of marriage but also no-fault divorce. This convoluted approach presented the opponents to both of these principles with considerable grounds to criticise the Act.

Practically the impact of Part I affected many of the facets of Part II, such as the information meetings and the period for reflection; causing internal tensions within the processes, resulting in, what could be argued as, a lack of direction. This criticism was underlined by the pilot study carried out by Walker, which assailed the information and assessment meetings for providing a bureaucratic and frequently irrelevant approach. Part III was similarly influenced by Davis' pilot study, which went on to demonstrate that mediation was not a panacea.

This chapter has outlined three conclusions that have emerged from the failure of the Act. Firstly, it has proposed that the reasons why the Family Law Act 1996 failed does not detract from the arguments for no-fault. It suggested that by attempting to

⁵³⁴ Part III was repealed by the Access to Justice Act 1999, however, its provisions were implemented through the Legal Services Commissions Funding Code.

reconcile two opposing forces – no-fault divorce and sanctity of marriage, the provisions of the Act lacked direction and were subsequently mired by practical failure. However, it was noted that this did not detract from the arguments for no-fault divorce. As the last chapter put forward, there are numerous theoretical arguments against fault. Yet, the failure of Family Law Act 1996 has been attributed not to the theoretical flaws of no-fault, but the existence of counteractive aims within the Act, specifically those revolving around sanctity of marriage, which caused practical problems. The summation of this allows the thesis to suggest that no-fault divorce could, despite the Family Law Act 1996, remain the working model for future reforms.

Secondly, building on the first conclusion, the above analysis has allowed the thesis to argue that by supporting both the liberal concept of no-fault divorce and the traditional concept of sanctity of marriage, the Family Law Act 1996 had opposing aims. As evidenced, this convolution distorted the Act providing an incoherent message. This caused the period for reflection and consideration to have a conflicted purpose, whilst also failing to provide the information and assessment meetings the direction and conviction they needed. Given the theoretical conclusions concerning the traditional arguments and the practical failure to reconcile them in the 1996 Act, the conclusions of the previous chapters has been further demonstrated. This allows the thesis, within the next chapter's analysis of the current law, to suggest that by having distorted aims the practical application of the law may be damaged.

Thirdly, the chapter demonstrated that where accepted voluntarily, mediation has many attractive benefits, including a reduction in conflict and increase in communication; greater agreement longevity; economic benefits and, with correct mediator training, a process that can support a spouse where the other is dominant. Equally, it also argued that where mediation is not accepted voluntarily, these benefits may be less forthcoming.

The failure of the Act is a lesson that should be recognised. In regards to this thesis, the practical failure of the Act demonstrates that multiple objectives within a divorce law detract from its potential for success. However, the processes that were outlined, such as the information meetings and mediation, were not necessarily completely

misguided. It may therefore be possible to remodel, redirect and then reuse parts of the Act. In particular the above analysis has highlighted that there is a demand for information and that voluntary mediation has numerous benefits. This is particularly relevant in the following chapter's coming analysis of the recent Protocol for Mediation Information and Assessment Meetings; and the Family Justice Review. What is more it does not severely detract from no-fault as many of the problems associated with the Act were due to practical rather than theoretical problems.

Chapter 4. The Aims of a Modern Divorce

Synopsis

This chapter seeks to draw together the conclusions previously reached, whilst separately assessing the aims of the law as it stands in the Matrimonial Causes Act 1973. This allows the chapter to suggest five interlinked themes for the thesis.

Firstly, within the second and third chapter, the thesis proposed that a no-fault system could be adopted. Secondly, it suggests that voluntary mediation may, if approached correctly, create higher levels of communication, cooperation and longer lasting agreements, whilst feasibly doing so at a lower cost.

Thirdly, following the analysis carried out during this chapter, it submits that the current law has not met either its first or second aim, providing what can be an unfair process that provides multiple opportunities to cause bitterness, distress and humiliation to the parties and any children.

Following on from this, the chapter puts forward its fourth and central proposition - that conflicted aims, between protecting the sanctity of marriage and providing a fair process with minimum bitterness, distress and humiliation, may actually exacerbate problems. This allows the thesis to suggest that a no-fault model, which seeks to provide an economically accessible process, focussed solely on the dissolution of the marriage with minimum bitterness, distress and humiliation, could be adopted.

Finally, it applies the above themes to the current reforms, outlined in the first chapter, arguing that they may provide a convoluted law if the provisions for mediation are coercive. With regard to this thesis, this may provide problems concerning the practical application of the reforms.

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1. Introduction

The first chapter, following an outline of the development of divorce law up until current day, concluded that as it has developed, the purpose of the law has changed from a traditional to socio-economic focus. This was built upon in the second and third chapters; which explored the concept of fault and no-fault divorce.

It was suggested that now, under a modern analysis, fault has few theoretical justifications. Traditional, socio-economic, contractual, psychological and tort-based rationales were explored; none of which were found strong enough to justify the retention of fault within divorce. Whilst there were certain strong arguments for specific situations; for example, the use of fault has been conceived to promote psychological benefits in certain cases; as a comprehensive vindication, no theory was adequate.

Subsequently, no-fault divorce was investigated within the thesis. This exploration took the form of the failed Family Law Act 1996. The chapter was divided into three segments, exploring Part I, II and III of the Act. With regard to Part I, the Act was found to be divided between the broadly opposing theoretical objectives of providing a no-fault divorce whilst protecting sanctity of marriage - causing practical difficulties within the application of the Act. Following this, it was suggested that several facets of Part II, such as the period for reflection and the information meetings, were negatively influenced by the internal tensions caused by Part I. This led the chapter to conclude that a theoretically divided Act may impact upon the practical application of the law. Finally, through an assessment of Part III, the chapter included an analysis of mediation, arguing that, from a modern analysis, compulsory mediation would appear ill advised, however, that should not diminish the welcome impact mediation may invoke when voluntarily accepted, as it may reduce conflict whilst increasing communication and maybe even the longevity of agreements over ancillary matters.

Emerging from the second and third chapter, it would appear that the thesis' first theme – that a no-fault divorce model could be adopted – is evidently clear. There appears to be little rationale for the continued use of fault. No-fault divorce provides an attractive alternative. Especially as broadly opposing theoretical objectives, which

contributed towards the failure of the 1996 Act, is avoidable. It is argued that this must not be interpreted as a rejection of no-fault models. Broadly, the first theme, that a no-fault model could be adopted, has strong evidence to support it, as demonstrated in the second and third chapter.

The second theme, that voluntary mediation may provide a beneficial procedure, was investigated and demonstrated within the assessment of Part III. The thesis considered a range of issues and, it was found that, when accepted voluntarily, mediation could reduce levels of conflict, communication and cooperation. With correct mediator training and handling, certain studies showed that it may not discriminate against women. Finally, if successful, mediation is likely to reduce the overall cost of the divorce, however, where not successful the cost had the potential to increase. Despite this, the previous chapter clearly demonstrated that mediation, as a voluntary process, has the capacity to provide a range of benefits.

Given these two themes, the thesis shall now move on to assess the current objectives of the law, questioning whether they have been met, allowing the thesis to propose its third theme – that the current law has not met its aims. It then suggests what the objectives of a modern divorce law could encapsulate, outlining its central tenet that divorce law should be economically acceptable and focused solely on providing a process with minimum bitterness, distress and humiliation. Following this, it shall outline its final proposition – that the current ongoing reforms, outlined in the first chapter, specifically the Pre-Application Protocol for Mediation Information and Assessment and the Family Justice Review, may not meet with several of the thesis' findings.

As mentioned in the previous chapter, within the build up to the Family Law Act 1996, the aim's of the Law Commission 1966 Report,⁵³⁵ often linked with the aims of the current law, were assessed by the Law Commission in it's 1988 Discussion Paper.⁵³⁶ This chapter shall seek to outline how the Law Commission approached the issue, whilst simultaneously adding scrutiny from a modern perspective.

⁵³⁵ N 17.

⁵³⁶ N 275.

This chapter's structure includes an assessment of both of the current aims of the law, outlined by the Field of Choice. These read:

- “(i) To buttress, rather than to undermine, the stability of marriage; and
 (ii) When regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.”⁵³⁷

It shall then move on to assess the subsidiary aims laid out by the Law Commission Paper. These include injustice to an economically weaker spouse and the impact on the children.⁵³⁸

The analysis concludes, with regard to the theoretical debate concerning fault in the previous chapter and the exploration of the Family law Act 1996, that a conflicted divorce law is unlikely to meet its multiple aims; perhaps even aggravating the issues it seeks to avoid. This provides the fourth and central message the thesis seeks to portray. It proposes that a more cogent solution could be to adopt a no-fault model with an economically acceptable process focussed simply upon reducing bitterness, distress and humiliation; providing a more humane divorce.

Using this hypothesis, the thesis tentatively evaluates the ongoing reforms.⁵³⁹ It suggests that, whilst they possess certain positive attributes, they may learn from the mistakes of the current, previous and failed laws relating to divorce and provide a more focussed approach to the law – the fifth and final theme of the thesis.

2. The First Aim Of The Field Of Choice

The Law Commission's 1966 Report titled, 'Reform of the Grounds of Divorce: The Field of Choice' argued that the first aim of the law in England and Wales should be:

⁵³⁷ N 17, para 15.

⁵³⁸ *ibid* para 17-18.

⁵³⁹ As there is so little information on the reforms, any analysis is naturally limited.

