

The attempts to reform divorce law have been nothing short of failure. Discuss

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Introduction

The essay will aim to explore attempts at reforming divorce law. It will focus on examining the proposed law in the Family Law Act 1996 and the fact that it was not implemented. It will then proceed to analyse the current approach of the law on divorce, its unfairness, adverse impact on the parties and its failure to promote healthy relationship between the parties during and after the divorce proceedings. Finally, even though the attempts to reform the law have been unsatisfactory, it is suggested that there is still hope for the new law reform to move away from the current approach and create a healthier environment for the parties.

Family Law Act 1996

Part II of the Family Law Act 1996 sought to introduce a 'no-fault' divorce. This would have been similar to that of USA's divorce procedure of a 'no-fault' based system, where it is enough to state that the parties cannot get along anymore.¹ When interviewing key policy makers, Hasson found that the 'vast majority of study participants strongly favoured the introduction of a no-fault framework'.² Similar to the current law, it would have sole ground of irretrievable breakdown and would require evidenced lodging statement of marital breakdown.

However, before bringing the statement, parties had to attend information meetings, and this is where the spectrum for difficulties was opened up. These information meetings were highly humiliating and intrusive into parties' personal lives. They were aimed at explaining what it means to get divorced, thus, proving to be patronising and paternalistic. Moreover, after these meetings parties had a 9-month period of reflection and consideration. This seems quite

¹ Department of State for the United States of America Office Website, '*FLO: Divorce and the Foreign Service*'

² Ezra Hasson, '*Wedded to 'Fault': The Legal Regulation of Divorce and Relationship Breakdown*', (2006) *Legal Studies* Volume 2, page 142

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unnecessary, since divorce is not an impulsive, naive decision. As the pilot scheme for information meetings identified, information about marriage counselling came too late to save marriages. Furthermore, it was found that information about the divorce process was helpful, but people required more specific assistance and tailored advice.³

The Government decided that provisions were unworkable. Although the Family Law Act 1996 sought to introduce 'no-fault' divorce which would prove beneficial for the preservation of the relationship between parties, its information meetings would have proven ineffective. Overall, this can be regarded as a failed attempt at reforming divorce law, since the relevant provisions in Part II have now been repealed.

Current law- Matrimonial Causes Act 1973

The current regime of divorce law is a failure. Not only does it promote hostile relations between the parties, which may also adversely impact relevant children, but it also encourages dishonesty and lack of inquiry on the part of the judiciary.⁴ Under Matrimonial Causes Act 1973, there is only one ground for divorce that marriage has irretrievably broken down. This calls for the petitioner to satisfy one or more of the five factors under s.1(2), three of which are fault based (adultery, behaviour, desertion). Two other factors relate to periods of separation- two years if both parties consent, and five years without consent.

Calls to abolish fault-based approach have repeatedly arisen from the judiciary, government and researchers. Most prominently, the seminal case of *Owens v Owens* [2017]⁵ clearly indicated the unfairness of the current approach and the ever so needed change in the divorce

³ J. Walker, *Picking Up the Pieces: Marriage and Divorce Two Years After Information Provision* (DCA 2004)

⁴ Trinder et al. (2017) *Finding Fault? Divorce Law and Practice in England and Wales*

⁵ EWCA Civ 182

law. Sir James Munby, then President of the Family Division, pointed out that the law that judges have to follow and apply is based on “hypocrisy and lack of intellectual honesty”.⁶ This is highlighted by the three factors which require blame. These factors foster “finger pointing”, parties seek to blame one another for the breakdown. Such laws force bitter relationships between the parties and affect children of the family. Specifically, bitterness and hostility are a result of magnifying some of the incidents during the marriage in order to reach the standard of behaviour petition. Moreover, judges rarely inquire into the truth of the allegations, and *prima facie* accept facts as presented.⁷ The law clearly promotes hypocrisy and escalates post-divorce relationship between the parties.

