The Construction of Policy in the Context of Divorce and Relationship Breakdown

by

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Abstract

In January of 2001 the Government announced its intention to repeal Part II of the Family Law Act 1996. Originally scheduled for implementation in 2000, the Act had provided for fundamental changes to English divorce law, including removing matrimonial 'fault' from the divorce process, and encouraging mediation as the preferred method of dispute resolution.

The Family Law Act began life as a set of recommendations intended primarily to bring marriages to an end with minimum hostility and distress. Yet what emerged from the policy 'process' was a piece of legislation that explicitly declared its support for marriage, and which imposed a framework of mechanisms designed to encourage couples to stay together. The first 'phase' of this thesis examines how the Act, with its dual aims of supporting and ending marriage, was reached. Initially the history of divorce law is traced. Through a series of interviews conducted with individuals involved in the Family Law Act 'process', the achievement of this 'middle-way' is then explored in detail. The second 'phase', drawing on a series of interviews conducted with individuals working with families on the ground, subsequently goes on to examine the 'street-level' response to marriage and relationship breakdown.

Whilst national policy is something of a compromise between idealism and pragmatism, for those at street-level their work is unambiguously pragmatic – policy is constructed primarily in terms of a non-judgemental 'service' catering to the diversity of the modern family experience. The apparent success of this approach, particularly when compared to the 'failure' of the Family Law Act, prompts the question of whether there are lessons to be learnt for national policy. Indeed the study suggests that a new mind-set and approach akin to that operating on the ground is also needed at national level, if workable divorce law reform is to be achieved.

Introduction

At the outset of my doctoral studies I envisaged this thesis as a comparative study of the concept of 'parental responsibility' in the post-divorce and youth crime contexts. However, upon commencing the substantive work, I found that I was increasingly drawn to the question of how the state has responded to the breakdown of intimate relationships. This reflected both an academic and a 'professional' interest, as during my previous 'career' as a solicitor I had spent some time with a small firm that dealt solely with divorce, relationship breakdown and related issues.

It is true to say that both debate and change when it comes to this area of law is a longstanding issue (Eekelaar et al 2000). However, during the late 1980s, policy-makers finally began to grasp the nettle of reforming the basis of modern divorce law. The end result of what proved to be quite a lengthy process, was the enactment of the Family Law Act 1996. This Act represented an interesting development for a number of reasons. In one sense it was somewhat unique, in that it constituted the first government sponsored reform of divorce law since 1857. In addition it also provided for two fundamental changes to divorce law - namely the removal of the concept of matrimonial 'fault' from the divorce process, and the encouragement of mediation rather than lawyers as the preferred method of resolving disputes (Day Sclater and Piper 1999).

The 1996 Act has been described as introducing a 'revolutionary mechanism' for obtaining divorce (Eekelaar et al 2000: 1). It certainly proved to be an extremely controversial piece of legislation, generating huge debate and experiencing a particularly rough ride through Parliament. Indeed what began life as a set of recommendations from the Law Commission designed primarily to bring marriages to an end with minimum hostility, upset and bitterness, ultimately culminated in legislation that both explicitly declared its support for marriage, and which established a framework of mechanisms that were designed to encourage couples to stay together

In view of the fact that the modern 'family' is evolving into both a diverse and fluid entity, this prompted the question as to how this policy 'shift' in favour of marriage had come about. In particular I wanted to understand why, at the end of the twentieth century, policy-makers had produced a piece of legislation that attempted to both support and save marriages, as well as bringing them to an end. The thesis was therefore refocused, with the central aim of exploring the policy process that had culminated in the Family Law Act of 1996 – in effect to interrogate how the role of law and policy is formulated when relationships break down.

The 1996 Act process has generated many documents, and even greater amounts of commentary. However, in addition to utilising the documentary evidence, this study provides access to some of the key players who were active during the course of that process. Yet policy cannot be understood purely through an examination of policy-making at the national level – indeed it is used, mediated, developed etc. by those who work with and within it. I was therefore also extremely interested to explore whether the dual policy aims that appeared to characterise national policy were in fact similarly present at 'street-level'. The second phase of the empirical part of the study thus goes on to contrast the national perspective(s) with the work that is actually being done with families 'on the ground'– in particular to examine the kinds of thinking and ideas that are utilised by local workers, and indeed to see whether there are any implications for policy-making at the national level.

During the course of the study the Government announced its intention initially to delay, and then subsequently to repeal the new divorce provisions contained within the Family Law Act. Indeed at the time of writing a date for that repeal is still awaited. Although this decision did initially cause me some degree of consternation, it has actually had what is arguably the perverse effect of rendering this study and its findings even more timely. The issue of divorce and how to respond to it is both a complex and emotive one. Divorce excites strong feelings and opinions, and is a policy arena that touches on a range of controversial and contested issues including marriage, concepts of 'family', children's welfare, parenting and morality. This study explores how policy-makers have charted a

course through these various issues, and suggests that a new approach and way of thinking is required if workable divorce law reform is to be achieved in the future.

Chapter 1

The Policy 'Dilemma'

Introduction

> 'The Act has two critical purposes. First, to support the institution of marriage. Support for marriage and for the family is at the heart of the Government's strategy for modernising Britain. Marriage is one tried and tested means of delivering the stability children need and crave. The Government believes that, if couples choose to marry in order to offer their children stability and security, then we should offer them our support.'
>
> 'The British Government accepts...that in many cases it will not be possible to repair broken marriages. So the second objective underlying the Family Law Act is that, where all attempts to save a marriage have failed and the marriage has broken down irretrievably, it should be brought to an end with the minimum distress to the parties and any children affected.'
>
> (Lord Irvine of Lairg, The Lord Chancellor. Speech for the closing session of the Fourth European Conference on Family Law, Strasbourg 2 October 1998.)

These two policy objectives, both of which relate to the Family Law Act of 1996, reveal a dichotomy that resides at the centre of policy. The nature of that dichotomy revolves around the issue of whether law and policy within the divorce context is about dealing with the 'reality' of bringing marriages to an end, or should instead be concentrating on the 'ideal' in the sense of supporting marriage. In essence, is policy about families as they actually are – namely recognising the diverse and fluid entity that modern family has become? Alternatively is it about families as 'we', or at least the legislators, would like them to be?

Rodger's analysis of British social policy – in particular the distinction that is drawn between what he labels 'moral regulation', and what is termed 'family policy' – provides a useful paradigmatic tool with which to explore this policy 'dilemma'. Policy falling within the moral regulation category is underpinned by a belief in a set of 'fundamental moral precepts' (1995:5). Those precepts, in turn, operate to guide all aspects of family policy and practice. One example of just such a policy is arguably provided by the Major Government's 'Back to Basics' campaign, which despite recent denials, was generally understood to involve the promotion of 'traditional' family and moral values.

One practical consequence of moral regulation is identified in terms of a policy focus on matters of individual morality and family structure. In addition, it is also suggested that such policies are inherently political animals. Indeed moral regulation is defined in terms of a 'broader political project', that effectively crystallises into an emphasis on the traditional nuclear family as uniquely beneficial to well being. In contrast, 'family policy' involves measures that are aimed primarily towards supporting family life (and responsibility) in its various different forms.

These different aspects or 'faces' of policy are, in turn, framed by two different perspectives. Whilst moral regulation adopts a 'correctional' perspective, family policy operates within what is termed an 'appreciative' one (Rodger 1996). Each perspective thus creates a particular role for law. As Rodger explains:

> 'The idea of 'moral regulation' can imply an explicitly coercive attempt to shape and define the parameters of behaviour by legal and institutional means.' (1995: 13)

In contrast, family policy involves recognising, and responding to a change or 'real movement' in family life (ibid: 14). In effect policy seeks to consolidate what is already happening in social practice, into law. It might therefore be said that the distinction is effectively one between the policing and supporting of families respectively.

Law and morality

One central aspect of the distinction between moral regulation and family policy is the nature of the relationship that exists between law and morals. The fundamental character of the precepts that underpin Rodger's moral regulation, have the effect of casting morality in absolute terms. In addition, the objective of enforcing those absolutist terms has the knock-on effect of constituting personal (and indeed family) morality as the legitimate site of legal regulation. In contrast, however, family policy appears to regard morality as more of an individual issue. As such it becomes something to be primarily supported, rather than positively or coercively shaped to fit a particular model.

The relationship between law and morality has long been the subject of jurisprudential debate, a full consideration of which lies beyond the scope of this thesis. Within this chapter the aim is therefore to selectively 'cherry-pick' the field - in particular to 'borrow' from the positions advocated by Patrick Devlin during the 1960s, and by the American Legal Realists. It is acknowledged that both of these positions are complex, and have generated much comment. For example, Devlin's assertions have been the subject of both significant, and indeed well-known criticism. However, rather than exploring these in any detail, the aim is to utilise his perspective as an 'orientation' towards the law – in effect to provide a (theoretical) insight into approaching and understanding law. Indeed whilst Devlin's views have largely fallen out of favour within jurisprudence, his position (complete with its alleged 'flaws') remains fundamentally relevant within the family policy field.

The 'Realist' position is also utilised in a similarly selective manner. Firstly, realists represent a broad church, a full consideration of which is beyond the bounds of the present discussion. Indeed they have been described as a 'heterodox lot' (Rumble 1968), and even as a 'mood' or 'intellectual tendency' (Duxbury 1995). Secondly, the thesis is not concerned with a detailed engagement with the debate surrounding what are identified by a number of commentators as central propositions of realist thought – namely a distrust of both traditional legal rules to

the extent that they purport to describe what courts or people are actually doing, and of the idea that rules expressed in the form of legal doctrine constitute the key factor in producing court decisions. What is key, for current purposes, are realist notions of and engagement with the 'real world'.

The Devlin 'view'

For the purposes of the present discussion, the interest in Devlin lies primarily in his response to the 1957 Report of the Committee on Homosexual Offences and Prostitution ('Wolfenden Report', Cmd. 247). Although this aspect of Devlin's 'thesis' is focussed on the criminal law he does, nevertheless, provide an extremely useful perspective on the role or function of law vis a vis morality that can be employed beyond the immediate confines of the 'criminal' context.

It was the opinion of Wolfenden, that homosexual behaviour between consenting adults in private should no longer constitute a criminal offence (para. 62). Underpinning this recommendation was the view that the proper function of criminal law was to 'preserve public order and decency', to protect individual citizens 'from what is offensive or injurious', and to provide 'sufficient safeguards' against corruption and exploitation (para. 13). Its role did not therefore include either intervening in an individual's private life or seeking to enforce particular patterns of behaviour, beyond what was necessary in order to preserve order and prevent harm. As the Report stated:

> 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.' (para. 61).

The stance adopted by Wolfenden represents something of a reiteration of Mill's 'harm principle'. Writing in 1859, Mill advanced what has been described as the classic liberal view of the relationship between law and morality. Indeed the 'one very simple' principle advocated by his essay, is the absolute nature of individual liberty. As he observes: 'Over himself, over his own body and mind, the individual is sovereign' (1974: 69). The one exception to this general rule is where the

exercise of that sovereignty does harm to another. The result is that law is thus precluded from intervening in the realm of morality on a purely paternalistic basis, with the dividing line instead being located in the idea of causing harm to others:

> 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it would be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right.' (ibid.: 68)

Support for this general position can be derived from Joseph Raz (1996), who offers a combination of what is termed 'perfectionism', with a commitment to the harm principle. The concept of perfectionism reflects the belief that one key objective of government is to help people to lead valuable and fulfilling lives. However, the harm principle operates in order to proscribe government activities to this end – in effect the use of coercion in order to protect or advance the moral well-being of citizens is excluded.

According to Raz, 'personal autonomy' constitutes the basic 'condition' for the achievement of 'personal well-being' in today's society. That personal autonomy is described as involving, 'the successful pursuit of valuable activities and relationships largely chosen by the person involved' (ibid.: 113). The role of government is thus constructed in terms of ensuring that individuals have the necessary resources in order to pursue the activities and relationships they choose – in essence to shape the various different options that are available to people. However, the importance that is accorded to an individual's autonomy of choice, means that serious limits are placed upon the circumstances in which coercive moral paternalism may be justified.

A somewhat different perspective on the question of law and morality is, however, provided by James Fitzjames Stephen. Writing in direct response to Mill, Stephen argues in favour of legislation whose purpose is described in the following terms: 'to establish, to maintain, and to give power to that which the legislator regards as a

good moral system or standard' (1967: 150). This argument is based upon the belief that, in every society at any particular point in time, there are a number of things that appear 'good' or 'bad' to its members. It is recognised that they may be so regarded to varying degrees, nevertheless, 'virtue and vice' are believed to possess 'quite definite' meanings. The end result is thus articulated as follows:

> 'the object of promoting virtue and preventing vice must be admitted to be both a good one and one sufficiently intelligible for legislative purpose.' (loc. cit.)

In a similar vein, George offers a more recent argument in favour of government possessing a legitimate interest in the promotion of certain views as to what constitutes the good life. In his view, the legal prohibition of certain immoral acts for the sake of supporting public morality does not necessarily violate either 'a norm of justice', or indeed 'political morality' (1993: viii). This is, however, subject to the caveat that there may be prudential reasons for the legal toleration of such moral wrongdoing. Thus in order to answer the question of whether something that is reasonably judged to be immoral should be prohibited or tolerated by law, an understanding of the particular circumstances of the community in question will be required.

At this point it is useful to turn back to Devlin, in order to explore his 'take' on the issue under consideration. Responding to the Wolfenden Report, Devlin (1965) challenged the idea that law's intervention in private life was limited to the circumstances of preserving order and preventing harm. He also questioned the emphasis placed by the Report on the importance that society and law ought to accord to individual freedom of choice and action in matters of morality. Indeed Devlin actually went so far as to pose the question of whether there really was a private morality lying beyond the remit of law.

When it comes to the question of whether society is entitled to pass judgement on moral matters, Devlin answers firmly in the affirmative. Morality is 'public' in the sense that society is made up of a 'community of ideas' about the way that its members should behave (1965: 9). That community of ideas represents an

important part of the glue, or as Devlin terms it, the 'bondage' that holds society together. However, in addition to this entitlement to make judgements about morality, Devlin also regards society as entitled to use the law as a means of enforcing those judgements. The basis for this assertion, can be located in the analogy that is drawn between immoral conduct and treason – essentially both are regarded as representing a threat to the continued existence of society. As he argues:

> 'the suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define a sphere of private subversive activity.' (ibid.: 13-14)

For Wolfenden, the determining factor was whether an act was likely to damage others. If not, then it was private and thus not of public concern. In contrast, the issue for Devlin is whether an act has anti-social consequences. However, once an act has been condemned as violating society's constitutive morality, then such anti-social consequences are regarded as an automatic given. In defying that constitutive or shared morality the act poses a threat to social cohesion, and thus becomes an offence against society itself (George 1993). As Devlin explains:

> 'Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its locus standi.' (Devlin 1965: 15)

It should, however, be noted that the question surrounding the instances in which society is entitled to use the law does remain somewhat unclear. For Devlin, the 'dividing line' involves the balancing of public and private interests. Indeed he argues as to the impossibility of formulating any absolute rule. Instead the general principle is set out in the following terms:

> 'there must be toleration of the maximum individual freedom that is consistent with the integrity of society' (1965: 16)

Parallels can be drawn between Devlin's position, and some of the more recent arguments that have been advanced by communitarian theorists. Indeed it has been suggested that Devlin's position can actually be described as a 'communitarian' one

(George 1993). Certainly it is the case that some theorists argue strongly in favour of a greater community involvement – in the sense of individual, institutional and official involvement – in the creation and maintenance of a moral order. Within that process law and legal coercion is accorded a small, but extremely integral part. Indeed, even where the legal rules in question are not positively enforced, law is regarded as having a valuable expressive or symbolic role. For example, Etzioni advances the following argument:

> 'laws do represent, in every society, a proper method of expressing social and moral values and of signalling the conduct that the community considers proper or abhorrent – even when these laws are rarely enforced through fines, jail sentences, or other coercive means.' (1995: 47)

Law may thus be used both to express the moral concerns of a community, and also to influence what is deemed to be appropriate and inappropriate behaviour. As Etzioni continues:

> 'the law as a deterrent has its place in any moral order. Morality rests on intricate interactions among three factors: individual conscience, the moral voice of the community, and the state. Each one helps to sustain the others. Hence, while it is best to build up individual consciences and community voices, communities must on occasion fall back on the law. Without punishing those who do serious injury to our commonly held values…no moral order can be sustained.' (loc. cit.)

The 'Realist' approach

Whilst connections can be made between Devlin's position and the universal morality and corrective framework of 'moral regulation', echoes of the pragmatism that implicitly characterises the appreciative perspective and supportive role of Rodger's 'family policy', can be similarly located within the American realist 'tradition'.

As alluded to in the introduction to this chapter, much of the realist focus is directed towards understanding judicial decision-making, and the critiquing of legal

reasoning. In effect, therefore, Realism is concerned to look beyond ideals and appearances, in order to attempt to discover what is actually going on. One example of this 'approach' can be seen in the belief that the way to discover what courts do, is to examine law 'in action'. Indeed Karl Llewellyn (1930) draws a distinction between 'paper rules' (law on the books) and 'real rules' (court practices), arguing that legal rules merely guide rather than control the decision-making process.

For the purposes of the present discussion, the key point to take from all of this, relates to Llewellyn's assertion that what he describes as the 'real rules', operate 'on the level of isness and not of oughtness' (1930: 448). This distinction between 'isness' and 'oughtness' also surfaces in his nine 'common points of departure' for realists (1931). Although recognising that there was no 'school' of realists, nor indeed was there ever likely to be, Llewellyn was of the opinion that they did share certain points of departure from which their work effectively branched out. Of these, five are of particular interest to the discussion.

One such common point of departure relates to the separation of the study of law as it is, from speculation as to what it should be. Whilst it is recognised that value judgements are crucial when identifying legal objectives, when it comes to the task of examining the law: 'The *temporary* divorce of Is and Ought is required' (1931: 62). The realist belief is therefore that it is simply not possible to judge what law should do in the future, until one has understood what it is actually doing right now.

Two further points of departure reflect what can be described as an instrumental view of law. Firstly law is regarded as a 'means to social ends', with the result that it, 'needs constantly to be examined for its purpose, and for its effect' (loc. cit.). In what is arguably a contrast to the kind of position adopted by Devlin and his supporters, the focus is thus very much on law in action as opposed to law as doctrine. Indeed this is further reiterated by the second 'point', which contains the assertion that realists share the following orientation, namely:

> 'an insistence on evaluation of any part of law in terms of its effects,
> and an insistence on the worthwhileness of trying to find these effects.'

(ibid.: 63)

Law is thus something to be assessed and valued primarily in terms of its effects or performance.

As Cotterrell (1989) observes, the realist outlook is underpinned by a particular philosophy – namely pragmatism. In the view of William James, the 'pragmatic method' is regarded as constituting, 'an attitude for orientation'. The essence of this attitude is described in the following terms:

> 'looking away from first things, principles, 'categories', supposed necessities: and looking towards last things, fruits, consequences, facts.' (1907: 54-55)

The result is that realists tend to view developments in legal philosophy in terms of their functional relevance, or indeed their lack of relevance to the legal needs of time and place (Cotterrell: 1989).

This type of orientation is reflected in Llewellyn's concept of 'law jobs' (1941). The argument here is that law is an institution that exists to ensure that certain jobs are done. In essence these jobs, which are defined as common to all societies, consist of the following: the disposition of 'trouble-cases', for example dispute resolution; 'preventive channelling' or problem avoidance – in effect the reorientation of conduct and expectations in order to avoid trouble; and the allocation and exercise of public authority. Once again, the key point to draw from this lies in the importance accorded to ensuring that these jobs are effectively and well carried out. For Llewellyn, a functioning institution is one that is both firmly rooted in the life of the community, and which is constantly tested against the needs of that community.

Linked to this are two further 'points of departure' identified by Llewellyn – namely that realists regard both law and society as being in a constant state of 'flux' (1931). The general belief is that society is in flux at a rate that is faster than that experienced by the law. The result is that law thus needs to be re-examined in order to, 'determine how far it fits the society it purports to serve' (1931: 62). This idea that law should 'fit' the society in which it operates, arguably contains echoes of

Holmes famous statement: 'The life of the law has not been logic, it has been experience'. Indeed as he then went on to observe, the legal standards by which citizens are to be judged conform to, amongst other things, 'the felt necessities of the time' (1946: 1). Furthermore, and in a similar vein, Jerome Frank endorses the following position:

> 'Rules (whether made by legislatures or judge-made) are embodiments of social policies, values, ideals, and...for that reason...should be recurrently and informedly re-examined.' (1949: xxiv)

Discussion

What can be taken from this extremely brief foray into the jurisprudential field, are the different perspectives that are offered with regards to the nature of law. It is important not to overstate the case, in the sense that both Devlin and the realists would probably agree that there are certain basic functions that the law should fulfil – for example, the resolution of disputes. However, Devlin's vision of law can arguably be described as both 'corrective', and 'top-down'. The term 'top-down' is employed here in the (Austinian) sense of law as somehow separate from society - as deriving primarily from the state. In essence law thus becomes largely constructed as an independent agency of social control and direction. The realist version is however, by comparison, a more 'bottom-up' and 'appreciative' one. The basic idea is of law as a human creation – to be understood as it is and not as it might be, and with doctrine as less important than those who create it. Whilst not denying the impact of broader policy priorities, or indeed the normative or regulatory aspects of legal rules, law is consequently viewed as more engaged with – and indeed as something that 'should' be more engaged with - the realities of social life.

For Devlin, the law's objectives are arguably imbued with idealism in the sense of the setting of a (common) standard, and effectively enforcing a particular model of the good life. Morality is defined in terms of common ideas about the 'right' way

to live – in essence morals are those standards of which the reasonable man approves. This 'commonsense' idea of morality is arguably somewhat at odds with the more political nature that appears to characterise Rodger's (1995) 'fundamental moral precepts'. However, the key point to emphasise here is the universal and absolutist nature of both moral visions, and the perceived importance to society of having such a universal moral code.

It is arguable that Devlin's position does go a 'stage further' than Rodger, in the sense that an established morality is regarded as essential to the very welfare of society. Indeed it was felt that society was in danger of disintegration when no such common morality was observed. Law's role in the protection of society is thus extended to include protecting the political and moral community of ideas, without which people cannot live together. In effect the law may legitimately intervene in individual morality, in order to preserve the cohesion and fabric of society. As Devlin argues:

> 'society is not something that is kept together physically; it is held together by the invisible bonds of common thought...The bondage is part of the price of society; and mankind, which needs society, must pay its price.'
> (1965: 10)

For the realists, the danger of societal disintegration is located not in moral fragmentation, but rather in the failure of law to carry out essential 'law jobs' (Llewellyn 1941). Within this 'group', law is recognised as dealing with real life on the ground – a task that involves an appreciation of the variety of circumstances with which it is confronted on a daily basis. For example, Llewellyn (1960) talks of judges being guided by their 'situation sense'. It has been suggested that the precise meaning of this concept is difficult to grasp, however it does seem to involve a 'true' understanding of the facts and the 'right' evaluation of them (Freeman 1994). In essence therefore, the law is concerned to deal with particular situations.