‘To buttress, rather than to undermine, the stability of marriage’.⁵⁴⁰

The notion of reinforcing marriage was touched on in the previous chapters. It was a source of debate in the Gorell Commission with Cosmo Lang even arguing that ‘any extension of the causes for divorce beyond female adultery was against the express words of Christ’.⁵⁴¹ Following this, the introduction of the 1937 Act was opposed by the Anglican Parish clergy and MPs with significant levels of Catholic constituents.⁵⁴² It is therefore perhaps no surprise that the preamble to the 1937 Act contained the statement that it was a necessary ‘expedient for the true support of marriage’.

In light of these repeated endorsements of divorce law supporting marriage, it is possible to question whether the current law has buttressed the stability of marriage. Two lines of analysis may be undertaken. Firstly, one can argue from a numerical perspective, that the sheer number of divorces – 113,949 in 2009⁵⁴³ - demonstrates, to a degree, that the institution of marriage has not been reinforced.⁵⁴⁴ Whilst the number is the lowest since 1974, when there were 113,500 divorces, it is still a significant figure.⁵⁴⁵ To provide historical context, the average number of petitions, dissolutions and nullities in the period 1901-1905 was 812; 2,848 between 1921-1925; 7,535 during 1936-1940 and 33,132 over 1951-1954.⁵⁴⁶ Within a century, the quantity of divorces has increased by roughly, 14,000% - a staggering sum.

However, the current statistics are slightly misleading, as they do not represent that, between the introduction of the Divorce Reform Act 1969 and 2009, a bell curve pattern emerged; the numbers of divorces peaking in 1990 with 191,615 divorces, only to then decline to the current levels.⁵⁴⁷ Building on the above percentages given,

⁵⁴⁰ *ibid* para 15

⁵⁴¹ N 29, 393.

⁵⁴² *ibid* 399.

⁵⁴³ N 2, 1.

⁵⁴⁴ Naturally, when assessing marriage and how it is viewed in society, there are a plethora of factors to consider, such as the rising rates of cohabitation, however, this chapter is not seeking to question this, but raise the fact that there is a high rate and number of divorces, especially when seen in light of divorce history. Office for National Statistics, *General Lifestyle Survey Overview* (2011)

⁵⁴⁵ N 2, 1.

⁵⁴⁶ N 3, 51.

⁵⁴⁷ S. Cretney, *Family Law in the Twentieth Century – A History* (OUP 2003) 377 and Office for National Statistics, *Statistical Bulletin: Divorces in England and Wales 2009* (2011) 1.

the percentile increase in divorces between 1901 and 1990 was approximately 23,500%.

Meanwhile, with regards to the duration of marriages, the average lifespan has also declined; currently, 33% of marriages will have ended by their 15th anniversary, whilst only 20% had ended by that point in 1969.⁵⁴⁸ It is not been suggested that the divorce process is wholly responsible for the decrease in the duration of marriages. Nevertheless, it is plausible that the increase in access to the divorce courts may have had an impact.

One may inquire as to the ease of obtaining a divorce. Given the nature of the special procedure, it would appear that it is relatively simple to acquire a divorce. It would seem, on the basis of the number of divorces, and the ease in which they are obtained, that with the introduction of the Matrimonial Causes Act 1973, the stability of marriage was diminished. Naturally, the process of obtaining a divorce may not solely be responsible, as other factors, such as society's acceptance of divorce, may have impacted upon divorce rates.

Secondly, leading from this, a discussion regarding reconciliation may take place. The Matrimonial Causes Act 1973 provides for reconciliation in section 6. This has two sections; one requiring that the legal representatives acting for the petitioner certifies that they have discussed reconciliation provisions. The second provides the court with the power to adjourn proceedings if there is a reasonable possibility of reconciliation.

Despite these legislative provisions, the special procedure has had a significant impact, distorting what was initially intended to be a judicial mechanism into an administrative one. Arguably, the reconciliation provisions are unsuccessful on account of several reasons. This has, largely, been credited to the fact that solicitors regularly fail to explore reconciliation;⁵⁴⁹ frequently taking the view that it would be ineffectual.⁵⁵⁰ Yet, the Law Commission 1988 Discussion Paper did suggest that the 'fall-off rates' between petition and decree *nisi*; and during the transition from decree

⁵⁴⁸ N 2, 1.

⁵⁴⁹ N 275, 15.

⁵⁵⁰ *ibid.*

nisi to decree *absolute*, appear to provide ‘evidence for some post-petition reconciliation.’⁵⁵¹ This would seem to be one-sided conjecture. One may question whether it is the procedure followed which, as the Law Commission seems to suggest, facilitates reconciliation, or if it is the parties themselves or outside influences, such as friends and family for example, who are affecting the reconciliation. Nevertheless, in regards to the ‘general’ concept of reconciliation, rather than the ‘fall-off rates’, the Law Commission supported the belief that the requirement to prove a fact may entrench hostility or alienate a respondent,⁵⁵² restricting opportunities for reconciliation, whilst also claiming that the speed of the process limits time for reflection.⁵⁵³ Whilst it may be argued that this could entrench hostility or alienate a respondent, it is questionable whether it will allow for a period for reflection. As already discussed, the assumption should surely be that this takes place before the decision to divorce is made. It could also fail to appreciate that the length of time taken under the special procedure may provide enough time for reflection for some couples.

From a political perspective, it would seem that both the Law Commission and the Government, with the introduction of the Family Law Act 1996, discussed in greater depth below, accepted that the original objective of supporting marriage was not being met. The Government included into the Act:

‘the parties... are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage’.⁵⁵⁴

The attempted introduction of no-fault divorce and,⁵⁵⁵ in Part II, the inclusion of a ‘period for reflection’⁵⁵⁶ both link in to the Law Commission’s suggestions.⁵⁵⁷ An interesting difference concerns the Law Commission, who, in contrast to the Government, did not suggest supporting the institution of marriage - indicating a distinction in approaches; the Law Commission arguing that the law should aim to

⁵⁵¹ *ibid.*

⁵⁵² *ibid.*

⁵⁵³ *ibid.*

⁵⁵⁴ Part I, S 1(b).

⁵⁵⁵ Part II, S 5.

⁵⁵⁶ Part II, S 7.

⁵⁵⁷ N 275, 45.

save a marriage, which was capable of being saved, where as the Government was arguing that the law should aim to support the institution of marriage as well. Either way, the Family Law Act 1996 itself acts as testimony to the fact that the original aim of supporting marriage was not being fulfilled. What is more, the fact that it was not implemented means the aim still remains unachieved.

The creation of the Family Justice Review (the Review) by the outgoing Labour Government also adds to this discussion.⁵⁵⁸ The aim of the Review seems to prioritise fairness, speed and simplicity over the buttressing of marriage. As mentioned previously, the interim findings of the Review did not engage with religious arguments. Indeed, none of the members of the Review panel had a religious background. It is plausible that the final findings will expand upon their initial statements, providing a religious element. Equally, it is possible that the review may change the dynamic of the law, placing fairness, speed and simplicity above the need to buttress the stability of marriage. Although, tempering this statement, the Review is not a Law Commission project - perhaps reducing the likelihood of reform emerging from the proposals.

With regard to the theoretical discussion of the previous chapter, this approach would seem to be a logical progression considering the waning influence of the traditional argument as outlined above. Indeed, if one charts the progression of the divorce reform since the Matrimonial Causes Act 1973, one may highlight the changing emphasis between the initial support of marriage and the divided attempt by the Family Law Act 1996, which advocated no-fault divorce but also reconciliation.⁵⁵⁹ Now, potentially, the focus may turn solely to fairness, speed and simplicity over the sanctity of marriage.

Overall two main conclusions may be reached. Firstly, it would seem that the first aim has not been met. Marriage has not been buttressed by the Matrimonial Causes Act 1973; there are a staggering number of divorces and minimal effective provisions for

⁵⁵⁸ Ministry of Justice, 'Family Justice Review' (*Ministry of Justice*, 31 March 2011) <<http://www.justice.gov.uk/reviews/family-justice-intro.htm>> accessed 31 March 2011.

⁵⁵⁹ K. Stylianou, 'The Tensions between Family Mediation Principles and the Formal Legal System' (1998) *Family Law* 218; R. Bailey-Harris, 'Rhetoric and Reality in Divorce Reform' (1995) *Family Law* 618.

the protection of marriage, casting doubt whether, in reality, divorce law can buttress the institution of marriage. Secondly, linking to the chapter concerning fault, support for the concept that divorce law should protect marriage, appears to be waning. It would seem logical to suggest that this should no longer be an aim of the law, and even if viewed as an aim, not the primary aim, as it currently stands. However, tempering this statement is that fact that, as the theoretical discussions concerning fault demonstrated, marriage is still valued by a large section of society. Therefore, perhaps the most sensible solution would be for divorce law to take a neutral stance on the concept of marriage, neither actively promoting nor undermining it.

3. The Second Aim Of The Field Of Choice

The second aim outlined by the Law Commission in the *Field of Choice* stated that the law should provide the ‘maximum fairness, and the minimum bitterness, distress and humiliation’.⁵⁶⁰ A relevant consideration made apparent in the previous chapter, is that the divorce process may be distinguished between the special procedure and the judicial process; where a petition is defended.

As mentioned, Elston, Fuller and Murch explored the judicial process, demonstrating the negative impact of the judicial process.⁵⁶¹ This chapter shall primarily examine the special procedure, questioning separately, whether the law provides maximum fairness; and minimum bitterness, distress and humiliation.

3.1. Fairness

Ensuring fairness ‘in a way that is just to all concerned, including the children as well as the spouses’,⁵⁶² was a major foundation in enactment of the Divorce Reform Act 1969. This was the one of the approaches of the Law Commission in the *Field of Choice* who, when arguing for ‘maximum fairness’,⁵⁶³ stated that the law at the time:

⁵⁶⁰ N 17, 10.

⁵⁶¹ N 147, 609.

⁵⁶² N 17, 11.

