From Indissolubility of Marriage to Unilateral Divorce on Demand: A Tardy Revolution in English Family Law

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Abstract:

This article maintains that the belated reform of divorce procedures after the implementation of the Divorce, Dissolution and Separation Act 2020 has paradoxically moved English law from the most conservative to the most liberal end of the spectrum. It provides a critical analysis of the radical features of the new divorce regime, but also of notable elements of legal continuity. Additionally, it investigates the reform process leading to the current divorce law and identifies the main themes emerging from the legislative debate; the analysis focuses on the rationale for the more controversial aspects of the new scheme, as well as on salient objections to reform, from ideological perspectives on the significance of marriage vows to anti-individualistic concerns about societal interests, innocent spouses and children's welfare. It further considers the statistical evidence available to date to preliminarily evaluate some of the claims and predictions made in the public debate, such as the increase in divorce rates, faster divorces or the likelihood of amicable separation in the absence of an incentive to apportion blame in order to secure a divorce order. Finally, the article discusses the success of the recent reform when compared to prior attempts to introduce no-fault divorce in 1996.

Keywords:
divorce, marriage, reform, Owens, autonomy, fault

[A] Introduction

Since judicial divorce supplanted the elitist parliamentary procedure in 1857, the evolution of divorce legislation in England and Wales has been remarkably slow. Long-term separation was added to marital fault as a basis for divorce over a century later through the Divorce Reform Act (DRA) 1969, and it took another half a century before procedures were revisited with the Divorce, Dissolution and Separation Act (DDSA) 2020. The inertia of divorce liberalisation in England stands in stark contrast with legislative developments in closely related jurisdictions, notably Australia, Canada, and the USA, which in the '70s-'80s moved towards no-fault divorce and shorter periods of separation.[1] Conversely, after the recent reform, rather than aligning with that trend, English divorce law emerges again as an outlier, this time for going beyond the liberal features prevailing elsewhere: no separation period is required before instituting proceedings, spouses can apply jointly, and there is no judicial scrutiny over the divorce decision.

Against this background, the aim of this article is threefold: to evidence the shift of English divorce law from the most conservative to the most liberal end of the spectrum; to cast light on the reform process, including the rationale for contentious amendments to the

[1] See the other contributions in this Special issue.

Matrimonial Causes Act (MCA) 1973; and to explore the statistical data available to assess the predicted consequences of divorce liberalisation. The article opens with a brief historical overview of divorce law, followed by the analysis of elements of novelty and continuity in the new statutory provisions. Next, the article considers the ideological and pragmatic arguments for and against reform dominating parliamentary debates in 2019-2020. To test the assumptions and speculative forecast in these debates, the article examines key divorce statistics before and after the implementation of DDSA 2020. The conclusions consider the factors contributing to the success of the 2020 reform, compared to the failed attempt of the Family Law Act (FLA) 1996 to introduce no-fault divorce.

[A] The Slow Path to Divorce Reform: A Historical Overview

The absolute indissolubility of marriage came to an end in late-seventeenth-century England. Historically, that notion was founded less on religious dogma and more on utilitarian concerns about the family as a social institution, ensuring stability[2] and reducing the need for State support.[3] After the Reformation, the law no longer reflected the Catholic Church's view of marriage as an indissoluble covenant.[4] For Protestant theologians, the practice of separation from bed and board (the equivalent of modern-day judicial separation) found no justification in the Bible and deprived spouses of 'the essence of the marriage, namely, sexual relations and companionship', incentivising cohabitation and adultery.[5] In fact, it permitted spouses to live separate and apart but did not entitle them to remarry. The first divorce *a vinculo matrimonii* (not just *a mensa et thoro*) dates back to 1670: an unprecedented private Act of Parliament was passed to allow Lord Roos to remarry and produce legitimate heirs to the earldom after his adulterous wife's offspring was declared illegitimate.[6]

Initially, parliamentary divorces were individual exceptions to the principle of indissolubility of marriage, reserved to wealthy/noble men and designed to secure the legitimate patrilinear descent of large properties and ancient titles.[7] Preventing children of adulterous wives from inheriting and allowing husbands to remarry and beget legitimate heirs remained the exclusive purposes of divorce for half a century (1700-1750).[8] The criteria for the successful passage of a divorce bill, as crystallised by 1810, were: (circumstantial) evidence of adultery; good marital relations prior to the adultery, ie an 'innocent' husband (no cruelty, neglect, or separation of beds potentially driving the wife to adultery); and no collusion between spouses in organising divorce proceedings.[9] The husband had to first secure a decree of divorce *a mensa et thoro* from the Ecclesiastical Court and a judgment against his wife's

[2] S Cretney, 'Breaking the Shackles of Culture and Religion in the Field of Divorce?', in K Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia, 2005) 3, 3.
[3] B Hale, 'Equality and Autonomy in Family Law' (2011) 33(1) *Journal of Social Welfare & Family Law* 3, 4.
[4] S Cretney, *Family Law in the Twentieth Century. A History* (OUP, 2003), 161.
[5] L Stone, *Road to Divorce: England 1530-1987* (OUP, 1990), 301.
[6] R Probert, 'The *Roos* Case and Modern Family Law' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart, 2016) 13, 18-23.
[7] Stone, n 5 above, 326-27.
[8] Ibid, 320-21.
[9] Ibid, 323-24.

lover in a common law action for 'criminal conversation'.[10] Problematically, Parliament's exercise of this new role as 'a court of equity over matrimonial affairs' was marred by unclear voting principles and procedures, resulting in 'erratic, inconsistent, and arbitrary' decisions.[11]

After 1750, the number of private bills increased dramatically, with a large proportion of upper-middle-class petitioners, rather than aristocrats and landowners; by the late eighteenth century, Parliamentary divorce became a privilege of the rich, irrespective of social standing or source of income.[12] The moral justification for granting exceptions to the indissolubility rule also changed, from the preservation of legitimate patrilinear succession to titles and estates to 'the pursuit of happiness'.[13] Interestingly, 'blatant examples of collusive petitions' to obtain a divorce by mutual consent were increasingly frequent.[14] While on occasion the collusion was so obvious it was detected, 'changing views about the theological and ethical propriety of divorce and remarriage meant that the great majority of bills were collusive'.[15]

Although the MCA 1857 introduced judicial divorce, adultery remained the sole ground, designed to allow innocent husbands to rid themselves of adulterous wives and shield their fortune against illegitimate children. However, the reform simplified procedures, removing the requirement to obtain an ecclesiastical divorce and damages for criminal conversation.[16] The passage of MCA 1857 was influenced by the need, generated by industrialisation and growth in personal wealth, to remove probate jurisdiction from the ecclesiastical courts for a more efficient treatment of estates; this led to changes in other areas of ecclesiastical jurisdiction.[17] The MCA 1857 terminated the Ecclesiastical Courts' jurisdiction in matrimonial matters, entrusting it to a new – secular – Court for Divorce and Matrimonial Causes.[18]

Substantively, the Act followed the historical precedent of private bills: the petitioner had to establish that his wife had committed adultery,[19] that he himself had not,[20] and that there was no connivance or collusion.[21] Under section XXVII, a husband's adultery had to be aggravated by incest, bigamy, rape, sodomy, bestiality, cruelty or desertion of at least two years. Despite these exceptionally restrictive grounds for wives, which followed the parliamentary practice, 40% of divorce petitioners between 1858-1899 were women.[22] This double standard *vis-à-vis* the expectation of marital fidelity was abolished by section 1 MCA 1923, which made it lawful for a wife to divorce her husband for adultery alone. The Act signalled 'a rejection of the idea that male adultery was acceptable', driven by Christians' and

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[10] Cretney, n 4 above, 161.
[11] Stone, n 5 above, 319.
[12] Ibid, 325-27.
[13] Ibid, 327-28.
[14] Ibid, 330.
[15] Ibid, 332.
[16] MCA 1857, s VII.
[17] Cretney, n 4 above, 162-63.
[18] MCA 1857, s II and s VI.
[19] MCA 1857, s XXVII.
[20] Adultery was not an absolute bar; under MCA 1857, s XXXI, if the petitioner was guilty of adultery, the court had discretion ('shall not be bound to pronounce such Decree'). However, the Divorce Court viewed itself as a 'court of morals', and adulterous petitioners only succeeded in exceptional circumstances: innocent adultery (man believing his wife to be dead), unwilling adultery (wife driven to prostitution by the husband), condoned adultery; see Cretney, n 4 above, 188-93.
[21] MCA 1857, s XXIX.
[22] Ibid, 167-69.

social purists' support for 'the equality of the sexes with regard to moral standards', a desire to provide equitable matrimonial relief to wives, but also the belief that male adultery contributed to social problems: prostitution, illegitimacy, the spread of venereal disease.[23] Divorcing a *non-adulterous* spouse became possible with the MCA 1937, which added further grounds: desertion for at least three years, cruelty, and incurable insanity for at least five years (the first instance of divorce without blameworthy conduct); wives could also petition on grounds of rape, sodomy or bestiality.[24]

After the DRA 1969 changes, re-enacted in the MCA 1973, although in theory there was only one ground, the irretrievable breakdown of the marriage, the divorce could not be granted without at least one supporting fact: adultery, behaviour, desertion (minimally two years), two-year separation if the respondent consented to the divorce, or five-year separation if consent was refused. Proof of irretrievable breakdown required proof of a fact, and the real obstacle to a decree was the latter.[25] Consequently, the 1969 reform failed to achieve such objectives as minimising hostility: 'although the matrimonial offence was supposedly dead, its decaying corpse had been denied a decent burial'.[26] This was compounded by the preference for the faster fault-based petitions; contrary to the reformers' expectations, a small proportion of divorce petitions were founded on separation, whereas an increasingly high proportion relied on 'behaviour'.[27]

Following the Law Commission's recommendations for further reform (replacing the facts by a period of reflection and consideration of post-divorce arrangements),[28] Part II of the FLA 1996 would have introduced 'no-fault divorce' and required spouses to attend compulsory information meetings about, inter alia, marriage counselling, aimed at identifying saveable marriages and encouraging reconciliation. After several information-meeting pilot schemes, the Government concluded that those provisions were 'unworkable'[29] and invited Parliament to repeal them.[30] The pilot projects' results, described by the Lord Chancellor as 'disappointing', showed that only 7% of 7000 volunteers chose mediation, 13% proceeded to seek marriage counselling, whilst 39% were more likely to see a solicitor than before.[31] Thus, the law did not achieve the aim of saving marriages; the information meetings 'came too late in the day', and those unsure about the state of their marriage were more inclined to divorce.[32]

The law was not revisited again until 2020, but the change was nothing short of revolutionary. Following the implementation of DDSA 2020 in April 2022, English divorce

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[23] A Sumner Holmes, 'The Double Standard in the English Divorce Laws, 1857–1923' (1995) 20(2) *Law & Social Inquiry* 601, 619 and passim. Male infidelity had been judged less serious as it 'impose[d] no bastards' on the wife (ibid, 605).
[24] MCA 1937, s 2.
[25] *Richards v Richards* [1972] 3 All ER 695; *Buffery v Buffery* [1988] FCR 465; *Owens v Owens* [2018] UKSC 41.
[26] S Cretney, 'Divorce Reform in England: Humbug and Hypocrisy or a Smooth Transition?', in M Freeman (ed), *Divorce: Where Next?* (Dartmouth, 1996) 39, 41-42.
[27] Cretney, n 4 above, 380.
[28] Law Commission, *Family Law: The Ground for Divorce*, Law Com No 192 (31 October 1990).
[29] C Fairbairn, *No-fault divorce*, House of Commons Library, Briefing Paper No 01409 (9 April 2019), https://researchbriefings.files.parliament.uk/documents/SN01409/SN01409.pdf, last accessed 21 August 2023, 12-14.
[30] Cretney, n 4 above, 390.
[31] H Reece, 'Divorcing Responsibly' (2000) 8 *Feminist Legal Studies* 65, 85.
[32] E Hasson, 'Setting a Standard or Reflecting Reality? The "Role" of Divorce Law, and the Case of the Family Law Act 1996' (2003) 17(3) *International Journal of Law, Policy and the Family* 338, 360.

law abandoned marital fault and lengthy separation and removed the option to challenge an application. These changes were prompted by the high-profile *Owens v Owens* litigation: in Court of Appeal proceedings, Munby P remarked that couples unable or unwilling to wait two years obtained a divorce 'by means of a consensual, collusive, manipulation of section 1(2)(b)'; thus, ironically, collusion, formerly a bar to divorce (until section 9 DRA 1969 abolished it), had become 'the very foundation of countless petitions and decrees';[33] he bluntly described divorce procedures as 'based on hypocrisy and lack of intellectual honesty'.[34] In the Supreme Court, Lord Wilson noted 'the damage caused by the requirement […] that […] one spouse must make allegations of behaviour against the other', which 'often inflame their relationship, to the prejudice of any amicable resolution of the ensuing financial issues and to the disadvantage of any children';[35] he suggested that 'Parliament may wish to consider whether to replace [the] law'.[36] Lady Hale found the case 'very troubling', whilst noting that '[i]t is not for [the Court] to change the law laid down by Parliament'.[37]