It arguable that the pragmatism that characterises the realist perspective, is also reflective of a different moral view. Indeed it might even be argued that the concept of pragmatism actually implies some distrust of fundamental values. For example,

Pound talks of a 'sociological movement in jurisprudence', which is described as 'a movement for pragmatism as a philosophy of law'. The essence of that movement is set out in the following terms:

> 'for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.' (1908: 609-610)

It is important to emphasise that it is not suggested that the realist perspective is somehow 'moral free'. It is, however, certainly the case that an appreciation of moral pluralism does sit more comfortably within it. Such an appreciation is also evident amongst those arguing specifically in favour of a realm of private morality. For example, Mill argues that moral progress is more likely to occur when alternative views about morality are discussed, and ways of living based upon these alternative values are tolerated (Bix 1999). Similarly, the position adopted by Raz (1996) is grounded on the principle (amongst others) that there are a variety of moral goods, and a variety of different ways of living a morally good life.

Parallels can be drawn between these ideas, and the more recent views articulated by Selznick. Challenging the universal ideas of morality advocated by communitarians, he stresses the need for both solidarity *and* autonomy. A 'proper' (sociological) understanding of community, 'presumes diversity and pluralism as well as social integration' (1992: xi). In comparison to the pessimistic interpretations adopted by communitarians, a much more positive view of moral change and fragmentation is offered:

> 'modern life offers a welcoming if risky challenge to the moral order. As self-determination is enlarged, as awareness is sharpened, the complexity of moral choice increases. The responsibility of individuals and groups becomes in many ways more self-conscious and more demanding. More is asked of us, and we ask more of ourselves. The peril, therefore, need not be understood as a sign of pervasive decay. It may also be understood as a price paid for certain kinds of moral development.' (ibid.: 4)

The competing interpretations of moral individuation and development are mirrored within the family context. For example, amongst commentators within the field there is a strong line of thought that adopts Devlin's disintegration thesis – indeed there is a strong tendency to view family change in terms of moral decline, degeneration and selfish individualism. One example of the perceived importance of universal values when it comes to family, is provided by the Bishop of Oxford:

> 'Fundamental values are there to be recognised, not made up as we go along. we need to get away from a pick and mix attitude to morality, to acknowledge that certain fundamental insights are inherent in the nature of things, and are essential for the well-being of both individuals and society.'
> (The Guardian, 1 January 1997. Quoted in Smart 2000: 23)

The opposing view is also articulated by a section of sociological writing within the family 'field'. For example, Sevenhuijsen (1998) regards moral values as deriving from individual agency, rather than being somehow imposed from above. Furthermore, the growth of new types of personal relationships are regarded as opportunities for the development of new values. In a similar vein, Beck emphasises that the process of individualisation is not simply about the dis-embedding from traditional ways of life. Indeed it also involves the extremely important task of re-embedding new ways of life: 'in which individuals must produce, stage and cobble together their own biographies themselves' (1998: 33). Such re-embedding involves the forging of new values that are better suited to modern society.

This view is reinforced by Smart and Neale (1999), whose empirical work with divorcing parents reveals that far from representing a journey into immorality, the experience of divorce actually involves what is often the difficult task of negotiating new moral terrains. The demise of moral absolutes has thus led to the view that to be moral in contemporary society no longer involves the unthinking adherence to some kind of 'abstract imperatives'. Instead morality is constructed in terms of actively and reflexively exercising 'choice with responsibility' (Ribbens-McCarthy et al 2000: 36).

Within the family context, these different views of morality are, in turn, underpinned by very different conceptions of 'family'. Indeed the concept of family itself arguably embodies a fundamental 'tension' between absolutism and plurality, and between ideal and reality. Family is, at the same time, both obvious and elusive. At one 'level' it is arguably self-evident and un-contentious, conveying connotations of naturalness and commonsense. As Finch (1989) notes, we all have some experience of family life. At a second 'level', to talk of family also implies some kind of fundamental universality. For example, Bernades (1985) refers to a process of reification whereby the family assumes a 'thing-like' status. Similarly Ribbens (1994) observes that as an element of contemporary western culture, 'the family' is conceptualised as an entity that exists as a concrete and natural unit.

Yet measured against this ideological construct of family (Morgan 1991), is the undeniable recognition that families are changing. Indeed Morgan (1975) suggests that family actually has change built into it. For example, at the 'practical' level, increasing numbers of children are experiencing lone parenthood and / or step-family life at some stage of their childhood. Thus family is not (and indeed arguably never was) a unitary concept with a single meaning or reference point for all (Fox Harding 1996). The reality is that 'family' has many meanings and many contexts, whilst people have different and differing experiences of family and family life (O'Donovan 1993).

This fragmentation of experience has led to a reorientation of sociology away from the definition of 'family' in terms of physical properties, towards a focus on the meanings that it conveys. For example, in his attempt to identify what is referred to as the 'whatness' of family, Morgan utilises the term 'family' as an adjective – in essence to refer to sets of practices which deal in some way with the ideas, expectations and obligations of parenthood, kinship and marriage. These practices do not necessarily emphasise the centrality of the conjugal bond, may not insist on co-residence and may not be organised around heterosexuality. As he argues: ''Family'...represents a quality rather than a thing' (1996: 186).

Following what might be described as this sociological adoption of a 'realist' perspective – in the sense of being concerned with what is actually happening on the ground - family has come to be conceptualised as the subjective meaning of intimate connections and relationships rather than of formal, objective blood ties. As Silva and Smart observe: 'What a family is appears to be intricately related to what it does' (1999: 7). In essence the focus is firmly placed on 'doing' family. For example, Bozett (1987) argues that lesbian and gay relationships share all the significant defining features of 'non-gay' families, whilst Nardi (1992) describes friends 'as' family.

In a similar vein, Gubrium and Holstein (1990) argue that although family does have legal and biological definitions, it is actually a socially constructed phenomenon whose meaningful reality is derived through discourse and interaction. In essence the assertion is that family is as much a way of thinking and talking about relationships, as it is a specific set of social ties and sentiments. This view is echoed by Finch and Mason (1993), who argue that rather than being pre-determined or flowing automatically from specific relationships, family responsibilities are actually created through interaction and negotiation. 'Family ties' are effectively as much a product of 'working out', as they are of blood. Thus what characterises these various approaches is a challenge to the conventional understanding of the family as a distinct entity. Here family is re-conceptualised as a 'reality project' of those who both live, and describe it.

> 'As an object of descriptive practice, family is neither just a thing or an objective set of bonds, nor merely an idea about the quality of social relations. It is, rather, an object which is assembled out of experience.' (Gubrium and Holstein 1990: 175).

Concluding Comments

Divorce is an aspect of policy that appears to represent something of a focus for anxieties and debate about family change and how to respond to it. As Smart et al observe:

> 'Divorce has been envisaged as, symbolically speaking, the originating stone that was dropped into a previously calm lake of intimacy and traditional family life only to generate most of the ripples of change we are now witnessing.' (1998: 1)

Those engaged in the task of drafting policy to govern the legal exit from marriage are thus faced with several fundamental issues. These include how far it is desirable to regulate such behaviour, the extent to which such regulation is feasible, and the nature and aim of such regulation. To return to the question posed at the outset of the chapter, is legislation about dealing with the reality of the breakdown of intimate relationships, or of somehow seeking to reshape outcomes? In other words is it about trying to 'correct' behaviour, or rather to 'appreciate' it?

With its two 'critical purposes' of supporting and ending marriage, the Family Law Act of 1996 attempts to negotiate something of a compromise between the two opposing positions that are discussed in this chapter. Indeed whilst the objective of supporting marriage suggests the desire to promote fundamental or common standards, that of ending marriage reflects a recognition of the reality of marital breakdown. However, in order to understand how this position was reached, it is first necessary to look back. As Holmes has pointed out, law embodies the story of a nation's development through many centuries. The result is that in order to understand the law it is necessary to, 'know what it has been and what it tends to become'. This requires reference both to 'history', and also to 'existing theories of legislation' (1946: 1). Over the course of the next two chapters, the thesis engages in just such a task. The history of divorce law is traced, culminating with an exploration of the 1996 Act and some of the theories and commentary that surrounds it. This provides the essential basis from which to launch a more focused examination of the Act itself, and of the policy dilemma that resides at its centre.

Chapter 2

The History of Divorce Law

Part 1: 1857-1969

Introduction

This chapter explores how divorce law in England developed from the mid-nineteenth century, through to 1969. The starting point for this exploration is located in the Matrimonial Causes Act of 1857, which has been identified as effectively heralding the advent of secular divorce (Gibson 1994). Subsequent developments are then traced, with particular emphasis being placed upon the 'reform' debates that took place during the 1950s and 60s. The period of analysis then culminates with a brief examination of the Divorce Reform Act of 1969. The 1969 Act represents a significant event in the history of English divorce law – not least because it contains the last major reform of the grounds for divorce to be fully implemented, and thus continues to remain the basis of divorce law today.

Within this review, the chapter is particularly concerned to examine how the exit from marriage has been regulated, the extent to which the legislation can be regarded as correctional or appreciative, and the legislative 'mechanisms' employed in order to achieve the its regulatory aims.

The advent of divorce

The Matrimonial Causes Act of 1857 has been described as representing the 'transformation' of divorce into a 'judicial procedure' (Wolfram1987: 3). Prior to its enactment divorces were effected by private Acts of Parliament, principally for the benefit of the wealthy few. In addition to this, the ecclesiastical courts were

able to grant a separation 'from bed and board' (divorce *a mensa et thoro*), on proof of either adultery or extreme cruelty. It should, however, be noted that this did not constitute an absolute divorce in the sense that although spouses were relieved from the obligation to live together, the marriage tie remained in existence.

The 1857 Act consolidated these matrimonial jurisdictions that were being exercised by Parliament and the ecclesiastical courts, and transferred them across to a civil court of law. The result was that the matrimonial jurisdiction of the ecclesiastical courts was thus abolished, effectively being recreated in a new 'Court for Divorce and Matrimonial Causes'.

This development has been described as 'making a decisive break with the past' (McGregor 1957: 17). However, the general tendency amongst commentators has not been to interpret the 'transfer' of jurisdiction as constituting a change in either the principles or the substance of divorce law. Lawrence Stone provides one example of this perspective. He accepts that removing control over all matrimonial affairs from the Church did represent a rejection of the theological principle of the indissolubility of marriage. However, he goes on to make the point that the predominant morality displayed during debates on the 1857 Bill was far from being liberal - indeed a more correct interpretation would be one of 'nervously defensive conservatism' (1990: 383). In a similar vein, Sir Morris Finer and O.R. McGregor make the following observations in Appendix 5 ('History of The Obligation to Maintain') to the Report of the Committee on One Parent Families (1974, Cmnd. 5629):

> 'the Act of 1857 did not, as is sometimes mistakenly thought, introduce divorce into England or discard a hitherto sacred principle of indissolubility of marriage……The only substantial change which it effected was to make more widely available matrimonial remedies which only the very few had until then enjoyed.' (para. 30)

The result has therefore been largely assessed in terms of providing a more accessible secular framework, albeit one that continued to be based upon Christian principles and canon law. Divorce was thus available on the basis of matrimonial

'fault' – in essence on the basis of adultery. It should, however, be noted that fault was not applied equally to men and women. The legislation enabled the presentation of a petition for divorce by a husband, on the simple grounds of his wife's adultery. In contrast, however, a wife seeking divorce required her husband's adultery to be aggravated by incest, bigamy, rape, sodomy, bestiality, cruelty or desertion, in order to be able to proceed.

The centrality of 'fault'

The adherence to the concept of matrimonial fault as the basis for divorce proved to be extremely durable during the initial stages of the twentieth century. Indeed the Royal Commission on Divorce and Matrimonial Causes (Gorrell Commission) provides one early example of the 'pull' that was exerted by the offence doctrine during this period. Appointed in 1909, the Commission had been accorded a broad remit to enquire into the general state of the law in England and its administration in divorce and matrimonial causes, with the additional direction that particular regard be paid to 'the position of the poorer classes in relation thereto' (1912: iii).

The Commission's Report was published in 1912, comprising both a Majority Report, and a Minority Report that was signed by three of the Commission members (Cd. 6478). It has been suggested that the Majority Report was anxious to deal with the two principal criticisms that had been levelled at the 1857 Act - namely the unequal treatment of men and women by the existing divorce legislation, and the continuing inaccessibility of law to the poorer classes (McGregor 1957). As Doggett (1993) observes, the reality of the 1857 Act proved to be that only the upper and middle classes were able to take advantage of the legislative changes - divorce proceedings remained extremely costly, and could only be brought in a single divorce court located in London.

The solution proposed by the Majority was, firstly, that the law should be amended in order to secure equal treatment of men and women with regards to the ground for divorce: women would be given access to divorce on the grounds of their husbands' adultery alone. Secondly, in an attempt to ensure that poverty did not constitute a bar to legal relief, a simplification and decentralisation of divorce procedure was recommended: in essence the High Court would be able to sit and exercise divorce jurisdiction locally.

With regards to the issue of matrimonial fault, the Commission's recommendations are of particular interest. Having examined the various Christian principles relating to the dissolubility of marriage, the Commission was faced with a distinct absence of any general consensus of opinion. Indeed 'Christian' opinions were found to range from those who maintained that marriage was fundamentally indissoluble, through to those who suggested that divorce should actually be available on certain serious grounds based on the 'necessities of human life'. Situated between these poles of opinion were those arguing that marriage should be dissoluble purely on the grounds of adultery, and more flexible constituencies supporting an extension to include the additional ground of desertion (Royal Commission on Divorce and Matrimonial Causes 1912: paras. 39-40).

The Majority ultimately rejected the previously accepted view that adultery should constitute the only matrimonial offence justifying the legal ending of a marriage. In contrast, however, the Minority Report firmly rejected any extension to the grounds for divorce. This stance was based upon a belief that the result of any such extension would be easier divorce. Easier divorce would, it was felt, in turn lead to an increase in the number of divorces. Furthermore, and drawing upon religious doctrine, any extension beyond (female) adultery was believed to be against the express words of Christ (ibid.: pp 171-185).

Eekelaar observes that the Commission constructed the problem of divorce primarily in terms of the adverse consequences that were believed to result from separation without divorce (1991: 233). The solution was thus perceived to lie in

the expansion of both access to, and the grounds for divorce. Indeed the Majority also recommended that desertion for more than three years, cruelty, incurable insanity, incurable drunkenness and imprisonment under the commuted death sentence should all be elevated to the status of matrimonial offences (Royal Commission on Divorce and Matrimonial Causes 1912: para. 329). This, it was hoped, would put an end to the 'evil' of judicial separation for those who lacked the money and circumstances to obtain a divorce (ibid.: para 234). Ultimately, however, these proposals were not acted upon – indeed it was only in 1937, by virtue of the Matrimonial Causes Act of that year, that the grounds for divorce were expanded to include desertion and cruelty.

Stone suggests that the Majority recommendations were based upon the principles that divorce should be primarily regarded as a 'legal mopping up operation' following the spiritual death of a marriage, and that no correlation necessarily existed between the number of divorces and the level of sexual immorality (1990: 393). However as other commentators have suggested, the Report did not actually represent a major shift away from ideology and towards a more practical legal approach. Firstly, it is argued that the proposals were underpinned by a hope that they would allow remarriage. Indeed Lewis suggests that 'liberalisation' was actually proposed in order to both draw a firmer line between the married and the unmarried, and to promote marriage (2001: 102). Secondly, it is important to emphasise the centrality that continued to be accorded to the fault doctrine within the Commission's thinking. Although in favour of expanding the grounds for divorce, the Majority were firmly against recognising marriage breakdown that did not rely on fault. Such a move was inevitably believed to involve some recognition of divorce by consent - a recognition that it was felt would fatally undermine the concept of life-long marriage (Royal Commission on Divorce and Matrimonial Causes 1912). As McGregor observes, the recommendation to extend the grounds for divorce was regarded as cementing rather than undermining the 'status' of fault:

> 'The Report wished to retain the principle of the matrimonial offence as the basis for divorce law, but applied it to a wider range of behaviour. The recommendations are thus to be regarded as an extension of the old principle rather than the establishment of a new.' (1957:28)

A concerted attempt to introduce a form of no-fault divorce into English Law was ultimately to take several decades to materialise. In 1951 Mrs Eirene White introduced a Private Members Bill into Parliament, which proposed to allow divorce following a period of seven years separation. Supporters of the Bill argued that such a provision would both allow dead marriages to be legally brought to an end, and would enable the legitimation of other 'sinful' unions. However, its departure from the matrimonial offence principle, meant that it was strongly criticised for effectively allowing a 'guilty' spouse to divorce an 'innocent' one against his or her will (Smart 1984). The Government itself was opposed to the Bill. However, upon realising that it was likely to reach the Committee stage, an attempt was made to encourage MPs to vote against by promising a Royal Commission in return. The end result of this political manoeuvring was that the Bill was withdrawn from Parliament. It has, however, been noted that the reaction provoked by this attempt to introduce no fault legislation, illustrates the hold that the offence principle continued to retain over the official version of just what divorce actually meant (Eekelaar 1991).

The promised Royal Commission was subsequently appointed in September 1951, under the chairmanship of Lord Morton of Henryton. It was accorded a wide brief to enquire into the law 'concerning divorce and other matrimonial causes':

> 'and to consider whether any changes should be made in the law or its administration...having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children.'
> (Royal Commission on Marriage and Divorce 1956 (Cmd. 9678): iii-iv)

The Commission found itself faced with a fundamental division of opinion. Advocates for reform based their position largely on the argument that the doctrine of the matrimonial offence no longer reflected the reality of either marital behaviour, or expectations. However, the opposing view was strongly articulated by the Church of England, who opposed any movement for change. The doctrine of fault was regarded as according with the New Testament, whilst divorce was

portrayed as a threat both to the family and to the conception of marriage as a lifelong obligation.

Wooton provides an illuminating summary as to the nature and extent of this divergence of opinion that formed the backdrop to the Commission's work. For example, she identifies that on one side of the 'debate', were those who believed in the primacy of family and marriage:

> 'the family and marriage, as institutions, have a value in their own right, over and above their effect on the welfare of any individuals affected by them. In the extreme case, this value may be held to outweigh everything else and to preclude divorce altogether. Whom God hath joined together let no man put asunder – no matter how wretched their lives may be.' (1955: 407).

A more modified version of this stance involved weighing the sanctity of marriage as one of a range of factors. As Wooton puts it: 'Whom God hath joined together man may put asunder provided that the situation is sufficiently desperate; but the *presumption* is that they ought to stay joined' (loc. cit.). In contrast, and situated on the opposite side of the debate, was the view of divorce as neither inherently 'good' nor 'bad'. For this constituency it was regarded primarily as a private matter:

> 'Whom man hath joined together, man may put asunder – but only with due consideration for the interests of the helpless.' (loc. cit.)

Ultimately the Commission itself also proved to be largely divided on how to proceed (Smart 2000). Indeed with regards to the proposal that there should be a new ground for divorce founded on the complete breakdown of marriage, the members were evenly split. In comparison, however, when it came the question of whether the matrimonial offence doctrine should be retained as the basis of divorce, there was virtual unanimity in favour (Royal Commission on Marriage and Divorce 1956: para. 65).

Referring to Mrs. White's 1951 Bill, nine of the commissioners regarded the fact that it would have enabled a guilty party to obtain a divorce against the will of an

innocent one, as a 'chief criticism' of the no-fault framework (ibid.: para 69(xxix)). It was their clear view that the proper function of divorce law was, 'to give relief where a wrong has been done' (ibid.: para 69(xii)). It is also noteworthy that these particular signatories to the Report went a stage further, and rejected the introduction of the doctrine of marriage breakdown in any form. Such a move, it was felt, 'would be to foster a change in the attitude to marriage which would be disastrous for the nation'. Indeed, it was thought that the result would be to encourage people to 'abandon their marriages on the flimsiest provocation' (ibid.: para 69(viii)). In contrast, the remaining nine members of the Commission proposed the limited introduction of the doctrine of breakdown of marriage - namely making divorce available on the basis of seven years separation.

The one dissenting voice on the matrimonial offence doctrine was proffered by Lord Walker. Unlike the rest of the Commission he did not support the retention of matrimonial fault, favouring instead the substitution of irretrievable breakdown of marriage as the sole ground for divorce. Such breakdown was to be evidenced by three years separation, and where the 'facts and circumstances' made it 'improbable' that cohabitation would ever be resumed (ibid.: page 340, para. 4). Underpinning this position was the following belief:

> 'The true significance of marriage, is life long cohabitation…But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie…adds increasing harm to the community and injury to the ideal of marriage.' (ibid.: page 341, para. 6)

A 'correctional' framework

Adopting Rodger's (1995) moral regulation–family policy paradigm, the first hundred years of secular (judicial) divorce can clearly be located towards the moral regulation end of the spectrum. Throughout this period the legislation is characterised by its firm grounding in the doctrine of the matrimonial offence, the

enforcement of which has the effect of 'casting' law into a particular role - in essence that of a 'correctional code' (Rodger 1996: 61). The matrimonial offence doctrine is based upon a fundamental moral premise - namely the theory that one spouse commits a grievous act that goes to the root of the marriage, and that the other spouse is to be given the choice of petitioning for dissolution. The assumption is thus that the petitioner is innocence personified, whilst the respondent is totally responsible for marital disharmony. Indeed Freeman makes reference to the 'quasi-criminal nature of the matrimonial offence', and the 'moral blame underlying the finding of fault' (1971: 181).

As Rodger (1996) explains, the correctional code is dominated by a view of marriage that involves constraints, rules, prescribed social roles and the imposition of penalties against those who choose to contravene the conventions and norms that govern marital relations. In turn, the imposition of what is essentially an external regulatory moral framework is founded on the basic premise that the state can and should regulate family dissolution (and indeed (re)formation) in the light of particular, and thus universal, ideas or conventions about marriage and family life.

Horstman provides an early example of the way in which divorce law has been underpinned by an external regulatory moral framework. Although the Matrimonial Causes Act of 1857 was regarded as making divorce more accessible, Horstman suggests that the legislation actually did what he describes as, 'its work' of keeping families together. Many people did not feel that adultery was in their interests, while for others it was simply 'not their style'. In addition, the blame inherent within the process, and the scandal that attached to divorce, also meant that the law operated to deter adultery and encourage forgiveness. The end result was that the 1857 Act actually operated as, 'the bulwark of the Respectable family, that most distinctive aspect of Victorianism' (1985: 171).

A further example of law operating in this way is provided by Lewis' (2001) observations on the Gorrell Commission proposals of 1912. As outlined earlier, it has been suggested that the proposed expansion of the framework of fault beyond

adultery was motivated by the desire to promote marriage. Lewis argues that this expansion was justified as the means of imposing an external code more effectively – principally by stopping the poor from making informal cohabiting arrangements. In effect, therefore, a degree of liberalisation was actually proposed in order to enhance the imposition of the external moral code (2001: 102).