⁵⁶³ *ibid* 10.

‘does not achieve the maximum possible fairness to all concerned, for a spouse may be branded as guilty in law though not the more blameworthy in fact.’⁵⁶⁴

This seemed to be an echo of *Putting Asunder’s* operandi, which argued for the removal of the formal concepts of ‘innocent’ and ‘guilty’.⁵⁶⁵ One may critique the current law’s relation to fairness from two perspectives – procedural and substantive.

Procedurally, as regards to the Law Commission and the Archbishops Group’s focus on innocence and guilt, several points can be made. *Putting Asunder’s* aspirations must surely be tempered by their insistence on an investigation into the breakdown of the marriage, akin to a ‘coroner’s investigation’. It assumes that the parties would not come to their own conclusions on guilt and innocence, especially if the previous matrimonial offences were one of the important elements. Returning to the investigations behind the psychological justifications of fault divorce, it would appear that many individuals do personally allocate blame. Considering *Putting Asunder* advocated a significant investigation; it would seem fair to assume that if implemented, the relationship between the parties may have been aggravated. Furthermore, as discussed in relation to justice based justifications for fault, it would be difficult to impart a fair investigation, with a certain outcome, when many couples considered that they were both at fault for the end of the marriage.

In contrast, the Law Commission’s proposed reform, which was adopted, required proof of one of five facts, which included the previous matrimonial offences, although they were no longer addressed as such. When this is combined with the reality that the parties are labelled the ‘petitioner’ and the ‘respondent’, something the Booth Committee, detailed in the following chapter, was quick to recommend should be altered,⁵⁶⁶ it is hard to see how anything was changed. Indeed, perhaps it is difficult to imagine how any legal system could not include these concepts if the courts are involved, as they correlate to an adversarial form. One party must win and, where a case is reliant upon the demonstration of a fact to be successful, this is arguably even

⁵⁶⁴ *ibid* 16.

⁵⁶⁵ N 107, 24.

⁵⁶⁶ N 302, 25.

more pertinent. To put this in perspective, the fault grounds were used in roughly 64% of cases in 2008.⁵⁶⁷ Again, one can highlight the aforementioned psychological discussions held in the second chapter, evidencing that parties may naturally allocate blame. Conceivably, with these concepts in mind, this is why the Law Commission utilised the word ‘maximum’ as an acknowledgement of the inherent flaws in the attempt to ensure a fairer process – accepting a limited capacity for success. This argument is compounded by the fact that the majority of petitions are conducted under the special procedure. With this in mind, it would appear that parties are labelled ‘innocent’ and ‘guilty’ without going through a judicial procedure.

An area of concern in the current system is the fact that, in certain cases, the respondent may not challenge the petition, either due to circumstance or capacity. More explicitly, parties may lack the financial capacity to defend a petition, or simply not wish the expenditure of doing so, preferring to accept the petition. This was raised by the Law Commission,⁵⁶⁸ who went on to highlight that this is especially problematic where Legal Aid is not available. Given the recent news that all Legal Aid is going to be removed for divorce petitions, this is a prominent point.⁵⁶⁹ The impact of its removal is seismic, changing the landscape of those able to challenge a divorce petition, ensuring that only those who can afford to challenge a petition may do so. It could be argued that this may amount to a form of economic discrimination. The introduction of the special procedure as a procedural reform, rather than as a legislative one, relied upon the fact that a respondent could still challenge a petition through the judicial mechanism outlined in the Matrimonial Causes Act 1973. Without a safety net to ensure individuals can do so, there is a prominent economic distinction between those who can afford to use the judicial process and those who can only afford the administrative process. Arguably, the fact that many individuals are financially unable to make legal challenges is a truth for all forms of English and Welsh Law. Mr Justice Mathew’s statement that ‘in this country justice is open to all

⁵⁶⁷ N 2.

⁵⁶⁸ N 275, 19.

⁵⁶⁹ Ministry of Justice, ‘Clarke Unveils Plan for Radical Reform of Justice’ (*Ministry of Justice*, 15 November 2010)

<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/news/newsrelease151110b.htm>> accessed 5 December 2010.

– like the Ritz Hotel⁵⁷⁰ is perhaps ironically pertinent in this regard. Overall, as mentioned above, restricting access to the judicial procedure on the basis of economics effectively makes divorce law a two-tiered system, distinguishing it as a legal area worthy of reform.

The law is also open to substantive criticism. The Law Commission, in its Discussion Paper, was quick to highlight the perpetuation of the concepts of guilt and innocence in fault based petitions.⁵⁷¹ It went on to emphasize that this is exacerbated by the fact that the behaviour need not be morally blameworthy, yet the law apportions blame,⁵⁷² evidenced in the case of *Gollins v Gollins*.⁵⁷³ These examples of blame are numerous, demonstrated by various fault-based cases, such as *Stevens v Stevens*⁵⁷⁴ where it was raised that, prior to appeal, Cumming-Bruce J had stated:

‘Mrs. Stevens is a highly strung lady with a good deal less capacity for self-control than most people and she is liable, if she gets irritated, to get very worked up and, to use a vulgar phrase, to go off the handle. The term hysterical, which is rather a loose one, is quite an apt adjective to describe how she presents herself when she is worked up. Her husband is capable of being rather a brutal personality’

Another example is contained within *Bradley v Bradley*⁵⁷⁵ where Scarman LJ stated ‘often a woman will willingly make the sacrifice of living with a beast of a husband’. To the neutral reader these judicial dicta are clearly apportioning a form of ‘blame’. Although, these were handed down in the 1970’s and so may not reflect current judicial attitudes, however, due to the special procedure, the majority of divorce cases do not go to trial, so they are some of the few judgements available to critique.

⁵⁷⁰ N 20, 183.

⁵⁷¹ N 275, 17.

⁵⁷² *ibid* 18.

⁵⁷³ N 189.

⁵⁷⁴ *Stevens v Stevens* [1979] 1 W.L.R. 885.

⁵⁷⁵ *Bradley v Bradley* [1973] 1 WLR 1291.

When granting a divorce in a fault-based petition, the court is agreeing with one party's subjective intolerability to living with the other party,⁵⁷⁶ either due to adultery or unreasonable behaviour.⁵⁷⁷ The Law Commission, in this instance, does not emphasise how distorted this attempt at 'fairness' is. If fairness is impartiality, then how can a judgment, which is so reliant on the subjective beliefs of one party, be fair? With the concepts of 'innocence' and 'guilt' being so prominent, there are connotations of a criminal trial. The central tenet of criminal law is the presumption of innocence, but, in the instance of divorce, it would seem that once the objective test has been fulfilled, the subjective question is impossible to rebuke. As a result if the respondent disagrees with the subjective viewpoint of the petitioner then, ultimately, it can only be perceived as 'fair' to the petitioner. Take the above case of *Stevens* as an example. Mrs. Stevens' petition was eventually successful, despite Mr. Stevens' attempts to defend his position. If Cumming-Bruce J's dicta is accepted, then Mrs. Stevens clearly had a role to play in the breakdown of the marriage. Yet, her husband was, legally, apportioned with the blame for the breakdown of the marriage.

Returning to procedural issues; this problem is exacerbated with regard to the special procedure, where the judge must accept, on paper, the subjective element of the application.⁵⁷⁸ Arguably, the fact that it is uncontested ensures fairness. However, if the respondent is consenting to avoid going to court, not because they disagree with the petition, but for economic or personal reasons, such as wanting to avoid further conflict, then this counterargument is nullified. To promote the opposing argument that - individuals who want to defend themselves are able to do so - seems to also correspondingly promote at least some form of conflict between the parties.

Yet, as the Law Commission points out, the fault-based grounds may actually provide a bargaining chip for one of the parties in instances where the respondent wants an

⁵⁷⁶ Whilst a petition based on adultery and behaviour does have an objective element, the court must also agree with the subjective opinion of the petitioner.

⁵⁷⁷ A petition based on desertion does not include a subjective element, and therefore is not being discussed.

⁵⁷⁸ As mentioned in the previous chapter, there are investigatory measures that may be undertaken by the Queens Proctor as in *Bhaiji v Chauhan, Queen's Proctor Intervening (Divorce: Marriages Used for Immigration Purposes)* [2003] 2 F.L.R. 485. However, this is rarely used.

immediate divorce but has no fact to rely on.⁵⁷⁹ Another bargaining chip can be found in petitions submitted under the fact of two years separation with consent, where one party may have a power imbalance if they withhold their consent.⁵⁸⁰ Distorting party positions is unlikely to provide for an impartial divorce.

It is clear that the current law on divorce has the potential for unfairness. It favours the party submitting the petition both in regards to procedure and substantive law. This stems from controlling who may or may not petition, giving one party an advantage before the divorce has begun and, secondly, during the divorce itself, by focussing on the petitioner, the petition is, naturally, one sided. This is all compounded by the fact that soon, with the cuts in Legal Aid, a respondent will only be able to challenge a petition if they have the economic means to do so, creating a two-tiered system. Arguably divorce petitions are rarely challenged, nevertheless, this does not denigrate from the argument that the law is substantially unfair.

3.2. Bitterness, Distress And Humiliation

Like fairness, the aim to reduce bitterness, distress and humiliation (henceforth BDH) seems to be in the very foundations of the law. As stated, on a number of occasions, the *Field of Choice*, sought to minimise ‘embarrassment and humiliation’,⁵⁸¹ whilst also arguing that:

‘it should seek to take the heat out of the disputes between husband and wife and certainly not further embitter the relationship between them or between them and their children. It should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future.’⁵⁸²

In contrast, *Putting Asunder* appears to accept BDH as part of the process, arguing ‘the public interest requires as a general rule that “empty” legal ties should be

⁵⁷⁹ N 275, 19.