Sir Munby also referred to the divorce by consent. The two other factors that refer to separation require consent. So, for those who are unwilling or unable to wait for two years, the divorce is brought about by means of “a consensual, collusive, manipulation of section 1(2)(b).”⁸ In the case itself, a judge refused to grant Mrs. Owens a decree nisi of divorce, even though he found that the marriage had broken down. The judge found that Mrs. Owens had failed to prove, within the meaning of the law, that her husband had behaved in such a way that she could not reasonably be expected to live with him. Both the Court of Appeal in 2017, and the Supreme Court in 2018,⁹ dismissed Mrs. Owen’s appeal. Judges in both courts decided that it was for Parliament to change the law.

It is no wonder that the law in light of this case has been heavily criticised. The decision failed to account for the impact that Mr. Owen’s behaviour had on her. Had Mr. Owens not defended

⁶ Ibid, [92]

⁷ Trinder (n3)

⁸ *Owens* (n5)

⁹ UKSC 41

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the case and consented to the petition, Mrs. Owens would have been saved the trouble and nerves of waiting for 5 years to obtain divorce when the respondent's consent would not be essential. Nigel Shepherd, the past Chair of Resolution quoted that the decision confirms the divorce crisis in England and Wales, and "the Government needs to take urgent action to address it."¹⁰ The decision clearly highlights the needs for Parliament to take serious consideration of the long repeated campaigns for 'no-fault divorce' and finally reform the law.¹¹

Divorce in Scotland

The unfairness and hypocrisy of divorce law in England and Wales can be compared to the Scottish approach. The basis for divorce under the Divorce (Scotland) Act 1976 was originally similar to that in England and Wales. However, the Family Law (Scotland) Act 2006 introduced a reduction in separation periods from two years to one where there is consent, and from five to two years when there is no need for consent. This provision is a step in reducing the period of loveless and daunting marriage before the parties get divorced, although still not being entirely satisfactory.

Hope for a change- Divorce, Dissolution and Separation Act 2020

Since the obvious failure of the current approach and multiple repeated calls for reform, there might still be hope for a positive change. The 'fault-based' approach, bitterness and animosity might soon be at an end. Although yet to be implemented on the 6th of April 2022, the Divorce, Dissolution and Separation Act 2020 aims to abolish accusations, "finger-pointing" and magnification of conduct in order to be granted a divorce. Section 1 of the Act amended the

¹⁰ *Owens v Owens*: Supreme Court decision strengthens calls to end divorce blame game, (Family Law, LexisNexis 2018)

¹¹ Lucy Bridger, "Analysis: Owens v Owens-the difficult in divorce", (Family Law, LexisNexis 2019)

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Matrimonial Causes Act 1973 allowing for parties to apply for a divorce on the ground of irretrievable breakdown without apportionment of blame on either party. This is a huge step in prevention of the conflict aggravation and encouragement for the parties to move on from the past and make arrangements for the future.

The reformed law should have two objectives: one is to make sure that the decision to divorce remains considered, and that parties are able to change course; and to make sure that divorcing couples are not put through legal requirements that escalate animosity and reflect poorly on the children.¹² Moreover, the new Act will update terminology such as “decree nisi” to “conditional order”. This will make legislation more accessible and easier to digest by the public. Margaret Heathcote, chair of family law group Resolution, pointed that the new law will support couples in resolving matters “as constructively and amicably as possible, minimising the impact on any children”.¹³

This reform promises to modernise the current approach and aims to create healthier dissolution of the marriage. Such a reform is crucial in maintaining each party’s financial and mental resources, as well as supporting their children. The success of this attempt to reform the law will be more practically observed once it comes into force. Until then, we can only theoretically predict its positive impact.

Conclusion

In conclusion, although the attempts to reform law in light of an un-implemented Part II of the Family Law Act 1996 and the current divorce law in Matrimonial Causes Act 1973 have

¹² Ministry of Justice (2018) Reducing family conflict: Reform of the legal requirements for divorce, Executive Summary, p.6

¹³ Monidipa Fouzder, “No-fault divorce to start in autumn 2021”, The Law Society Gazette 2020

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proven to be nothing short of failure, there is still anticipation for positive change brought by Divorce, Dissolution and Separation Act 2020. The current law has an immense negative impact on the relationship between the parties. The reformed law aims to abolish the fault-based system and encourage parties to focus on their future, which is thought to be more beneficial. However, until this reform comes into force, we cannot conclusively state its success in improving the current failed approach.