Despite the rejection of the appeal, the case played a pivotal role in triggering reform, acknowledged in the House of Commons' Briefing paper 'No-fault divorce'.[38] It inspired the Government's 2018 consultation 'Reducing Family Conflict: Reform of the legal requirements for divorce', followed by the introduction of a reform Bill. The Ministerial Foreword to the Consultation paper opened with an express reference to the judgment: '[T]he recent case of Owens v Owens has generated broader questions about what the law requires of people going through divorce and what it achieves in practice'.[39] The case was also recalled in parliamentary debates by speakers from all sides of the political spectrum. Labour MPs were 'pleased that the Government have acted, especially in the light of the troubling case of Owens *v.* Owens',[40] which showcased 'a particularly iniquitous aspect' of divorce law;[41] the need for 'the old and outdated divorce rules' to change was 'crystallised and highlighted by the case of Owens *v.* Owens'.[42]

It might appear rather singular that an isolated case galvanised political will after decades of unsuccessful reform attempts and campaigning by organisations such as Resolution, the largest organisation for family justice professionals in England and Wales.[43] The explanation may partly lie in the fact that *Owens* placed the locus of calls for reform in the litigants' camp (as opposed to the academia or the legal profession), bringing the needs of spouses trapped in collapsed marriages to the forefront of demands for change. Indeed, the 1969 reform did not occur until 'pressure […] for change came primarily from those directly affected by the divorce law'; pressure 'from professionals working […] within the system' was

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[33] *Owens v Owens* [2017] EWCA Civ 182, [94].
[34] Ibid.
[35] *Owens v Owens* [2018] UKSC 41, [7].
[36] Ibid, [45].
[37] Ibid, [46].
[38] Fairbairn, n 29 above, 9-11.
[39] Ministry of Justice, *Reducing Family Conflict: Reform of the legal requirements for divorce* (15 September 2018), https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf, last accessed 21 August 2023.
[40] *Hansard*, HC Deb, vol 662, col 580 (25 June 2019) (Richard Burgon).
[41] Ibid, col 582.
[42] Ibid, col 599 (Yasmin Qureshi).
[43] Founded in 1982, Resolution gathers over 6,500 members (https://resolution.org.uk/about-us/, last accessed 28 August 2023).

insufficient.[44] Despite the rarity of successfully defended divorce applications, *Owens* laid bare the absurdity of the law from a strikingly real human perspective. The case 'attracted a huge public outcry',[45] 'highlighted very publicly the nonsense of [the] system',[46] and 'heightened the urgency of the reform debate'.[47] The forceful criticism of the law by senior members of the judiciary was also unprecedented. Furthermore, the *Owens* saga revived a well-trodden debate; it was recalled in the House of Lords that a substantial agreement on the removal of fault already existed 22 years earlier: 'the essence of the [1996] Bill, which passed both Houses of Parliament with considerable majorities, was no-fault divorce'.[48]

A further factor in promoting reform was the vast support for the *Divorce, Dissolution and Separation Bill 2019-2020* from the legal profession. The Chair of the Justice Committee noted 'the overwhelming view of family practitioners, including solicitors, barristers and senior judges' that the requirement of fault did not work satisfactorily;[49] divorce law failed to achieve its main objective, namely 'to enable civilised and caring arrangements to be made for [the spouses] and their children'.[50] Opposition MPs remarked that the representations they had received from the legal profession supported the Bill[51] and that, according to 90% of family lawyers represented by Resolution, the law 'ma[de] it harder to reduce conflict between ex-partners'.[52] Lady Hale was quoted labelling the system 'misleading' because the 'fact used as the peg on which to hang the divorce may not bear any relationship to the real reason why the marriage broke down'.[53]

While the *Owens* appeal was progressing in the courts, the publication of the Nuffield Foundation *Finding Fault?* report[54] provided 'compelling empirical evidence' about what Munby P called the 'intellectual dishonesty' of the divorce process and revealed 'the unnecessary distress caused to couples who are being pushed into attributing fault'.[55] The companion study *No Contest* (surveying defended cases) concluded that '[w]ithout allegations of behaviour, it is likely that most defences would not occur';[56] it recommended a notification system avoiding additional conflict and reducing costs for the parties and the Ministry of Justice.[57] Critics of the Bill challenged the legitimacy of a 'seismic shift on the advice of one non-peer-reviewed study and the legal lobby'.[58] In response, it was pointed out that the messages of the *Finding Fault?* report – that the law increased conflict and encouraged

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[44] Cretney, n 4 above, 391.
[45] L Trinder, 'Divorce Reform in England and Wales: The Human Rights Perspective' (2018) 6 *European Human Rights Law Review* 557, 558-59.
[46] N Shepherd, 'Maybe this time' (2018) (Nov) *Family Law* 1365, 1365.
[47] S Trotter, 'The State of Divorce Law' (2019) 78(1) *Cambridge Law Journal* 38, 41.
[48] *Hansard, Lords Debates*, vol 792, col 1896 (6 September 2018) (Lord Mackay of Clashfern).
[49] *Hansard*, HC Deb, vol 662, col 594 (25 June 2019) (Robert Neill).
[50] Ibid.
[51] Ibid, col 595 (Ian Lucas).
[52] Ibid, col 599 (Yasmin Qureshi).
[53] Ibid, col 597 (Robert Neill).
[54] See L Trinder et al, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017), www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL.pdf, last accessed 17 July 2023.
[55] Shepherd, n 46 above, 1365.
[56] L Trinder and M Sefton, *No Contest: Defended Divorce in England & Wales* (Nuffield Foundation, 2018), www.nuffieldfoundation.org/wp-content/uploads/2018/04/No-contest-final_Nuffield_Foundation.pdf, last accessed 26 August 2023, 81.
[57] Ibid, 83.
[58] *Hansard, Lords Debates*, vol 802, col 1404 (17 March 2020) (Lord Farmer).

dishonesty – were 'consistent with a body of evidence going back about 40 years, not least the Law Commission report of 1990'; the study showed that the problems persisted.[59]

Crucially, the Bill enjoyed widespread cross-party support. Labour MPs recalled their commitment to the introduction of no-fault divorce in their 2017 general election manifesto.[60] They welcomed the proposed legislation, 'which ha[d] for many years been required and called for',[61] praising it for the 'common-sense approach that continues to respect the institution of marriage and civil partnerships, but avoids unnecessary antagonism and costs'.[62] The Liberal Democrats commended the Bill for 'mak[ing] our legal practices around divorce fit for the 21st century'.[63]

[A] The New Divorce Procedure: Change and Continuity

The Lord Chancellor's address to Parliament on the 2020 draft legislation encapsulated the rationale for reform: '[T]he law should reduce conflict when it arises. Where divorce is inevitable, this Bill seeks to make the legal process less painful, less traumatic. […] [T]he decision to divorce is not taken lightly or impetuously. […] Once that decision has been reached, the parties need to move forward constructively.'[64] Other Government speeches denounced the existing divorce requirements as 'needlessly rak[ing] up the past to justify the legal ending of a relationship that is no longer a beneficial and functioning one'.[65] The no-fault route to consensual divorce was also criticised: living 'in the limbo of separation' for two years served no useful purpose,[66] and complex rules for establishing a period of separation deterred couples from attempting to resume cohabitation.[67]

Although a ground for divorce/dissolution must still be cited under the new law, and that remains the irretrievable breakdown of the marriage/civil partnership, applicants are no longer required to substantiate it. Under the revised section 1 of the MCA 1973/ section 44 Civil Partnership Act (CPA) 2004, an application must be accompanied by a statement that the marriage/civil partnership has broken down irretrievably, which the court must take as 'conclusive evidence'. There is no judicial inquiry into the breakdown, based on the view that the law 'cannot save a marriage that has broken down, nor can it determine who was responsible for that breakdown'.[68]

Rather extraordinarily, the option to defend the divorce was removed. The Government remarked that respondents who contested typically did so not to oppose the divorce but to dispute allegations against them; once the conduct-based facts removed, the ability to defend fell away.[69] Consequently, one can no longer artificially extend the marriage by disputing facts

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[59] Ibid, col 1406 (Lord Keen of Elie).
[60] *Hansard*, HC Deb, vol 662, col 580 (25 June 2019) (David Gauke).
[61] *Hansard*, HC Public Bill Committee, col 29 (2 July 2019) (Yasmin Qureshi).
[62] *Hansard*, *Lords Debates*, vol 677, col 105 (8 June 2020) (David Lammy).
[63] *Hansard*, HC Deb, vol 662, col 586 (25 June 2019) (Wera Hobhouse).
[64] *Hansard*, HC Deb, vol 677, col 95 (8 June 2020) (Robert Buckland).
[65] *Hansard*, HC Public Bill Committee, col 34 (2 July 2019) (Paul Maynard).
[66] *Hansard*, *Lords Debates*, vol 801, col 1808 (5 February 2020) (Lord Keen of Elie).
[67] Ibid.
[68] *Hansard*, HC Deb, vol 677, col 97 (8 June 2020) (Robert Buckland).
[69] *Hansard*, HC Public Bill Committee, col 34 (2 July 2019) (Paul Maynard).

and requiring a court hearing, potentially preserving empty legal ties with an estranged (often re-partnered) spouse for years. Also omitted is the former section 5 of MCA 1973, which allowed the court to refuse the decree in five-year separation cases on grounds of grave hardship to respondent; as discussed below, section 10 was preserved to address post-divorce economic concerns.

Another unprecedented change in the new section 1(1) MCA 1973 is the option for spouses to apply jointly, which was expected to 'create a level playing field' and 'encourage [the parties] to work together from the very beginning of the process'.[70] In an astounding move away from the adversarial process, the reference to 'applicant(s)' (instead of 'petitioner'/'respondent') no longer places the parties in opposite camps and avoids victim/wrongdoer connotations. Evidence from the legal profession suggests that there was considerable demand for joint applications. Resolution's response to the consultation indicated that couples who agreed to divorce found it 'illogical and frustrating' to have to identify one petitioner; moreover, the question of who issued the petition carried symbolic meaning and raised concerns about children being told that that person ended the marriage.[71]

A noteworthy novelty in the timeline of proceedings is the waiting period between the application and the confirmation of intention to divorce. The new section 1(6) precludes the court from making a conditional order unless the applicant gives confirmation that they wish the application to continue, which cannot be done before the end of a 20-week period from the start of proceedings. This minimum period of reflection – after the institution of proceedings – was presented as an essential element of reform, allowing applicants 'to reflect on the decision' and to make arrangements for the future if divorce is inevitable.[72] In joint-application cases, both spouses must confirm their intention to proceed. If one party changes their mind, a joint application can progress as a sole application. While the statute is ambiguous, Practice Direction 7A confirms the possibility of a transfer from joint to sole application.[73] This solution was indispensable: the risk of having to start afresh would disincentivise collaborative divorce. Conversely, a sole application cannot become a joint application at the confirmation stage. The Law Society's Family Law Committee viewed a joint application for the final order appropriate where one spouse initially disagreed with the divorce but ultimately came to terms with it;[74] the current approach might be explained, however, by the absence of the minimum period of reflection for a spouse joining the process belatedly.

Finally, a minor but not insignificant change concerns the names of the orders. 'Conditional/final order' substituted 'decree nisi/absolute',[75] 'to bring terms in line with the more modern terms used in civil partnership law'.[76] The simplification of the jargon facilitates a user-friendly court process, critical for litigants-in-person. As noted in the parliamentary debates, many practitioners 'speak of their clients' bewilderment at terms such as decree nisi

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[70] Ibid, col 103.
[71] *Reducing family conflict. Reform of the legal requirements for divorce. Resolution's response to the Ministry of Justice* (on file with the author).
[72] *Hansard*, HC Public Bill Committee, col 35 (2 July 2019) (Paul Maynard).
[73] Practice Direction 7A (Procedure for Applications in Matrimonial and Civil Partnership Proceedings), [9.1].
[74] *Hansard*, HC Public Bill Committee, col 9 (2 July 2019) (David Hodson).
[75] MCA 1973, s 1(4).
[76] *Hansard*, HC Deb, vol 662, col 580 (25 June 2019) (David Gauke). See, analogously, *Hansard*, HC Public Bill Committee, col 34 (2 July 2019) (Paul Maynard).

and decree absolute'.[77] The more accessible language was described as 'a reminder that the law must serve all people, not just those who are legally trained'.[78]

At the same time, the new divorce/dissolution regime exhibits numerous elements of legal continuity. In addition to the divorce ground, DDSA 2020 preserved the two-stage process (with modernised names) and the time gap between stages. The court first issues a conditional order, which may not be made final before the end of a period of six weeks from the conditional order.[79] As before, the other spouse can apply for the final order after the expiration of three months from the earliest date on which the applicant could have applied.[80] The Government explained that the retention of the two stages encouraged reconciliation; the need for a further application 'ensures that a divorce is never automatic': the decision is 'considered and intentional at each stage',[81] 'with opportunities for a change of heart right up to the last moment'.[82] Overall, 'it takes three active steps before a marriage can be dissolved'[83] (initial application, confirmation, application for final order).