⁵⁷⁹ *ibid.*

⁵⁸⁰ *ibid.*

⁵⁸¹ N 17, 11.

⁵⁸² *ibid.*

dissolved... that has to be put in the scales against the injury an unoffending respondent may suffer'.⁵⁸³ Despite this, it was the Law Commissions suggestions that were ultimately adopted. An important difference outlined at the beginning of the chapter was between the special procedure and the judicial process – uncontested and contested cases. This distinction is perhaps most relevant when exploring BDH.

With regard to the judicial process, one can turn to Elston, Fuller and Murch's work. As already stated, their research effectively demonstrated that, in contested cases, the law failed in its aim to minimise BDH,⁵⁸⁴ often providing unnecessary courtroom drama; one interviewee describing the process as a 'Gilbert and Sullivan comic opera'.⁵⁸⁵ This failure was one of the reasons for introducing the special procedure. It is unflattering criticism of the Divorce Reform Act 1969 that, shortly following its introduction, its calibre was already being tested by negative empirical research results.

In both contested and uncontested cases, the parties go through administrative hurdles that may cause BDH. The Law Commission argued that the prevalence of fault-based claims, particularly under the grounds of behaviour, creates BDH.⁵⁸⁶ This can be distinguished from adultery petitions, which tend to 'carry less stigma and are more likely to involve agreement'.⁵⁸⁷ In contrast, the behaviour petitions may create hostility or exacerbate pre-existing antagonism between the parties.⁵⁸⁸ It was also put forward that a lack of fairness, which, as discussed above, can be commonly found in fault-based claims, results in BDH, as the respondent 'will often resent the fact that he is being held responsible'.⁵⁸⁹ At the same time, the requirements for separation may also stimulate the parties to make 'more damaging allegations'.⁵⁹⁰

⁵⁸³ N 107, 21.

⁵⁸⁴ N 147, 609.

⁵⁸⁵ *ibid* 616.

⁵⁸⁶ N 275, 21.

⁵⁸⁷ *ibid* 20.

⁵⁸⁸ *ibid* 21.

⁵⁸⁹ *ibid* 20.

⁵⁹⁰ *ibid*.

As noted in the previous chapters, the Law Commission outlined three possible types of recipients of a behaviour petition. These included a collaborating recipient,⁵⁹¹ someone who received a petition ‘out of the blue’⁵⁹² and, lastly, a party who was guilty of violence or serious misconduct.⁵⁹³ In each of the situations a behaviour-based petition was alleged to have created BDH. In the first situation this was a result of encouraging the petitioner to ‘dwell on everything in the marriage and about the respondent which is bad and therefore to encourage a resentful and uncompromising attitude’.⁵⁹⁴ In the second, it was argued that the respondent was ‘likely to react bitterly and antagonistically to the surprise petition’.⁵⁹⁵ Lastly, in the third, it was argued that the petition could ritualize hostility that had been present in the marriage.⁵⁹⁶

One may question the predicted outcome of the first situation – a collaborating recipient. The Law Commission states that the respondent ‘may not be able to view the allegations against him with indifference despite his consent to the use of the behaviour fact’.⁵⁹⁷ But, it could be argued that, if the petitioner were collaborating with the respondent, then it would be more probable that an indifferent fact would be chosen? This would naturally depend upon the level of collaboration. One may speculate that higher levels of cooperation would result in an increase in the chance of an indifferent fact being used. This seems to be an area the Law Commission has overlooked.

Equally, it is important to question the Law Commission’s evidence. Initially, one can highlight that several of the proffered arguments are speculative. The repercussions of the situations, described above, are not referenced and rely largely upon tentative statements such as ‘hostility and conflict *may well* be generated... a respondent in the second category *is likely* to react bitterly’.⁵⁹⁸

⁵⁹¹ *ibid* 21.

⁵⁹² *ibid.*

⁵⁹³ *ibid.*

⁵⁹⁴ *ibid.*

⁵⁹⁵ *ibid.*

⁵⁹⁶ *ibid.*

⁵⁹⁷ *ibid.*

⁵⁹⁸ *ibid.*

Following this, when the Discussion Paper does use evidence it is often difficult to assess its quality. Frequently, it refers to the Booth Report as ‘evidence’.⁵⁹⁹ However this Report did not document its evidence and, like the Discussion Paper, the reader is expected to accept it on face value.⁶⁰⁰ One can find the same circumstances in regards to the frequently cited Law Society paper ‘*A Better Way Out*’.⁶⁰¹ The paper, despite being relied upon as evidence in the Discussion Paper, proffers no actual evidence itself and relies upon similar speculative phrases such as:

‘even though the ‘accused’ *may* not want to oppose divorce proceedings, indeed *may* welcome them, resentment at having to accept the blame for a situation for which he or she *may* feel the other spouse to be as much or more responsible *can* provoke quarrels where none...’⁶⁰²

In regards to the language of both the Law Society and Law Commission, whilst speculative terms may often be considered typical, given the lack of empirical evidence, the suggestive language is perhaps more misleading and therefore of note. In defence of the Law Society paper, the Sub-Committee was composed of professionals with significant experience, and summarily endorsed by the then Master of the Rolls, President of the Family Division and other members of the judiciary.⁶⁰³

Access to evidence is also difficult. The Davis and Murch seminar ‘The 1969 Legislation in Practice – Cause for Concern?’⁶⁰⁴ was relied upon frequently. This was unpublished and as evidence, it would seem that the Law Commission requires readers to unequivocally accept it, without the opportunity to access it. Although, with this in mind, one can assume that a large part of the 1985 seminar was subsumed into their 1988 book *Grounds for Divorce*,⁶⁰⁵ which was also heavily used. This was, in contrast, to the other sources relied upon, heavily researched through two projects,

⁵⁹⁹ *ibid* 20.

⁶⁰⁰ N 302.

⁶⁰¹ Law Society, *A Better Way Out* (Law Society, 1979).

⁶⁰² *ibid* 12. Emphasis added.

⁶⁰³ N 601.

⁶⁰⁴ G. Davis and M. Murch, ‘The 1969 Legislation in Practice – Cause for Concern?’, (Reform of the Ground for Divorce, Joint Law Commission – University of Bristol Seminar, 1985).

⁶⁰⁵ N 261.

one focussing on the special procedure, whilst the other focussed on conciliation in divorce.⁶⁰⁶ The research was aimed at assessing the way in which English divorce law operates in practice.⁶⁰⁷ Although it was not specifically aimed at assessing BDH, the research did back up many of the Law Commission's statements. Particularly that the behaviour petitions stood out as less amicable,⁶⁰⁸ due to the bitterness at the sense of injustice⁶⁰⁹ and the issues arising when a petition arrived 'out of the blue',⁶¹⁰ detailing, and frequently exaggerating, past behaviour.⁶¹¹

Ingleby, who looks at the factors underlying no-fault divorce, gives the Law Commission's findings considerable credibility.⁶¹² Within his research, he carried out empirical studies upon the 'files of sixty divorcing clients, twelve from each of five solicitors... over a period of eighteen months',⁶¹³ considering the parties responses to the current fault grounds. The advantage of this, over Davis and Murch's work, is that it is partly focussed directly on the subject at hand – the implications of the divorce law on the level of BDH created by a divorce petition.

It would seem fair to conclude that, despite the frequent speculative comments within the Law Commission's findings, the current fault-based divorce law does often create BDH. This is affirmed by the literature that supports their argument.⁶¹⁴ Almost from its conception the Divorce Reform Act 1969 has been accused of creating BDH, not only by academics such as Davis and Murch but also institutions including the Law Society, the Booth Committee and the Law Commission itself. The concept of providing a divorce that has minimum BDH is understandable, still, as concluded in the previous chapter, given the lack of support for the use of fault, it would appear

⁶⁰⁶ *ibid* preface.

⁶⁰⁷ *ibid* 1.

⁶⁰⁸ *ibid* 83.

⁶⁰⁹ *ibid* 84.

⁶¹⁰ *ibid* 89.

⁶¹¹ *ibid* 89-90.

⁶¹² R. Ingleby, 'Matrimonial Breakdown and the Legal Process: the Limitations of No-Fault Divorce' (1989) 11 *Law and Policy* 1.

⁶¹³ *ibid*.

⁶¹⁴ J. Herring, *Family Law* (4th edn, Longman 2009) 130; R. Probert, *Cretney and Probert's Family Law* (Sweet & Maxwell 2009) 75; M. Hayes & C. Williams, *Family Law: Principles, Policy and Practice* (OUP 2007) 538; J. Masson et al, *Principles of Family Law* (8th edition, Sweet & Maxwell 2008) 307; S. Harris-Short & J. Miles, *Family Law: Text Cases and Materials* (OUP 2007) 387-393; S. Cretney, *Family Law in the Twentieth Century – A History* (OUP 2003) 385-390.

logical to argue that fault should be removed. It provides numerous opportunities to create BDH without contributing to a justifiable aim.

4. Subsidiary Aims

4.1. Does The Law Avoid Injustice To An Economically Weaker Spouse?

Both the *Field of Choice* and *Facing the Future* advocated that the law must ‘avoid injustice to an economically weaker’⁶¹⁵ spouse, avoiding leaving a ‘blameless’⁶¹⁶ spouse ‘destitute and outcast’.⁶¹⁷ However, this is a slight misrepresentation as the *Field of Choice* was largely concerned with avoiding ‘injustice to wives’.⁶¹⁸ *Facing the Future*, whilst generally attempting to provide a balanced view with statements such as ‘many spouses still have great difficulty in coping financially’⁶¹⁹ and ‘marriage breakdown often results in financial hardship’,⁶²⁰ was frequently assessing the impact on women and, on occasion, simply equating being economically weaker to being female. This can be seen in statements such as ‘the economically weaker spouse is likely to have difficulty in finding alternative accommodation. Not only must it reflect *her* budget...’⁶²¹ It has been several decades since the *Field of Choice* was published, therefore, it is important to assess whether there is the need for such a focus today. In answering this question, this chapter shall focus on the ‘economic independence’⁶²² of women in general. Perhaps the strongest way of assessing this is through statistics concerning employment and income rates.