This construction of divorce law in terms of the external imposition of a moral code, also features in much of the discussion that surrounds the Morton Commission. An example of such an interpretation is provided by Smart who argues that, when formulating its recommendations, the Commission relied on 'high principles' and 'orthodox moral guidelines'. Indeed she goes on to make the following suggestion:

> 'The Royal Commission expressed – albeit implicitly – a strong sense of homogenous nationhood within which only one form of family life could be seen as morally appropriate.' (2000: 9)

McGregor is extremely critical of the Commission's failure to engage with the reality of everyday life, describing the prevailing attitudes towards divorce as reflected in the Morton Report as, 'defensive if not atavistic' (1957: x). In a similar vein Freeman, writing in 1971, comments on the striking nature of the Report's 'complacent tone and lawyers' insularity' (183). However, Smart makes the point that the Commission's approach was not actually meant to be either populist or representative, 'nor did it mean to follow current trends. Its aim was to set standards and to reiterate the moral rules outlined in the law of divorce' (2000: 9).

One 'aspect' of law's regulatory framework, relates to perceptions as to the nature of marriage. Indeed it has been observed that divorce law, 'reflects a particular vision of the moral foundations of marriage' (Eekelaar 1991: 15). Commenting on the virtual consensus of Morton when it came to retaining fault as the basis for divorce, Smart argues that the Commissioners effectively adhered to the definition of marriage as a contract between spouses and state - marriage was constructed as an institution, not as a relationship simply between two spouses. A marital offence was thus committed against the institution, thereby harming the broader moral and

social fabric. This, she argues, reveals that the quality of the marriage itself was actually deemed irrelevant – instead concern was reserved for the 'greater good' (2000: 8). During this period, the correctional 'framework' was thus characterised by the perception of marriage as a social institution, with personal relationships constructed primarily in terms of conservatism, control and social order.

This concern for the fabric of society is reflective of the argument advanced by Devlin (1965). Indeed another 'characteristic' of much of the debate that surrounded reform during this period is, if the discussion in the preceding chapter is recalled, the way in which arguments are couched in similar terms to that of Devlin – namely that society is entitled to pass judgement on moral matters and thus to regulate 'private' morality, in order to protect the common morality forming the basis of society. One example of such 'framing' is provided by the Church of England's evidence to the Morton Commission. Here change was opposed on the basis of the damage that it would cause to the social order. In the Church's opinion, such damage outweighed any possible relief of individual suffering and hardship. The result was therefore the submission of the individual to dominant culture and social order.

McGregor (1957) observes that in their evidence given to the Commission, all the churches actually agreed that the practical policies stemming from their theological convictions did coincide with those dictated by the secular good of wider society. Indeed the evidence that was put before the Commission advocated policies directed to securing the stability of the family, and hence the general social good. It was also the case that when the Commission ultimately split over the question of irretrievable breakdown as a new ground for divorce, both sides based their view on the belief that their position was not only in the interests of the parties immediately involved, but also that of the community as a whole (Lee 1974). Therefore whilst there was certainly some divergence of opinion over what would benefit or protect public morality, the policy 'process' was clearly characterised by a strong belief that this did constitute a legitimate role for divorce law.

One particular 'facet' of this idea that divorce law has a role to play in supporting the wider community has been linked to broader developments taking place at the time. It is interesting that present, once again, are echoes of Devlin's belief in a shared morality constituting an essential aspect of social cohesion. Indeed during this period, much of the divorce reform and review process was characterised by a concern for the more general upheaval and disruption being experienced within the country. Divorce law thus became incorporated into an agenda that went significantly wider than simply dealing with broken relationships.

An early example of this broader concern is provided by the Committee on Procedure in Matrimonial Causes (Denning Committee). The Committee was established in June of 1946, as a response to a sudden rise in divorce - the number of divorces quadrupled between 1944 and 1946 - and resulting concerns about the strain that was being placed on the legal system (Dingwall and Eekelaar 1988). The Committee's terms of reference were thus as follows:

> 'To examine the present system governing the administration of the law of divorce and nullity of marriage in England and Wales; and, on the assumption that the grounds upon which marriages may now be dissolved remain unchanged, to consider and report upon what procedural reforms ought to be introduced in the general interests of litigants, with special reference to expediting the hearing of suits and reducing costs and to the Courts in which such suits ought to proceed; and in particular whether any (and if so, what) machinery should be made available for the purpose of attempting a reconciliation between the parties, either before or after proceedings have been commenced.' (Committee on Procedure in Matrimonial Causes 1947 (Cmd. 7024): para. 1)

The Committee's Final Report, published in 1947, devoted significant attention to the issue of reconciliation (Dingwall and Eekelaar 1988). One proposal, that a tribunal be established in order to consider the possibility of reconciliation in undefended divorces was, however, rejected. It was felt that this would introduce the possibility of reconciliation into the equation at too late a stage – indeed the feeling was, 'that the procedure would quickly develop into a formality to be undergone by persons intent at that stage not on reconciliation but only on divorce'

(Committee on Procedure in Matrimonial Causes 1947: para 25). What is interesting for the purposes of the present discussion, however, is the fact that the Report nevertheless placed great emphasis on preserving marriage and attempting reconciliation in every case where there was a possibility of success (Maclean: 2000). Indeed it concluded that a state 'sponsored' Marriage Welfare Service should be established, whose work would include the provision of 'help and guidance' to those preparing for marriage, and to spouses experiencing 'difficulties' thereafter (Committee on Procedure in Matrimonial Causes 1947: para. 28(iii)).

A further recommendation made by the Committee was the appointment of welfare officers, to whom the Court would be able to refer divorce cases involving children. The role of such officers was envisaged in terms of investigating the circumstances of the case, and exploring the possibility of reconciliation (ibid.: para 29(viii)). Thus what can be seen here is an attempt to 'encourage' behaviour to conform to the preferred model of the traditional nuclear family - in essence the imposition of an external moral code, but through a more paternalistic, rather than a purely coercive or punitive mechanism.

The nature of the external moral code contained within divorce law, has been linked to a wider policy agenda to recapture pre-war society. In particular, a number of feminist writers have identified the incorporation of family law into a broader correctional or moral code in post-war Britain. For example, Lewis (2001) argues that one effect of war time disruption, was to strengthen both conservative views about the family, and the need for a strong moral code. In a similar vein, Finch and Summerfield (1991) suggest that the desire to consolidate family life following the disruption of war - and in particular to create a future in which marriage and the home would constitute the foundations of a 'better' life - became a central aim of post-war reconstruction. Economic and environmental reconstruction is identified as a pre-requisite for achieving this consolidation – after all stable family life requires a conducive physical and material environment. However, in addition to this, the policy agenda also incorporated a more moral and ideological element.

Following the end of the Second World War, public discussions of family life tended to focus on the falling birth rate and the overall shape of the British population. The birth rate had actually fallen to a record low in 1940, which prompted speculation that the population would fall below replacement level. Finch and Summerfield (1991) observe that this debate had implications both for ideas about motherhood in the post-war period, and also for the models of marriage that were deemed appropriate to the promotion of that motherhood. Indeed they describe the 1949 report of the Royal Commission on Population as 'the main clearing house for 'pronatalist' ideas' (1991: 9).

Part of the 'problem' for the Royal Commission is identified as being that of the emergence of the 'companionate marriage' (Finch and Summerfield 1991). Indeed it is suggested that the Commission's recommendations reflected a belief that the movement for more equality between men and women had impeded the task of raising the birth rate. As more women were drawn into paid work, it was felt that a potential conflict was created with the demands of motherhood. At the same time, a weakening of the traditional dominance of husbands was seen to emphasise the wife's role as partner and companion, rather than as the producer of children (loc. cit.).

It is interesting to note the similarity between the Royal Commission on Population, and Morton's subsequent explanations of the rise in post-war divorce. Clearly evident within Morton is a concern both about the impact of war on the family, and the steadily increasing divorce rate (see, for example, Royal Commission on Marriage and Divorce 1956: paras. 39-40). In addition to locating responsibility for increased divorce rates in the impact of war, and of legislation widening the grounds for divorce and extending financial aid to those seeking divorce, Morton suggested that general cultural trends were also contributory factors. One such trend was that of the emancipation of women. This was regarded as having the dual effect of increasing friction within marriages as women demanded greater equality with their husbands and, as more women entered the labour market, of reducing the

fear amongst women that divorce would inevitably herald financial disaster (Stone 1990).

Following the post-war baby boom, fears regarding the declining birth rate did begin to subside (Finch and Summerfield 1991). Nevertheless, the policy focus continued to remain firmly on the family. As Smart observes:

> 'The concept of family, in particular the romanticised notion of the Victorian family, was...identified as a source of national stability, and attempts to re-stabilise the nation were thus seen as logically concentrating on the family' (1984: 50).

Smart goes on to make the point that, in reality, this concept of 'family' actually comprised the mother and child(ren). In a similar vein, Lewis (1986) suggests that this focus on the mother can be related to the issue of the welfare of children. Against a backdrop of concerns that social dislocation was the primary cause of family failure – a major fear was that the disruption created by evacuation and intensive bombing had caused family life to disintegrate – policy increasingly emphasised the socialisation of children. The end result was that the mother-child relationship became viewed as the key to a child's healthy development. This re-focusing on motherhood also reflected the influence of the dominant psychological 'maternal deprivation thesis', most notably propounded by John Bowlby (e.g. 1951) – namely that disruption to the mother-child bond could cause potentially irreparable psychological harm to children.

The reconstruction of society and family thus took place around a very clear vision of the family, namely that of the male breadwinner – female housewife and mother. This ideal became enshrined within national politics and policies, primarily through its incorporation into the social security system via the Beveridge Report of 1942. This shift in emphasis away from 'women-as-wives' towards 'women-as mothers' is underlined by Parker, who identifies it as a 'central change' in post-war family law:

> 'The point to be made here is that Beveridge was not purporting to devise a scheme of social insurance which was adapted to *existing* employment

patterns: he was devising a model of how it should be in the future. In other words, the new social security was intended for a new model family' (1990: 101).

With regards to stated ideology on the role of women within the family, Smart highlights the similarities that exist between Beveridge and the Morton Commission's 1956 Report. She argues that, in common with Beveridge, Morton recognised the economic dependence of women. It then proceeded to enforce that dependence by refusing to improve the property rights of married women. She goes on to argue that although the Commission paid 'lip service' to the concept of marriage as an equal partnership, it was not willing to take the requisite steps in order to achieve any real legal or economic equality – for example the concept of a community of property in marriage was rejected (1984: 38).

It should, however, be noted that Lewis adopts a slightly different approach to the Beveridge reforms. She does recognise that Beveridge assumed that a married woman would not engage in paid work, and could therefore be classified as a dependent. However, she then goes on to argue that Beveridge actually welcomed the idea of companionate marriage, regarding the marital relationship as a partnership. It was the nature of that partnership that was not equal - Beveridge believed that husband and wife had 'strictly traditional, complementary roles to play' within the partnership, with the husband as breadwinner and the wife as housewife and carer (1986: 44).

Smart suggests that against this backdrop populated by ideologies of motherhood and family life, the Morton Commission gave a, 'renewed legitimacy to dominant ideologies concerning the patriarchal family and further established the Church in the realms of marriage and the family' (1984: 40). She argues that in an effort to recapture pre-war family and society, the government could be seen to be delaying the development of family law. Legislation was thus utilised in an attempt to prevent social change – in effect, as the country emerged from war, the family had a 'particular form of patriarchal relations' imposed upon it. This form of relations, it is argued, was 'increasingly incompatible with the economic and social reality of

family life and the needs of the economy' (loc. cit.). The resulting failure to legislate on divorce during the 1950s is thus held up as an example of how law was utilised in an attempt to reproduce a particular family form – namely one in which women remained economically dependent upon men.

This issue of the role of law, and indeed of what the law can realistically achieve in this context, is also considered by Smart. Again focussing on the Morton Commission, she suggests that it set itself the task of 'inducing responsibility', and of 'countering the blurring of moral values in the public mind' (1984: 37). She argues that the presumption made here was that the law could be used to achieve the well being of the community - the basis of that well being having been defined as stable marriage. In essence therefore, law is viewed as an active agent in shaping social behaviour and attitudes. In addition to providing relief when a wrong has been done, the function of law is thus described as a control on 'bad' impulses, and an encouragement to the 'good' (loc. cit.).

The feasibility of such legislative restraint is, however, subject to question. In a subsequent work, Smart argues that the Commission made the assumption that it was faced with a 'homogenous society' that was in the early stages of 'moral decline' (2000: 10). The regulation of marriage was regarded as a moral issue, requiring a response that was, 'a form of moral rearmament in which individuals would become bound securely again to the (supposed) values of the pre-war era' (ibid.: 11). In a similar vein, Finch and Summerfield describe the Commission's recommendations in terms of the re-implantation of moral and social sanctions (1991: 27). Indeed they make the point that the ultimate remedy was apparently seen by the Commission to lie in the following:

> 'in fostering in the individual the will to do his duty by the community; in strengthening his resolution to make marriage a union for life; in inculcating a proper sense of his responsibility towards his children.' (Royal Commission on Marriage and Divorce 1956: para. 51).

It was envisaged that education would be key to reinforcing this sense of responsibility and commitment. Such education was to involve the development of

'a carefully graded system' for young people in order to 'fit them for family living', in addition to the provision of 'specific instruction' for those about to get married (ibid.: para. 330).

Smart describes this approach as a form of 'rational teaching based on reason' (2000: 12). However, the efficacy of such an approach is questioned by McGregor's argument that people's lives were actually changing in relation to structural changes - they were not simply a result of moral laxity. He continues: 'The essence of democratic living is the rational exercise of choice. Choice necessarily implies change and fear of change has never been a successful guardian of morality' (1957: x). In addition, he is critical of the Commission for failing to attempt to investigate the social reality which divorce seeks to regulate, arguing that people will not 'model their behaviour upon principles laid down by backward looking Royal Commissions' (loc. cit.).

In a similar vein, Smart argues that the Commission could not see that this form of regulation – which she describes as 'a combination of traditional modes of banning behaviour, combined with more modern methods of instruction to ensure obedience' – was actually 'irrelevant' in post-war Britain (2000: 12-13). She argues that both the Morton Commission, and the Church were afraid of releasing people from the constraints of Christian marriage. Furthermore, she suggests that they were also unable to envisage alternative mechanisms for regulating family life. Consequently the end result was that the, 'pre-war methods of imposing restraint through legislative and religious measures which simply banned or punished incorrect behaviour, were still attractive and potentially feasible' (2000: 11).

Summary

During this initial period in the history of the development of English divorce law, the exit from marriage was governed by a family law system that was underpinned

by a strong external moral code. This code, it is argued, was designed to operate in concert with the traditional male-breadwinner model of family (Lewis 2001). Thus the prevalent concept of family during this period was of a fixed and concrete entity that stands outside and above social change (Silva and Smart 1999). Indeed as Dewar and Parker have observed, this 'formal era' during which family law emerged from ecclesiastical law to become a matter for the civil state, was characterised by a 'coherent edifice of thought'. This edifice was founded on patriarchal assumptions, the sexual double standard, the assumed economic dependence of women, and the ideology of motherhood (2000: 126).

The dominant discourse was thus a universal moral one. Within the sphere of marriage breakdown and divorce, constructions of law were dominated by the belief that 'private' conduct should conform to publicly set standards. Reflecting the influence of Christian theology, the 'nature' of those standards centred around a firm belief in the importance and primacy of marriage. This was underpinned by a 'version' of the disintegration thesis – namely that divorce and marriage breakdown was indicative of societal degeneration and decline. The end result was thus a legal divorce process that sought to regulate intimate relationships and define the parameters of marital behaviour. At the heart of that regulation was the doctrine of matrimonial fault - indeed the central position accorded to fault created a primarily punitive regulatory framework that both sought to reinforce marriage by deterring divorce, and punished those individuals who failed to live up to the marital ideal.

It should, however, be recognised that the policy 'dilemma' discussed in Chapter 1 was not completely absent during this period. Indeed some policy actors did offer an alternative perspective on the whole divorce question. For example, the Gorrell Commission Report of 1912 articulated what can arguably be described as a challenge to the more traditional view of divorce as deterioration or pathology requiring corrective intervention. Indeed the Commission made reference to the following obligation:

> 'to recognise human needs, that divorce is not a disease but a remedy for a disease, that homes are not broken up by a court…and that the law should

> be such as would give relief where serious causes intervene, which are generally and properly recognised as leading to the break up of married life. If a reasonable law, based upon human needs, be adopted, we think that the standard of morality will be raised and regard for the sanctity of marriage increased.' (Royal Commission on Divorce and Matrimonial Causes 1912: para. 243)

A strand of opinion was therefore present to the effect that divorce was not simply about failure or deviance, that law should have some awareness of the social reality, and that the role of law should include the provision of relief to individuals experiencing marital difficulties – in essence that law should have a 'service' element. However, despite some recognition of societal change, the latter stages of the period under discussion continued to be characterised by a belief that it was possible to hold on to a form of marriage that had been consolidated in the previous century (Smart 2000) – and that a corrective framework remained the primary mechanism for its achievement. It is true to say that the argument that fault failed to accord with the social reality did begin to find a voice during this period. It was not, however, until the 1960s that criticism of the whole fault-based process really began to come to the fore.

The shifting balance

The following observation has been made with regards to the 1956 Morton Report:

> 'The Morton Report was the death pangs of the school of thought which saw divorce as a legal problem, *the* greatest evil, and which believed that one fostered marital stability by making divorce difficult.'
> (Freeman 1971: 183)

The arrival of the 1960s did witness a shifting away from the law's exclusive reliance on the matrimonial offence doctrine, and consequently something of a 'chipping away' at the overtly corrective approach to marriage breakdown. A

change in the approach of the Church towards the whole issue of marriage and divorce has been identified as an important contributing factor in this shift. Indeed in 1964, a group was appointed by the Archbishop of Canterbury to look into the whole issue of divorce. The group interpreted its task in terms of making recommendations as to divorce law reform, but 'without prejudicing the stability of marriage or the lifelong nature of the marriage covenant' (1966: para.8). Its report, 'Putting Asunder', was published two years later in 1966.

Writing in 1971, Freeman identifies three 'evils as having attracted the particular attention of the Archbishop of Canterbury's Group. These comprised the 'social evil' of the stable but illicit union, the 'image' of the law in view of the widespread awareness that a huge discrepancy existed between the letter and practice of law, and the 'harm' that the existing legal process was believed to be causing to the institution of marriage (184).

In contrast to the position that had been previously adopted by the Church, 'Putting Asunder' ultimately chose to reject the matrimonial offence doctrine. The basis for this rejection lay in the group's perception that it was failing to uphold either the sanctity of marriage, or indeed its public repute. The doctrine was criticised for the fact that it concentrated on making findings of past faults, and for its encouragement of perjury, collusion and even the commission of offences in order to facilitate the legal escape from an unhappy marriage. The group thus concluded: 'As a piece of social mechanism the present system has not only cut loose from its moral and juridical foundations: it is, quite simply, inept' (Archbishop of Canterbury's Group 1966: para. 45). As an alternative to 'fault', 'Putting Asunder' recommended divorce based on the breakdown of marriage – such breakdown to be assessed by way of judicial inquest. This inquest or investigation was envisaged in terms of assessing whether or not the marriage was still viable, and not in order to find evidence of any individual deficiencies or fault.

'Putting Asunder' was closely followed by the Law Commission's Report, 'Reform of the Grounds of Divorce: The Field of Choice' (Cmnd. 3123), which was

published in November of 1966. 'Field of Choice' commented on the range of existing proposals for reform, but focussed particularly on those suggested by 'Putting Asunder'. Indeed it has been described in some quarters as constituting a direct response to the Archbishop of Canterbury's Group (see, for example, Smart 1984). The Report defined the objectives of a 'good' divorce law in dual terms – namely buttressing rather than undermining the stability of marriage, and enabling marriages that had irretrievably broken down to be brought to an end with maximum fairness and minimum bitterness, distress and humiliation (Law Commission 1966: para. 15). It was the Commission's opinion that the principle of matrimonial fault was failing to achieve either of these. In addition four 'major problems' were identified with the existing fault-based system. These comprised the need to encourage reconciliation; the prevalence of 'illicit' unions that could not be regularised (or the children legitimated); the injustice experienced by the economically weaker party to the marriage (generally the wife); and the need for adequate protection for the children of failed marriages (ibid.: para. 120(3)).

'Field of Choice' did accept the general philosophy that underpinned 'Putting Asunder' (Smart 1984). However, adopting a more pragmatic perspective, the Law Commission felt that the recommendations of the Archbishop's Group would be unworkable. Their principal objections were based upon the practical difficulties of time and cost - both human and financial - that breakdown by inquest was thought to involve. In addition, it was felt that such a procedure was overly reliant on the subjective opinion of the court. Inquisition was rejected as 'not easily triable' (Law Commission 1966: para. 58(i)), whilst a 'detailed inquest' into the marriage was felt likely to prove 'more distasteful and embarrassing than proceedings under the present law' (ibid.: para 58(m)).

Three proposals for reform were ultimately identified by the Commission as 'practicable'. These comprised 'breakdown without inquest', whereby the court could assume that the marriage had broken down on receiving proof of a period of separation, and in the absence of any evidence to the contrary; 'divorce by consent', although this was considered unlikely to be acceptable where dependent children

were involved; and 'the separation ground', which would involve divorce on the basis of a period of separation 'substantially longer' than six months (ibid.: para. 120(4)).

A more appreciative perspective?

What emerges through the policy 'developments' of the 1960s is, to utilise Rodger (1996) once again, what can arguably be described as a more 'appreciative' discourse. Both 'Putting Asunder' and 'Field of Choice' display a greater appreciation of the 'real world' – both in the sense of the reality of social behaviour, and the impact of law on individuals and families. Indeed the extent to which the approach to the whole issue of divorce had shifted, is underlined by the Law Commission who made the statement: 'our point of departure must be the hard facts about social habits and public opinion in this country at the present time' (1966: para. 52). Similar factors were also regarded as being fundamentally relevant to proposals for reform: 'The field of choice for reform is circumscribed by a number of practical considerations and public attitudes, which cannot be ignored if acceptable and practicable reforms are to be undertaken' (ibid.: para. 120(4)). In a similar vein, 'Putting Asunder' stated that breakdown was the preferable principle when compared to fault, because it accorded 'better with social realities' (Archbishop of Canterbury's Group: 1966: para. 26).

This perspective thus represents the beginning of a real, and indeed more pragmatic engagement with social reality. Indeed Lewis and Wallis suggest that 'Field of Choice' was concerned to promote a 'modernising, efficiency-orientated view of the everyday practices of the courts' (2000: 329). The perspective echoes that of the legal realists in the sense that much of the concern is with the impact of law and its 'fit' with the society in which it operates, rather than in simply approaching the situation in terms of first principles. For example, the Commission set out a number of considerations which were, in its opinion, 'undeniably real' in the sense that to

disregard them might render a proposal useless, unjust, or unacceptable to public or Parliamentary opinion (Law Commission 1966: para. 52). Such considerations included the fact that public opinion would not accept more difficult or lengthy divorce, unless it could be shown that a significant number of marriages would be mended as a result; that the chances of reconciliation were almost negligible by the time a divorce petition was filed; that spouses will separate if life becomes intolerable, regardless of whether a divorce is actually obtainable; and that marital breakdown usually tends to precede the matrimonial offence on which the divorce petition is actually based.