A further element of continuity is the first-year bar on divorce.[84] The preservation of the status quo was explained by a lack of consensus or evidence that the bar 'causes hardship', although future change was not ruled out.[85] The lead author of the influential *Finding fault?* report noted that only four in a sample of 300 nationally representative undefended cases were brought within the second year of marriage, and only one in the thirteenth month.[86] While some MPs objected that the bar prevented women in abusive marriages from obtaining a timely dissolution and financial support,[87] the Government preferred to dissociate divorce from civil remedies against abuse, recalling the availability of non-molestation and occupation orders.[88]

The law also preserved section 10, extending to all respondents the ability to apply for the final order to be delayed while the court considers their financial position post-divorce.[89] Where a conditional order is made pursuant to a sole application (or one spouse has withdrawn from the joint application), the court must not make the divorce order final unless it is satisfied that the applicant should not be required to make financial provision for the respondent, or that the financial provision made is reasonable and fair or the best that can be made in the circumstances.[90] The statute allows the court to bypass this provision if there are circumstances making a final order desirable without delay and the applicant has made a satisfactory undertaking that they will make financial provision as approved by the court.[91]

Similarly, section 10A safeguards in relation to religious marriage were maintained. Where the parties were married in accordance with any prescribed religious usages and must

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[77] *Hansard*, HC Deb, vol 677, col 107 (8 June 2020) (David Lammy).
[78] Ibid.
[79] MCA 1973, s 1(4).
[80] Ibid, s 9(2).
[81] *Hansard*, HC Deb, vol 677, col 103 (8 June 2020) (Robert Buckland).
[82] *Hansard*, HC Deb, vol 662, col 580 (25 June 2019) (David Gauke).
[83] *Hansard*, HC Deb, vol 677, col 894 (17 June 2020) (Alex Chalk).
[84] MCA 1973, s 3.
[85] *Hansard*, HC Public Bill Committee, col 36 (2 July 2019) (Paul Maynard).
[86] Ibid, col 19 (Liz Trinder).
[87] See *Hansard*, HC Deb, vol 662, col 583 (25 June 2019) (Richard Burgon); ibid, col 600 (Yasmin Qureshi).
[88] Ibid, col 602 (Paul Maynard).
[89] Ibid, col 601.
[90] MCA 1973, s 10(3).
[91] Ibid, s 10(4).

cooperate for the marriage to be dissolved under those usages (eg Jewish divorce), either party can apply for an order that the divorce is not to be made final until the court receives declarations from both parties that they have taken the required steps to dissolve the marriage under their religious usages.

The Government has also retained judicial separation, recognising that, despite its rare use (fewer than 300 petitions annually, compared to around 110,000 divorce petitions), 'divorce is not an option for some couples because of deeply held religious or other beliefs', and hence judicial separation provides an important legal alternative.[92] While previously applicants had to prove one of the five facts, under the new section 17 MCA 1973/ 56 CPA 2004, either or both parties may apply for a (judicial) separation order, submitting a statement that they seek to be (judicially) separated.

[A] The Legislative Debate on Divorce Reform: Prompts and Dissent

Several thematic threads can be identified in the 2019-2020 parliamentary debates. They range from ideological and expressivist concerns (regarding the institution of marriage, the message sent by permissive legislation, and the place of individual autonomy), to pragmatic concerns (about divorce rates, abusive households, unfair leverage in child arrangements proceedings, or the impact on children). Although some form of change was unanimously welcomed, MPs from the Government's own party described the Bill as 'an extreme liberal agenda',[93] and 'one of the most radical and most extreme divorce laws in the whole of the European continent'.[94]

[B] The significance of marriage and State's interest in the dissolution of private relationships

The divorce process is inextricably linked with the understanding of marriage, which is not defined in the legislation. Unsurprisingly, much of the legislative debate revolved around the significance of marriage as both a private commitment and a public institution. Many Conservative MPs expressed disquiet at the unintended consequences of unilateral divorce on demand, in particular 'the message that it sends out to society'.[95] They feared that 'the Government are prioritising the ability easily to leave marriage, which is a bad signal'.[96] The Bill was said to 'lessen the seriousness of the marriage contract',[97] to 'water down marriage to a six-month commitment',[98] and to introduce 'Las Vegas-style drive-through divorces'.[99] For some, the Bill proposed 'the effective abolition of the marriage vow', ie saying that the commitment 'is not solemn, public and lifelong, but trivial, private and as long or short as

[92] *Hansard*, HC Public Bill Committee, col 37 (2 July 2019) (Paul Maynard).
[93] *Hansard*, HC Deb, vol 677, col 114 (8 June 2020) (Sir Edward Leigh).
[94] Ibid, col 115.
[95] *Hansard*, HC Deb, vol 677, col 875 (17 June 2020) (Scott Benton).
[96] Ibid, col 880 (Sir David Amess).
[97] *Hansard*, HC Deb, vol 662, col 582 (25 June 2019) (Eddie Hughes).
[98] *Hansard*, HC Deb, vol 677, col 880 (17 June 2020) (Sir David Amess).
[99] Ibid, col 890 (Sir John Hayes).

people want it'.[100] It purportedly undermined 'the assumed permanence of marriage',[101] reducing it to an arrangement 'that can be ended at will'.[102] The Bill was dubbed 'fundamentally un-Conservative', because 'it ma[de] marriage less significant and […] less valued'[103] and failed to support the traditional family.[104] It was conjectured that, if marriage commitments become unreliable, people will be less likely to marry due to low expectations of it lasting.[105] The solution to the intellectual dishonesty of divorce law was deemed worse than the problem: the Government was accused of attempting to cure the hypocrisy at the end of the relationship by 'introducing hypocrisy at the start', because now the vows 'have no legal force and no moral value'.[106]

The ability to contract out of marriage unilaterally was derisively contrasted to less solemn obligations the law does not permit individuals to evade: 'people can sign up to a mobile phone contract and be stuck with it for two years […] but they can have a church or civil ceremony, profess lifelong fidelity before the law, before God, before friends and neighbours, and after just six months walk away'.[107] Others questioned the fairness of 'being able to just walk swiftly away […] with no dialogue and without being held to account'.[108] Marriage was described as 'something that people have to work at',[109] and criticism targeted the Bill's support for individual choice over the 'commitment, self-giving and sacrifice that lie at the heart of the marriage covenant'.[110]

Some MPs sought to shift the focus of reform from divorce procedures to measures aimed at saving marriages, primarily the allocation of more funding to counselling services.[111] Nonetheless, even supporters of increased access to counselling stressed that the law 'should not be forcing people to remain tied to each other for two years just to make sure that divorce is what they really want'.[112] Reform promoters aptly viewed divorce as a process for achieving legal finality and resolving post-separation issues, not as a surrogate for dialogue between the parties in an attempt to reconcile. They argued against the use of a divorce application as a 'notice' to the other spouse of marital difficulties, instead of a means to dissolve legal ties when the marriage ends.[113]

Addressing concerns about the devaluation of marriage, the Government emphasised that the Bill was not anti-marriage, but 'anti-bitterness': it 'remove[d] unnecessary and artificial flashpoints to reduce the scope for pain, recrimination and, crucially, harmful impact on children'.[114] Thus, the Bill 'replace[d] a broken system that for decades ha[d] not operated as its framers intended'.[115] Significantly, marriage was depicted as a modern union whose

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[100] *Hansard*, HC Deb, vol 677, col 115 (8 June 2020) (Danny Kruger).
[101] Ibid, col 117 (Fiona Bruce). See also *Hansard*, HC Deb, vol 677, col 849 (17 June 2020) (Fiona Bruce).
[102] *Hansard*, HC Deb, vol 662, col 589 (25 June 2019) (Fiona Bruce).
[103] *Hansard*, HC Deb, vol 677, col 120 (8 June 2020) (Sir John Haynes).
[104] *Hansard*, HC Deb, vol 677, col 875 (17 June 2020) (Scott Benton).
[105] Ibid, col 849 (Fiona Bruce).
[106] *Hansard*, HC Deb, vol 677, col 116 (8 June 2020) (Danny Kruger).
[107] *Hansard*, HC Deb, vol 677, col 882 (17 June 2020) (Sir Edward Leigh).
[108] Ibid, col 855 (Fiona Bruce).
[109] Ibid, col 872 (Sir Christopher Chope).
[110] *Hansard*, *Lords Debates*, vol 801, col 1814 (5 February 2020) (The Lord Bishop of Carlisle).
[111] *Hansard*, HC Deb, vol 677, col 95 (8 June 2020) (Jim Shannon).
[112] Ibid, col 124 (Alex Cunningham).
[113] *Hansard*, *Lords Debates*, vol 802, col 1400 (17 March 2020) (Lord Keen of Elie).
[114] *Hansard*, HC Deb, vol 677, col 125 (8 June 2020) (Alex Chalk).
[115] *Hansard*, HC Deb, vol 677, col 892 (17 June 2020) (Alex Chalk).

legitimacy is predicated on enduring mutual consent: '[M]ost people nowadays recognise that marriage is a voluntary union. When consent disappears, so, too, does its legitimacy.'[116] An interesting question emerging from the debate was whether law-makers' role is to shape, or bow to, public opinion. It was suggested that 'the Bill reflect[ed] changing attitudes to marriage', but '[i]n this place we need to lead the culture, not to follow'.[117] However, a Parliament ignoring public *mores* risks appearing elitist, paternalistic, moralist and borderline un-democratic.

The ideological debate also addressed the overarching question raised by *Owens*: 'who should decide on whether a marriage has ended: the parties to that marriage or the state?'[118] A subsidiary question was 'whether the *law* should have anything to say about marital conduct'.[119] Under DRA 1969, judges had found themselves compelled to articulate their own views about marital expectations, ensuring that the facts 'were not interpreted in such a way as to render them nugatory, given Parliament's clear intention not to allow divorce on grounds of mere incompatibility'.[120] Some parliamentary interventions voiced paternalistic views of courts as objective arbiters of marriage breakdown and insisted on protecting parties against their own misjudgement. The requirement to present evidence of irretrievable breakdown was described as important because many marriage breakdowns are temporary but the parties interpret them as irretrievable.[121] Similarly, the six-month process was deemed too short to shield spouses against ill-conceived divorces, 50% of divorcees regretting their decision.[122] For advocates of contested divorce, it was also a matter of respect for the respondent to afford them an opportunity 'to make the case for why the marriage is saveable and worth saving'.[123]

Sensibly, reform supporters argued that, just as the State does not attempt to decide if a couple should get married, it must also leave the divorce decision to the parties, not investigate 'whether they are right'.[124] The Nuffield Foundation study was referenced to highlight the public opinion in favour of expunging the State from such private decisions: 'people have said that it is time that the state respected and did not second-guess the decisions of parties to a failed marriage'.[125] Moreover, the law was deemed incapable of adjudicating responsibility for the breakdown – 'an intensely private and personal matter between the couple themselves'.[126] Some noted that a marriage cannot subsist without both parties' consent: 'marriage is a voluntary union of two people, the moment one person decides that the marriage is over, it is indeed over'.[127] It was further suggested that it is pointless to trap somebody in a marriage 'in which they are no longer invested'.[128] Interestingly, some reform supporters, albeit conceiving marriage as a sacrament/'covenant from God', accepted that not everyone views

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[116] *Hansard*, HC Deb, vol 677, col 126 (8 June 2020) (Alex Chalk).
[117] Ibid, col 116 (Danny Kruger).
[118] Trotter, n 47 above, 41.
[119] J Miles, 'Judging Matrimonial Behaviour', in J Miles, D Monk and R Probert (eds), *Fifty Years of the Divorce Reform Act 1969* (Hart, 2022) 159, 177 (original emphasis).
[120] Ibid.
[121] *Hansard*, HC Deb, vol 677, col 870 (17 June 2020) (Sir Christopher Chope).
[122] Ibid, col 874 (Andrea Leadsom).
[123] *Hansard*, *Lords Debates*, vol 802, col 1392 (17 March 2020) (Lord McColl of Dulwich).
[124] *Hansard*, HC Deb, vol 677, col 113 (8 June 2020) (Toby Perkins).
[125] *Hansard*, *Lords Debates*, vol 802, col 1396 (17 March 2020) (Baroness Butler-Sloss).
[126] *Hansard*, HC Deb, vol 677, col 901 (17 June 2020) (Robert Buckland).
[127] *Hansard*, HC Deb, vol 662, col 602 (25 June 2019) (Paul Maynard).
[128] Ibid, col 590 (Gavin Robinson).