Facing the Future highlighted that the effect of separation on women increased unemployment from 4% to 34%.⁶²³ Contrastingly the Department for Work and Pensions’ 2007 Research Report – ‘Partnership transitions and mothers’

⁶¹⁵ N 275, 22.

⁶¹⁶ *ibid.*

⁶¹⁷ *ibid.*

⁶¹⁸ N 17, 20.

⁶¹⁹ N 275, 23.

⁶²⁰ *ibid.*

⁶²¹ *ibid* 24.

⁶²² N 502, 5.

⁶²³ N 275, 23.

employment'⁶²⁴ – demonstrated that ‘prior to a separation, around 60% of mothers with partners are in work. This proportion drops... to around 56%’.⁶²⁵ Whilst this is a study of transitional mothers, rather than all women, it is still a valid indicator of the unemployment rate. Importantly, it also demonstrates the unemployment rates of those who have dependents, whose economic status is arguably more vital. As the Research Report demonstrates the work patterns of separated women changed during the 1990’s where, for example, in the period 1990-1996 the percentage in work dropped from roughly 54% to 40%, whilst in the period 1997-2001 this was reduced to a drop of roughly 4%. Resultantly, it is possible to argue that, whilst separation does result in a 4% drop in employment, this is not as significant as it was when *Facing the Future* was published.

The Law Commission also put forward the argument that women have less job prospects than men and that their occupations are frequently poorly paid, highlighting that women tend to have poorer paid occupations in service sector positions, rather than managerial or supervisory posts.⁶²⁶ Yet, the Office for National Statistics clearly shows that women’s employment opportunities have steadily improved since *Facing the Future*, and have drastically improved since the *Field of Choice*. In 1985 men filled two million more jobs than women, however, by 2008 the numbers were similar, with each sex performing roughly 13.6 millions jobs.⁶²⁷ Whilst, there are clear differences in the types of jobs, with women performing more part-time work and less full-time work,⁶²⁸ it is difficult to now argue that there are less employment opportunities *per se* for female labour. Although tempering this statement, it is clear from the European Commission’s eighth ‘Report on Progress on Equality Between Women and Men in 2010 – The Gender Balance in Business Leadership’⁶²⁹ that the ‘higher up the hierarchy, the fewer women there are.’⁶³⁰ The Report details that only ‘3% of the largest publicly quoted companies have a woman chairing the highest

⁶²⁴ Home Office, *Partnership Transitions and Mothers’ Employment* (Department for Work and Pensions Research Report No. 452, 2007).

⁶²⁵ *ibid* 35.

⁶²⁶ N 275, 23.

⁶²⁷ Office for National Statistics, *Gender, Working Lives* (2008).

⁶²⁸ *ibid*.

⁶²⁹ N 502.

⁶³⁰ *ibid* 11

decision-making body.⁶³¹ Furthermore, in ‘terms of companies not listed on the stock market, women still represent only one third of leaders of EU businesses’; within this figure the UK is seventh best in the EU with 33%.⁶³² It would seem that whilst there are roughly equal opportunities for employment, the opportunities for women are in part-time work and in low hierarchy positions.

In regards to the gender pay gap, in 2010, the gap for full-time employees dropped by 2.2%, the largest drop since 1997.⁶³³ Whilst this only reduced the gap to 10.2%, which is still a sizeable sum,⁶³⁴ it represents a continuous fall since the two Law Commission publications. These Government statistics seem to contradict the EU Report, detailed above. The European Commission stated that the difference between men and women’s average gross hourly earnings as a percentage of men’s average gross hourly earnings is 22% in the UK, and 17.5% in the EU on average. Meanwhile, the Report argues that there ‘has been no reduction in the gender pay gap in the last few years.’⁶³⁵ Yet, this is a verdict regarding the EU as whole, not the UK specifically. The Government statistics, showing the reduction in the gap, have caused some to speculate that it will continue to such an extent that there may even become a reversal of the current situation.⁶³⁶ But, given the sizeable difference between the Government and EU statistics, one may query this.

Contrastingly, the pay gap for part-time work widened in favour of women to 4% in 2010.⁶³⁷ Obviously, part-time work does not provide the same level of income as equivalent full-time employment. Furthermore, it typically has a lower income rate.⁶³⁸ At the same time, when one analyses the median earnings of the two genders, the picture is less auspicious. In 2010 the median pay of full time male employees was £538, whilst the median female employee was paid £439.⁶³⁹ This is clearly the strongest argument for retaining a female focus. Whilst it would seem that there is ‘a

⁶³¹ *ibid.*

⁶³² *ibid* 12

⁶³³ Office for National Statistics, *Labour Market, Earnings* (2010).

⁶³⁴ *ibid.*

⁶³⁵ N 502, 11.

⁶³⁶ J. R. Shackleton, *Should We Mind the Gap? Gender Pay Differentials and Public Policy* (The Institute of Economic Affairs 2008) 13.

⁶³⁷ N 633.

⁶³⁸ N 502, 9-10.

⁶³⁹ N 633.

general trend towards more equality... eliminating gender inequalities remains slow.⁶⁴⁰ Therefore, whilst it is foreseeable that the situation may change, the focus of the law should remain on both of the sexes, whilst remaining vigilant to the evident inequalities.

The question now turns to whether the law does actually protect the economically weaker spouse. There are three relevant provisions. The first, as mentioned in the first chapter, is where a petition based on five year's separation could be dismissed where the divorce would cause 'grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage'.⁶⁴¹ The second is a provision found in section 10 Matrimonial Causes Act 1973 that allows for the decree absolute to be postponed under the court is satisfied with the financial arrangements in a case regarding a petition based on two years or five years separation.⁶⁴² Lastly, the third can be found in the wide discretion granted to the judiciary in section 25 of the Matrimonial Causes Act 1973.⁶⁴³

The Law Commission was quick to point out that section 5, the first safeguard, despite being used very rarely,⁶⁴⁴ is an effective provision when it is invoked. It is useful in certain cases such as: *Reiterbund v Reiterbund*,⁶⁴⁵ *Archer v Archer*⁶⁴⁶ and *Julian v Julian*.⁶⁴⁷ These cases concern situations where there is an 'expectation of an occupational widow's pension for which the husband is unable to compensate'.⁶⁴⁸ As outlined, when used properly there are numerous advantages to this provision. The benefits notwithstanding, the Law Commission argued, correctly, that for no-fault divorce to be introduced, the provisions would have to either be available to everyone

⁶⁴⁰ N 502, 17.

⁶⁴¹ Matrimonial Causes Act 1973, S 5(1).

⁶⁴² S 10(2-4)

⁶⁴³ Naturally this is an ancillary matter and not linked directly to divorce.

⁶⁴⁴ N 275, 22.

⁶⁴⁵ *Reiterbund v Reiterbund* [1975] Fam. 99 - in *Reiterbund*, the wife was attempting to use section 5, as she may have lost her entitlement to a state pension if she was divorced and then her husband subsequently died. It was found that as she would receive the same pension from a different source, it was not 'grave'.

⁶⁴⁶ *Archer v Archer* [1999] 1 F.L.R. 327 - in *Archer*, the wife's substantial assets meant that the removal of maintenance payments due to death, would not qualify as grave.

⁶⁴⁷ *Julian v Julian* (1972) 116 S.J. 763 - in *Julian*, the loss of the pension could not be replaced, qualifying the requirements, ensuring that a divorce was not granted.

⁶⁴⁸ N 275, 22.

or no one.⁶⁴⁹ However, as it was highlighted, if ‘divorce were impossible in cases where hardship could not be avoided, it would defeat the object of enabling dead marriages to be dissolved in due course’.⁶⁵⁰ As the previous chapter sought to demonstrate, the arguments behind fault are lacking. Therefore, it would seem only logical to conclude that these protections, in a no-fault system, would have to be offered to everyone.

The second safeguard, despite not being able to stop the divorce, is alleged to ensure that the best financial outcome is made; within the time frame it can prolong the divorce.⁶⁵¹ With the removal of fault, the potential to expand this safeguard to all divorcees is the natural conclusion the Law Commission came to.⁶⁵² This would seem like a logical conclusion. As will be discussed below, when the Family Law Act 1996 was initiated, all financial issues had to be settled when the final application for divorce was made. In regards to the third safeguard – the discretion granted to the courts under Section 25 of the Matrimonial Causes Act 1973 – this would be unlikely to change with the introduction of no-fault divorce. At the same time it could be used productively to counterbalance the potential problems of removing the first safeguard.

Overall, it is clear that the law’s focus should remain neutral, however with safeguards to provide for the prevalent economic disadvantages exposed to women.

4.2. The Impact On Children

It is important, especially in regards to children, to distinguish the process of a divorce from a divorce itself. The Law Commission provided evidence that demonstrates children ‘would have preferred [their parents] to have stayed together’⁶⁵³ and, unsurprisingly, further research since then has demonstrated this

⁶⁴⁹ *ibid* 41.

⁶⁵⁰ *ibid*.

⁶⁵¹ *ibid*.

⁶⁵² *ibid*.