Aspects of the legal 'realist' perspective can also be found in the fact that both 'Putting Asunder' and 'Field of Choice' were characterised by something of a distinction along the lines of Llewellyn's (1930) 'isness' and 'oughtness'. Indeed both documents display a sense of needing to understand the impact and effects that current law has 'on the ground', in order to decide the appropriate direction for future reform.

What also seems to have emerged during this period, are the beginnings of a movement away from a universal moral discourse, towards a more flexible and individualistic approach. One example is the clear shift in the Church's position on divorce as articulated in 'Putting Asunder', when compared to its stance before the Morton Commission a decade earlier. The point made by the later document is that divorce is not invariably about fault. Indeed the reality of divorce is regarded, 'not a reward for marital virtue on one side and a penalty for marital delinquency on the other; but a defeat for both' (Archbishop of Canterbury's Group 1966: para. 26).

Smart (1984) observes that during the 1960s, the Church was in retreat from the position of imposing Christian beliefs on the mass of the population. She argues that the reasons behind this reorientation included: the fact that it was becoming increasingly difficult to support a divorce law that tended to increase unhappiness and injustice; that the divorce process neither enhanced marriage, nor prevented relationship breakdown; that by maintaining its traditional position, the Church

would be running the risk of becoming an unpopular and repressive institution; and an increasing feeling it simply was not possible to force faith and belief upon people.

One aspect of this shift may thus be interpreted in terms of the difficulties of imposing an external moral code. However, Lewis and Wallis (2000) suggest that this re-positioning also had much to do with changing views as to the source of sexual morality. At this point it is helpful to make reference to an earlier work by Lewis (1999), who argues that the 1960s witnessed a reformulation of ideas about morality amongst both churchmen, and politicians. These ideas were subsequently utilised in certain quarters in order to justify more individualistic behaviour, whilst those individuals themselves became advocates for further relaxation of the divorce laws.

One such individual is identified as John Robinson, the Bishop of Woolwich. Writing in 1963, Robinson broke with the traditional Christian view that the teachings of Jesus and the Bible provided unalterable and absolute laws concerning moral behaviour (Smart 1984). In his work, 'Honest to God', he advocated a moral position based on love – which was described as possessing 'a built-in moral compass' (1963: 115). For Robinson, the disappearance of the 'old land-marks' of universal standards supported by the law was regarded as something to be welcomed rather than deplored (ibid.: 117). Indeed love was regarded as more searching and demanding than anything required by law, 'because it goes to the heart of the individual personal situation' (ibid.: 118). It was further argued that, for Christians, there could be no ''packaged' moral judgements' – a stance that was underpinned by the basic belief that, 'persons are more important even than 'standards''(ibid.: 120).

This perspective would seem to reflect the introduction of Pound's (1980) 'human factor' into the equation. As Lewis (1999) observes, a more individual morality coming from within, was therefore sought as a replacement for the traditional moral code imposed from without. In the presence of love, nothing (including divorce)

could be labelled as 'wrong'. Furthermore, once the idea of love as the true moral basis of marriage had become paramount, then only the couple themselves could determine the state of their marriage. The purpose of the marriage thus became the welfare of the couple. Indeed as Smart also observes:

> 'There was an important shift away from status towards a recognition of the individual occupying the status. In this context it became the quality of the relationship that became the yardstick of its moral worth, not simply the marital status of the parties.' (2000: 14)

In what can arguably be described as reflective of Mill's (1974) appreciation of moral pluralism, it is suggested that the importance of this shift lies in the acknowledgment that individualisation did not necessarily equate to moral decline. This acknowledgment was also combined with an acceptance that the moral worthiness of relationships could be assessed in terms of their internal quality, rather than their external structure (Smart 2000).

Care should, however, be taken in order not to overstate the nature of the shift that actually took place. The 1960s did herald an increasing acceptance of choice and creativity in personal relationships. However, policy processes did not go so far as to embrace the rational individual, empowered to shape family life in accordance with his or her life project, who characterises the truely appreciative code or framework. Indeed it is suggested that those who argued in favour of a morality from within, did not do so on the basis of the right of the individual to exercise his or her personal preference. Rather, for the majority of reformers, the aim was actually to achieve a 'higher morality' (Lewis 2001: 72). Furthermore, it also true to say that the developments during this period cannot be described as heralding the end of idealism. As previously discussed, 'Field of Choice' talked of the need to encourage reconciliation, to adequately protect children, and to deal with the problem of injustice to the weaker partner to the marriage. These aspirations have led the Law Commission's Report to be characterised, in some quarters, in terms of 'idealised standards', 'humanitarian values' and a 'confident morality' (O'Donovan 1993: 111).

The 'compromise'

The outcome of this 'debate' surrounding divorce law reform was ultimately the compromise (Winnett 1968) of the Divorce Reform Act 1969. That compromise took the form of the introduction of a regime of partial no-fault divorce – which has been described by some as a 'rather strange formulation' (Lewis and Wallis 2000: 309). By virtue of the 1969 Act, the sole ground for obtaining a divorce became the 'irretrievable breakdown of marriage'. The five conditions or 'facts', at least one of which had to be demonstrated in order to establish that breakdown, embraced both instances of 'fault' – namely adultery, unreasonable behaviour and desertion – and the 'no-fault' situations of two years separation with consent, and five years simple separation.

One consequence of this retention of matrimonial fault was that the martial relationship, at least in theory, remained a legitimate object of state intervention. However, commentators have generally identified the 1969 legislation as representing a significant change in policy.

> 'The enormity of the breach with the past which this reform represented was shrouded by the use of traditional language and the continuation (for a time) of traditional procedures. But the ideological premisses of the structure of a community's norms governing family and sexual behaviour generate an ineluctable logic which has repercussions reaching into the innermost recesses of the lives of its members. In this case, the old premisses were fatally undermined.' (Eekelaar 1991:4)

The end result, it is argued, was that the state ceased to regulate the dissolution of marriage, turning its attention instead to adjusting the situation between the parties (see, for example, Eekelaar 1984).

The 1969 Act is characterised by Lewis as a 'liberalisation' of divorce law (1999: 35). However, in contrast to the developments in the early part of the century, this liberalisation is not additionally characterised in terms of facilitating the external imposition of morality. In fact in this instance, it is argued that reform reflected a

major shift in thinking about the extent to which the law could, and indeed should impose certain standards of behaviour in intimate relationships.

The idea of greater limits being placed upon the capacity and role of law is one that is echoed by Dewar. He suggests that the legislation reflected the assumption that there was relatively little law could do to stop married couples from divorcing. Instead the 'best' that could be hoped for was that marriages could be brought to an end with minimal distress and upset:

> 'the decision to divorce was to be the private decision of the parties, and the law's role was to assist them to effect that decision while acting as go-between or arbiter between the parties as to its terms: a sort of social service in other words.' (1998: 477)

Although it is therefore arguable that the Divorce Reform Act does represent a shift towards a more pragmatic (or legal realist) stance, the theme of moral regulation continues to retain a very real presence. The movement towards no-fault divorce has been characterised as part of a process of deregulating family law (for example, Glendon 1981). However, commentators such as Lewis (1999, 2001) suggest that this characterisation of the legal changes is somewhat problematic. Indeed whilst accepting that there has been a rethinking of the moral underpinnings of the law, whether this should really be classed as deregulation is subject to some questioning.

It is argued that the debate in the 1960s was decided largely in favour of the view that it was very difficult to impose a prescriptive moral code in what was an increasingly secularist and pluralist society. However, it does not necessarily follow that the space that is effectively opened up, is filled by simple de-regulation. Indeed it is suggested that the view that morality should come from within, was actually accompanied by a shift in the nature of regulation. The nature of that shift is identified as a movement away from judging the affairs of the couple according to pre-set criteria, towards ensuring that they take responsibility for sorting out their own affairs (Lewis 2001).

The view that liberalisation does not equate to de-regulation also derives support from Smart (1984). She notes that the 1969 Act did herald an end to punishing those individuals who fell short of the ideal of one life-long, monogamous, heterosexual relationship by labelling them guilty of a matrimonial offence, and imposing financial and emotional hardships. However, it is argued, that the result was not a liberalisation of individuals from the institution of marriage or its 'regulatory effects' – in fact one aim of the legislation is identified as bringing people back into conformity, through the legitimisation of their previously illicit relationships. Consequently it could not be said that the family was any less regulated by law:

> 'the law has facilitated a shifting of persons around different family groups and has, in the process, averted a large-scale dissent from legally controlled marriage. Moreover it has legitimated an increased surveillance over families, particularly where there are children, through welfare agencies. What might otherwise be understood as a 'reform', or a break with previous practices, can in consequence be seen as a continuation of modes of regulation over sexual and reproductive relationships through the agency of marriage.' (1984: 56)

In a subsequent work this position is reiterated – indeed the 1969 reforms are identified as marking a shift away from traditional methods of controlling family life through restriction and limitation on movement and change, towards regulation through the provision of directions for that movement and change (Smart: 2000). Much of the discourse that surrounded the reform process (particularly that articulated by politicians), characterised divorce as a process by which individuals could leave miserable relationships in order to start new legitimate ones. As Smart observes: 'Quite simply, the solution to the divorce problem was seen as (re)marriage' (2000: 16). This interpretation is reinforced by Freeman, who describes the Divorce Reform Act as, 'an unconscious adjustment to the acceptance of serial marriage' (1971: 179).

Concluding comments

The 1960s witnessed something of a challenge to the previously dominant universal moral framework. Enacted against the backdrop of a more appreciative moral and policy discourse, the Divorce Reform Act of 1969 arguably represented a step away from the idea that divorce required a corrective response. However, although the law was no longer solely based on denial and restriction, the concept of matrimonial fault was retained. The end result was that divorce law thus retained the potential, at least in theory, to operate as a punitive moral code. Furthermore, the fact that the courts also retained a duty to scrutinise the alleged marital breakdown, meant that intimate relationships (and thus arguably individual morality) remained a legitimate site of state regulation.

It should be emphasised that despite the greater appreciation of moral pluralism that emerged during this period, the legislation continued to adhere to the concept of the traditional family based on marriage. Indeed it has been argued that the 1969 Act was undertaken with the specific aim of making family law more fit for the purpose of upholding marriage, by acknowledging changes both in behaviour, and in ideas about marriage (Lewis 2001). It is therefore suggested that divorce law also continued to operate as an external moral code in the sense that it aimed to encourage remarriage – although, in comparison to the use of the matrimonial fault doctrine, this 'regulatory' aspect was directive rather than punitive in nature.

The 1960s also continued to be characterised both by a concern for the greater societal good, and a conviction that divorce law did have a role in its achievement, or at least in its support. For example, 'Putting Asunder' had described part of its remit as investigating whether, 'there is any amendment or reform of that law we can recommend in the interests of the nation as a whole' (Archbishop of Canterbury's Group 1966: para. 7). In addition, both 'Putting Asunder' and the Law Commission's 'Field of Choice' accepted the argument that the fault doctrine was acting to prejudice (public) morality – a stance that arguably suggests an acceptance, at least implicitly, that the law has a role in 'supporting' that morality.

This was a perspective that was to prove to be extremely enduring, as will be illustrated by the discussion contained in the next chapter.

Chapter 3

The History of Divorce Law

Part 2: 1970 – 1996

Introduction

This chapter 'picks up' the story of the development and reform of divorce law following the enactment of the Divorce Reform Act of 1969. The various developments that took place during the 1970s, after the Act's implementation, are briefly considered. The reform 'process' that spanned the late 1980s and 1990s is then explored. As with the preceding period, the chapter is interested to examine the extent to which legislation and policy has sought to correct and / or support the decision to leave a marriage, and the ways in which it has attempted to achieve those aims.

The reform process ultimately culminated in the enactment of the Family Law Act in 1996. The 1996 Act has proved to be an extremely controversial piece of legislation, and has prompted a huge amount of debate both within and beyond the academic community. The chapter therefore goes on to conclude with an examination of this Act - the perspective(s) that it adopts, the aims that it seeks to achieve, the regulatory techniques that it employs, and some of the discussion and commentary that it has generated.

The 1970s: the focus on practicalities

The Divorce Reform Act 1969, with its mixed regime of fault-based and no-fault divorce, came into force on 1 January 1971. The Act formed part of a decade that has been described as one in which the 'axes of regulation' of divorce shifted away

from morality towards economics (Smart 1984a). It is certainly the case that much of the development on the legislative front during the 1970s, did focus on the financial aspects of marital breakdown. The Matrimonial Proceedings and Property Act 1970 and the Matrimonial Causes Act of 1973 provide two examples of this. A detailed exploration of these developments is beyond the scope of this work. However, one effect of the former was to codify the law governing the financial consequences of divorce, whilst the latter introduced a somewhat 'new' approach to financial issues - a duty was placed upon the courts to exercise their powers in order to place the parties in the financial position that they would have been in had the marriage not broken down (section 25). The developments thus seem to be reflective of an apparent reorientation of law towards the practical consequences of divorce.

A further example of this shift is evidenced by the 1974 Report of the Finer Committee on One-Parent families (Cmnd. 5629). Established five years earlier, in 1969, the Committee's terms of reference included: considering the 'problems' of one-parent families in society; examining the 'nature' of any 'special difficulties' encountered by the single parents including the extent to which they were able to obtain financial support when it was needed, and 'the ways in which other provisions and facilities are of help to them'; and considering how and to what extent it would be 'appropriate' to provide one-parent families with further state assistance (Committee on One-Parent Families 1974: para. 1.1).

One part of the resulting Report emphasised the importance of improving the provision of, 'machinery and services…to deal realistically with the practical problems resulting from marriage breakdown' (ibid.: para. 4.282). The Committee's stance can thus be seen as representing something of a contrast to that of the Denning Committee in the 1940s. Whereas Denning placed great emphasis on the preservation of the marriage tie, and on attempting reconciliation where the possibility of success existed, Finer concentrated instead on the issue of 'conciliation'. The objective of such conciliation was not to effect reconciliation, but rather to provide the following assistance to the parties:

> 'to deal with the consequences of the established breakdown of their

> marriage...by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyer's fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.' (ibid: para. 4.288)

The Committee did investigate whether divorce actually constituted the right vehicle for promoting reconciliation. The conclusion reached, was that the court's ability in this regard was limited. Instead it was suggested that the advantages offered by the family court in this context, should be seen primarily in terms of its capacity to help families, 'to make the best decision and reach the best solutions over the whole range of problems which the fact of breakdown produces in the circumstances of each particular case' (ibid.: para. 4.313). The Report continues:

> 'The welfare service associated with the family court will remain – as will, indeed, the judge – alive to any sign that a reconciliation is possible, and will in such a case take the steps...seen most likely to procure it. But it will remain alive, also, to the policy of the law that dead marriages should be decently buried. Decency in this connection involves diagnosing the practical needs of the family at the time when the court assumes control over the relationship between its members and their affairs...encouraging the victims of the family breakdown to wind up their failure with the least possible recrimination, and to make the most rational and efficient arrangements possible for their own and their children's future'. (loc. cit.)

Finer also tackled the issue of whether law had any place in trying to control marital behaviour. It is argued that the Committee's statement that the burden of supporting lone parent families would inevitably fall on the state, effectively constitutes a recognition that government could not seek to directly control reproductive and marital behaviour (Kiernan and Lewis 1996). With specific regard to the Committee's decision not to make marriage and divorce more difficult, Lewis (1996) suggests that the grounds for that decision were that such legislation would have the inevitable effect of imposing a stricter code of familial conduct and sexual morality on the poorer sections of society. Such a result would be inappropriate in a liberal democratic state.

This theme of the apparent 'withdrawal' of law from the immediate sphere of intimate relationships, is also reflected in amendments made to the divorce process itself during this period. Whatever the relationship between divorce law and the divorce rate – and this has been the subject of considerable debate - the implementation of the Divorce Reform Act 1969 was followed by an increase in the number of divorce cases. Indeed the number of decrees absolute granted in England and Wales rose from 74,000 in 1971, to a figure of 127,000 in 1976 (Central Statistical Office: 1987). One result of this increase was a growing concern over the burden that divorce cases were placing on the Legal Aid Fund. For example, in 1976 it was found that costs had risen by £7.5 million when compared to the preceding year (Eekelaar 1991: 27, referring to the 25th Reports of the Law Society and the Lord Chancellor's Advisory Committee on Legal Aid, 1976, (HC 629)).

In June of 1976, the Lord Chancellor announced that a procedure, initially introduced in 1973 for certain divorce cases in which no children were involved, would be extended to all undefended cases. Under this 'Special Procedure', instead of orally presenting divorce petitions to a judge in the presence of the petitioner, they would now simply be read by a Registrar. Provided the judge was satisfied that the conditions for a divorce were met, a certificate would then be issued on the basis of which a divorce must be granted. This was subject to the proviso that where children were involved, an appointment should be made in order for the petitioner to meet with the judge.

The introduction of a universal Special Procedure in 1977 thus constituted, in part, a response to the financial difficulties of the mid 1970s, and the need to cut the legal aid budget. An additional factor in the equation is identified by Cretney (2000), who states that the sheer appetite for divorce necessitated the transfer of the process for dissolving a marriage into an essentially administrative one. He suggests that the result was thus that by the mid 1970s, courts were barely concerned with whether or not a marriage should be legally dissolved. Instead their concerns were focussed on financial matters, and on parenting arrangements.

Discussion

At the end of the 1970s the focus of law, in the sense of legal regulation, had shifted towards the consequences of and practicalities surrounding divorce. As the Family Law Sub-Committee of the Law Society stated:

> 'the important decisions are no longer about the rights and wrongs of the spouses' behaviour in relation to the decree of divorce, but rather those that relate to children and the division of family resources.'
> ('A Better Way Out',1979: para. v)

Arguably one result of the developments was a greater vesting of responsibility, at least with regards to the breakdown of the marital relationship, in the parties involved. As Davis and Murch note:

> 'In terms of the state's responsibility to safeguard the exit from marriage, we have witnessed the gradual triumph of the liberal position. This is reflected in the shift of focus away from the matrimonial offence, first towards an examination of whether the marriage is truly at an end, but subsequently to an almost *laissez-faire* attitude to the award of the divorce decree.' (1988: 13)

This shift in attitude not only had implications for the 'role' of law, but also for that of the lawyers working within the process. One example of this is provided by Davis et al (1982), who argue that the impact of the special procedure, combined with the withdrawal of legal aid from undefended divorces, effectively created a system which although providing 'comparatively generous' support for legal representation in ancillary matters, did not allow solicitors to give 'adequate' time to their divorcing clients. The kind of role envisaged by the residual Green Form system of funding was little more than a series of administrative tasks – thus scope was not really provided for solicitors to consider the social and emotional aspects of divorce with clients, explore possibilities for reconciliation, or act as sounding boards for clients who might be unsure as to how to proceed.

Whilst the 'law on the books' retained the compromise framework of corrective and appreciative elements originally established in 1969, subsequent practice effectively undermined those corrective (moral) elements with regards to the marital relationship itself. Indeed it is arguable that the traditional ideological premise of divorce law itself was undermined (Eekelaar 1991). The removal of any real investigation into the facts alleged to have caused a marriage to break down can be said to have had the effect of reconstituting the state of marital relationship within the private sphere, and out of the direct public (in the sense of official) gaze. Indeed it is argued that the 'eclipse' of the matrimonial offence doctrine post 1971, represents an abandonment of the attempt by divorce law to spread normative standards in favour of what is described as the, 'simple instrumentality of no-fault divorce' (Eekelaar 1987: 133).

Certainly the perception of divorce law as evolving into an essentially administrative process is one that is reiterated by a number of commentators. For example, Freeman (1976) regards the introduction of the Special Procedure as effectively heralding divorce on demand. It is true that section 1(3) of the Matrimonial Causes Act 1973 (into which the 1969 Act was consolidated) does impose a duty on the court, 'to enquire so far as it reasonably can into the facts alleged.' However, the effect of the universal Special Procedure was arguably to signal the end of any real attempt to adhere to this duty. Indeed, even prior to the introduction of the Special Procedure, significant question marks had been raised as to the extent to which the duty was actually being carried out. For example, in their study of three county courts during the course of 1973, Elston et al (1975) found that the majority of hearings (85%) in undefended divorces lasted less than ten minutes. Following the withdrawal of legal aid and the introduction of the Special Procedure, the granting of a decree thus appeared to become the inevitable consequence of filing a divorce petition (Freeman 1976).

During this period, the reorientation in the focus of legal regulation in order to deal with the reality and consequences of marriage breakdown, appears to reflect both a recognition of the limits of the law when it comes to intimate relationships, and also the constraints and context of broader society and the circumstances within which

law has to operate. It is arguable that this pragmatic concern with the consequences of divorce, is largely a product of the 'self-interest' of law and state – in particular the need both to reduce the cost of the legal process itself, and to safeguard the financial position of wives on divorce thereby minimising their reliance upon the state. However, the resulting concentration on the necessity of getting certain practical rather than 'moral' jobs done, does seem to represent something of a movement towards, to use Rodger's (1995) vocabulary once again, a more 'family policy' type of perspective.

The 1980s: the movement for reform

During the 1980s, much of the legislative focus continued to be directed towards issues of finance and property. However, what also began to emerge during this period was the question of children within the divorce process. Initially that visibility arose primarily within the financial 'arena'. For example, in 1981, the Law Commission recommended that when dealing with financial matters, the provision of adequate financial support for children should be given overriding priority by the courts (Law Com. No. 112). A watered down version of this recommendation was subsequently enacted by the Matrimonial and Family Proceedings Act 1984 - a new section 25 was inserted into the Matrimonial Causes Act of 1973, requiring the court to give first consideration to the welfare of any minor child of the family.

However, at this time, concern also began to crystallise around the perceived impact of divorce law and process on the individuals involved. It was felt that the necessity of alleging 'fault' aggravated conflict which, in turn, had the potential to impact adversely on the parties – in particular on their children. One result of these growing concerns was the appointment, in 1982, of the Matrimonial Causes Procedural Committee under the chairmanship of Mrs. Justice Booth (Booth Committee). The Committee's task was to recommend reforms that would (a) mitigate the intensity of disputes; (b) encourage settlements; and (c) provide further

for the welfare of the family, having regard to the desirability of simplifying procedure and saving costs (Matrimonial Causes Procedural Committee 1985: para. 1.1).

The view of the Committee was that the 'problem' with the existing system, lay primarily in the fact that law required spouses think in terms of wrongdoing and blameworthiness from the outset. The result was thus a perpetuation of images of innocence and guilt. On the evidence presented to it, Booth recognised that a minority did support the retention of the fault concept, principally on the basis that its removal would lead to a denial of justice. However, it was felt that there was a general acceptance that, in the majority of divorces, both parties were at fault to some degree. The idea that marriages broke down because one party had committed a matrimonial 'offence' was thus regarded by most as 'unreal':

> 'divorce should be truly and not merely artificially based upon a no-fault ground...the concepts of guilt and innocence which have ruled our divorce laws, and consequently our divorce procedures, since 1857 should no longer have any part to play.' (ibid.: para. 2.9).