marriage through the prism of faith, and that the Bill only sought to regulate marriage as a civil institution.[129] For many, the justice system must deal with the sad reality of relationship breakdown in a 'civilised, compassionate, swift and humane' manner;[130] indeed, '[i]t is neither humane nor particularly Christian to trap people in an unhappy marriage, particularly if one of the parties is unable to move out of the matrimonial home'.[131]

As regards pragmatic concerns, the most common was the allegedly inevitable 'increase in the divorce rate and the problems within society that family breakdown creates'.[132] It was feared that, 'by making divorce more straightforward and easier, it becomes the first resort, rather than the last', 'vastly reducing the potential for counselling and reconciliation'.[133] Other objections conflated the divorce process with post-separation financial and child arrangements: 'the changes could mean that faithful, committed husbands lose access to their children',[134] and 'the best way to propel women into poverty is through family breakdown and divorce'.[135]

Conversely, reform supporters disputed the notion that it would make divorce easier or impact divorce rates. They stressed the Bill's aim to 'make divorce not easier, but kinder'.[136] It was further argued that people usually learn about divorce legislation *after* they decided to end their marriage, and hence the complexity or ease of the process is not a factor in that decision; so, 'putting grit into the machine and deliberate friction into the process' does not reduce marital breakdown.[137] Others noted that no correlation was established between legal change and an increase in divorce rates in jurisdictions with 'easier' divorce systems.[138] In its response to the consultation, Resolution had observed that any increase in numbers in jurisdictions having liberalised divorce law was 'short-term and temporary, reflecting those who have waited for the new legislation to come in'; in Scotland, following changes in 2006, 'within two years the divorce rate reverted to the pre-reform level and then continued on a downward trend'.[139] The DRA 1969 precedent is also instructive, studies showing that it 'did not lead to a long-term change in the rate of resort to divorce'.[140] The inaccuracy of the assumed causality between divorce availability and marriage breakdown was forcefully contested by the Government: 'divorce is a sad and unhappy consequence of relationship breakdown, not a driver for it'.[141] The parliamentary debate noted, symmetrically, that the fault-based system did

[129] Ibid; *Hansard*, HC Public Bill Committee, col 33 (2 July 2019) (Paul Maynard).
[130] *Hansard*, HC Deb, vol 677, col 108 (8 June 2020) (Sir Robert Neill).
[131] Ibid.
[132] *Hansard*, HC Deb, vol 677, col 875 (17 June 2020) (Scott Benton).
[133] *Hansard*, HC Deb, vol 677, col 113 (8 June 2020) (Sir Desmond Swayne). See also ibid, col 99 (Sir John Hayes); col 114 (Sir Edward Leigh).
[134] Ibid, col 120 (Sir John Haynes).
[135] Ibid, col 114 (Sir Edward Leigh).
[136] Ibid, col 111 (Andrew Selous).
[137] *Hansard*, HC Deb, vol 677, col 893 (17 June 2020) (Alex Chalk).
[138] *Hansard*, HC Public Bill Committee, col 30 (2 July 2019) (Yasmin Qureshi).
[139] Resolution, n 71 above. See also *Hansard*, HC Public Bill Committee, col 18 (2 July 2019) (Liz Trinder), anticipating a possible temporary spike owed to people living apart 'in a queue already'.
[140] C Gibson, 'Contemporary Divorce and Changing Family Patterns', in M Freeman (ed), *Divorce: Where Next?* (Dartmouth, 1996) 9, 32.
[141] *Hansard*, HC Deb, vol 677, col 101 (8 June 2020) (Robert Buckland). See also *Hansard*, HC Deb, vol 677, col 127 (8 June 2020) (Alex Chalk).

not make divorce difficult (fault-based applications were successful);[142] nor did the procedure influence divorce rates, English and Scottish divorce rates being comparable.[143]

Further pragmatic concerns regarded the impact on children. Speeches revealed a profound disagreement on what child welfare requires, whether separate-but-happy co-parenting or togetherness at all costs. There was a suggestion that 'even where there is an argumentative marriage […] where parents stick together, the stability benefits children';[144] this allegedly warranted strong State intervention in family life: 'to promote stability, the Government are justified, and have an interest, in helping couples stay together'[145] (where 'helping' more likely signified 'forcing'). For the Government, 'having two parents apart but happy is infinitely better for a child than having parents stuck in an unhappy marriage';[146] 'children's best interests are most clearly served by the reduction of conflict and the co-operation of divorcing parents'.[147]

[B] The appropriate duration of divorce proceedings

A vividly debated issue was the six-month term for the completion of divorce proceedings (20 weeks between application and confirmation, six weeks between conditional and final orders), assuming applicants act as soon as eligible at each stage. Some characterised this process as 'quickie divorce'.[148] Despite the futility of mandatory reconciliation efforts after the start of proceedings showcased by the FLA 1996 pilots, some MPs insisted on 'maximising counselling options' for divorcing parties rather than 'put them on a conveyor belt towards certain divorce'.[149]

Contrastingly, reform supporters from across the political spectrum emphasised that most people embark upon divorce after a long period of consideration, reconciliation attempts, often counselling; filing for divorce is only the final step of a process, and hence extending the waiting period beyond six months served no useful purpose.[150] For the Government, the Bill allowed sufficient space for reflection, with a 'triple lock' requiring applicants to *act* at each stage: application, confirmation, final order;[151] moreover, six months was the minimum duration of the process, 'not a maximum or absolute time limit'.[152] It was further suggested that the overall duration under the new law would be longer for about four out of five (80%) of couples when compared to fault-based divorces.[153]

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[142] *Hansard*, HC Public Bill Committee, col 20 (2 July 2019) (Liz Trinder).
[143] Ibid, col 22.
[144] *Hansard*, HC Deb, vol 662, col 588 (25 June 2019).
[145] Ibid.
[146] *Hansard*, HC Deb, vol 677, col 858 (17 June 2020) (Alex Cunningham).
[147] *Hansard*, HC Deb, vol 677, col 99 (8 June 2020) (Robert Buckland).
[148] *Hansard*, HC Deb, vol 662, col 592 (25 June 2019) (Fiona Bruce).
[149] *Hansard*, *Lords Debates*, vol 801, col 1845 (5 February 2020) (Lord McColl of Dulwich).
[150] *Hansard*, HC Deb, vol 677, col 856 (17 June 2020) (Alex Cunningham); ibid, col 888 (Dehenna Davison); ibid, col 894 (Alex Chalk).
[151] *Hansard*, HC Deb, vol 677, col 104 (8 June 2020) (Robert Buckland).
[152] Ibid, col 103-104.
[153] *Hansard*, HC Deb, vol 662, col 580 (25 June 2019) (noting that between 2011-2018, around two thirds of cases had reached decree nisi in under 20 weeks); *Hansard*, HC Deb, vol 677, col 104 (8 June 2020) (Robert Buckland); ibid, col 111 (Andrew Selous).

The six-month term was also seen to promote equality: the law no longer discriminated in favour of wealthy couples who could afford to live in separate accommodation before petitioning.[154] Opposition MPs agreed that the existing law disadvantaged low-income couples, for whom separation without financial relief was impossible and who had to make accusations.[155] The replacement of separation by a notification period (during which the parties could cohabit without affecting the proceedings) was said to support reconciliation. Indeed, the no-fault route previously available was 'counterproductive to any hope of reconciliation': couples were discouraged from moving back in together, lest they had to restart the separation process.[156]

Some MPs advocated for a moderate, Scottish-style reform: one-year separation with consent to divorce, two-years' separation without consent.[157] They decried the 'uncharted course' chosen by the Government, 'enabling possibly the fastest divorce in the world'.[158] Defending the radical nature of reform, the Government expressed its preference for an act 'with a longer shelf life', instead of a 'piecemeal approach to divorce reform' requiring revisitation in short order.[159]

[B] Moving away from the adversarial process

Before *Owens*, the scholarship had suggested that the law ought to allow spouses to exit marriage 'in a civilised non-confrontational manner'.[160] In fact, the fault-based system did not preserve marriages; most couples wishing to divorce were able to do so, albeit through 'a massaging of the law' and sometimes 'outright dishonesty'.[161] While the 2020 Bill sought to 'end […] the blame game',[162] the removal of the requirement to justify the petition was not without detractors.

Some MPs argued that innocent (especially religious) spouses 'would like to be given a reason why they are being divorced'.[163] Evocative analogies were proposed. The new scheme was compared to unfair dismissal in an employment relationship – a notice to quit without justification.[164] Others thought it 'reduc[ed] marriage to the legal status of a tenancy contract – one that can be dissolved at minimal notice by either party, without any expectation of permanence or any explanation'.[165] The elimination of the option to defend was similarly attacked. It was objected that the other spouse may not enjoy the same 20-week notice as the

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[154] *Hansard*, HC Deb, vol 677, col 97 (8 June 2020) (Robert Buckland).
[155] Ibid, col 107 (David Lammy); *Hansard*, HC Public Bill Committee, col 30 (2 July 2019) (Yasmin Qureshi).
[156] Ibid, col 106 (8 June 2020) (David Lammy). See also Resolution, n 71 above, supporting a law allowing divorcing couples to live in the same household post-notification (and attempt to save the marriage) without 'the need for artificial living arrangements'.
[157] *Hansard*, HC Deb, vol 677, col 100 (8 June 2020) (Sir Edward Leigh); *Hansard, Lords Debates*, vol 802, col 1407 (17 March 2020) (Lord Farmer); *Hansard*, HC Deb, vol 677, col 870 (17 June 2020) (Sir Christopher Chope).
[158] *Hansard, Lords Debates*, vol 802, col 1430 (17 March 2020) (Lord Farmer).
[159] *Hansard*, HC Deb, vol 677, col 100 (8 June 2020) (Robert Buckland).
[160] M Welstead, 'Divorce in England and Wales: Time for Reform' (2012) 24 *Denning Law Journal* 21, 35.
[161] Ibid, 21.
[162] *Hansard, Lords Debates*, vol 801, col 1810 (5 February 2020) (Lord Keen of Elie).
[163] *Hansard*, HC Deb, vol 677, col 115 (8 June 2020) (Sir Edward Leigh).
[164] Ibid, col 117 (Fiona Bruce).
[165] Ibid, col 119 (Sir John Haynes).

applicant, which was seen as an 'assault on the rights and dignity of the respondent'.[166] Disengagement from a 'till death do us part' commitment was said to require giving the other party an opportunity to 'make the case for why the marriage is saveable and worth saving'.[167]

These objections arguably misconstrue the purpose of the 20-week period, which ensures that the *applicant's* decision to divorce is well-thought-out (sufficient notice to respondents for practical purposes is satisfactory). Moreover, conversations on whether the marriage can be saved should occur privately, not through the courts; nor is the judge better placed to decide which marriage is saveable. Concerns about sudden notifications were rightly challenged in Parliament on the basis that the petition does not arrive as soon as the relationship deteriorates, and 'it is very unlikely that the respondent is taken by surprise'.[168] Empirical evidence was used to show that, in a sample of 74 defended cases, none was upheld, and most respondents did not challenge the relationship breakdown but behaviour allegations.[169]

Curiously, some MPs appeared to assign the divorce process a vindicating, cathartic or therapeutic role: avenging the innocent (eg abandoned) spouse by identifying the other as the culprit. They condemned the unfairness of 'unilateral, no-reason divorce'[170] because the spouse who is 'wronged' is unable to 'put anything on record';[171] thus, 'women cruelly abandoned by errant husbands will have no way of marking that betrayal'.[172] They protested the idea of taking away 'a divorce that recognises who was in the right and who was in the wrong'.[173] Some rejected the notion that having to make fault allegations increased acrimony; instead, they deemed conflict inevitable, because enmity 'is not a product of the process, but a characteristic of human relations when they break down'.[174] Some favoured a regime maintaining fault alongside a shorter period of separation (the Scottish model), to give petitioners a choice: not force applicants to rely on fault, but also not deprive them of that option.[175]

More convincingly, other interventions contested the public relevance of 'fault'; questions of blame were seen as a matter for the couple.[176] The civil, as opposed to criminal, nature of divorce proceedings was aptly highlighted, as well as the appropriate role of the court process, which is not 'to assist someone in a measure of trauma'.[177]