⁶⁵³ Wallerstein and Kelly, *Surviving the Breakup* (Basic Books 1980); A. Mitchell, *Children in the Middle – Living Through Divorce* (Jossey-Bass Publishers 1985), Y. Walczak and S. Burns, *Divorce: the Child’s Point of View* (Harper 1984); G. McCredie and A. Horrox, *Voices in the Dark: Children and Divorce* (Harper 1985).

too.⁶⁵⁴ It is impossible to affect the parties' decision to divorce, save by either restricting divorce law or making divorce more difficult to dissuade petitions. Yet, as discussed in the second chapter, there is evidence that delaying a divorce can be equally damaging.⁶⁵⁵ In short, whilst the process of a divorce may be altered, it is difficult to influence anything outside of the process itself, namely the relationship of the parties. As outlined in the introduction of the thesis, the focus is solely on the process of a divorce.

This concept seems to have been accepted by the Law Commission, which suggested that the process should aim to ensure that, firstly, 'nothing should be involved in that process which makes it more difficult for the children to cope with the separation'⁶⁵⁶ and that, secondly, 'every effort should be made to encourage good post-divorce relationships'.⁶⁵⁷

As the Law Commission highlighted the current law often fails to satisfy either of these aims. The adversarial nature of the process has a predisposition to create stress and conflict, which could have a negative effect on any children.⁶⁵⁸ Meanwhile, as discussed above, it is liable to create BDH, which is unlikely to bode well for post-divorce relationships.⁶⁵⁹ Whilst the Law Commission also mentions residence disputes and the occupation of the home as potential sources of conflict,⁶⁶⁰ the focus of this thesis is strictly on the divorce process itself.

Fundamentally, one may conclude with the straightforward observation that if the divorce process has a predisposition towards creating BDH then this may affect any children. Consequently, it would appear that removing the aspects of the process that may cause BDH, might contribute towards a reduction of any negative impact upon

⁶⁵⁴ Amato, P, 'The Consequences of Divorce for Children and Adults' (2000) 62(4) *Journal of Marriage and the Family* 1269; K. Leon, 'Risk and Protective Factors in Young Children's Adjustment to Parental Divorce: A Review of the Research' (2003) 52 (3) *Family Relations* 258; E. M. Hetherington, M. Stanley-Hagan & E.R. Anderson, 'Marital Transitions: A Child's Perspective' (1989) 44(2) *American Psychologist* 303.

⁶⁵⁵ F. F. Furstenberg and K.E. Kiernan, 'Delayed Parental Divorce: How Much Do Children Benefit?' (2001) 63(2) *Journal of Marriage and Family* 446.

⁶⁵⁶ N 275, 26.

⁶⁵⁷ *ibid.*

⁶⁵⁸ *ibid.*

⁶⁵⁹ *ibid.*

⁶⁶⁰ *ibid* 26-27.

on any children. Whilst this is a simplistic explanation of a complex problem, an investigation into the impact of divorce upon children, outside of the conclusion above, would be beyond of the remit of this thesis.

5. The Aims For Modern Divorce Law

Following the previous chapters, the thesis suggested two themes. Firstly, that a no-fault model could be adopted and, secondly, that voluntary mediation may provide a beneficial procedure. In the third chapter it was discussed that Part I of the Family Law Act 1996 provided a broadly divided theoretical approach, between no-fault divorce and protecting sanctity of marriage, causing practical problems. This chapter has put forward the thesis' third theme - that the current law is often not fair to the respondent either with regard to principle or economics, does not buttress the stability of marriage and that rather than reduce BDH, may actually exacerbate problems. Linked to this, the thesis highlighted the interests of the children, which may be affected by the provisions pertaining to reducing BDH. In contrast to these negative conclusions, the economic provisions for the protection of a weaker spouse were deemed to be capable of working.

Considering the culmination of these conclusions, it must be asked - what could the aims of a modern divorce law be? This is the fourth, and central, focus of the thesis. Three areas may be highlighted as imperative. Firstly, one of the clearest lessons, and one of the central points of this thesis, is that convoluted aims are likely to have a negative impact upon the parties. The sanctity of marriage and the protections granted to uphold it, such as fault, are evidently frequently in direct conflict with providing a fair divorce process with minimal BDH. As discussed in both the current and previous chapters, there are few justifications for using divorce law to protect the sanctity of marriage and any attempt to do so may lead to practical problems. This leads the thesis to conclude that this aspiration, and its protections, could be questioned as an objective of the law. Rather, the focus could be solely on providing a fair process with the nominal occurrence of BDH. However, it is important that the law take a neutral stance with regard to marriage, rather than attempting to promote or undermine the institution.

The second concerns economics. As discussed with regard to ‘fairness’, the current law favours the economically stronger of the parties involved. It would therefore seem logical that a divorce law should not overtly impact upon the finances of either the respondent or petitioner. Naturally, there will always be a cost to the process. Following from both of these, a third consideration is that if the process does not overtly impact upon the party’s ability to finance a divorce or cause BDH, thus also limiting adverse impacts on any children.

With the above analysis it would seem that the strongest overriding factor must be that the aim of the law should not be convoluted, specifically, the law must not tread a half-way house between supporting the institution of marriage and providing for a divorce with minimum BDH. Indeed, this thesis argues the two concepts are, in many respects, irreconcilable. This is further demonstrated in the analysis of the previous chapter, concerning the Family Law Act 1996 which, on a practical level, failed to combine the two. With regard to future reforms, it would appear from the above analysis that the strongest path for the law would be to assume a neutral position, providing a process solely for the dissolution of marriage with minimum BDH. The chapter shall now go on to question and apply this thesis, where relevant, to the Pre-Application Protocol for Mediation Information and Assessment and the Family Justice Review.

6. The Current Reforms

The thesis has now provided four themes: firstly, that a no-fault model could be adopted, secondly, that voluntary mediation may have significant advantages, thirdly, that the current law has failed to meet its prescribed aims and, fourthly, that the law should now be focussed solely on providing an economically acceptable process concerned with creating minimum bitterness, distress and humiliation.

Given this, it is possible to apply these concepts to the current reform attempts, outlined in the first chapter, specifically the Pre-Application Protocol for Mediation Information and Assessment 2011 and the Family Justice Review 2011. As the Pre-Application Protocol impacts upon the use of mediation and the Review has the potential to digitalise the special procedure, further emphasising its administrative

nature, the need for an analysis is pressing. The chapter shall analyse each with regard to the proposed conclusions.

6.1. The Family Justice Review 2011

The Review was outlined in the initial chapter. It proposes that the procedure be automated, allowing individuals to complete their petition online.⁶⁶¹ Whilst it still allows for a petition to be challenged, on the basis of current evidence, the majority of cases would be carried out online. This would effectively digitalise the special procedure, perhaps enhancing its administrative nature even further.

6.1.1. The Interim Report – A Critique

It is difficult to provide an in depth critique of the Review considering that so little has been released concerning the proposed changes. As a result, only a general analysis may be undertaken.

What is initially clear is that substantial changes to the law are not being considered. This would appear to be a proposal to reform procedure, effectively digitalising the special procedure, albeit with some minor administrative changes. Of note, the petition may be submitted jointly. This echoes the conclusions of the Booth Committee, outlined earlier.⁶⁶²

Perhaps one substantial change, mentioned above, is the removal of the courts. As stated, on plain reading it would seem to advocate judicial supervision of a contested petition rather than a court case. However, given the bare number of contested cases the relative effect of this would appear to be minimal.

What is most important to underline and then query, is the failure to suggest a removal of fault. Given the conclusions of this chapter and the previous chapter, fault can be argued as an unnecessary facet, perhaps even a relic, of English and Welsh divorce law. Hypothetically, if the Review's proposals were implemented, then the

⁶⁶¹ N 5, 226.

⁶⁶² N 302.

special procedure would be made more accessible. Why then, considering this, have the Review not suggested the removal of fault? Given the ease of the suggested process, the credibility of any arguments for the retention of fault, which largely relate to making divorce *more* difficult, seem to be reduced, if not non-existent.

Furthermore, one may question how the Review's preliminary Report integrates with the Pre-Application Protocol for Mediation Information and Assessment. Practically, the Review seems to be emphasising that the process should be digitalised. Yet, the Protocol appears to require that a Family Mediation Information and Assessment Form be completed and signed by the mediator. The Report makes no mention of the Form being completed at the beginning of the 'online hub'. Arguably these issues could be digitalised. However, it would appear to demonstrate that they do not seem to have been designed with integration in mind. With the release of the final Report in autumn 2011, this may naturally change.

Lastly, the notion of an 'information hub' is noteworthy. This was discussed in the first chapter. It is the idea that an online portal, with information concerning divorce, be made available. One of the main criticisms of the Family Law Act 1996 Information Meetings was that it was rigid and bureaucratic. In the build up to the Act there was debate over whether the Meetings would end up giving advice. Arguably, to avoid this, the Meetings went too far the other way, becoming administrative and unresponsive. On the other hand, the idea of an information hub could act as a good response to this. If designed correctly a website can offer a plethora of differing information for the parties in a simple and accessible fashion. Yet, equally, it may also end up being inaccessible, offering little valuable information. Naturally this is speculation, but the information portal would seem as a modern day interpretation of Walker's suggestion of providing an information DVD or booklet.⁶⁶³

As this is a preliminary report, any conclusions are liable to change. Despite this, one may draw several positives and negatives from the proposals. On a constructive note, the concept of an online information hub could successfully provide a method for imparting relevant information without patronising the parties. Meanwhile, by placing

⁶⁶³ N 355, 330.

the process online the process will become simplified, potentially saving legal costs too.