Commenting on the impact of the Special Procedure, the Committee noted the extent to which the ability of courts to comply with their statutory duty to investigate the facts alleged had been circumscribed: 'In the great majority of cases the court is quite simply in no position to make findings of fact' (ibid.: para. 2.17). Consequently the Report's recommendation was that this duty of inquiry be removed. Instead the court should merely be required to satisfy itself on the evidence, as was the situation in other cases of civil litigation (ibid.: para. 2.18).

For the Booth Committee, the way forward was perceived to lie in allowing parties to present a joint petition for divorce in all cases. In order to avoid the distress that might be caused by the reciting of marital details in such a document, the Committee suggested that no such details should be given. Instead the parties would simply state that they agreed that one of them had behaved in such a way that the other could not reasonably be expected to live with him or her. Underpinning this approach was the belief that 'primary decision-making responsibility should

rest with the spouses themselves'. The role of the law was thus constructed principally in terms of providing the parties with, 'all necessary help in deciding for themselves what should happen to their children, their property and their marriage' (ibid.: para. 3.2).

The Law Commission

The Law Commission subsequently took up task of divorce law reform, and the issues that had been raised by Booth. In 1988, following continued criticism of the existing system, a Discussion Paper entitled 'Facing the Future' was published with the aim to both 'discuss and inform' (Law Commission 1988 (HC 479): para. 6.5). One interesting aspect of the Paper, lies in its clear reiteration of those objectives of a 'good' divorce law originally outlined in 1966 - namely 'the support of marriages which have a chance of survival', but also 'the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead' (ibid.: para. 3.1). However, on the question of the mechanisms by which those objectives could be best achieved, the 1988 Paper took a somewhat different view from that of its predecessor.

The Commission outlined a number of 'problems' with regards to the existing law. These included the allegation that it was guilty of failing to support marriage through an inability to prevent parties from obtaining a speedy divorce. The retention of fault-based facts was also highlighted as generating hostility. The end result was thus a much more painful process for all of those involved, little or no scope for reconciliation, conciliation or the re-negotiation of relationships, and a potentially detrimental impact on the nature and quality of relationships post-divorce (ibid.: paras. 3.48 – 3.49).

The current law was also criticised for its failure to recognise that divorce was not, 'a final product but part of a massive transition for the parties and their children' (ibid.: para. 3.50). The Commission felt that it was crucial both for children, and for their parents, that this transition be as smooth as possible. This was underpinned

by the belief that the child's adjustment to divorce was largely dependent upon how his or her parents adjusted to the situation, and on the quality of his or her relationship with each parent after divorce. The Commission thus concluded:

> 'Although divorce law can do little actively to this end, it can and should ensure that the divorce process is not positively adverse to this adjustment. As Lord Hailsham has said, "though the law could not alter the facts of life, it need not unnecessarily exaggerate the hardships inevitably involved". There seems little doubt that the present law is guilty of just this.' (loc. cit.)

With this in mind, the Paper reviewed a number of possible options for reform. The Commission recognised that it was working against a particular social backdrop that inevitably affected those possibilities – indeed reference was made to the academic literature exploring changes in expectations, attitudes and behaviour towards marriage and the family (Law Commission 1988: paras. 2.19-2.21). In the light of these changes, which were found to include a greater acceptance of both marriage breakdown and cohabitation, it was felt that imposing a more restrictive divorce system would not succeed in bolstering stability in marriage (ibid.: para 5.3). The reintroduction or retention of fault-based grounds, together with the introduction of an inquest into each marriage, was also rejected as being impracticable and likely to exacerbate an already difficult situation. In addition, divorce on the basis of either mutual consent or unilateral demand was thought to provide no safeguard against 'hasty' applications that failed to properly consider post-divorce arrangements (ibid.: para. 6.2). In view of the importance placed by the Commission upon both promoting co-operation between the parties, and recognising divorce as a process, two proposals thus emerged as the 'most realistic'. These comprised divorce following a period of separation, and also divorce after a period of transition in which the parties would be given time and encouragement to reflect, and to make arrangements for the future (ibid.: para. 6.3).

Having considered these two options, the Commission put forward a scheme that was based upon the latter. Either or both parties would be able to initiate divorce proceedings simply by filing a statement alleging that the marriage had irretrievably broken down. This would then initiate a 'transition' period intended for the

consideration of future arrangements, and for reflection. At the expiry of that period, either party would be entitled to apply for the divorce decree. The main advantage of such a scheme was felt to be that 'it combines the logical position that the only true test of breakdown is that one or both parties consider the marriage at an end, with the need to provide a period for reflection and transition' (ibid.: para. 5.25). It was also hoped that the process would encourage parties to focus on their continuing obligations to children, and would enable them to make arrangements for their children's future in as civilised a manner as possible.

The 1988 Paper concluded by inviting comments and responses with regards to this proposed scheme of no-fault divorce. Following a subsequent period of consultation, the Commission published its final recommendations for reform in October of 1990: 'Family Law: The Ground for Divorce' (Law Com. No. 192). Like its predecessor, the report again endorsed the 'original' 1966 objectives of 'good' divorce law, although this time a caveat was added as to the difficulty of actually achieving them in practice. Interestingly, however, the 1990 document also saw the addition of the following new objectives:

> 'to encourage so far as possible the amicable resolution of practical issues relating to the couple's home, finances and children and the proper discharge of their responsibilities to one another and their children.'
>
> And:
>
> 'to minimise the harm that the children may suffer, both at the time and in the future, and to promote as far as possible the continued sharing of parental responsibility for them.' (Law Commission 1990: para. 1.6)

The Commission recommended that irretrievable breakdown of marriage should remain the sole ground for divorce. Such breakdown was, however, now to be established by the expiry of a minimum period of one year. The purpose of this period was to allow for the consideration of the practical consequences of divorce, and for parties to reflect on whether the breakdown was really irreparable. It was hoped that such a framework would provide time for the parties to adapt emotionally, socially and psychologically to their new circumstances; encourage them to focus on the practical consequences of divorce; provide the potential for

increased use of conciliation and mediation; increase the chances of reconciliation; and foster more constructive and co-operative attitudes towards the future of any children (ibid.: paras. 3.29-3.33).

Discussion

The approach adopted by the Law Commission to the issue of divorce law reform, has been characterised by several commentators as pragmatic. Lewis and Kiernan provide one example of this interpretation, describing the 1988 Discussion Paper as talking, 'pragmatically of the need to make procedures more consumer friendly' (1996: 381). This construction of law as some kind of consumer product that reflects the needs or demands of its market did previously emerge in the Commission's 1966 Report, 'Field of Choice'. However, what is notable during this later period, is the increasing reference to parties as 'consumers' of divorce. The fact that more people were divorcing than had been the case in the 1960s, was seen to enhance the need to take the 'consumer interest' into account 'in any evaluation of the present law or proposals for reform' (Law Commission 1988: para. 2.22). Indeed prior to publishing the 1990 recommendations, a public opinion survey was commissioned – the aim being to identify the views of the public regarding both the present law and the acceptability of various different bases for divorce, and to probe possible models for reform in more depth. The ensuing results were subsequently published in Appendix D to the Commission's 1990 Paper.

The policy debate conducted by the Commission has also been described as one characterised by a preparedness to admit that it would be extremely difficult to turn the clock back, especially in respect of divorce (Kiernan and Lewis: 1996). This (re)orientation of perspective was welcomed by Walker, who suggested that the aim of a good divorce law was actually to ensure that marriages were dissolved 'as painlessly and with as few negative consequences as possible.' In his view, the proposals advanced by the Commission thus constituted a 'significant step forward' (1991: 235).

The Commission's view was that the concept of matrimonial fault was unable to provide either a moral framework for marriage, or to act as a restraint on the behaviour of spouses. One reason for this was the perception that law was an unsuitable mechanism for carrying out the task of 'engaging in the complex and sensitive factual and moral judgements which would be necessary accurately to reflect the relative blameworthiness of the parties to a marriage' (Law Commission 1990: para. 3.6). In addition, it was suggested that restricting divorce to matrimonial fault constituted an, 'illogical and ineffective means of trying to achieve acceptable standards of behaviour' (ibid.: para. 3.7). For example, if the 'guilty' spouse actually wants a divorce, then the law will not operate to restrain his or her behaviour. Furthermore, by granting that spouse a divorce, law is actually failing to provide a sound moral framework. It was also suggested that allowing the innocent party to punish the guilty by refusing a divorce was unlikely, in reality, to change that 'guilty' behaviour (loc. cit.). The end result was that the role of the courts was thus constructed in much more limited, and indeed more pragmatic, terms:

> 'There are always going to be some fights and the courts are there to resolve them. But the courts should be kept to their proper sphere of adjudicating upon practical disputes, ensuring that appropriate steps are properly taken, and enforcing the orders made. They should not be pretending to adjudicate upon matters they cannot decide or in disputes which need never arise.' (Law Commission 1990: para. 2.21)

This pragmatic framing of divorce law has generated some criticism. For example, O'Donovan (1993) compares the position adopted in 1988 and 1990, to that of the 1960s. In the 1969 Divorce Reform Act, fault had been retained in the facts to be elicited as evidence of marital breakdown – this was despite the fact that the Law Commission had stated in 1966 that breakdown was not justicable. In 1990, the Commission justified the removal of fault in terms of encouraging parties to look to the future, rather than the past (Law Commission 1990: para. 3.3). However, O'Donovan argues that end the result was actually an abandonment of law's claim to establish truth and blame in the divorce arena. This abandonment, in turn, is seen

to constitute, 'part of the retreat of family law from an overt moral discourse, because the notion of shared, or imposed values is being abandoned' (1993: 112).

O'Donovan also goes on to suggest that it is possible to read the Law Commission documents as placing limits on the power of law when it comes to human relationships. Indeed it is suggested that the 1988 text is underlain by resignation – in essence a retreat from the earlier confidences of 1966 in the basic 'goodness' of individuals. Whilst recognising that this retreat might be welcomed as making way for pluralism, she argues that it actually takes place in the name of pragmatism – essentially because the law is being manipulated, because it generates antagonism, and because of the impossibility of allocating blame between spouses. The fact that reform is proposed for such reasons, rather than in the name of liberty, is regarded as a cause for criticism.

O'Donovan also asserts that the idealism originally present in the 1966 document is now marked by its absence. 'Justice' has become defined in terms of procedure rather than substance, and the whole debate is described as having shifted from idealised standards and a confident morality, to consumer led options and efficiency: 'The language of 1966 contained humanitarian values…The language of 1988 is of efficiency, pragmatism and resignation' (1993: 111). In a similar vein Deech (1990) is also critical of the move to make the law more realistic, and of the ongoing shift in emphasis from the moral dimension of marriage to the personal and economic.

Continuing the trend that characterised the 1970s, the legal attention during this period did remain focussed primarily on the practical consequences of divorce. However, the reforms proposed during this period also arguably offered a reconstruction of the state role in divorce – indeed the proposed introduction of a no-fault framework can interpreted as the formal abandonment of the attempt to directly impose an external moral code through divorce law. This can be said to represent an increasing awareness of the limitations of law, particularly when functioning against a backdrop of fragmented social and moral values, and is thus reflective of a more legal realist type of perspective. However, this must be

balanced against the fact that policy makers were not completely abandoning the idea of creating a coherent and consistent moral law (Law Commission 1990: para. 3.40) – and certainly the various proposals put forward for reform continued to emphasise the importance of, and their support for marriage.

It has been suggested that the proposed new model of divorce had no standards of justice, no adjudication and no responsibility – 'only a norm of negotiation' (Deech: 1990: 244). Other commentators would, however, disagree (see, for example, Lewis 2001). Indeed it is arguable that what was actually present within the reform proposals, was an expansion of a more 'indirect' form of regulation - namely the encouragement of personal responsibility when relationships break down, and the formal provision of space within the divorce process in which to exercise it.

The 1990s: the 'process' of reform

The Government response to the Law Commission's proposals for reform came three years later with the publication of a Green Paper, 'Looking to the Future. Mediation and the ground for divorce', in December of 1993 (Lord Chancellor's Department, Cm. 2424). The aim of the Paper was articulated as seeking to canvass opinion on the recommendations made by the Commission. In particular, opinion was sought on the question of mediation, and the possibility of incorporating it into the divorce process.

The Green Paper did make several changes to the process originally envisaged by the Law Commission. One such change was the suggestion that the process should commence with a single first 'port of call' for those wishing to initiate proceedings (Lord Chancellor's Department 1993: para. 8.1). It was envisaged that this would comprise a personal interview incorporating the provision of advice on marriage guidance, information about the divorce process and possible alternative options, and an explanation of mediation and how it might work (ibid.: paras. 8.2, 8.7). Following this meeting, the period of reflection and consideration would be initiated

by either or both parties filing a statement to the effect that the marriage had broken down. This was to be accompanied by statements of circumstances containing information about children, property, and finances. Within twelve weeks the court would then be required to hold a preliminary assessment, in order to monitor progress on the arrangements being made, and to make any necessary orders. At the expiry of the period, either or both parties would then be able to apply for a divorce order.

The publication of the Green Paper initiated yet another period of consultation, which finally culminated in the publication of the Government's detailed proposals for reform in its 1995 White Paper, again entitled 'Looking to the Future. Mediation and the ground for divorce' (Lord Chancellor's Department, Cm 2799). Echoing previous proposals, the irretrievable breakdown of marriage was to be demonstrated by the passage of 'a period of time for reflection and consideration' – this would enable couples 'to address what has gone wrong in the marriage', and to explore 'whether there is any hope of reconciliation' (Lord Chancellor's Department 1995: para. 2.34). However, in the event that the parties decided that reconciliation was not possible, they were now to be required, 'to make proper arrangements for living apart **before** a divorce order can be made' (loc. cit.).

The minimum period for reflection and consideration was fixed at twelve months. In addition, the personal interview envisaged in the Green Paper was replaced by the requirement to attend a group information giving session prior to commencing proceedings. The function of this meeting was described in the following terms:

> '[to] introduce parties to the benefits of marriage guidance and counselling, provide information about the emotional, psychological, financial and legal aspects of separation and divorce, and its effects on parents and children. The session will provide an important opportunity for the objectives of family mediation to be explained, and the benefits of couples working together on future arrangements to be described.'
> (Law Commission 1995: para. 2.37)

Discussion

Much of the 1993 Green Paper appears to echo the kind of thinking that underpinned the Law Commission's stance on divorce reform. For example the Lord Chancellor, who had strong personal views regarding the value of the institution of marriage to both individuals and the wider community, stated in his foreword:

> 'The breakdown of marriage is a serious problem. Seeking to prevent the breakdown of marriages is an objective which goes far beyond the scope of the law. The divorce law is intended to deal with the situation in which a breakdown has taken place.'

He then continued:

'I believe that a good divorce law will support the institution of marriage by seeking to lay out for the parties a process by which they receive help to prevent a marriage being dissolved. If that is not possible it should seek to eliminate unnecessary distress for the parties and particularly for their children in those cases where a marriage has broken down irretrievably.' (Lord Chancellor's Department 1993: iii)

The proposals contained within the Green Paper have been described as based upon the following:

> 'a clear-sighted view that marriage and family life have been changing and that there is little that public policy can do to transform deeply entrenched social changes; it can only facilitate the best possible outcome for failed marriages.' (Rodger 1995: 14)

It is true to say that one objective accorded to the law by the Green Paper, was that of saving saveable marriages – indeed much of the emphasis of the proposed new process was placed upon the identification of such marriages, and on couples seeking appropriate professional help (see for example, Lord Chancellor's Department 1993: para. 1.10). However, the role of law was not extended to save 'irretrievable' marriages, and there was a clear focus both on the impact that law and procedure could have on the conduct of divorce and the parties involved, and on the provision of effective mechanisms to protect those parties and adjust their financial and living arrangements (Lord Chancellor's Department 1993: paras.1.3,

3.4). It is thus argued that the Paper constituted the recognition of the 'real movement' in family life – in effect it was seeking to consolidate in law what is already happening in practice. As such it has been regarded as representing a prime example of 'family policy' (Rodger: 1995).

Adopting what is arguably a 'related' perspective, Lewis makes the point that the Green Paper accepted that the basis for marriage was love, and that a decision as to whether this was present or absent could only be made by the parties themselves (2001: 92). It is, however, important to recognise that this acceptance did not equate to the emergence of some kind of 'moral free' system. For example, the Green Paper continued to assert that part of the function of law was to, 'reflect the seriousness and permanence of the commitment involved in marriage' (Lord Chancellor's Department, 1993: para. 3.1). Consequently it should ensure that, 'divorce is not so easy that the parties have no incentive to make a success of their marriage and, in particular, to overcome temporary difficulties' (loc. cit.).

With regards to the subsequent White Paper, some commentators have noted the beginnings of a real shift away from the position of the late 1980s and early 90s. Lewis (1996, 2000, 2001) does make the point that although the Lord Chancellor did initially announce his intention to introduce measures that would cut the rate of divorce, what was ultimately proposed in the White Paper was actually a collection of measures that were designed to make divorce more amicable and less expensive. However, Davis finds evidence of more regulatory (in the sense of directive) and idealistic elements within the proposals for compulsory information sessions, the period of reflection, and the encouragement of mediation. Indeed, as he comments: 'I am left with the feeling that this White Paper seeks to improve on human nature and to fly in the face of social change' (1995: 556).

Both the Green and White Papers concluded that the support of marriage must continue to be one of the objectives of divorce law. It has been argued that the approach adopted in order to achieve that objective, amounted to a 'new formulation'. Certainly the abandonment of a fault-based law of divorce was confirmed. However, alongside that abandonment, government also created a space

for both reconciliation, and for ensuring that people took responsibility for settling their own affairs:

> 'The optimism that morality would come from within and that people would behave in a caring fashion towards one another gave way to public effort to impose structures and conditions to ensure that they did so' (Lewis 2001: 93).

Thus Lewis argues that although attempts to enforce an external moral code were being abandoned, the same could not be said for regulation. Indeed it would seem that the more individual morality of personal responsibility was increasingly becoming the focus of the new regulation.

The parliamentary 'stage'

The government proposals, in the form of the Family Law Bill, were introduced into the House of Lords on 16 November 1995. Over the following months the Bill was changed quite significantly, largely as a result of Conservative backbench opposition in both Houses (Read and Marsh 1997). Those changes included the insertion of a set of 'general principles', which constructed a framework within which the courts and all others using the Act would be required to operate (section 1). These principles included that the institution of marriage was to be supported; that the parties to a marriage that had irretrievably broken down were to be encouraged to take all practicable steps to save the marriage; and that where a marriage had irretrievably broken down it should be brought to end with minimum distress to parties and children, and with questions dealt with so as to promote as good a continuing relationship between parties and their children as possible.

Certain procedural changes were also made to the divorce process. These included the extension of the period of reflection from twelve to eighteen months, where children under the age of sixteen were involved (sub-sections 7(11) and (13)). In addition, attendance at an Information Meeting was to be required at least three months prior to the initiation divorce proceedings (sub-section 8(2)). That meeting was now to include the provision of an opportunity to meet with a marriage

counsellor, and would involve encouraging parties to attend such a meeting (sub-section 8(6)(b)).

These various changes made to the original Bill were result of intense debate within both Houses, much of which focussed on the state of marriage and the need to reduce marital breakdown. A consideration of the debates falls beyond the scope of the present discussion, however, it is useful to provide a 'snapshot' of some of the issues involved. An example of one 'side' of the debate is provided by Lord Jakobovits, whose stance was underpinned by the perception that the state of modern marriage was a 'national disaster area' causing economic, social and moral harm. Reflecting the views of a significant number of members, he made the following statement:

> 'It may be argued...that it is not the business of government or Parliament to give moral advice or to urge people how to conduct themselves in their private lives. I reject that argument as false and irresponsible. It is the business of government to protect society from any looming peril, especially when it is liable to be of catastrophic proportions, as the breakdown of marriage now is.' (House of Lords debates, 30 November 1995, c. 721)

In a similar vein, Baroness Young argued that marriage constituted the basis of society, and that the effect of removing fault from the divorce process was to undermine individual responsibility. Indeed the removal of fault was regarded as an active discouragement on the part of the state of, 'any concept of lifelong commitment in marriage, to standards of behaviour, to self-sacrifice, to duty, to any thought for members of the family' (ibid.: c. 733).

Situated on the other 'side' of the debate were Parliamentarians such Lord Marsh, who refuted the idea that legislators should be providing some kind of moral lead:

> 'It is all well and good to be superior about modern trends. On an issue such as this, it is the will of people in a democracy that is changing. The whole institution of marriage is changing. By all means, provide, as the Bill does for those who need it, assistance towards the least bad agreement between the parties...But divorce will continue to be a major fact of modern life. Modern marriage is different from the past because the participants are

different.' (ibid.: c. 757)

Earl Russell highlighted a related issue –namely the limits of the law when it came to the issue of the breakdown of intimate relationships. It was argued that the belief that marriage breakdown could be prevented by tightening the divorce laws, 'is a bit like thinking that one can prevent death by postponing the funeral; it is altogether aimed in the wrong place.' For the Earl, the test of a good divorce law was thus not to be measured in terms of whether it produced more or less divorces:

> 'It will be whether when a marriage has broken down it minimises conflict; provides orderly arrangements for protecting the interests of children; settles money and property; and is generally an orderly procedure.' (ibid.: c. 713)

During the Parliamentary stage, the view that law could guide people in the right direction, in essence that it could determine a particular type of marital behaviour became increasingly vocal. Indeed Lewis (2001) suggests that much of the debate surrounded the question of whether legislation should once again seek to impose a moral code of behaviour. She does, however, ultimately characterise the legislation that was finally enacted as part of a trend across the latter part of the twentieth century away from the attempt to directly impose such a code on divorcing spouses. Nevertheless, what is also undoubtedly present through this policy process, is a concern by the state to promote those values in which it believes.

The Family Law Act 1996

The Family Law Act finally received the Royal Assent on 4th July 1996. As a result of the various changes made during the reform process, the final 'form' of the legislation contains various elements of 'duality'. As mentioned in Chapter 1, the Act is characterised by a basic duality between supporting and ending marriage. An additional aspect of that duality is also identified as lying in the Act's attempt to enforce the obligations of the parties in their capacity as parents through the provisions for conciliation whilst, at the same time, attempting to buttress marriage

– and thus enforce obligations in the parties' capacity as spouses - through the promotion of reconciliation and marriage-saving. Therefore, in essence, an attempt is made to utilise the arrangements for no-fault divorce in order to save marriages (Lewis 2000: 117).

One further 'aspect' of the 1996 Act's duality has been located in the fact that the legislation places a premium upon marriage as the traditional basis for family, whilst also recognising the importance of ties between parents and children. A 'tension' thus exists between the traditional and the biological family:

> 'the provisions of the Family Law Act negotiate the fine line between reinforcing 'traditional' family values…at the same time as it restates and underlines the salience of both biological 'traditional' practices and acknowledging the trend (demographic and attitudinal) of departure away from those practices.' (Day Sclater and Piper 2000: 146)

It is argued that the aim of the Act was to incorporate both the idea that the decision to divorce should be that of the couple involved, and that the parties should take responsibility for sorting out their own affairs, particularly with regards to the children (Lewis 2001). Indeed Cretney suggests that under the Act, the court's role in deciding whether the status of marriage should be terminated was to be reduced to little more than that of, 'a gatekeeper checking that the correct boxes have been ticked on the form'. The 'staple' business of the divorce court would thus comprise dealing with the financial consequences of divorce, determining how children's interests could be best promoted, and possibly mediating in grievances (2000: 5). However, the extent to which parties are actually entrusted to make decisions about the state of their marriage, and to which the exercise of personal responsibility is genuinely privatised, is subject to some debate.