Some MPs criticised the Government's decision to ignore the preference of 83% of the respondents to the consultation for retaining the right to contest a divorce.[178] Apparently, however, 'the vast bulk of responses were supportive of the proposals', but '[a] small evangelical Christian organisation then e-mailed all its members and there was a flood of responses', which '[we]re not a valid representation of the British public'.[179] Rights of Women

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[166] *Hansard*, *Lords Debates*, vol 802, col 1394 (17 March 2020) (Baroness Howe of Idlicote).
[167] Ibid, col 1392 (Lord McColl of Dulwich).
[168] *Hansard*, *Lords Debates*, vol 802, col 1395 (17 March 2020) (Baroness Butler-Sloss).
[169] *Hansard*, HC Public Bill Committee, col 22 (2 July 2019) (Liz Trinder).
[170] *Hansard*, HC Deb, vol 662, col 589 (25 June 2019) (Jim Shannon).
[171] Ibid, col 589 (Fiona Bruce).
[172] *Hansard*, HC Deb, vol 677, col 120 (8 June 2020) (Sir John Haynes).
[173] *Hansard*, HC Deb, vol 677, col 883 (17 June 2020) (Sir Edward Leigh).
[174] *Hansard*, HC Deb, vol 677, col 119 (8 June 2020) (Sir John Haynes).
[175] *Hansard*, HC Deb, vol 677, col 883 (17 June 2020) (Sir Edward Leigh).
[176] Ibid, col 856 (Alex Cunningham).
[177] Ibid, col 864 (Sir Robert Neill).
[178] *Hansard*, HC Deb, vol 662, col 592 (25 June 2019) (Fiona Bruce); *Hansard*, HC Deb, vol 677, col 890 (17 June 2020) (Sir John Hayes).
[179] *Hansard*, HC Public Bill Committee, col 20 (2 July 2019) (Liz Trinder).

also noted that not all sections of society were aware of the consultation, and – based on the experience of callers on the charity's advice line – many domestic abuse survivors lacked awareness or confidence to respond.[180]

An academic commentator queried the compatibility, under section 4 Human Rights Act (HRA) 1998, of the new section 1(3)(a) MCA 1973 (requiring courts to take one spouse's statement of irretrievable breakdown as conclusive evidence) with the Article 6 right to a hearing of the spouse who disagrees with, but cannot challenge, that assertion.[181] He suggested that it was open to courts to decide whether such an assertion is an actionable dispute 'where Parliament says otherwise'.[182] In its memorandum on ECHR compatibility, the Ministry of Justice reasonably concluded that no issue arose under Article 6, because there is no right to contest a divorce: 'Marriage is a voluntary union and when one party concludes that the marriage is at an end, they should not be forced to remain in the marriage indefinitely.'[183]

The prompts for reform in a non-adversarial direction were overwhelmingly more numerous. Speeches emphasised the importance of 'mov[ing] away from the blame culture'[184] and reducing hostility by making divorce 'less confrontational'.[185] It was noted that the law as it stood did not prevent unilateral divorce: petitions were rarely defended;[186] only 2% of respondents indicated an intention to contest the divorce and fewer proceeded to trial; thus, 'marriages are not saved by the ability of a respondent to contest a divorce, because marriage is […] a consensual union'.[187] Moreover, the court could not refuse to make a divorce decree simply because the respondent wanted to stay married; a legal reason had to be provided.[188]

Additionally, the incentive to attribute blame antagonised the parties and created long-lasting resentment when they needed to co-operate on financial and child arrangements. The confrontational nature of the divorce process was said to trigger/exacerbate conflict and damage the children's life chances,[189] allegations of behaviour undermining good co-parenting.[190] The Law Society's Family Law Committee indicated that lawyers avoided citing the real reason for the breakdown to prevent greater animosity.[191] A survey conducted by Relate – a UK-wide charity providing family counselling and mediation services –[192] revealed that a civil separation could turn into a 'war' after divorce papers, because 'no one wants to

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[180] Ibid, col 20-21.
[181] D Burrows, 'Human rights and a divorce or civil partnership dissolution statement', *UK Human Rights Blog* (28 February 2022), https://ukhumanrightsblog.com/2022/02/28/human-rights-and-a-divorce-or-civil-partnership-dissolution-statement/#more-190333, last accessed 15 August 2023.
[182] Ibid.
[183] Ministry of Justice, *Divorce, Dissolution and Separation Bill - European Convention On Human Rights*, January 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856454/echr-memorandum-divorce-bill-jan-2020.pdf, last accessed 27 August 2023, [8].
[184] *Hansard*, HC Deb, vol 677, col 122 (8 June 2020) (Jonathan Gullis).
[185] *Hansard*, HC Deb, vol 662, col 579 (25 June 2019) (David Gauke). See also *Hansard*, HC Deb, vol 677, col 105 (8 June 2020) (David Lammy).
[186] *Hansard*, HC Deb, vol 662, col 602 (25 June 2019) (Paul Maynard).
[187] *Hansard*, HC Deb, vol 677, col 101 (8 June 2020) (Robert Buckland).
[188] *Hansard*, HC Deb, vol 662, col 579 (25 June 2019) (David Gauke); *Hansard*, HC Deb, vol 677, col 107 (8 June 2020) (David Lammy).
[189] Ibid, col 578.
[190] Ibid, col 579; *Hansard*, *Lords Debates*, vol 802, col 1405 (17 March 2020) (Baroness Butler-Sloss).
[191] *Hansard*, HC Public Bill Committee, col 5 (2 July 2019) (David Hodson).
[192] Founded in 1938, the National Marriage Guidance Council relaunched as Relate in 1988; see https://www.relate.org.uk/about-relate/our-history, last accessed 15 August 2023.

accept blame or responsibility'.[193] Avoiding fault was said to allow a chance of reconciliation insofar as it did not 'irretrievably toxify relations'.[194]

For reform supporters, children's best interests required the reduction of conflict between divorcing parents. From a policy perspective, '[it] cannot be right that the law would encourage one parent to be pitted against the other'.[195] Many MPs remarked that, according to research conducted by child welfare organisations, such as the Early Intervention Foundation, parental conflict, rather than the break-up itself, affected children's development and life chances.[196] The experience of Resolution members supported that conclusion.[197] It was further noted that the need to apportion blame could place children in the unenviable position of having to take the side of one parent over the other.[198]

Numerous interventions recalled that the legal fact chosen as the route to divorce bore little relevance to the reality of the marriage breakdown. Firstly, the ability of one fact to encapsulate the relationship dynamics was disputed; the reasons for the breakdown were described as being often 'subtle, complex, and subjective'.[199] It was pointed out that sometimes the relationship falls apart over time not because of 'one great wrong' but because people and circumstances change and compatibility for marriage is not permanent.[200] The law was said to require petitioners to invent allegations of behaviour.[201] This was compounded by the fact the court had limited means to inquire into such allegations and often had to accept them at face value, which was a source of injustice and resentment.[202] Resolution observed that, in undefended cases, court officials had on average four minutes per case to scrutinise the evidence, which reduced the checks to ensuring that the jurisdictional grounds were correct and that the legal connection existed between the behaviour and the breakdown; the veracity of allegations could not be meaningfully probed.[203] The misalignment between reality and procedure was said to turn the divorce process into a 'farce'.[204] Many cited the *Finding Fault?'* study, which had exposed the injustice of a system where 'the respondent cannot put his own side of the story across';[205] furthermore, 43% of the respondents in the sample disagreed with the reasons invoked by the petitioner.[206] Additionally, the Government highlighted the futility of focusing on conduct in divorce proceedings since conduct allegations did not bear any relevance in linked proceedings about finances and children.[207]

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[193] *Hansard*, HC Public Bill Committee, col 6 (2 July 2019) (Aidan Jones).
[194] *Hansard*, HC Deb, vol 677, col 893 (17 June 2020) (Alex Chalk).
[195] *Hansard*, HC Deb, vol 677, col 102 (8 June 2020) (Robert Buckland).
[196] Ibid, col 117 (8 June 2020) (David Simmonds); *Hansard*, HC Deb, vol 677, col 885 (17 June 2020) (David Simmonds). See also *Hansard*, *Lords Debates*, vol 802, col 1396 (17 March 2020) (Baroness Shackleton of Belgravia), supporting '[d]ignified separation without naming and shaming and blaming'.
[197] *Hansard*, HC Public Bill Committee, col 7 (2 July 2019) (Nigel Shepherd).
[198] *Hansard*, HC Deb, vol 662, col 584 (25 June 2019) (Anne Marie Morris).
[199] Ibid, col 577 (David Gauke).
[200] *Hansard*, HC Deb, vol 677, col 903 (17 June 2020) (Alex Cunningham).
[201] *Hansard*, HC Public Bill Committee, col 10 (2 July 2019).
[202] See *Hansard*, HC Deb, vol 677, col 125-126 (8 June 2020) (Alex Chalk); *Hansard*, HC Deb, vol 677, col 124 (8 June 2020) (Alex Cunningham); *Hansard*, HC Public Bill Committee, col 31 (2 July 2019).
[203] *Hansard*, HC Public Bill Committee, col 15 (2 July 2019) (Nigel Shepherd).
[204] *Hansard*, *Lords Debates*, vol 802, col 1404 (17 March 2020) (Baroness Butler-Sloss).
[205] *Hansard*, HC Public Bill Committee, col 31 (2 July 2019) (Yasmin Qureshi).
[206] *Hansard*, HC Deb, vol 677, col 124 (8 June 2020) (Alex Cunningham); ibid, col 125 (Alex Chalk).
[207] Ibid, col 98 (Robert Buckland).

Secondly, strategic considerations were said to affect the declared basis for the divorce: petitioners fearful of abusive respondents could rely on two-year separation, while others could embellish behaviour (exaggerate episodes or stretch minor/one-off incidents into a pattern of behaviour to satisfy the legal threshold) to avoid a two-year wait.[208] In fact, the academic literature had suggested that a shorter period of separation would lessen 'the incentive to secure freedom by alleging fault'.[209] Citing Munby P, many speeches lamented that, by encouraging the parties to stretch the truth, the law propagated 'intellectual dishonesty'.[210] Professor Liz Trinder, giving evidence in Parliament, perceptively interrogated the contrast between the use of fault in 60% of divorces in England and Wales and only 6-7% in Scotland: 'Are we, south of the border, so much more badly behaved in marriages than the Scots? […] The system is gamed […]'.[211] Relatedly, the risk of not meeting the legal threshold for behaviour could lead to the manufacture of blame between couples having grown apart amicably.[212]

It was also noted that domestic violence survivors had concerns about petitioning for divorce, especially if they had to cite conduct particulars.[213] Victims who self-represented and believed conduct allegations to be relevant for child or financial proceedings risked further violence unnecessarily.[214] For the Government, the Bill meant that domestic abuse victims no longer had to place themselves in danger by describing the perpetrator's conduct, nor see themselves forced to stay in a legal relationship for another two years.[215] Moreover, the lengthy and adversarial nature of divorce proceedings allowed domestic abuse perpetrators to 'continue to torment their victims', prolonging proceedings through claims of a lost marriage certificate, failure to attend court, or spurious cross-allegations.[216] The removal of the option to defend the divorce petition shields applicants against their spouse's unfair bargaining power in related proceedings: perpetrators can no longer use the threat of defending as leverage in negotiations about finances and children.[217] It was observed that many respondents defended not because they believed the marriage to be saveable, but to control the other party.[218]

Because, like defending, avoiding service could be used as a tactic, proposals for the 20-week period to start from the acknowledgment of service were opposed.[219] Said proposals sought to avoid delayed notifications where respondents are away/ill or applicants obstruct the receipt of the petition (so-called 'bombshell applications').[220] The amendment was aptly rejected, as this 'could incentivise an unco-operative party to delay a divorce and could enable

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[208] Ibid, col 126 (Alex Chalk) and col 102 (Robert Buckland); *Hansard*, HC Deb, vol 662, col 577-8 (25 June 2019) (David Gauke).
[209] R Probert, 'England and Wales Juxtaposed to the European Principles of Family Law', in E Örücü and J Mair (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance* (Intersentia, 2007) 55, 62.
[210] *Hansard*, HC Deb, vol 677, col 98 (8 June 2020) (Robert Buckland); ibid, col 105 (David Lammy); ibid, col 108 (Sir Rober Neill); ibid, col 126 (Alex Chalk); *Hansard*, HC Public Bill Committee, col 29 (2 July 2019) (Yasmin Qureshi).
[211] *Hansard*, HC Public Bill Committee, col 21 (2 July 2019) (Liz Trinder).
[212] *Hansard*, HC Deb, vol 677, col 103 (8 June 2020) (Robert Buckland).
[213] *Hansard*, HC Public Bill Committee, col 18 (2 July 2019) (Mandip Ghai).
[214] *Hansard*, HC Public Bill Committee, col 32 (2 July 2019) (Yasmin Qureshi).
[215] *Hansard*, HC Deb, vol 677, col 103 (8 June 2020) (Robert Buckland).
[216] *Hansard*, HC Deb, vol 677, col 107 (8 June 2020) (David Lammy).
[217] *Hansard*, HC Public Bill Committee, col 18 (2 July 2019) (Mandip Ghai).
[218] Ibid, col 24 (Liz Trinder).
[219] Ibid, col 23 (Mandip Ghai).
[220] *Hansard*, HC Deb, vol 677, col 854 (17 June 2020) (Fiona Bruce).