With the support of this thesis' analysis, the following is suggested. Firstly, in line with its first theme - that no-fault could be adopted, why not remove fault? Retaining it whilst implementing the proposals would appear to provide an unnecessary and destructive part of what would be an exceptionally simple process. As has been demonstrated, there appears to be little justification for the retention of fault, whilst there is strong evidence that a no-fault system would reap benefits. Furthermore, with the retention of the current law, the aims of the Matrimonial Causes Act 1973 would still not be met, underlining that the third theme of this thesis is still valid – that the current law provides neither a fair system, nor reduces bitterness, distress and humiliation. Meanwhile, as the law would remain the same, the conflict between the sanctity of marriage and providing a divorce with minimum bitterness, distress and humiliation would remain. As a result neither the first, third or fourth themes of this thesis would be addressed by the Review.

Secondly, in line with the thesis' second theme, concerning the support of voluntary mediation, one must consider how the Review and the Pre-Application Protocol will be reconciled. As the reform process continues this will evidently be an area for continued analysis.

6.2. The Pre-Application Protocol for Mediation Information and Assessment

The Pre-Application Protocol was explained in the first chapter. It provides a system whereby married couples, as a necessary pre-condition to divorce, must attend a Mediation Information and Assessment Meeting.⁶⁶⁴

6.2.1. The Aims – A Critique

The Protocol prescribes three aims, which include to:

⁶⁶⁴ S 4.1.

‘encourage and facilitate the use of alternative dispute resolution... set out good practice to be followed by any person who is considering making an application to court for an order in relevant family proceedings... ensure, as far as possible, that all parties have considered mediation as an alternative means of resolving their dispute’.⁶⁶⁵

The first aim – encouraging the use of alternative dispute resolution (ADRTs)⁶⁶⁶ – will be analysed in respect of the rationale behind the Protocol. Initially it is possible to highlight that there is a difference between mediation and ADRTs. Mediation is a type of ADRT; it is not synonymous with the term. It is unclear whether the Protocol is encouraging ADRTs in general or just mediation. As it only refers to mediation, one may assume that it is the latter.

The second aim – setting out good practice – is incumbent upon the first. If there is a strong rationale behind encouraging ADRTs then it is only logical that there should be a ‘good practice’ to exercise this facilitation.

The third aim, which refers to ensuring parties consider mediation ‘as far as possible’, is open to criticism. Initially one can argue, what is ‘as far as possible’? This is an ambiguous and practically challenging phrase. How can a judge or administrator know when ‘as far as possible’ has been reached? It would seem to be at odds with the Information and Assessment Meeting, which is a specified and attainable target.

There is also a conflict between the first and third aims. The first aim seeks to ‘encourage’ the use of ADRTs, however, the third aim aspires to ‘ensure’ that parties consider mediation, providing a convoluted message. Whilst there is a difference between ‘using’ and ‘considering’, one may wonder whether the Protocol is treading the fine line between coercion and promotion. When seen in the light of the fact that applicants will be ‘expected’ to have followed the steps set out and that the court ‘will’ take into account any failure to do so, it would seem that the process is more coercive than promotional.

⁶⁶⁵ S 2(1).

⁶⁶⁶ For grammatical purposes, this shall be referred to as alternative dispute resolution techniques (ADRTs).

If the mediation is coercive, then this could provide a new tension to divorce law. This thesis has argued that there is a conflict between the provisions protecting sanctity of marriage and ensuring minimum bitterness, distress and humiliation. If the substantive law remains the same then the Protocol may add a further dimension to this. Given the negative conclusions concerning involuntary mediation reached in the previous chapter, the extra dimension to the law may add to the present confusion. But, as the reform is so recent this remains speculation.

It is also possible to inquire into the prospect of there being ulterior aims. The Protocol makes no mention of costs within its aims. Under its rationale it states that ‘it is likely to save court time and expense if the parties take steps to resolve their dispute without pursuing court proceedings’. Therefore, it is only appropriate to consider costs as one of the unspoken aims. This would seem to reflect the approach of the Family Law Act 1996, which included within its principles that a divorce should be attainable ‘without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end’. Given the thesis has outlined that an economically acceptable process should be one of the main aims, this is a welcome development.

6.2.2. The Rationale – A Critique

The rationale behind the Protocol includes several elements that may be assessed separately. At the outset, the Protocol proposes that there is a ‘general acknowledgement that an adversarial court process is not always best suited to the resolution of family disputes’.⁶⁶⁷ It is important to realise that this statement is referring to a court process. As discussed in length during this thesis, there has been support for the removal of adversarial court proceedings; the Law Commission’s 1988 Discussion Paper outlined in detail why the court process is flawed, arguing that the current law fell well short of its two objectives of: buttressing the stability of marriage and, when a marriage has broken down, enabling its empty shell to be destroyed with maximum fairness, and the minimum bitterness, distress and humiliation. Yet, as has equally been emphasised, the majority of divorces are processed through the special

⁶⁶⁷ S 3(1).

procedure and are not court based, aside from judicial approval of the documents. It seems strange that this is not therefore addressed.

With the debate on mediation outlined above, it would seem that there are benefits to voluntary mediation. Studies have shown that voluntary mediation can have high rates of a reduction in conflict and an increase in communication and agreement longevity.⁶⁶⁸ Beyond this it may prove better fiscally and also provide a useful process in cases of power imbalance.⁶⁶⁹ However, as concluded, this is the case with voluntary mediation, not compulsory mediation. As a result, it is crucial to question whether the Protocol will coerce the parties into mediation. Given that there is already a conflicted approach in regards to the aims of the Protocol, between encouragement and coercion, one may have to wait for evidence relating to this to accumulate, allowing an informed conclusion.

One may analyse the economics of the meetings prior to the accumulation of evidence. As previously concluded, mediation may cost less than solicitors, however, this is mostly in circumstances of not-for-profit mediations. It is possible to question whether for profit mediators will cause the estimated cost to rise. At the same time, one must factor in the cost of the ‘Mediation Information and Assessment Meeting’. Media reports have suggested that the Assessment Meeting will cost up to £140.⁶⁷⁰ The cost of this meeting must be attached to the entire expense of the process. Therefore, simply via its existence it may raise the cost of a divorce process. Arguably, it is an unnecessary hurdle for divorcees who have already decided to mediate or not to mediate and, if there is a similar lack of uptake regarding mediation then the cost is unlikely to be justified.

Given the above discussion concerning the attempted Information Meetings of the Family Law Act 1996, one may also question the Protocol’s statement that ‘there is growing recognition of the benefits of early information and advice about

⁶⁶⁸ See chapter 5 subsection 6.4. and 6.5.

⁶⁶⁹ See chapter 5 subsection 6.6. and 6.8.

⁶⁷⁰ Guardian Life & Style, ‘Divorcing Couples to Face Compulsory Marriage Mediation’ (*Guardian*, 23 February 2011)

<<http://www.guardian.co.uk/lifeandstyle/2011/feb/23/divorcing-couples-marriage-mediation>> accessed 25 February 2011.

mediation'.⁶⁷¹ Arguably, this statement can be seen from two perspectives. The first view is that there is a benefit to divorcees being able to 'consider alternative means of resolving their disputes'⁶⁷² as a substitute for solicitor-led negotiation. This view has foundations in the sense that, if the divorcees are paying for their divorce, they should be able to choose the course of the process themselves. Common sense also dictates that they are more likely to know which process will suit them best. This is open to the criticism that divorcees should not be forced to go through a formal process of coerced consideration as they will already have, potentially, come to a conclusion. Equally, it is possible that they could be informed of the benefits of mediation through a cheaper and more accessible medium than a face-to-face meeting.

The second perspective is that the divorcees should be given information and advice, so that they will choose mediation. This would seem to be a more accurate interpretation of the Protocol given its emphasis on encouraging ADRTs. This is, however, open to the criticism that it is overpriced and may be seen as an inaccessible medium for encouraging ADRTs. If the divorcees are paying for the divorce, then why should they be encouraged to choose a specific path, especially when Davis has demonstrated that this is the less preferred route?

The Information and Assessment Meeting bares a direct resemblance to the aforementioned Information Meetings of the Family Law Act 1996 outlined in Part II Section 8. In regards to the Family Law Act 1996, concerns were raised about the danger of information-giving spilling over into advice giving.⁶⁷³ However, as observed, it did seem that the concept of providing information was received positively. One may hypothesise that if the process were reformed to provide information in a style that avoided the rigid and bureaucratic nature of the Family Law Act 1996 Information and Assessment Meetings; instead providing a situation where the parties may access relevant information, then the process may be successful.

⁶⁷¹ S 3(3).

⁶⁷² *ibid.*

⁶⁷³ J. Walker, *Information Meetings and Associated Provisions Within the Family Law Act 1996 – Final Evaluation Report* (University of Newcastle 2001).

Despite this, perhaps the most forceful criticism of the rationale is provided by Walker's aforementioned research. Within this Walker demonstrated that 39% of those attending the information meetings 'described themselves as more likely to go to see a solicitor'.⁶⁷⁴ At the same time, only 7% of attendees went on to use mediation and, most tellingly, within this figure there were those who only had one mediation session.⁶⁷⁵ One may question the value of resuscitating such a similar process given that it is unlikely to increase mediation uptake and increase the demand for solicitor-led negotiation. It seems to largely conflict with the aims of the Protocol.

With regard to the thesis' second theme, and given the success of voluntary mediation, if the meetings can tread a fine line, avoiding coercion, then the process may be received positively. Ultimately, this will depend upon whether the meetings will strike the right balance between coercion and advice giving; and providing a flexible opportunity for the parties to acquire information without overtly pressuring them to choose a process that will not be suitable. To push the parties towards a system that may be inappropriate for their needs is comparable to using fault to protect marriage and is unlikely to produce successful results.