A tension between autonomy and coercion is present within the Family Law Act. For example, it attempts to both modify behaviour, and to informalise or de-legalise divorce through mediation. As highlighted earlier in the discussion - and reflecting a trend that runs through the reform process - the Act seeks to give parties greater

autonomy, whilst at the same time seeking to influence how they use it. As Eekelaar argues:

> 'People are at one and the same time treated *as if* they were independent, responsible and autonomous individuals, with the freedom of choice that entails, but because of the persuader's belief that he holds the only rational view, they are effectively denied any real choice at all' (1999: 388).

In a similar vein Dewar states: 'Gone is the idea that the role of law is to facilitate and implement private decisions: it now seeks to influence the decisions themselves' (1998: 477).

A preference for regulation by individual initiative is perhaps unsurprising in a state based on liberal principles (Dingwall 1992, 1994, Dingwall and Eekelaar 1988, Dingwall et al 1984). However, Lewis (2000) suggests that the question of how to enforce that responsibility or initiative has actually had the effect of opening the way for what Mead calls a 'new paternalism'. The child support legislation is identified by Lewis as one example of this new paternalism operating within the family arena. It is true that the Child Support Act of 1991 does represent a more 'direct' form of intervention, something which similarly characterises much of Mead's (1997) own discussion of social policies that attempt to reduce poverty and other social problems through directive and supervisory means. However, it is arguable that his 'vision' is also applicable to the 1996 developments in divorce law and process.

Mead defines 'paternalism' in terms of 'supervisory policies' (1997: 2). Inherent within paternalistic policy, is regulation in order to improve the enforcement of 'norms'. Policies are directive in the sense of telling people what they are supposed to do. Paternalism also asserts the authority to judge individual interests. Society claims the right to tell its dependents how to live, whilst the enforcement of society's interest in good behaviour is deemed to also serve the interest of the individual. The assumption here is that government can know and serve individuals' interests better than they would themselves (1997: 5). In essence therefore Mead's vision is about setting standards and helping people to function

'better' – elements of policy which are, as will be discussed in the remainder of this chapter, undoubtedly present within the Family Law Act framework.

The 'nature' of regulation

The 'nature' of the regulation present within the Family Law Act has formed the subject of some discussion. At one 'level', the exercise of personal responsibility is enforced through the imposition of explicitly coercive mechanisms – in the sense that there are a number of procedural steps that must be complied with. However, whilst the regulation imposed by the Act has been described in some quarters as mild, Davis presents the legislation in a somewhat different light:

> 'it marks an extension to, rather than a retreat from, the presumption that divorce law can of itself reinforce commitment to the marital tie. In the time limit it imposes…in the various obligations under which it places people, this is the first reversal of the liberal trend for 150 years. For once the rhetoric of divorce law and its attempts to bolster the institution of marriage actually has some meaning potentially.'
> (Speaking as discussant at: 'Commitment: Who Cares?' One Plus One Marriage and Partnership Research conference, 25 October 1999.)

Another regulatory 'aspect' of the legislation is highlighted by Dewar and Parker. The opening sections of the Act, which contain a statement of principles and objects exhorting parties to end their marriage and sort out their affairs by the most amicable and cost-efficient means possible, are identified as an example of modern family law attempting to speak directly to the families themselves. One possible reason suggested for the adoption of this new style of law, is that politicians 'seek to use legislation to perform an overtly educative role' (2000: 139). The law's role is thus to state the principles which, in turn, set the tone for mediation or negotiation: 'Private ordering is encouraged against a backdrop of clearly articulated principles of public policy which dictate how that bargaining freedom should be used' (loc. cit.). As Davis observes of the 1996 Act: 'It is clearly an attempt to offer a guide to

the individual conscience' (One Plus One Marriage and Partnership Research Conference, 25 October 1999).

Inherent within the Family Law Act, is also the ideal or model of the 'good' divorce (see, for example, Collier 1999). Parties are not simply left to choose their own moral standard of outcome at the point of relationship breakdown, but rather are bombarded by messages as to how they should behave. The nature of those messages is that the 'responsible' individual will reflect on whether his or her marriage can be saved, behave in a reasonable and conciliatory manner, engage in mediation, maintain contact with children after divorce, and meet any financial responsibilities towards his or her children and former spouse.

Dewar regards this as an example of the 'expressive' function which, he argues, is increasingly being performed by family law – in effect law is concerned to 'radiate messages' that are designed to influence behaviour in a general, rather than any detailed way (1998: 483). He suggests that the Act is thus best understood 'as setting out general aspirations on how to divorce well' (loc. cit.). Adopting a slightly different perspective, Collier argues that divorce has effectively been 'reconstituted' within the Act 'as a *different kind* of 'governable space'' (1999: 260-1). For example, an individual attending the compulsory information meeting, is regarded as, 'entering a point of regulation a central aim of which is to foster a particular consciousness on the part of the subject attending' (ibid.: at note 20). A certain kind of good divorcing subject (in particular a 'good parenting' subject) is thus brought into being – in this instance one who will make a 'better' decision about the ending of their marriage.

The divorce 'process'

If the focus of discussion is now shifted to the various elements that comprise the new divorce process, it is possible to consider the nature of regulation within the Family Law Act in some more detail. For example, the information meeting has been described as,

> 'a strikingly direct form of regulation of social relations in which the law can be seen as supporting the authorisation of some explicit normative strategies by those counsellors and other 'experts' of human relationships who have so vigorously promoted what has been described as the new consensus around family law policy enshrined in the FLA.'
> (Collier 1999: 259).

It is argued that divorce is conceptualised, and indeed is experienced, at both the collective and the individual level. Much of the debate surrounding reform may have been premised on the paramountcy of the welfare of the child, however, 'within this regulation of the family by government' a particular notion of the 'good society' has also been generated. The construction of family members as the objects of intervention has effectively been fused both with ideas of what are desirable family forms, and with the production of 'social health':

> 'Men and women, notably in their role as parents, have been subjected to identification, explanation and disposition as 'familial' individuals via the production of normative criteria around what constitutes a 'good' marriage, good (enough) parenting and…what is, or should be, a good divorce.' (ibid.: 260).

This perspective contains echoes of Nikolas Rose's, 'complex apparatus of health and therapeutics'. It is argued that this has been assembled in the name of both social and personal well-being – it is concerned with the management of individuals, of the social body, and also of 'problems of living'. The make-up of this apparatus is described as comprising techniques of advice and guidance, which are then utilised by medics, clinics, guides and counsellors (1996: 37). As Rose goes on to argue:

> 'The lines between public and private, compulsory and voluntary, law and norm operate as *internal* elements within each of these assemblages, as each links the regulation of public conduct with the subjective emotional and intellectual capacities and techniques of individuals, and the ethical regimes through which they govern their lives.' (ibid.: 38).

The result is thus the construction of the actively responsible individual. However, as Rose notes – and this is something that can be seen with the Family Law Act - broader political and social goals are also 'translated' into the choices and commitments of individuals. Arguably parallels can also be drawn between Rose's 'medical' experts and the processes of mediation and marriage counselling within the 1996 framework. In both instances individuals are apparently exercising personal freedom and choice, however they are actually involved in situations in which they are effectively binding themselves to expert advice.

The information meeting, and particularly the extension of the information provided from legal principles, divorce procedures and marriage guidance services to include 'the consequences of divorce and the effects of divorce on children', has been identified as creating 'much wider scope for the use of value-based persuasion' (Eekelaar 1999: 389). Indeed it is suggested that, in view of the way in which the Law Commission's original proposals were subsequently developed, it is difficult to resist the conclusion that a desire 'to use the device of providing 'objective' information as a means of influencing behaviour' is at work (ibid.: 390).

The main purpose of the period of reflection and consideration was, in the opinion of the Law Commission, to ensure that a marriage had broken down irretrievably. However, within the 1996 Act, the function of that period was constructed somewhat differently. Eekelaar makes the point that the effect of legislating on the basis envisaged by the Law Commission, would have been to signal that the state was willing to simply stand by and accept the situation as it was resolved between the parties. This, he suggests, was not the kind of message that the Government wished to convey. The end result was therefore a structure:

> 'avowedly viewed primarily as giving the parties an opportunity to explore the possibility of holding back from divorce, and making them aware that they are expected to use it in this way.' (1999: 389)

The duality of personal responsibility and regulation is particularly evident in the mediation arena. Within the reform process, mediation was often constructed in terms of party control and agreement – indeed this was frequently articulated as

constituting one of its main advantages (see, for example, Law Commission 1990: para. 5.30(iii); Lord Chancellor's Department 1993: para. 7.7; Lord Chancellor's Department 1995: para. 5.6). However, in certain quarters it is argued that this apparent privatisation of family law actually cloaks a continued intervention in, and supervision of families. In effect therefore one form of regulation is being exchanged for another (Bottomley 1985).

Eekelaar suggests that it could be argued that the very concept of mediation is a, 'manifestation of the phenomenon of government by persuasion' (1999: 391). Mediation was envisaged (at least by the Government) as a process that might save marriages, enable spouses to take responsibility for marriage breakdown, and encourage them to look forward to their future responsibilities. However, these do not necessarily constitute features that the mediators themselves would associate with mediation. Indeed the Government perception was of a process that would underline to parties just what their obligations were:

> 'Mediation was not simply a method of bringing parties to agreement; it was a further way of informing people about how they should have behaved, and should behave, and, through informing them about these matters, bringing pressure to bear on them to act in a 'responsible' manner.' (loc. cit.)

Studies of mediation have concluded that the agenda is often strictly controlled For example, mediators may create opportunities for certain options to be explored whilst disregarding others (Dingwall and Greatbach 1991). As a forum it may not always allow people to have their say in a manner that fits their own sense of justice (Richards 1994). Furthermore mediators are not invariably objective or neutral, in the sense that they may be operating with their own set of values. One example of this is provided by Piper's (1993) study of divorce mediation and parental responsibility. In this instance, mediator interventions were found to be guided by a very particular construction of parental responsibility held by mediators. This concept had the effect of limiting the agenda for discussion. Furthermore, mediator perceptions of both the 'problem' and the 'solution' were found to be of far greater significance than the opinions that were actually held by the parties themselves.

The 'efficacy' of regulation

This approach to regulation does prompt the question as to whether it is possible to either imbue people with legal principles to such an extent, or to present them with the requisite incentives to adopt them, that they will choose to constrain their actions in the required way (Dingwall et al 1984). The issue of whether the law actually has any direct impact upon behaviour has been the subject of considerable debate (for a summary, see Lewis 1999). Certainly one theme characterising Parliamentary debates on the Family Law Bill, was a belief in the ability of law to send messages to the members of society. Paul Boateng, Labour's legal affairs spokesman, provided one example of this view during the course of the Bill's Second Reading in the House of Commons:

> 'We cannot legislate for domestic virtue...What we can do, however, is to send important messages about what is valued in our society. We value families – the domestic relationship and the safety and security provided for children by families – and we must make it clear that we are not prepared to see the family continually eroded.' (House of Commons, 25 March 1996, c. 757)

It has been suggested that whether divorce law does, or indeed should be expected to convey any messages to the married, is something that actually far from clear (Schuz: 1993). Several commentators do, however, seem to assume that this is the case. For example, both Brown (1991) and Mears (1991) are of the opinion that law should be acting to stem the tide of divorce. According to Brown, the need is to, 'strengthen the moral base, not to erode it' (1991: 129). In a similar vein, Mears criticised the Law Commission's apparent move to make divorce 'easier', suggesting that this was 'the opposite of what was wanted' (1991: 237).

It is extremely difficult to establish the existence of any simple causal link between law and behavioural change. However, it is argued that a greater degree of agreement surrounds the proposition that the law does facilitate and legitimate particular types of behaviour (Lewis 1999). One view is that law provides a framework within which relationships and responsibilities are negotiated, and as

such possesses the potential to influence behaviour. With regards to children, it is argued that law sets the parameters of what is considered to be 'normal' in the way that they are cared for. Rather than merely representing something to which recourse is had at times of duress, the law affects daily lives. It is not possible either simply to 'opt out' of these legal parameters by adopting an unconventional lifestyle, or to assert law's irrelevance by choosing to ignore it (Smart and Brophy 1985).

In a similar vein, it has been asserted that law does affect how people think about their own relationships (Finch 1989). Again, with regards to the parent-child relationship, Piper argues that social concept of 'responsibility' underpinned by law, has become a 'strong normative tool for delineating socially acceptable behaviour' (1993: 5). Edwards and Halpern (1992) also suggest that the concept of 'parental responsibility' (which was introduced in the Children Act 1989, and is discussed later in the chapter) actually operates as a 'psychological device', to restructure thinking on family functioning. They argue that the perception is thus encouraged, both within the public mind and internalised by individuals, that it is the parents who are fundamentally responsible for the support and welfare of their children.

At what might be termed the more 'practical' level, questions as to the efficacy of 'regulation' centre largely on the conceptualisation of the good divorce, vis a vis the reality. As Collier observes:

> 'it does raise a number of questions about how a 'good divorcing' subject is being conceptualised and how, importantly, this relates in turn to what might be termed the 'lived experience' of divorce.' (1999: 261)

One set of questions surround the issue as to whether the reforms actually overlook the psychological realities of divorce. For example, it is suggested that the Act fails to address the need to revisit the past which divorcing people seem to have, in order to make sense of their experience: ''Looking to the future' may not be possible without first looking back, and the emotions associated with divorce are likely to continue to demand expression' (Day Sclater 1997: 424). Collier (1999) makes a similar point with specific reference to the information meeting. Indeed he argues

that pilots of the new procedure have indicated that a looking forward is encouraged just at a moment when many couples appear to be looking back to what went, or was going wrong with their relationship.

Collier also goes on to argue more generally that the changes that have taken place within both society and people's relationships do not fit with the vision of divorcing behaviour encapsulated in the legislation:

> 'The social process of individualisation, and the dominance of what we might call a form of 'rational, self-seeking confluent love' would appear to run counter to, if they do not fly in the face of, the normative model of the 'good divorce' in this regard.' (1999: 263)

Adopting a similar perspective, Mansfield et al emphasise the necessity for policies to be 'in tune with changing social attitudes'. Those attitudes are 'individualistic', and are 'characterised by independence and freedom of choice" (1999: 33). They argue that the evidence suggests that changes in social values and the material environment have resulted both in an increased acceptance of divorce, and an increased readiness to leave marital relationships that prove to be unsatisfactory. As the scope for policy intervention is largely determined by these social changes, that intervention is thus likely to be limited to providing information and accessible support to couples experiencing difficulties, rather than using legal barriers and financial penalties in an attempt to protect marriage. This view is reinforced by Maclean and Eekelaar, who argued that the 1996 Act was likely to make little difference to the drift of marriage into the private domain of individuals:

> 'At most, the procedural obstacles to divorce, in particular, the delay, can be viewed as an attempt to encourage, or create, for married people, a *social* obligation to live together for life which the legislators think they have, or ought to have, the *legal* obligation having been removed.' (1997: 11)

It is also suggested that the law cannot make individuals consider and reflect – indeed the most that it can do, is to provide the time and the institutional framework to encourage them to do so (Schuz 1993). Cretney arguably goes a stage further, describing the White Paper as 'seriously naive' about what is likely to happen during the period of reflection: 'some, at least, of those concerned are likely to

spend the time in the far more pleasurable activity of conceiving – necessarily illegitimate – babies. Some will spend the time exploiting their emotional or financial advantage; others will brood on their grievances' (1995: 303). Indeed in a subsequent work he suggests that what is happening, is actually the concealment of the reality that divorce is to be available at the unilateral wish of either party, 'behind a comforting façade of consideration, reflection and counselling' (Cretney 1996: 52).

The requirement that ancillary matters be resolved prior to granting an order for divorce, is also questioned as a mechanism for enforcing or regulating individual responsibility. As Cretney (1995) argues, an ongoing assumption within divorce legislation, is that the main issue to be decided is whether or not the marriage should be dissolved. This, he suggests, is 'completely false'. Similarly, Davis asserts that the view of divorce reflected in the 1995 White Paper presumes that the divorce decree is sufficiently important, 'to provide both stick and carrot to ensure that everything else falls into place' (1995: 564). However, he goes on to argue that this is not in fact the case – in essence the decree no longer possesses that central importance. The reality is that the status of being married or not married is no longer of such importance – it is certainly not as important as the practicalities of having somewhere to live and sufficient resources to live on: 'The decree is still important symbolically, but that is all it is, a symbol' (ibid.: 565).

Regulating parents

Within the family law framework it has been suggested that the parental relationship is taking over from marriage and divorce as the focus for legal and other forms of regulation (Maclean and Richards 1999). For example, Lewis (1999, 2001) argues that the effect of the process of law reform since 1969 has been to assume a degree of individualisation with regards to the parties in their capacity as husbands and wives, whilst at the same time increasingly putting in place measures that seek to regulate them in their capacity as parents: 'the focus [of regulation] switched from the relationship between adults as husband and wife, which had

become much more fluid, to their roles as fathers and mothers' (Lewis 2001: 94). The result has thus been a shift towards parenthood as a significant legal status (Maclean and Eekelaar 1997).

The Children Act 1989 represents a key development in this shift. The Act effectively re-defined the relationship between the state and the family with regards to child-care, welfare and parenting issues. Central to this redefinition, was the introduction of the concept of 'parental responsibility', which was defined as: 'All the rights, duties, responsibilities and authority which by law a parent of a child has in relation to the child and his property' (section 3(1)).

Parental responsibility has been described as representing the 'fundamental status' of parents (Bainham 1990: 208). Once acquired, either through motherhood or the procreation of a child within marriage (Children Act 1989: section 2), it cannot be simply lost or abdicated. Indeed it survives parental separation and divorce, and even the taking of the child into local authority care. In the words of Mrs Thatcher, 'parenthood is for life' (The Independent, 19 July 1990). The dominant message thus conveyed by the concept, is that the responsibility for children lies firmly with the parents (Eekelaar 1991a). The state is relegated to a residual role, dealing principally with irresponsibility. Indeed Eekelaar and Dingwall (1990) suggest that parental responsibility essentially represents a 're-packaging' of the commitment to the traditional authority of the family.

The concept of parental responsibility thus provides a 'space' in which parents are expected to exercise individual responsibility – indeed this 'space' is reinforced by the 'no order' principle in divorce. Following implementation of the Children Act, courts in divorce proceedings were no longer required to pass judgement on the arrangements proposed for children. Instead no order would be made, unless the court was positively convinced that it would be 'better' for the child to do so (section 1(5)). The emphasis is therefore on the parents to reach agreement between themselves. Indeed it is suggested that the assumption is that the interests of children on divorce are best served by facilitating and supporting parental agreements – although the legislation takes no position as to the nature and content

of those agreements (Bainham 1990). As Dingwall (1992) observes, what we have witnessed is thus the imposition of parental autonomy in the belief that this will be exercised for the benefit of children, combined with a circumscription of public powers to investigate and intervene.

This principle of parental responsibility has been identified as consonant with the then Conservative Government's general emphasis on self-reliance and responsibility (Douglas 1990). Inherent within this 'privatisation' of family life is also the belief that less regulation encourages more responsible behaviour (Eekelaar 1991a). This reflects the underlying psychological theory that the more freedom individuals are given, the greater the likelihood that it will be used wisely. As Kaganas (1995) observes, the liberal construction of parental responsibility is made possible by the assumption that parents are dutiful and responsible.

The faith placed in parents, reflects a particular set of beliefs that surround the biological fact of parenthood. Dingwall et al argue that what they term, 'the rule of optimism', is explicitly underwritten by the Children Act and the concept of parental responsibility. Their study of social work practice in child protection, reveals how the assessment of parents' moral character is conducted under this rule, which effectively requires staff to think the best of parents wherever possible. Social workers investigating incidents of child abuse and neglect, were found to employ the concept of 'natural love' to excuse parental behaviour, and consequently not to intervene in families. Parent-child love was constructed as an 'instinctual phenomenon, grounded in human nature' (1995: 87). As the authors observe, if it is assumed that all parents love their children as a matter of nature, it inevitably becomes extremely difficult to interpret evidence in a way that is inconsistent with that assumption. The rule of optimism effectively underpins the reading of parental behaviour as, 'honest, competent and caring' (ibid.: 89). In essence the fact of parenthood is taken as sufficient assurance that parents will naturally care for children (Freeman: 1992).

The Family Law Act was thus enacted against a (legal) backdrop where the nature of the relationship between parents, children and the state might best be captured by

employing the theory of trusteeship (Eekelaar 1987; 1989; Dingwall and Eekelaar 1984). This theory is explained by Dingwall, who asserts that the privacy of the family rests on the condition that the practice of its members will promote the general values and goals of a society. Where, however, this trust is breached, the family may properly become the object of intervention (Dingwall: 1994: 64). Although the 1996 Act does not violate the non-intervention principle contained in the Children Act, it does arguably provide 'guidance' to the parent-trustees as to how that trusteeship should be exercised when marriages breakdown. Thus in essence parental autonomy is being subjected to a form of regulation – the 'nature' of that regulation is discussed in the following section.

The post-divorce 'family'

One regulatory 'aspect' of the Family Law Act has been identified in the image of family and family life that underpins the model divorce. Assumptions incorporated into policy reflect and reinforce underlying ideologies of family life and functioning. The power of family imagery is underlined by Gubrium and Holstein's argument that family discourse and usage both creates and controls the social order that it purports to describe. The reality is that a family image may recommend particular social arrangements as 'normal' or 'expectable', whilst proscribing others (1990: 132). The fact that the use of 'family' not only describes what exists, but also promotes a sense of what 'ought' to be, renders it 'an important and ubiquitous social control rhetoric' (ibid.: 143). Consequently whilst the internalisation of family ideology may constitute a less overt strategy of regulation, it may nonetheless be an effective one. Indeed Rose (1990) recognises the 'permeability' of family to such normalisation and moralisation from outside – personalities, subjectivities and relationships are 'intensely governed' by social conventions, community scrutiny and legal norms.

One image of 'family' enshrined within the 1996 model of the 'good' divorce relates to the post-divorce family, in particular to the parent-child relationship. Indeed it has been suggested that policy developments, of which the Family Law

Act forms a part, invoke a strong normative order for family life post-divorce (Smart and Neale 1999). A number of commentators have noted that, since the 1980s, there is evidence within family law of an attempt to strengthen family ties across households after separation. Indeed it is further suggested that this attempt to preserve family ties after the household in which they were formed has ceased to exist, might actually be called, 'a new form of 'institutionalism'' (Dewar and Parker 2000: 133).