a perpetrator of domestic abuse to exercise further coercive control'.[221] To reconcile both parties' interests, the Government gave an undertaking to request the Family Procedure Rule Committee to ensure that notice of proceedings is served within a specified period.[222]

The joint application option received substantial support. Resolution viewed it as 'a crucial part of the Bill', allowing parents to present the decision to children as mutual 'rather than having Kramer v. Kramer'.[223] Similarly, the Law Society's Family Law Committee criticised 'the black-and-white element' of one petitioner and one respondent, noting that, albeit reassured that the blame in divorce proceedings had no bearing on children or finances arrangements, respondents resented that classification.[224] The joint application option was also welcomed by Relate for sending 'the right message for the children', that the adults can 'co-parent and get on with each other'.[225]

[B] Practical difficulties for estranged spouses

A thought-provoking objection to reform was that having to wait in order to meet the separation requirement was not too high an individual price to pay for the societal interest in protecting the institution of marriage: 'the damage done to society and future generations by this Bill will be far greater than the distress of some people waiting 18 months longer'.[226] This objection underplayed the practical difficulties facing spouses who cannot move on without financial or transfer-of-property orders. Other speakers recalled that the separation of assets is predicated on formal divorce, given the courts' inability to make such orders before decree nisi.[227]

One suggestion was that judicial separation after six months could allow couples to 'settle their affairs before a divorce'.[228] Since the major hurdle to a divorce decree was not establishing the irretrievable breakdown of the marriage, but one of the evidential facts, judicial separation was equally unachievable in the absence of fault, unless section 17 MCA 1973 was amended to eliminate the facts. Even so, judicial separation is unsatisfactory from the viewpoint of de facto family life and the position of children born to new partners during the marriage. Some MPs focused on the practical reality of the legal limbo in which spouses find themselves where the marriage has broken down but divorce is unattainable: the law hindered the parties' ability to move on with their lives, despite sometimes having a new partner and planning a new family.[229]

Finally, the Bill was commended for saving costs. The average cost of legal proceedings – estimated at approx. £8.000 – was described as 'unaffordable for large groups in the population',[230] left with a choice between 'a lengthy and costly adversarial legal

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[221] *Hansard*, HC Public Bill Committee, col 36 (2 July 2019) (Paul Maynard).
[222] *Hansard*, HC Deb, vol 677, col 895 (17 June 2020) (Alex Chalk); *Hansard*, HC Deb, vol 677, col 901 (17 June 2020) (Robert Buckland).
[223] *Hansard*, HC Public Bill Committee, col 17 (2 July 2019) (Nigel Shepherd).
[224] Ibid, col 8.
[225] *Hansard*, HC Public Bill Committee, col 17 (2 July 2019) (Aidan Jones). See also *Hansard*, HC Deb, vol 677, col 106 (8 June 2020) (David Lammy).
[226] *Hansard*, HC Deb, vol 677, col 115 (8 June 2020) (Danny Kruger).
[227] *Hansard*, HC Public Bill Committee, col 6-7 (2 July 2019) (Nigel Shepherd).
[228] *Hansard*, HC Deb, vol 677, col 116 (17 June 2020) (Danny Kruger).
[229] *Hansard*, HC Deb, vol 677, col 109 (8 June 2020) (Sir Robert Neill).
[230] *Hansard*, HC Deb, vol 677, col 108 (8 June 2020) (David Lammy).

proceeding, or delay and legal limbo'.[231] Labour MPs welcomed the removal of the option to contest and the simplified procedures, given the legal aid cuts and the increase in litigants-in-person following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.[232] Conservative MPs also noted that the prospect of high legal costs if the petition was defended kept people trapped in unhappy marriages, whereas 'a divorce should not be a luxury item' and low-income individuals 'should not be priced out of their happiness'.[233] By reducing the amount of legal representation required, blameless divorce without contest was expected to reduce costs.[234]

[B] The big absentee: human rights considerations

In the legislative debate preceding the adoption of DDSA 2020, the only fundamental right explicitly considered was non-discrimination, understood as unjustified less advantageous treatment, rather than discrimination in the enjoyment of an ECHR right, *per* Article 14. There was no discussion of access to divorce as a right under Article 8 and/or 12 or as a domestic right linked to an ECHR right;[235] non-discrimination in respect of any domestic entitlement was established by Protocol 12, neither ratified nor signed by the UK. Discrimination concerns were raised *vis-à-vis* the unavailability of no-fault divorce to low-income couples, given the financial constraints of living in separate households.[236] Support was expressed for a period of notice instead of a period of separation, as the latter 'can have artificial and discriminatory elements'.[237]

Despite the scarcity of reflection on fundamental rights, some parliamentary interventions appeared inspired by Article 8/12 concerns; eg, references to 'the freedom that people deserve to decide how to live their lives',[238] to spouses not having 'to produce or face a real or perceived catalogue of failings in respect of their most intimate relationship',[239] or to conservatism as 'giving people […] the freedom to love, the freedom to marry […] and also the freedom to separate where that difficult decision has been made'.[240] Criticism of State intrusiveness transpired from the argument that '[t]here should not have to be blame on one of the two consenting adults wishing to end their marriage' and the characterisation of the Bill as 'a common-sense approach to the reality of people's lives and how they choose to live them'.[241] These comments acknowledge important components of 'private life', such as decisional autonomy and the confidentiality of intimate facts.

Paradoxically, individual freedom featured in speeches advocating against it, eg: 'the ethic of marriage embodied in the Bill prioritises individual freedom and liberty, rather than

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[231] Ibid, col 105.
[232] Ibid, col 107.
[233] *Hansard*, HC Deb, vol 677, col 888 (17 June 2020) (Dehenna Davison).
[234] Ibid.
[235] On ECHR principles governing non-mandatory domestic rights linked with ECHR rights see C Draghici, 'Equal Marriage, Unequal Civil Partnership: A Bizarre Case of Discrimination in Europe' (2017) 4 CFLQ 313, 315-319.
[236] *Hansard*, HC Deb, vol 662, col 581 (25 June 2019) (Richard Burgon).
[237] *Hansard*, HC Public Bill Committee, col 5 (2 July 2019) (David Hudson).
[238] *Hansard*, HC Deb, vol 662, col 599 (25 June 2019) (Yasmin Qureshi).
[239] *Hansard*, HC Deb, vol 677, col 100 (8 June 2020) (Robert Buckland).
[240] *Hansard*, HC Deb, vol 677, col 888 (17 June 2020) (Dehenna Davison).
[241] Ibid, col 123 (Alex Cunningham).

encouraging, as it should, self-giving, sacrifice and commitment'.[242] Similarly, others denounced the 'hyper-individualism of the ethic of autonomous decision-making' in family life,[243] suggesting that the law 'should be encouraging not an autonomous decision but a responsible decision, one that has regard for the impact on others, especially the children'.[244] The boundary between 'encouraging' and 'compelling' appears blurred; indeed, it was intimated that spouses should not be enabled to walk out on their obligations: after the exercise of 'autonomous choice to create a family unit', one allegedly gives up 'autonomous decision-making, in the sense of decision-making based entirely on self'.[245] These anti-autonomy views do not distinguish between obligations of spousal/child support (which the State may legitimately exact) and the oppressive, counterproductive obligation to remain legally tied to a spouse (an enforceable obligation to continue *cohabiting* would be inconceivable outside a dystopian universe). As Resolution pointed out, '[i]n this day and age, it is simply wrong that anybody is forced to remain trapped in a marriage which has come to an end in all but name'.[246]

Unlike most of the ideological debates in Parliament, which covered issues already exhaustively discussed by the scholarship, human rights featured marginally in the divorce literature. The respondent's 'list of misdemeanours' entering the public domain was said to raise privacy concerns under Article 8,[247] and the inability to challenge behaviour allegations without defending the divorce petition was seen as offending Article 6.[248] Before the Court of Appeal, the *Owens* appellant submitted that a high threshold for behaviour under section 1(2)(b) MCA 1973 was incompatible with Convention rights. The argument was summarily dismissed on the authority of *Johnston v Ireland* and *Babiarz v Poland*, according to which the ECHR cannot be interpreted as guaranteeing the possibility of obtaining a divorce, nor a favourable outcome in divorce proceedings.[249] In Supreme Court proceedings, the appellant abandoned the HRA ground, revived by Resolution *qua* third-party intervener. The ruling endorsed, however, the Court of Appeal's assessment of ECHR-compatibility.[250] It also rejected Resolution's submission that, in accordance with section 3 HRA 1998 and the principles established in *Ghaidan v Godin-Mendoza*,[251] section 1(2)(b) MCA had to be down-read 'so as not to require objectively culpable behaviour on the part of the respondent'.[252] This statutory construction was thought necessary to avoid a disproportionate infringement on the petitioner's Article 8 and 12 rights (a five-year wait to obtain a divorce from a non-consenting, non-adulterous spouse).[253] The intervener emphasised 'personal autonomy, personal identity

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[242] *Hansard*, HC Deb, vol 662 col 591 (25 June 2019) (Jim Shannon).
[243] *Hansard*, *Lords Debates*, vol 802, col 1416 (17 March 2020) (Baroness Howe of Idlicote).
[244] Ibid, col 1420.
[245] Ibid, col 1416.
[246] Resolution, n 71 above.
[247] Trinder, n 45 above, 558.
[248] R Kay, 'Whose Divorce is it Anyway - the Human Rights Aspect' (2004) *Family Law* 892, 897-898; Trinder, n 45 above, 558.
[249] *Owens v Owens* [2017] EWCA Civ 182 [77]-[82] (*per* Sir James Munby), citing *Johnston v Ireland*, App no 9697/82, 18 December 1986, [52]-[53] and *Babiarz v Poland*, App no 1955/10, 10 January 2017, [47], [49]-[50], [56].
[250] *Owens* [2018] UKSC 41, [29].
[251] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[252] Written case for the Intervener ('Resolution'), *Owens v Owens* UKSC 1917/0077 (on file with the author), [112].
[253] Ibid, [73]-[75].

and dignity' as part of private life,[254] and marital status as 'an aspect of one's personal autonomy and identity' even where the petitioner is not 'positively required to live with the respondent' (as opposed to staying married);[255] the infringement was said to be compounded where petitioners were financially unable to live separately without the court's exercise of redistributive powers, and hence forced to continue living under the same roof.[256] Resolution powerfully argued that construing section 1(2)(b) to require objectively culpable behaviour was not 'necessary in a democratic society': precluding a spouse from obtaining the legal dissolution of a marriage which has broken down as a matter of fact does not 'buttress marriage' or 'resuscitate' the relationship; therefore, those objectives are not rationally connected to the restrictive interpretation.[257]

The courts' blunt approach to the non-existence of a right to divorce under the ECHR did not allow for a more nuanced consideration of Strasbourg principles governing the regulation of divorce procedures. In fact, several judgments confirm that unreasonable delays in divorce proceedings may breach ECHR obligations. *Laino v Italy* found an Article 6 breach due to the excessive length of proceedings for judicial separation,[258] stressing the special diligence required of States in proceedings concerning civil status, given the importance of what is at stake for applicants: the effective enjoyment of the right to respect for family life.[259] In *Charalambous v Cyprus*, it was indicated that 'a failure of the domestic authorities to conduct divorce proceedings within a reasonable time could, in certain circumstances, raise an issue under Article 12'.[260] *V.K. v Croatia* recognised that divorce is a precondition for remarriage, and so 'a failure […] to conduct divorce proceedings with the required urgency may impair the right to marry of an individual who has […] sought to have his previous marriage dissolved in order to marry again'.[261] It is arguably immaterial if the delays stem from the authorities' lack of diligence or hurdles embedded in legislation and administrative rules.[262]

While these rulings addressed the conduct of proceedings, Strasbourg case law has also touched upon substantive divorce requirements. According to *Ivanov and Petrova v Bulgaria*, an Article 12 breach may arise where, despite an irretrievable breakdown of marital life, domestic law regards the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party.[263] Under Article 8, *Piotrowski v Poland* and *Babiarz v Poland* indicated that, in the area of 'framing their divorce laws and implementing them in concrete cases', States have discretion as to the steps required 'to reconcile the competing personal interests at stake' and 'ensure compliance with the Convention'.[264] The recognition

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[254] Ibid, [88].
[255] Ibid, [89].
[256] Ibid, [90].
[257] Ibid, [103]-[106].
[258] *Laino v Italy*, App no 3158/96, 18 February 1999 [GC], [18].
[259] Ibid, [23]-[25].
[260] *Charalambous v Cyprus*, App no 43151/04, 19 July 2007, [56].
[261] *V.K. v Croatia*, App no 38380/08, 27 November 2012, [100].
[262] See also Resolution, n 252 above, [115]: 'if an unreasonable length of time for divorce proceedings *could* infringe Article 12 (as recognized by the ECtHR), then having to wait an unreasonable length of time *before* commencing divorce proceedings could equally infringe Article 12.' (original emphasis). The impact of a 'moratorium of five years' on 'persons of advanced years' was said to be even greater, because '[i]t eats into a greater proportion of such a person's remaining statistical life expectancy, thereby restricting, to a greater extent, his or her possibility of remarriage and personal autonomy' (ibid, [117]).
[263] *Ivanov and Petrova v Bulgaria*, App no 15001/04, 14 June 2011.
[264] *Piotrowski v Poland*, App no 8923/12, 15 December 2016, [44]; *Babiarz*, [47].

of a wide margin of appreciation in the *choice of means* to achieve a fair balance in divorce procedures implicitly confirms the *obligation* to achieve it.