As has been discussed, the law is clearly divided between protecting the sanctity of marriage and providing a divorce with minimum bitterness, distress and humiliation – this division has been identified as a crucial problem within the law. If the mediation is coercive, then this will add another dimension to the law, potentially complicating it further, adding to the present problems. Without any evidence it is impossible to provide accurate analysis. However, one may speculate that, by providing this additional aspect, the law would be further convoluted. Indeed, perhaps the most worrying aspect would be the prospect of situations where mediation failed and the divorcees had to then resort to the traditional route of solicitors, increasing their costs. Nevertheless it provides an area of concern and a topic for further research.

⁶⁷⁴ *ibid.*

⁶⁷⁵ *ibid.*

7. Conclusion

This chapter suggested, in conjunction with previous chapters, five main themes for the thesis. Firstly, it argues that future reforms could adopt a no-fault model. This conclusion was reached following the theoretical investigations undertaken in previous chapters. It was proposed that the arguments in favour of fault are limited; the socio-economic argument imposing objective moral standards into a private domain; whilst the contractual and justice-based arguments pertaining to practical flaws and misplaced foundations; and any plausible psychological benefits fail to justify wholesale retention. This chapter combined the theoretical debates with a practical investigation into the aim's of the Matrimonial Causes Act 1973. It was proposed that the fault provisions might actually contribute towards creating further BDH. It would appear that there is little justification for retaining fault both practically and theoretically. It does not protect marriage and is therefore not relevant to the first aim; meanwhile, there appears to be little strength in substitute arguments that would justify its retention. The conclusions regarding fault are not new, being the conviction of the Law Commission since 1988. It has been over two decades since the Law Commission Discussion Paper; however, their conclusions still stand up to modern day analysis.

Secondly, with regard to the third chapter, it proposes that voluntary mediation may provide certain benefits. Evidence demonstrates that, where mediation is voluntarily accepted and successfully carried out, there may be increased rates of cooperation and communication, whilst also providing greater agreement longevity with the potential for a lower cost.

The third concept relates to the analysis undertaken within this chapter relating to the aims of the current law. It was demonstrated that the sanctity of marriage has not been buttressed. On the evidence investigated, with the introduction of the current law there was a rapid and sustained increase in the number of divorces, meanwhile, the provisions for the protection of marriage were found ineffectual and underused. From a social perspective, support for the concept that divorce law should protect marriage appears to be waning. Clearly, the first aim is not being met. It would also appear that neither is the second aim. As was initially established, the provisions are not

completely 'fair'. There is an initial advantage given to whoever submits the petition and following this the decision is based, partially, upon the subjective beliefs of one party, frequently untested due to special procedure. This is exacerbated by the alternative higher cost of not using the special procedure, which naturally favours those in a stronger financial position. Furthermore, with regard to the second part of the second aim, through empirical and theoretical evidence, it was recognised that the fault provisions within the current law frequently create, rather than reduce, BDH. Evidently, the second aim has not been met either – allowing the thesis to firmly outline its third theme – that the current law has not met its aims.

The fourth and central argument of the thesis, demonstrated, both within the current and previous chapter, was that the provisions for protecting sanctity of marriage have conflicted with those seeking to provide a divorce with minimum BDH. Given that the law does not buttress the stability of marriage and the attempts to do so may actually create BDH, future reforms may seek to avoid attempting to reconcile the two concepts and focus solely on providing a fair process concerned solely with reducing BDH. This was supplemented by concerns for the fiscal fairness of the process, where it was highlighted that the law favours the economically stronger party and that reforms may seek to provide a less fiscally demanding process. Fourthly, it made the straightforward acknowledgement that any improvement with regard to divorcing parents is likely to impact upon the children.

Given these conclusions, it would seem correct to put forward the fourth argument of this thesis - that the law could aim to provide a process that is economically accessible, fair and with minimal bitterness, distress and humiliation. Having convoluted aims has little justification both due to the waning strength of the arguments for protecting the sanctity of marriage and the practical implications of fault which may cause bitterness, distress and humiliation, and holds the potential to frequently produce unfair results both objectively and to the parties themselves, impacting upon not only the parties, but also any children of the marriage.

The fifth and final theme of the thesis concerns the ongoing reforms, suggesting that they may have disregarded the factors that contributed to the failure of the Family Law Act 1996. Whilst the Family Justice Review has the potential to utilise the

lessons learnt regarding the information meetings, its continued retention of the current law and support of fault-based divorce is questionable. It is also difficult to see how the Review will be reconciled with the Protocol. In regards to the Protocol itself, the authors seem to have overlooked the dangers of compulsory mediation. Ultimately, time will tell whether the Protocol will coerce parties into mediation or simply encourage them, however, on the bare facts provided it would seem to be leaning towards coercion. Given the fourth theme and central tenet of this thesis - that a divorce law could provide a neutral process focussed solely on the dissolution of the marriage – this would seem to be misguided. To overtly coerce divorcing parties into mediation is the liberal equivalent of using divorce law to protect marriage and is unlikely to be met positively. It also runs the risk of adding another dimension to the law, further complicating it.

Conclusion

To conclude, this thesis has put forward five main themes. Firstly, that no-fault divorce could be adopted. Secondly, that voluntary mediation may provide a beneficial procedure. Thirdly, that the aims of the current law have not been met. Given this, the thesis suggested its fourth theme – that the law should be based on an economically acceptable procedure, focused solely on providing a fair divorce with minimum bitterness, distress and humiliation. Finally, the fifth theme concerned the application of these arguments to the current reform attempts, tentatively asking whether the thesis may provide a relevant lesson, as depending on their approach to mediation, reformers may be repeating the mistakes of previous laws, albeit from a different perspective.

These observations were reached through several stages. Initially, it was demonstrated that, once divorce on popular demand was sanctioned through the Matrimonial Causes Act 1857, the importance of religious arguments have diminished over time, whilst the momentum of socio-economic concerns have increased. This was evident within the changing relevance of socio-economic motivations at each stage of reform. Specifically, the thesis highlighted the emerging relevancy of socio-economic arguments with regard to the attempts to reform the 1857 Act and then the changing dimensions between the religious arguments of the Gorell Commission, which arguably restricted reform, and the strength of socio-economic arguments with regard to the 1937 Matrimonial Causes Act. Equally this dichotomy may be seen within the provisions of the current law, which frequently pertain examples of attempts to encourage reconciliation.

Following this, the differing arguments relating to divorce law and, specifically, the use of fault, were analysed. These justifications included traditional, socio-economic, contractual, psychological and tort-based arguments. None of which, aside from certain psychological arguments, were found to be strong enough to warrant the retention of fault to bring about an alternative aim outside of the dissolution of marriage. On the evidence discussed, each justification pertained practical and theoretical flaws, lacking a strong social rationalization. Given this, it appeared logical to propose that future reforms may seek to abandon fault.

Following this indictment of fault, the third chapter set out to assess no-fault reforms through an analysis of the Family Law Act 1996 and the preceding investigations into the law, including the Booth Committee and the Law Commission Discussion Paper and Report. It was proposed that the Act was theoretically convoluted in Part I, which subsequently influenced the practicalities of Part II and III – specifically within the period for consideration and reflection and the information meetings. Meanwhile, the poor results of the pilot schemes further damaged the Act. However, again these can be linked to the lack of direction assigned to the information meetings. This allowed the thesis to establish the foundations of its fourth and central hypothesis – that a conflicted law may be unlikely to provide positive results. Despite the failure of the Family Law Act 1996, the chapter maintained that no-fault divorce still has significant value and could be the model for future reforms, outlining its first theme. With regard to mediation, the second theme of the thesis was proposed, that where it was undertaken voluntarily, there was evidence that mediation increased communication and cooperation whilst extending the longevity of agreements.

Subsequent to these two conclusions, an investigation within the fourth chapter was undertaken to explore whether the current law has met its initial aims and what the aims of a modern divorce law could now be. It was found that there was little support that the law has not buttressed marriage, given that the number of divorces are much higher now than they were previous to the Divorce Reform Act 1969, and due to the fact that there is little evidence that the provisions targeted at reconciliation expressly work or are even implemented correctly. At the same time, with regard to the second aim of the law, it was proposed that the current system is not fair – heavily favouring the petitioner and those without the economic capacity to challenge a petition in court. Furthermore, it suggested that the use of fault is prone to creating bitterness, distress and humiliation. This allowed the thesis to outline its third theme – that the current law has not met its aims of buttressing the stability of marriage and providing a fair process, with minimum bitterness, distress and humiliation. Given that the use of fault may lack theoretical and practical justifications, the thesis consequently proposed its fourth and central argument - that future reforms may seek to avoid conflicted aims and provide an economically acceptable, objectively fair process, focussed solely on providing a divorce with minimum bitterness, distress and humiliation.

It then set out to fulfil its fifth theme and apply all of the analysis carried out during the thesis to the current reforms, specifically the Pre-Application Protocol for Mediation Information and Assessment 2011 and the Family Justice Review 2011. Through an analysis of these movements, it argued that, despite some improvements, the reform proposals may be repeating some previous mistakes. The Family Justice Review may further simplify the procedure and provide easy access information – a welcome reform. However, it does not appear to engage with the debates concerning fault or seek to alter the aims of the law, which is disappointing. With regard to the Pre-Application Protocol, if the provisions for mediation are coercive, which is a possibility, it may be providing the liberal equivalent to the conservative sanctity of marriage justifications for influencing divorce law. The result of this is that the reforms may fail to remove many of the problems with the current law, whilst potentially adding further issues to the law, which may have a negative impact.

Overall the summation of the observations reached throughout the thesis is that a divorce law with conflicted aims, such as protecting sanctity of marriage and providing a humane process, is unlikely to provide positive practical results. Future reforms could possibly be based on a no-fault system and may choose to focus solely upon providing an economically acceptable, fair process with minimum bitterness, distress and humiliation.

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