One element of this 'institutionalism' can be found in the Child Support Act's requirement that parents pay maintenance to children with whom they no longer reside. However, it is also necessary to look to the Children Act of 1989. The 1989 Act constructs a standard or expectation that (married) parents will remain jointly responsible for their children (Piper 1995). It is thus argued that the ethos of the Act effectively maps children's welfare onto the concept of the intact parental unit (Smart and Neale 1999). As discussed earlier, the Act created a situation where divorce no longer altered the legal relationship of parents to their children. In addition, the no order presumption on divorce was based on the assumption that mothers and fathers simply retained all the parental responsibility that they enjoyed during marriage (Smart 1999). The philosophy of the Family Law Act subsequently builds upon this ongoing and joint model of parenting. For example, section 1(c)(iii) sets out the general principle that marriages are to be brought to an end, 'in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances'. In a similar vein, section 11(4) states that when deciding whether to exercise its powers with regards any child of the family, the court should have regard to the general principle that a child's best interest will usually be best served by his having 'regular contact' with parents, and by 'the maintenance of as good a continuing relationship with his parents as is possible'.

Smart and Neale regard the Children Act as constituting, 'a clear attempt at social engineering…based on a vision of ideal post-divorce relationships' (1999: 31). The fact that parental responsibility survives divorce, is regarded as encouraging the extension of 'marriage-type' commitments beyond the duration of the marriage

itself. Indeed in an earlier work, Smart argues that what the law is actually attempting to do, is to effectively change marriage into an 'ongoing parenting arrangement' (1997: 318). Family law is thus taking a lead in promoting change, the direction of that change being a return to the so-called traditional (patriarchal) family of the 1950s.

Day Sclater and Piper (1999) suggest that rather than attempting to reverse social change and thus create a 'new' post-divorce family, the focus on life after divorce actually represents an attempt by the law to constrain and contain those changes that are regarded as threatening. By constructing a concept of 'family' that coheres around the child, the 1996 Act represents divorce as an opportunity for the re-organisation of the family – divorce is thus effectively 'normalised'. It is argued that the image that emerges from the Act is that of divorce as a transition in the life cycle of the family (Day Sclater: 1999). The concept of family is broadened so as to incorporate those who have experienced divorce, thus denying the presence of any kind of crisis within the family. In effect the construction of an image of a 'separated–but–continuing family' re-conceptualises or re-packages the family as a stable entity (Day Sclater and Piper 2000: 144). The Act can therefore be seen as responding to social and demographic change, and as attempting to contain the anxieties engendered by that change, through the utilisation of discourses that reconstruct the post-divorce family 'in a new non-threatening form' (Day Sclater 1999: 15).

As with the divorce process, the ability of law to enforce this kind of post-divorce family is also subject to some interrogation. One aspect that is remarked upon relates to the law itself, and to the apparent absence of any real mechanism by which to enforce the policy vision of continued parental responsibility. For example, Piper notes that the Children Act assumes the existence of some form of parental partnership, yet fails to provide the necessary 'legal nuts and bolts' to reinforce it (1995: 38).

In a similar vein, Bainham also argues that the 1989 Act fails to back up the philosophy of dual parenting – indeed the pre-existing parental veto under the

Children Act 1975 was removed in 1989, thereby allowing parental responsibility to be exercised independently. It is therefore argued that the resulting implication is that, 'joint *independent* rather than *co-operative* parenting, is the normative standard approved by society and reflected in the law' (1990a : 212). This argument sits somewhat uncomfortably with the stated aims of the reforms, which were ostensibly to encourage the practical involvement of two parents where possible. At the time of its enactment, Bainham suggested that the practical result of the Children Act would be to perpetuate the sole custody paradigm, albeit in a slightly different form. As demonstrated by Maidement's (2001) recent review of the relevant case law, it would seem that this suggestion has in fact come to pass. Conducted almost a decade after the Act's implementation, the study reveals that except in a small set of judicially created instances - involving exceptional or important decisions, such as changing a child's surname or school – decisions can be made by one parent acting alone.

A second aspect of the ability of law to achieve its 'ideal', relates more to the reality of the parenting experience. For example, Piper's (1993) study of divorce mediation revealed that the concept of 'parental responsibility' (in the context of custody and access post-separation) was founded on a particular construction of responsibility as joint. Yet this construction was rarely viewed, or easily accepted as joint by parents. Indeed she concludes that the Children Act does not support a form of continuing parenting that comprises parenthood in the sense of shared physical care. Instead what is provided is described as, 'a concept of parental responsibility which is divorced from actual care'. The law thus stands accused of ignoring the 'importance' of care(Piper 1993: 196).

The concept of 'care' is broken down by Tronto (1989), who draws a distinction between 'caring about' (intellectual concern), and 'caring for' (actual physical work of caring). Studies have suggested the existence of a divergence between the social reality of the parenting task, namely caring 'for' children, and the concept of parental responsibility constructed around the idea of 'caring about' them. One example of this, is provided by Maclean and Eekelaar's (1997) study of parenting across households. Here it was found that, amongst one hundred and fifty-two

formerly married parents, some form of parenthood continued to be exercised in over two-thirds of cases. In fact the authors remark that the continued exercise of parenthood showed a 'surprising resilience'. However, despite this, relatively little evidence was found of widespread 'joint' parenting or joint decision-making. Indeed only ten percent of those parents who remained in contact reported joint decision-making on some issues.

A subsequent study conducted by Smart and Neale (1999) also revealed a relative paucity of 'joint' parenting. In this case, the parenting practices of sixty divorced or separated parents were explored. Of those parents, eleven were 'solo-parenting', whilst thirty-seven were engaging in 'custodial parenting arrangements'. This was defined as a pattern of shared care where children lived primarily with one parent, and had a visiting relationship with the other. Decision-making, however, was vested in the residential parent alone. The remaining eleven parents could be described as 'co-parenting' – an arrangement that involved the sharing of both care and parental authority.

The study findings may partly reflect the pattern of parenting that existed prior to divorce. For example, the Maclean and Eekelaar study also found little evidence of widespread joint parenting whilst parents were living together. One reason for this may lie in the 'positioning' of fathers in the family. For example, an earlier study conducted by Backett (1987) found that fatherhood was mediated through the behaviour of the mother, and generally did not operate as an independent relationship with children. As mothers took the greatest share of responsibility for children, fathers effectively adopted a largely supportive role.

It is argued that the adoption of such a role is likely to have major implications for the way in which fatherhood can be enacted after divorce. If the father has relied on the mother in order to have relationship with his children, then the removal of that mediating element after divorce necessitates a re-negotiation of his relationship both with the children, and with their mother. Indeed as Smart argues: 'We might therefore argue that pre-divorce fatherhood is usually a poor training for post-divorce parenthood' (1999: 103).

Neale and Smart also question how, in the light of the diversity of post-divorce parenting and the complexity and fluidity of parenting arrangements, this sense of 'family' based on a collaborative, joint parenting project, can be preserved beyond the end of a couple's personal partnership or marriage. Their study revealed that a range of significant factors influence how parents negotiate parenting - from socio-economic to interpersonal relations, and from different narrative expectations about post-divorce life to shifting gender expectations about parenting abilities:

> 'This diversity and fluidity is…increasingly at odds with the model of post divorce family life that is promoted through the operations of the Children Act' (1997: 213).

The language of parental partnership also implies the existence of common goals – however, once divorced parents have separate lives, experience different opportunities and are faced with different problems (Kaganas 1995). In addition, Lamb et al (1987) observe that the impact upon mothers – namely the increased involvement of fathers with their children – may threaten the woman's prerogative in an area where her domination and power had previously been assured. A number of feminist writers also make the argument that 'family' is not a neutral term – that it in fact entails relationships of power, dominance and dependency (Brophy 1987). For example, Smart suggests that children represent an implicit site of power relationships linked to gender, in the sense that a father's relationship with his child necessarily entails a power relationship with the mother. The exercise of contact post-divorce will continue this power relationship or, at least, the possibility of it. Furthermore, and in a related vein, Brod (1987) questions to extent to which the new fathering 'ethos' actually represents an attempt to re-establish male power in the face of feminist gains by women.

The extent to which the gender-neutral parent enshrined within the legislation actually reflects the reality, is also the subject of some discussion. Mitchell and Goody (1999) suggest that this image is created and sustained both in demands that mothers should participate in the labour market, and in the hope that fathers will care for and nurture children. However, they question the extent to which the de-

gendering of parenthood fits with the experience of parenting: 'The realities of family life and the vicissitudes of parenting for most people remain, however, several steps removed from any such idea' (1999: 107). The majority of couples follow traditional child-care arrangements. The result is that for most fathers, fathering is thus something that they have to fit into a schedule dominated by paid employment (Smart and Neale 1999a). Even in dual earner families it is suggested that fathers generally remain peripheral as carers for children (Brannen and Moss 1987).

It is argued that the influence of gender in divorce is 'pervasive' (Carbone 1996: 181). Men and women approach 'family' in very different ways – mothers have a greater and qualitatively different attachment to their children – which has implications for divorce policy. Also the expectation that women will bear the primary responsibility for child rearing is identified as exerting a powerful influence on roles within marriage.

A slightly different perspective is advanced by Woollett et al (1991) who suggest that the interest in fathers parallels changes in the portrayal of men within the media – for example the 'New Man' presented by advertising as caring, tender, and involved with his children. However, whilst it may be said that the role of fathers in family life has changed over recent years (see, for example, James and Richards 1999), it is also argued that discussion of the 'new father' far outweighs evidence of his actual existence (Lewis and O'Brien 1987).

As Collier observes, 'the rhetoric and realities of paternal responsibility are by no means the same thing' (1999a: 946). It has been argued that research has demonstrated that children do better after divorce where they are able to have continuing and conflict-free contact with both parents , and indeed that this has necessitated a reconstruction of fatherhood (James and Richards 1999). However, the point is also advanced that it is beyond the scope of family law to radically transform structural differences in child-care (Brophy 1989). With regards to the legislative presumption in favour of contact, Maclean and Eekelaar argue that the evidence from their study reveals that the exercise of contact is related to the time

the parent in question had lived with the child before separating: 'In other words, it is an extension of an existing social obligation' (1997: 148). They express significant doubt as to whether social parenthood can thus be created by legal obligation. For example, the study also revealed how strongly the strand of parental responsibility comprised in the support obligation is resisted, when the liable parent is not acting as the social parent of the child in question. They argue that this suggests that any attempt to enforce 'personal relations' by legal means is unlikely to succeed.

Concluding comments

Whilst the regulation of parties in their capacity as parents is an important aspect of the Family Law Act, it is important not to overstate the nature of the shift towards the status and governance of parenthood. As the discussion has demonstrated, marriage continues to be an extremely central focus of the legislation. In addition, marriage remains important as both a legal status, and in terms of the obligations that it generates beyond the immediate divorce 'context'. For example the recent Law Commission Discussion Paper, 'Sharing Homes' (July 2002), identifies the need for law to recognise and respond to the increasing diversity of modern living arrangements. Nevertheless, marriage remains 'a status deserving of special treatment' (Law Commission: iv). Furthermore, with regards to the parties in their capacity as parents, the 1996 Act does continue to be subject to the non-intervention principle contained with in the Children Act (section 1(5)). Consequently in the absence of any dispute or problem, the courts will not intervene in the arrangements parents make for their children. The end result is that the situation is perhaps therefore best described in terms of parenthood representing an *additional* axis of regulation.

As this chapter has demonstrated, much of the debate that surrounded the Family Law Act was concerned with the issue of whether legislation should seek to directly impose a moral code of behaviour on divorcing spouses. Lewis (2001) argues that

ultimately the decision was taken in the negative. However, it is arguable that the 1996 Act did represent an attempt to regulate more directly what had previously become primarily private decisions about the state of ones marriage. Indeed this regulation took an external form through the imposition of a framework of procedural 'hoops' through which spouses were required to pass in order to obtain their divorce.

In addition to this greater scrutiny and direction of the divorce decision and consequent behaviour, the 1996 reforms also utilise a more indirect or 'internal' form of regulation. The model of the 'good' divorce enshrined within the legislation effectively offers a guide or set of performance indicators for divorcing behaviour – the hope being that parties will exercise personal responsibility and choice in order to attempt to match up to that ideal model.

Underpinning both the support accorded to marriage, and the model of the 'good' divorce, is arguably a re-emergence of Devlin's (1965) enforcement of common morality – albeit that that morality now has both an ideal and a 'default' standard. Furthermore, the paternalistic orientation of the legislation - in the sense that it both involves setting standards, and seeks to help parties to function better as spouses and parents – also represents something of a violation of Mill's 'harm principle'. Whilst this has arguably long been the case when it comes to children, inherent within the new divorce process is the idea that the government knows what is best for spouses. To utilise Raz's perspective, the legislation goes beyond the simple provision of options to positively coerce people into choosing particular ones.

As the historical review has demonstrated, the task of formulating law and policy to deal with the breakdown of intimate relationships is always going to be a difficult one. Indeed Lewis has argued that because the institution of marriage has long been viewed as the 'basic unit' or 'bedrock' of society that effectively imposes 'rational bonds on irrational sexual urges', the relaxation of divorce law has proved be both difficult and controversial throughout the twentieth century.

In view of its history, it is perhaps unsurprising that the Family Law Act ultimately took the form that it did – namely a combination of moral regulation and family policy, of correctional and appreciative perspectives, and of saving and ending marriage. As O'Donovan notes, having developed from an 'authoritarian, patriarchal and religious base', family law is inevitably 'faced with its tradition' (1993: 106). However, both the lessons of history and the assertions contained with academic commentary, suggest that it is difficult for law to achieve objectives that are more ambitious that simply ending marriages and dealing with the consequences. In view of this, one aspect of the empirical study therefore goes on to explore, in more detail, how the final form of the Family Law Act of 1996 came about.

Chapter 4

Methodology

The research project

As noted in the previous chapter, one aim of the empirical study was to explore how the complex policy approach adopted by the 1996 Family Law Act was reached. An examination of the policy process would, it was also felt, provide an illuminating snapshot of the state of current thinking at national level – in particular the different ideas, values, aims and objectives that are effectively 'in play' when it comes to formulating policy in the context of relationship breakdown and divorce.

My approach to the 'policy' question was, however, underpinned by the basic belief that the nature and content of policy cannot be understood purely through an examination of policy-making at the national level. Indeed, my own experience of legal practice brought home the extent to which those who work with law and policy effectively 'mediate' it for their 'clients'. Law is not simply about those rules that are 'on the books', but is also about the decisions and actions of those who work within them. This perspective derives support from Gewirtz and Ozga (1993) who argue that policy is about what individual groups do and say, within the areas of influence in which they move. Policy frameworks established by central government inevitably provide 'space' for those charged with delivering policy to engage in a process of negotiation, and to exercise discretion (Davis 1969). Consequently policy is not 'made' only by the centre, but also in the daily activities of those working on the ground. As Lipsky argues:

> 'public policy is not best understood as made in legislatures or top-floor suites of high-ranking administrators, because in important ways it is actually made in the crowded offices and daily encounters of street-level workers.'
> (1990: xvi)

The research project thus adopted a 'two-phase' exploration of policy-making. Whilst the first phase explored the debates and negotiations that surrounded the 1996 Act, the second phase went on to investigate the work that was being done on the ground with families and individuals who were either experiencing relationship breakdown, or who were at risk of so doing. One key aim of this second phase was to explore the extent to which the work being done at street-level actually meshed with the kinds of thinking and ideas that were framing national policy debates, and then to address any implications that the findings might have for the task of policy-making.

It is true to say that this national – local comparison is not a direct 'like-for-like' one. For most of the local workers, individuals and families experiencing relationship breakdown or divorce represented just one constituent part of a broader client base. Nevertheless, I would argue that the framework remains both a valid, and indeed a useful one to employ. At one 'level', street-level workers do deal with the reality of divorce, separation and relationship breakdown. Furthermore, at a 'second' level, they all have to operate within the broad arena of 'family policy'. The parameters and priorities of that family policy are largely drawn by the debates conducted at national level, of which the Family Law Act process constitutes an integral part.

The methodology employed by the project was that of qualitative interviews, conducted with selected individuals involved in the formulation and delivery of policy at the national and local levels respectively. It has been suggested that 'the most fundamental characteristic' of qualitative research lies in its express commitment to viewing events, actions, norms and values from the perspective of those people who are being studied (Bryman 1988: 61). Whilst there are undoubtedly issues surrounding the extent to which it is possible to really access the perspective of another individual, qualitative interviews were felt to offer the most appropriate method of exploring the experiences and ideas of the various policy actors.

The Family Law Act process is evidenced by a variety of documents. These include official reports, proposal documents and records of Parliamentary debates and committees. In addition, a range of promotional literature, mission statements and progress reports also provide evidence of local activities and policy. Whilst these undoubtedly provide an important resource for any study conducted in this area, I was keen for the project to try to 'get behind' the language and rhetoric employed by such documents. Interviewing was seen to provide the best forum for an in-depth exploration of the kind of thinking that underpins law and policy. This choice can, as Murphy et al have noted, be interpreted as: ' "If you want to understand what people do, believe and think, ask them".' (1998: 112)

The project was influenced by the grounded theory approach propounded by Glaser and Strauss (1967). It should be emphasised that the study does not make any claims to utilise grounded theory as a full research methodology. It does, however, draw upon some of the ideas and thinking that underpin the grounded theory approach – in particular the idea that research is best approached with an open mind, and that theory is generated from data - in order to provide a general 'orientation' to the research venture.

Selection

National policy-makers

The sample of national policy-makers chosen for interview was compiled through snowballing. At the outset of the project, and following personal introductions from one of my supervisors, three individuals who had been identified as key actors within the Family Law Act process were initially approached and asked if they would be willing to participate. At the end of these initial interviews, each participant was asked to suggest the names of any individuals who he or she thought it would be useful to approach for inclusion in the study. This process was then

repeated at the end of all subsequent interviews, thereby enabling the study sample to be gradually compiled.

The snowball technique, which essentially employs the use of what have been called 'experienced and knowledgeable experts' (Lincoln and Guba 1985) to help decide who should be included in the study, proved to be particularly useful in a situation where it was not easy to identify the members of the study population. Indeed the make-up of the family policy-making 'community' was not always evident from the various documentary sources. In addition, and as the study got underway, a further advantage of this approach to sampling also emerged. In addition to making suggestions as to who else could be included, several participants also offered to facilitate introductions, thereby easing access to what was effectively an 'elite' group of potential informants.

Snowball sampling has been criticised for the fact that the representativeness of the data collected, does depend upon the extent to which all of those individuals who should be studied exist in a complete social network (Burgess 1984: 57). The potential therefore exists for the opinions of those who do not form part of that network, to be omitted from the study. It is recognised that by employing this approach, the study has inherited the decisions of each individual participant as to who constitutes the next suitable interviewee (May 1993). It is, however, argued that this has not ultimately created a problem with the data collected.

There are two main reasons for having confidence in the study data. The first relates to the fact that although the chain of suggested informants did initially diverge to a degree - largely as a result of the particular 'interests' of participants, and their different positions within the policy process - as the study progressed what might be labelled a 'core' of names were repeatedly mentioned. Access was subsequently gained to the majority of these individuals. Secondly, it became evident during the course of the project that, in addition to those actors who occupied positions within the formal state 'apparatus', there were also a range of relatively defined interest 'groups' or constituencies who were inputting into the policy process. Examples of these interest groups included lawyers, mediators,

'marriage support' organisations and groups representing and working with children. In the light of this finding, steps were taken to ensure that representatives from each such group were also incorporated into the study sample.

The study sample thus included the majority of the 'key' actors within the Family Law Act process, and was broadly representative of 'make-up' of the national policy-making community. It can be argued that one potential 'gap' within the sample relates to the absence of any representatives from the Labour party. During the parliamentary stages of the process, the Conservative Government's small majority did mean that it was reliant upon the support of the Labour Opposition in order to get the legislation passed. As a result, the Opposition was thus provided with the opportunity to have a real input into the final form of the Act. Although approaches were made to the relevant individuals, access did not ultimately prove to be forthcoming. It is felt that this lack of access was probably attributable largely to the fact that these individuals are now holding ministerial posts. However, in view of the fact that Parliamentary records provide a good source of Opposition views, this absence is not regarded as problematic for the project as a whole.

Local workers

As a pre-requisite to making any selection decisions, a census was first conducted of those groups and organisations within the Greater Nottingham area, who were working with families and individuals experiencing or at risk of relationship breakdown. The choice of location was a partly pragmatic one. Firstly it was local to me, meaning that that it was convenient to access. Secondly, it is also a relatively compact area, resulting in less pressure being placed upon the limited resources of a PhD project. However, in addition, it also constitutes an ideal site for study in that its ethnic, socio-economic and demographic profiles almost exactly match the nation as a whole. It also has the further advantage of a long tradition of civic activity, with the result that there are a variety of different initiatives within the city which are working with families under a range of different circumstances.

A number of different sources were employed in the compilation of this local census. These included contacts within the School of Sociology and Social Policy, and the Centre for Social Work at the University of Nottingham; personal contacts within the local legal community; the directory of Marriage Support Services compiled by the Lord Chancellor's Department; local volunteer bureaux; local directories; and the internet.

The census revealed the existence of a range of groups and organisations that spanned the voluntary, statutory and private sectors. Some were operating within what may be termed the formal divorce process, whilst for others relevant services represented just one aspect of a broader programme of family-oriented work. Decisions were then made as to which organisations would be approached for inclusion within the study, with the underlying aim of attempting to access the range of different groups revealed by the census. The resulting sample can thus be described as a purposive one (Robson 2002: 265).

It did not ultimately prove possible to secure access to either the local judiciary, or to the specialist groups catering purely to non-Christian communities and ethnic minorities. However, subject to these exceptions, it is argued the sample was largely successful in securing its representative aim. Where access was successful, the selection of individual interviewees was then made on the basis of their ability to provide an overall perspective on their organisation, to be reflexive about its activities, and to assess the approach and thinking of the organisation within the context of the broader framework of national policy.

Data collection

The 'mechanics' of collection

Interviews with the national policy-makers were conducted between January and September of 2000, whilst those with street-level workers were conducted between

November 2000 and June 2001. In total thirty-one interviews were conducted – fifteen at 'national' level, and sixteen at the 'local' level. The interviews ranged in duration from forty-five minutes to two hours.

Gaining access to participants proved to be largely unproblematic. Indeed subject to the exceptions noted in the previous section, those individuals who were approached were generally very willing to participate. In the majority of instances potential participants were approached directly, although in some cases it was first necessary to approach a 'gate-keeper' in order to gain permission to access the particular informant. At the local level it was also not always immediately possible to identify the most appropriate individual to approach, with the result that it was again necessary to initially contact a senior gatekeeper in order to seek both advice on potential participants, and permission to proceed. Individual participants and gatekeepers (where relevant) were both provided, in writing, with brief details of the research project, an explanation as to why they and / or their organisation had been selected, what participation would involve, and some details about myself as the researcher.

The interviews themselves were conducted in a variety of different 'situations'. The original intention had been that all interviews would be conducted on a 'face-to-face' basis. However due to certain circumstances, which in one instance involved illness on the part of a participant, it proved necessary to conduct two of the 'national' interviews by telephone. The majority of the remaining interviews were conducted in private rooms at the interviewees' place of work. However, four participants (one national, three local) requested that the interview take place at their home. In addition, of the three national interviews conducted with 'political' constituents, two were conducted in tearooms within the Houses of Parliament, whilst one took place in the corridor outside the room in which a Select Committee of which the informant was a member was meeting.