A Dissenting Opinion in *Babiarz*[265] criticised the majority's unwillingness to discuss the circumstances in which the inability to obtain a divorce breached Article 12, despite not having ruled out a breach in *Ivanov*. Judge Sajó noted that Polish courts had acknowledged the irretrievable breakdown, evidenced by the husband's long-term cohabitation with another woman, which had also produced a child; he viewed the legal impossibility of divorcing an innocent party as a violation of Article 12.[266] In fact, divorce 'becomes a necessary precondition of the right to marry'.[267] The dissenter also recalled the well-established requirement for domestic restrictions on the exercise of the right to marry not to impair the very substance of that right.[268] By denying Mr Babiarz the divorce, despite the irreparable breakdown of his marriage, the authorities had impaired the essence of his Article 12 right.[269] At the same time, impediments to self-determination in relation to private and family life raised Article 8 issues. Judge Sajó eloquently referenced the US Supreme Court's position on marriage: 'the right to personal choice regarding marriage is inherent in the concept of individual autonomy', and 'decisions concerning marriage are among the most intimate than an individual can make'.[270] These considerations apply to the ability to exit a marriage whether or not a new marriage is pursued.

The Strasbourg Court's justifications for upholding the refusal to grant a divorce are also informative: concerns over acting as a fourth instance (domestic courts having examined the evidence extensively),[271] and a broad-brush scrutiny of the domestic balancing exercise (eg protecting 'against the machinations and bad faith of the other party').[272] None of these suggest that ECHR rights are extraneous to divorce regulation. A cumulative reading of the authorities arguably warranted a section 4 HRA 1998 declaration in relation to the five-year bar on divorcing a non-consenting innocent spouse, delaying the clarification of status and remarriage.

Several areas of personal law were reformed as a result of human-rights pressures, including litigation in the highest courts: same-sex partners' right to succeed to a tenancy,[273] transsexuals' right to marry in the acquired gender (critical before the Marriage (Same Sex Couples) Act 2013),[274] and heterosexual couples' right to form a civil partnership.[275] It was noted that '[t]he most significant catalyst for change in family law recently has been the

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[265] *Babiarz*, Dissenting Opinion of Judge Sajó, [18]-[19].
[266] Ibid, [19].
[267] Ibid, [20].
[268] Ibid, [21].
[269] Ibid.
[270] Ibid, [20], citing *Obergefell v Hodges* 576 U.S. ___ (2015), [12].
[271] *Babiarz*, [53]; see also *Piotrowski*, [50].
[272] *Piotrowski*, [49].
[273] *Ghaidan v Godin-Mendoza*, [8]-[18].
[274] *Belinger v Belinger* [2003] UKHL 21, [50]-[55], [69]-[70], [74]-[79], following *Goodwin v United Kingdom*, App no 28957/95, 11 July 2002 [GC].
[275] *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, [40], [50], [52], [62], leading to the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019.

European Convention'.[276] Surprisingly, divorce reform, by contrast, was not prompted or even significantly influenced by human rights considerations.[277]

[A] The Impact of Divorce Reform: An Examination of Statistical Data[278]

This section examines the statistical evidence available to evaluate predictions voiced in the public debate preceding divorce reform. Given the inherent brevity of time series corresponding to the new law and limitations stemming from data quality and available levels of aggregation (in particular restricted access to case-level data from repositories such as FamilyMan), any conclusions are by necessity tentative at this stage; patterns of association identified shall not be construed as implying causality.

[B] The volume of divorce petitions/applications over time

Figure 1 shows the number of petitions/applications between the first quarter of 2003 and the second quarter of 2023; the first series [Old Law] displays petitions before April 6, 2022, and the second [New Law] applications under the amended legislation. Superimposed on this graph are several milestone events potentially impacting divorce decisions, such as the time intervals between royal assent and entry into force of major legislative acts.

[276] Kay, n 248 above, 895.
[277] For an argument that restrictive divorce procedures may breach ECHR requirements see C Draghici, 'Divorced from Human Rights? English Divorce Law under Human-Rights Scrutiny', in Miles, Monk and Probert, n 135 above, 215.
[278] I am grateful to Diana Draghici for the data analysis in this section.

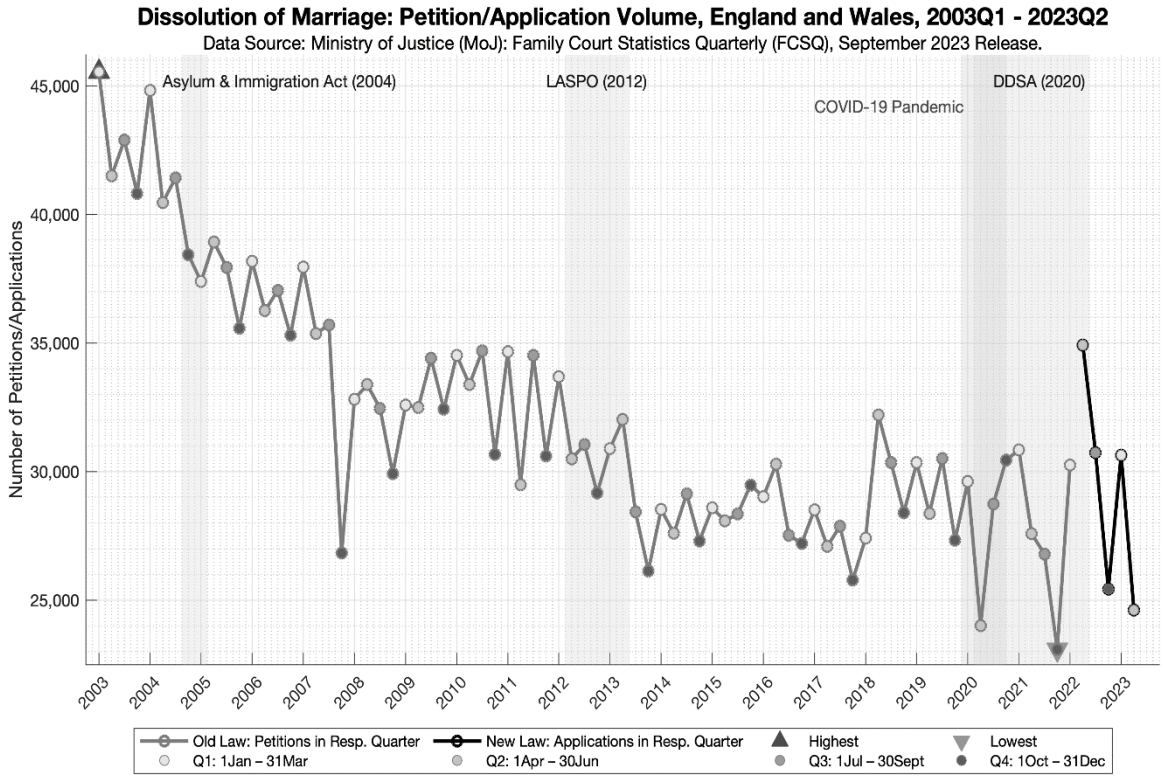

Figure 0. Dissolution of Marriage: Application/petition volume over time.

Statistics on divorce applications should be interpreted in conjunction with demographic and socio-behavioural trends in the population. For instance, between 2003 and 2010, divorce petitions exhibited a steep decline, but that phenomenon paralleled a decline in marriages, deferment of marriage until more advanced ages and increasing propensities towards cohabitation as an alternative or precursor to marriage; there were fewer divorces but also fewer marriages.[279] Additionally, a visible decline in divorce occurred in 2007, approximately two years after the entry into force in February 2005 of the Asylum and Immigration Act 2004, which sought to pre-empt marriages contracted solely for the purpose of circumventing UK immigration control ('sham marriages'). According to the ONS marriage statistics release of 2011, the period 2004-2005 was associated with the largest percent decline in marriages since 1972.[280] Seasonality trends also seem to emerge, with quarter 4 typically recording the lowest volume of applications within any given year (a possible 'winter holiday effect').

The implementation of the LASPO 2012 provisions on legal aid cuts marked another prominent decline in divorce, followed by a stabilisation of petition volume around approx. 5,000-lower yearly averages. Temporary disruptions attributable to Covid-19 were followed by a brief reversion to pre-pandemic levels, before petition numbers reached a record low in

[279] See Office for National Statistics, *Divorces in England and Wales: 2011*, https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2012-12-20, last accessed 15 September 2023.

[280] Ibid, *Marriages in England and Wales (Provisional): 2011*, https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2013-06-26, last accessed 7 October 2023.

the fourth quarter of 2021. The latter is at least partially indicative of a postponement effect, whereby parties contemplating divorce deliberately sought to place themselves under the DDSA 2020 jurisdiction, to avoid adversarial procedures.

Although in an initial surge associated with the DDSA 2020 entry into force (second quarter of 2022) application numbers attained levels not seen since the third quarter of 2007, these subsequently reverted to levels comparable to post-LASPO pre-pandemic ones, and indeed the second quarter of 2023 witnessed an approx. 30% decrease compared to the start of the new law. Thus, projections of a sudden massive increase in divorce applications do not appear to have materialised. However, this is a short-term window. In the long run, the new law – to the extent that laypersons have knowledge of it – may modify the incentive structure in the population, steering individuals away from a cautious approach to marriage and thus increasing the incidence of divorce.

[B] The success of joint applications under the new law

Figure 2 shows that joint divorce applications have followed a slowly increasing trend, from 21.47% of the total number of applications in April 2022 to 24.57% in June 2023. Substantially higher numbers, a steady 41-42% of applications, were registered for civil partnership dissolution.

It cannot be excluded that, given the lack of familiarity with the new procedures (in particular, the option under Practice Direction 7A to transfer from joint to sole application), concerns over the other party's change of heart after the initial application might have deterred the use of the mutual divorce route. The success of the joint application regime will require a longer period of observation.

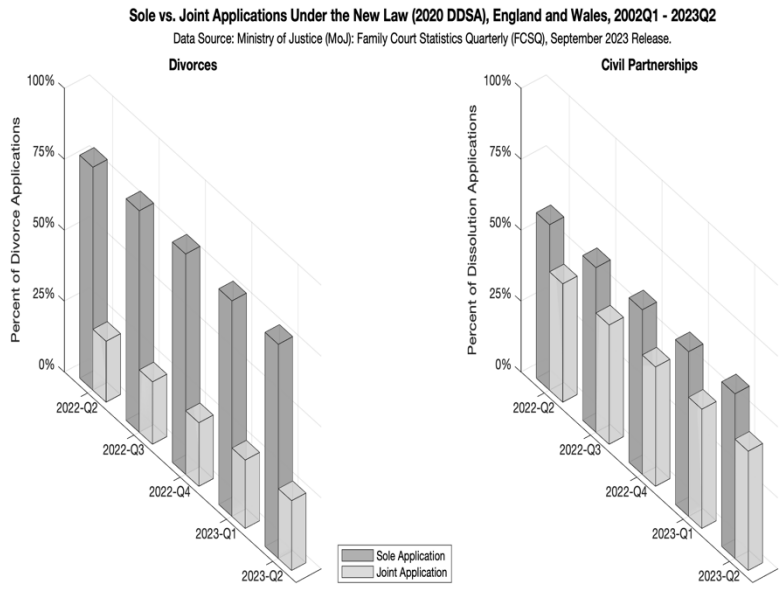

Figure 0. Applications under the new law: Sole vs. joint.

[B] The comparative duration of proceedings under the old and new law

Figure 3 summarises statistics on number of weeks lapsed until the decrees/orders were issued pre- and post- reform. While the mean values (the average duration of cases) for decree nisi/conditional order are comparable, prior to 2018 the median series (less sensitive to outlier

observations, being unaffected by atypically long cases) indicates that approx. 50% of decrees were issued within 17 weeks, but the mean (approx. 25 weeks) exceeding the median suggests that some cases took much longer. The process started to take significantly longer in 2018-2019 due to an apparent backlog experienced by the courts, but median values fell below 15 weeks in 2020, which corresponded to a sudden drop in petitions, likely freeing up court time (see Figure 1). The abrupt spike in 2022 appears imputable to the administrative transition to the new divorce regime, which has generated major delays in processing cases started under the old law; this is likely a transitory trend that should vanish after an adjustment period until the outstanding caseload reaches finality. As suggested by reform proponents, the new mandatory 20-week period before confirmation of intention to proceed with the conditional order has increased the minimum duration under the new regime.

As to decrees absolute/final orders, the first orders under the new law were issued in quarter 4 of 2022 (due to the 26-week minimum duration of the first two stages), and the data available for this inquiry only goes until the second quarter of 2023; therefore, the comparison is limited to three data points. On that basis, however, so far the median values post-reform lie between 32.1-34.7 weeks, compared against approx. 30 weeks prior to 2018 (with a gradual increase to nearly 41 weeks in 2019, associated with the afore-mentioned backlog, followed by a gradual return to prior levels by 2020). Overall, the suggestion of 'quickie divorce' does not appear borne out by the comparison.

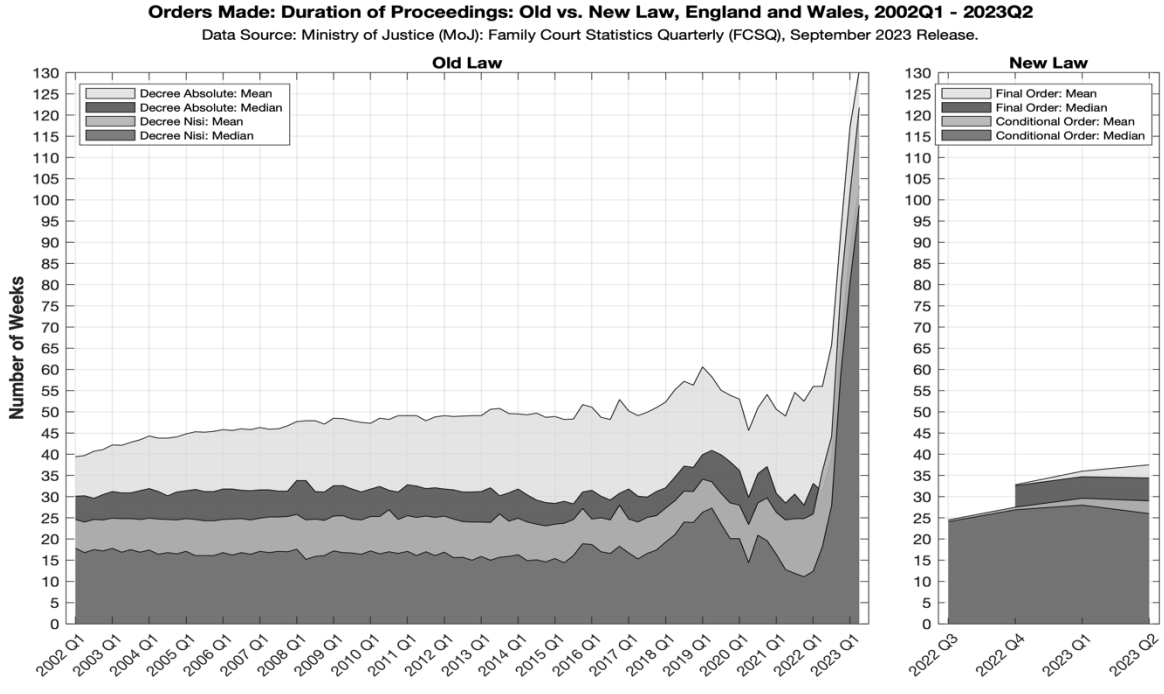

Figure 0. Orders made: Duration of proceedings under old and new law.

[B] Amicable divorce pre-reform and future implications

As seen in Figure 4, the distribution of facts used to prove irretrievable marriage breakdown was strongly dominated by fault-based facts. 'Behaviour' was the preponderant fact across all

available timepoints,[281] despite some declining tendencies in recent years and a concomitant increase in cases of two-year separation with consent.

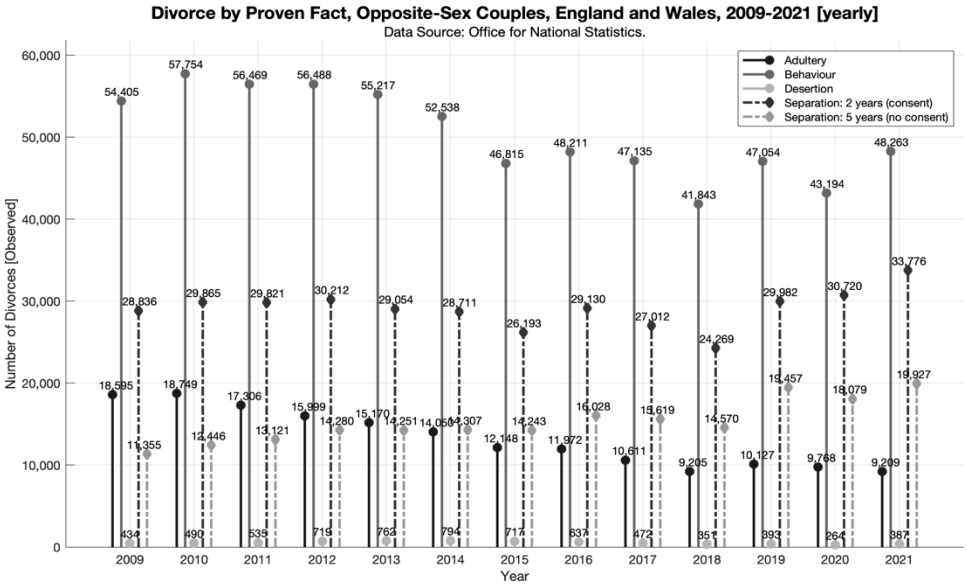

Figure 0. Fact(s) proven at divorce (under the old law).

Figure 5 probes the conjecture that petitioners who had children in common with the respondent would avoid publicly exposing the other parent's blameworthy conduct, to facilitate harmonious post-divorce co-parenting. Despite a decline over time in the number of divorcing couples with children invoking fault, the distribution of cases indicates that such couples constituted the largest group relying on conduct. The impracticality of maintaining separate households may have compelled socioeconomically disadvantaged couples to use the 'behaviour' fact to obtain a speedy divorce and the separation of assets. There are severe limitations in the available data, but to the extent that this was a more systematic phenomenon, divorce reform will likely have a beneficial effect, obviating the need to apportion blame and mitigating potentially harmful impact on children.

[281] Observing the divorce facts used by husbands/wives between 1971-2017, John Haskey noted that the belief that separation would become the most popular fact after the 1969 reform did not materialise; see J Haskey, 'Divorces by Fact Proven Over the Past Half Century in England and Wales: The Historical Context, Statistical Trends and Future Prospects' in Miles, Monk and Probert, n 135 above, 33, at 36, 43-47, 52.

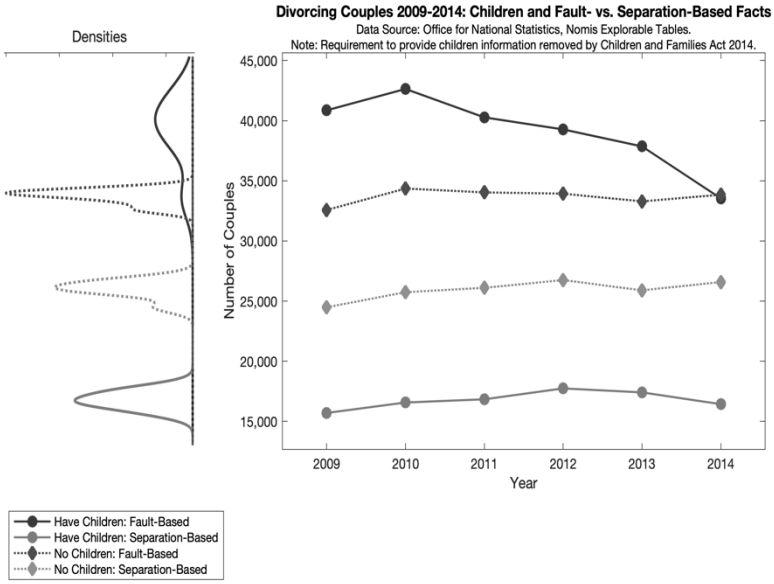

Figure 0. Children of divorced couples and fault- vs separation-based facts.

[A] Conclusions

The public debate preceding the recent changes in English divorce law did not reveal fundamentally new concerns when compared to the 1996 attempted reform. Whilst divorce reform was not on the Government's manifesto, the magnification in the *Owens* case of the absurd results of a regime reliant on fault and long-term separation renewed momentum and ended the legislative inertia. Nonetheless, this robust prompt for reform is sufficient to explain the success of the second version of 'no-fault divorce' where the previous one failed. Rather, the answer apparently lies in the simplicity of the new scheme.

In fact, the 1996 legislation was 'overly amended' and became 'impracticable'.[282] Strong opposition to key Law Commission proposals (criticised for conveying the message that 'breaking marriage vows does not matter' and 'making divorce easier') compelled the Government to accept many amendments, resulting in 'an exceedingly complex legislative construct', reflective of 'conflicting policy objectives'.[283] The FLA 1996 compromise between an idealist position and 'an appreciation that law needs to engage with real life as it is'[284] backfired. The introduction of information meetings and different waiting periods muddled and elongated the process excessively (18 months, 21 for couples with children); this generated the perception that the law made divorce more difficult (despite media headlines about easier divorce), whereas 'a longer divorce does not help the public'.[285] Additionally, 'public attitudes have changed considerably' since 1996, prioritising autonomy and a dignified, constructive, future-oriented separation.[286]

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[282] *Hansard*, *Lords Debates*, vol 792, col 1896 (6 September 2018) (Baroness Vere of Norbiton).
[283] Cretney, n 4 above, 389.
[284] Hasson, n 32 above, 360.
[285] *Hansard*, HC Public Bill Committee, col 6 (2 July 2019) (Nigel Shepherd).
[286] Ibid.

A fundamental distinction between the new law and the 1996 aborted scheme is that the latter failed to acknowledge the divorce petition as the terminus of a long period of reflection and as a very personal decision. The government of the hour was criticised for the claim that mediation 'enables spouses to accept responsibility for the breakdown of the marriage' and 'offers an opportunity to address what went wrong with the marriage' – matters regarded as 'more appropriate for the confessional or indeed for the re-education programmes associated with totalitarian regimes.'[287] The DDSA 2020 celebrates privacy instead of intrusive inquiry, and closure rather than stirring up the past. It better reflects changes in attitudes towards divorce in post-industrial society, 'associated with heightened personal expectation and demand for marital happiness'.[288]

Conversely, the slowness of divorce reform might be explained by the lack of social pressure. Despite the lobbying efforts of family law professionals and academic criticism, in an era of collusive manipulation of the law, the pressure for reform from court users themselves appeared limited. It took the unusual *Owens* case – the respondent' obstinate refusal to accept marital breakdown and the parties' resourcefulness catapulting the dispute to the Supreme Court – to bring the law's pitfalls to the forefront of public consciousness.

As a social phenomenon, the breakdown of marriages occurs with independence from the procedure for their *legal* dissolution. Consequently, as observed in other jurisdictions, the reform may not have considerable long-term effects on divorce rates. It will impact, however, the manner in which couples divorce and post-divorce co-parenting. The uptake of the joint application option, breaking with tradition, suggests that the new law might foster more amicable separations. Whilst the permanence of marriage, in the interest of the parties, their children and society, is unquestionably desirable, all the evidence suggests – from the eighteenth-century practice of collusive petitions for parliamentary divorce to the manipulative use of 'conduct' facts under MCA 1973 and the futility of marriage-in-nothing-but-name showcased by *Owens* – that divorce law cannot artificially secure that objective.

[287] Cretney, n 26 above, 50.
[288] Gibson, n 126 above, 9.