At the start of each interview the participant was again given details of both the project, and how the interview data might subsequently be 'used'. They were also assured of confidentiality, and were asked for their consent for the interview to be

recorded. Recording did not prove to be an issue for the local participants however, in contrast, there was some notable reticence amongst a proportion of the national sample. The situation was generally resolved by offering respondents the opportunity to see the interview transcripts, and to make amendments to them. It was recognised that this surrender of control opened up an additional possibility of data 'management' on the part of the participants. In the event, however, only three participants actually chose to make any changes. The nature of those changes primarily involved grammatical amendments, and 'filling in the gaps' where the tape had proved to be inaudible. Consequently it is not felt that this ultimately had an adverse impact on the quality or status of the data collected.

One particular (national) participant steadfastly refused permission for the interview to be recorded. Notes were therefore taken during the course of the interview, and were then written up immediately afterwards. Note-taking in the interview situation is inevitably restricted both by the desire that it should not become intrusive, and by the interviewer's need to actively listen to the informant. It is thus inevitable that such a method cannot result in a full reconstruction of the interview. The necessity of taking more detailed notes also has the potential to impact adversely on the interviewer's ability to follow up issues arising during the course of the interview. However, from a pragmatic point of view, this was felt to be the only way to secure the participation of an individual who was clearly an important actor in the policy process. A similar approach, based on detailed note taking was also adopted for the two telephone interviews.

The interview

The interviews were semi-structured, and were supported by the use of an interview schedule. The schedule used during the 'national' interviews was initially compiled following a review of documents generated during the Family Law Act process. 'Local' interviews were supported by a schedule that was initially compiled in the light of the early analysis conducted with regards to the national data. Both

schedules were continually modified in small ways as the data collection progressed, and in the light of the resulting findings.

The rationale for choosing a semi-structured approach was that this allowed for the exploration of the topics and issues that were of interest to me as the researcher, whilst also retaining the flexibility to incorporate and probe those issues regarded as important by the interviewee. This flexibility is, it is suggested, essential if the researcher is concerned to explore the perspective of her interviewee. In addition, such an approach also supported a research design whereby the same questions were not asked of all the interviewees in each sample. Due to the range of different positions occupied by the participants, a more universal set of questions was deemed inappropriate. It was also felt that in order to achieve data that was comparable in key ways, it was sometimes necessary to ask different questions of the various interviewees.

The interviews were conducted in the manner of Burgess' (1984) purposeful conversation, rather than as an interrogative process. This ensured that sufficient flexibility was retained to enable the complexity and depth of issues to be uncovered. It also provided the opportunity to develop a dialogue about issues that were of particular interest to the individual participants. The topics covered during national interviews included questions about the participant's role in the Family Law Act 'process'; the connections between divorce law and marriage; the connections between divorce law and parenting; and what an 'ideal' divorce law might look like. Local interviews included questions about the nature of the work being done by local organisations; the methods that they were using; their assessments of outcomes; and what they thought about current national policy and thinking.

Data analysis

The 'status' of interview data

As mentioned earlier in this chapter, fundamental questions do surround the extent to which interviews really enable the researcher to access the perspective of his or her interviewee. Indeed, as Silverman (2000) notes, an important methodological issue concerns whether interviews are to be treated as giving direct access to 'experience', or rather as actively constructed 'narratives'.

Although the study did seek to access the experiences and views of its participants, the reality is that those experiences can only ever be 'recounted' in the interview situation (Mason 1996). Access is thus restricted to those interpretations and understandings that participants choose to reveal. The study is also underpinned by a perspective that regards the research interview as social interaction. As Murphy et al have observed, interview data should not therefore be regarded as 'more or less accurate reports of some external reality', but rather as 'occasions' when individuals are called to give 'accounts' of their actions, feelings or experiences etcetera (1988: 120). It is therefore suggested that rather than treating what is said in interviews as a literal description to be evaluated in terms of the likelihood that the respondent is telling the truth, they should in fact be regarded as accounts that are embedded in the circumstances of production.

It must therefore be recognised that the data produced by the study is inevitably subject to some very real limitations. The particular 'circumstances of production' faced by the project included the fact that it was dealing with national policy-makers - experienced policy practitioners, skilled in the art of presentation. Similarly, the local workers were frequently experienced in the art of 'selling' their services, albeit primarily in the context of pitching for funds.

The majority of participants were interviewed in a 'representational' capacity, thus creating the potential for resulting data to represent the 'official line'. In one sense this was unproblematic, as one purpose of conducting the interviews was to access

the views of the organisation or group represented. However, a further aim of the project was also to attempt to probe beyond the 'safe' official view. An additional 'circumstance' was the fact that at national level, the issue of divorce law reform is a highly politicised one. Where participants were 'in post', the potential thus existed for the safeguarding of future prospects to operate as restraint on the information that they chose to impart. Thus while the use of an interview based methodology did provide a valuable opportunity to probe behind the policy 'veil', this must be tempered by an awareness that the data generated remains something of a 'presentation'. The end result was therefore that analysis was ultimately conducted, to adopt Silverman's (2000) terminology, on the basis of data as narrative.

The 'process' of analysis

All the national interviews were transcribed in full prior to commencing analysis. Due to time constraints the tape recordings of the local interviews were listened to in full, and then selectively transcribed. Where a decision was made not to transcribe a certain section, notes were made on the transcript providing brief details of what had been omitted. This process ensured that it was always possible to return to those sections, if it was deemed necessary in the light of subsequent analysis.

The process of data analysis was conducted alongside those of data collection and interview transcription. In addition to assisting in the practical task of data management, it was felt that this would also allow for a more genuinely ongoing, reflexive and dynamic process. In particular, it enabled those findings that emerged from the initial stages of analysis to be used in order to review and refine the schedules utilised in subsequent interviews.

The mode of analysis that was used to examine the interview transcripts is perhaps best described as a variation on the 'thematic content analysis' outlined by Burnard (1991), and which is itself adapted from grounded theory and content analysis. The

process of analysis commenced with the national interviews, although a similar approach was adopted with regards to the local data 'set'. The first three transcripts were read, during the course of which notes were made on the general topics and themes within them. These transcripts were then re-read as part of a process of 'immersion' in the data – described by Burnard as the attempt to become more fully aware of the 'life world' or 'frame of reference' of the interviewee (ibid: 462).

Categories representing different topics and themes generated from this initial analysis, were then used as the basis for coding the transcripts. Each transcript was worked through, with coloured highlighter pens used to distinguish between each piece of the transcript that was allocated to a category. These categories were then subsequently used as the basis for coding all further transcripts. As the analysis progressed, the categories were kept under constant review, with amendments being made where subsequent transcripts revealed additional topics and themes.

Once all of the transcripts within the data set had been coded, a second copy of each transcript was generated. Each coded section of the interview was cut from this second copy, pasted onto index cards, and filed under the relevant category. To assist with identification, the cards were marked with the reference number or letter of the participant. Complete copies of all the transcripts were kept alongside the index cards, in order to ensure that the original context of the coded sections was maintained. Upon completion of the coding process, each category of coded data was reviewed. All of the sections were then filed together for reference when writing up the findings. During the writing up stage copies of the complete transcripts were kept to hand, in order to ensure that the process remained as close as possible to original meanings and contexts.

This process of manual coding was chosen in preference to a computer-based qualitative data analysis package for several reasons. Firstly, the relatively small number of interviews conducted within each phase of the project, meant that the data generated was physically manageable without the necessity of resorting to a computer package. Secondly, it was felt that a manual approach maintained 'closeness' to the data. The process of physically handling the interview transcripts

meant that both immersion in the data was quickly achieved, and that 'theoretical sensitivity' was maximised. Thirdly, the fact that each data excerpt was both highlighted on the transcript and available on an individual index card, greatly assisted in the exploration of the 'make-up' or 'content' of each conceptual category, and thus in the analysis process as a whole.

The 'position' of the researcher

Grounded theory is apparently based upon the belief that it is possible to approach the research task without any '*a priori* assumptions' (Glaser and Strauss 1967: 3). This suggestion that it is possible for the researcher to operate in a completely idea or value 'free' way is, however, rejected. To some extent, the values of the researcher are present within all research (Weber 1946). For example, it is only as a result of those values that certain problems or issues are initially identified as the subject for research, and are then studied in various ways. Furthermore, the conclusions and implications drawn from a research study are also unavoidably grounded, to some extent, in the moral and political beliefs of the researcher (Silverman 2000).

The perception of interview data as essentially interactional in nature, in addition to the interpretative nature of the analysis process itself, has the effect of requiring that my own position as researcher be factored into the analysis. The role of researcher is not that of a neutral data collector, but rather that of an active agent in the process of data generation and analysis. Data was inevitably shaped by how I was perceived by the study participants, by how I in turn perceived them, and by my own personal history, prejudices and biases.

I inevitably approached the study with a set of pre-existing ideas and assumptions. My personal experience of the professional legal practice of divorce, did mean that I regarded the idea of divorce being accorded a role in supporting marriage with some scepticism. However, despite these personal views, the belief that the researcher should be as open-minded as possible remained central throughout the

course of the study. An acceptance that interviews are always social interactions, carries with it the recognition that it is not possible to completely eradicate the influence of the researcher (Dingwall 1997). However, during the various interviews, I sought to adopt a position that can perhaps be best described as one of 'sympathetic self-presentation' (Gewirtz and Ozga 1993). This was found to represent a useful research tactic in that it both encouraged constructive dialogue, and minimised the extent to which my personal views were articulated within the interview forum.

There were, however, occasions on which my personal views were specifically sought by study participants. This created something of a dilemma. Textbook interviewing is presented as a one-way process of gaining answers from people, which is not supposed to include answering their questions (May 1993). However, such disengagement on the part of the interviewer cannot always be regarded as a 'realistic' description of what actually occurs in the interview scenario, but rather as follows:

> 'an idealized and wishful set of statements and prescriptions which we construct after the event and around our account of this. In other words what we present is a 'doctored' account...a researcher who behaves in textbook ways...would render them immediately noticeable because it would be so unnatural.'
> (Stanley and Wise 1983: 155-7, quoted in May 1993: 102)

A number of feminist researchers arguably go a stage 'further', suggesting that the researcher's self and views actually constitute an integral part of the research interview (for example, Oakley 1981, Cotterill 1992, Finch 1993). Although not dealing solely with female respondents, it was felt that aspects of the perspective adopted by these researchers were relevant and applicable to the present study. Whilst it was not felt that, as an interviewer, my own personal identity should be actively or positively invested in the interview 'relationship', the view was taken that to fail to answer respondents' questions or share knowledge and experience when asked was not realistic. Such failure would not be conducive to the aim of

establishing rapport, and ran the risk of damaging the interviewer- interviewee relationship.

During the course of this study I have not set myself up as an objective and scientific researcher out to uncover some kind of fundamental 'truth'. The interviews that form the basis of the project were social interactions, involving negotiation between the participants and myself. The accounts that they chose to share were inevitably selective, and were dependent upon both their perceptions of the situation, and indeed of me. It is also inevitable that the researcher cannot simply reproduce a participant's meanings. The process of selection and interpretation inevitably intervenes between the interview conversation, and the account that is subsequently given of that conversation. I have, however, made every effort to treat what was told to me in an even-handed way, and it is hoped that the study provides an account with which the participants would identify.

Chapter 5

The 'Problem' of Divorce

Introduction

Together with the next two chapters, this chapter presents the findings from the national phase of the empirical study. The purpose of this first 'data chapter' is to explore how the national policy-making community talk about divorce as a 'problem'. At one 'level', problem 'talk' was something that featured strongly across the interviews. However, the whole issue of problematisation does also represent a fundamentally important 'factor' in the policy process. Indeed the way in which the divorce 'problem' is constructed inevitably operates to structure the nature and content of the perceived solution, and thus the policy response that is ultimately proposed.

Perhaps unsurprisingly, the national policy 'community' spanned what might be termed a 'spectrum' of opinion. Situated firmly at one 'end' of the spectrum are what can be described as the 'Idealists'. For this constituency, divorce itself was considered to be something of a problem. On the issue of the divorce 'problem', the remainder of the policy community occupied what might be regarded more as the 'middle-ground'. This broad-based constituency – the members of which are termed the 'Progressives' – embraces a range of positions from those vested with idealist tendencies, through to policy-makers whose disposition can be characterised as relatively pragmatic. What, however, they all have in common is both a preparedness to engage with the reality of marriage breakdown, and a concern for the situation and welfare of the family post-divorce.

The third policy constituency discussed, is that of the 'Child Advocates'. Although situated within the broad umbrella of the Progressive constituency, with the result that some of their comments are included within the examination of that constituency, this group of policy-makers are also differentiated from the remainder

of the policy community by virtue of their child-focussed approach to the whole issue of divorce and divorce law reform.

The 'Idealists'

The Idealists constitute a clearly differentiated constituency within the policy-making community. They also represent a very vocal faction, who ultimately proved to be extremely influential during the Family Law Act process. Within the study sample the constituency comprised two politicians, both of whom can be described as being positioned on the political and moral 'right'.

Failure to implement the law

At the centre of the claims articulated by this faction about the state of current divorce law, is the gap that has developed between the law on the books and law in practice. For these constituents, one key problem lies in the fact that 'nobody bothers to implement' the 1969 legislation [11]. The judicial role apparently accorded to law in the Divorce Reform Act has, following the implementation of the Special Procedure, evolved into an administrative function that permits 'divorce by post' [12]. The end result is, in the words of one constituent, a 'farce'- but only in the sense in which it is practised:

> 'The present law is not a farce on the face of the Act, it's a farce in the way it's carried out.' [11]

The perception within this group, is that this failure to investigate the circumstances of marital breakdown has led to, 'divorce on demand...because people make up these unreasonable behaviours, or adultery or anything else' [11]. As has been demonstrated by the historical review of divorce law provided in Chapters 2 and 3, few would actually argue with this assessment. However, what is of interest, is the fact that implicit within this claim is, firstly, the belief that the decision to divorce

should not lie solely within the province of the individual parties. The marital relationship is constituted as a unique kind of intimate relationship, which effectively represents legitimate terrain for state scrutiny. Indeed as this constituent argues:

> 'You never had to get married. You don't have to now, you can just live with somebody. But if you choose to get married...by the state, the state has a right to say this is how you get unmarried, you know...you've chosen to come to us to get married, we have the right to tell you how to get unmarried.' [11]

However, within this constituency, there is also a pervasive unhappiness that the current lack of state scrutiny facilitates the manipulation of the legal process. The implication is thus that people are divorcing for no reason, or at least for no genuine one.

Underlying one constituent's unhappiness with the administrative function of divorce is the belief, 'that when people want to get divorced they should provide a reason for it' [11]. This is reflective of a particular, and indeed what is arguably an overly simplistic view of marriage and the reasons for its failure. Echoing the kinds of views that were articulated by the Morton Report back in 1965 (Report of the Royal Commission on Marriage and Divorce), the implicit assumption is that the reasons for such failure can be located and detailed. As this constituent goes on to assert:

> 'Well you just have to tell the truth you know, if you can't live together you say 'we've been separated for two years.' If you can't live together because your husband's beating you up, you say that, or vice versa. If you say you can't live with your husband or wife because they're having affairs you say that. I mean that's just the truth, you know you get over it...I suppose it's something we have honesty about.' [11]

For this constituent, one reason for holding individuals to public account as to the state of their intimate relationships lies in the belief that such public location and allocation of the causes of, and responsibility for marriage breakdown serves a valid psychological function. As he goes on to claim, there are those who 'feel very aggrieved' when it comes to divorce:

> 'I mean they may be quite difficult people, but they may think that they've behaved perfectly properly and their wife, or husband goes off, has masses of affairs you know, and then wants everything...leaves them...and they feel very bitter about it, because they feel they haven't had their day in court, they say nobody's interested, nobody's interested that I was trying to make this work, and that he or she ran off...and left me holding the baby literally.'

As marital failure is constructed in terms of guilt and innocence, the law is thus accorded a role in providing some psychological satisfaction to the 'innocent' party.

Law encourages divorce

The second constituent adopts a somewhat broader perspective in her construction of the divorce problem. For this constituent, the central issue is that the law has actually encouraged divorce. The fact that people are not required to provide a reason for divorce means that they 'just give up' [12]. The implication is that divorce has become the easy option, and has effectively undermined the marital commitment. The law thus encourages irresponsible behaviour in personal relationships, particularly it would seem on the part of women:

> 'I think it is quite wrong that a couple is married and...the man, or the woman, and it seems to be more often nowadays it's the woman who brings the divorce, you know simply says 'I'm absolutely fed up with you, I won't see you any more', and that's it.' [12]

This perspective is echoed by her fellow constituent who also makes the following claim:

> 'I think that...there is a bit of a feeling that, oh god I'll kick the old man out he's just a crashing bore you know, and...kick him out, and of course...I'll get the house, I'll get the children.' [P11]

Within these discourses, women are thus beginning to emerge almost as the villains of the piece. The suggestion is that divorce law and ancillary relief provisions have actually operated as a perverse incentive - encouraging divorce on the part of women, by providing an easy 'out' of marriage and a route to economic

independence from men. In essence divorce law has, in effect, exacerbated women's move towards individualism, and away from what might be termed 'familism'.

The impact on marriage

The second constituent also talks very explicitly about how divorce law, 'undermines the principle of marriage' [12]. At one 'level', part of the problem appears to be located in the fact that marriage is perceived to have effectively become little more than a low-status contract. For example, adopting a comparative perspective she argues, 'if you break the law, and if you break your promises on anything else, the law does investigate'. Although this is not in fact true as a matter of law, this claim is illustrative of a pervasive uneasiness with how marriage has evolved in modern society. One aspect of this uneasiness would appear to be located in the perception that the contractual structure of commercial and bureaucratic life is also increasingly becoming an ideology for personal life.

At another level, divorce law is also seen to undermine marriage in the sense that it is viewed as part of a wider system of law that is trying to equate marriage and cohabitation. Indeed it is alleged that the law is basically saying:

> 'okay well you know you've lived together for whatever it is,
> and it says you can inherit, you know you can adopt children, you
> can do everything as if you were married.' [12]

This constituent clearly believes that marriage and cohabitation are not the same, and indeed should not be treated as such. For her, an important aspect of the problem is that law is simply following social behaviour – in effect it is merely reflecting the fact that the way people form personal relationships is changing: 'The law is now moving further and further to blur the distinction between marriage and cohabitation, and they're saying…because everybody's doing it, it must be alright' [12]. Part of the problem is thus that law has simply become another consumer product, which is just responding to the demands of its market.

The constituent then continues to emphasise the point, arguing: 'the whole of the time what the law is doing is sending out a sequence of signals that...marriage is just one of a series of alternative options...and equally good.' As with the perception that divorce law has positively encouraged divorce, this claim reflects a belief in the symbolic power and function of law and its ability to actively shape social values. In addition it also reflects a very particular valuation of marriage as the 'proper' form of intimacy.

The impact on children

Another aspect of the divorce problem for this constituency, lies in the impact that divorce is believed to have on children. Strong, and indeed quite emotive statements are made by the constituents, alleging that 'society doesn't care at all about children' [12]. It is also suggested that, 'people have had a very casual attitude to becoming parents, to having children, and not looking after them' [11]. Divorce is therefore constructed as just one example of that casual attitude and lack of care.

The theme of irresponsibility, initially applied to the parties in their capacity as spouses, is thus similarly applied to the parties in their capacity as parents. Once again, the implication is that those parents who choose to divorce are acting irresponsibly. For example, one constituent makes the following statement:

> 'Now when I say parents don't care, the two parents get together and sort of say...'of course darling we both of us love you as much as we can, but we can't live together'. Now if they really loved the child, they would stay together.' [12]

The good or responsible parent is therefore regarded as the one that stays married. For this constituency the ethic of care of the adult self, in the form of leaving an unsatisfactory marriage, is thus constructed as being incompatible with the ethic of care for children.

Of course these discourses reflect a very particular view of the ethic of care for dependent children - or what might perhaps be termed their 'best interests'. Central to the claims made by this constituency, are constructions of children as the vulnerable victims of divorce:

> 'It's children who've suffered I think, they've suffered more than anybody else, because more and more children over the last thirty or forty years have been living away from their parents.' [11]

The welfare of children is equated with or, to use Smart and Neale's (1999) terminology, is 'mapped' onto the married parental unit. The end result is that divorce becomes effectively constructed as a bad thing for children per se.

Central to the construction of the divorce problem in this context, is the issue of father absence. Indeed divorced fathers are effectively constructed as absent fathers. One example of this is provided by a constituent who links the 'devastating impact' of divorce, to the following fact:

> 'a very large number of men who get divorced lose contact with their children, or have virtually no contact...particularly in the modern world where people live often in very mobile labour forces, people move apart you know.' [11]

It might be argued that the empirical reality does not invariably accord with this claim. However, both constituents were extremely dismissive of the suggestion that in some circumstances it might be better for the child to have two 'happy' parents who did not live together. Indeed one constituent specifically referred to research, claiming that it demonstrated: 'that in fact it was better...for children, even when the parents quarrelled all the time, for the parents to stay together...rather than to divorce' [12]. It is the fact of two parents, rather than the quality of parenting, that would therefore seem to be regarded as serving the child's best interests.

The problem of absent fathers is perceived, by both constituents, to be particularly acute where boys are concerned. For example, one constituent talks of, 'young boys particularly not having father figures about to provide...some kind of role model and authority' [11]. In a similar vein, the second constituent makes the assertion:

'When a divorce happens children almost certainly go to the mother...and the father, you know first of all does have access, and then you know gets less and less frequent...and there is a very real correlation...between the rise in crime and the rise in divorce, and I'm certain the reason is that there aren't fathers in the home. Boys need fathers. Well girls need fathers too, but boys particularly through a role model, and now you've got a whole lot of boys growing up, and they never meet a man doing a responsible job until they get to secondary school, about two or three years into that, and then they meet a schoolmaster.'

The argument is then continued:

> 'Boys play differently you know, and they've got to, you know rush about with them, and pummel one another and all that kind of thing, which I mean mothers up to a point could do, but...they don't do it naturally...And they enjoy it boys...horseplay and that kind of thing, and especially sports and things which I think is so good, and I think not to have that...is an absolute deprivation.' [12]

These discourses position children in a welfarist and protectionist framework. Divorce is essentially constructed as something that is done to children, and in which they are not perceived to be moral 'players'. It is also interesting to note that welfare is not constructed positively or concretely, in the sense of children's caring needs on a daily basis. Rather it is defined in negative or hypothetical terms – in essence as some kind of 'lack' (Neale and Smart 1998: 8). That lack is presented in terms of the absence of a male role model, playmate, and stabilising influence.

Arguably what can be seen within these discourses is therefore a mixture of both traditional and non-traditional views. The advent of the Child Support Act of 1991 has been identified as marking an ideological shift in the perception of the public interest in fathers taking responsibility for their children (Pickford 1999). This can, however, be regarded as the legal 'solidification' of the father's traditional role – namely that of providing financial support. For the Idealist constituency, fathers are no longer confined to the role of economic provider. As one constituent puts it: 'Children don't want money, they want fathers' [12].

The centrality that is accorded to the child's need for his or her father in this construction of welfare echoes Smart's (1991) observation that fatherhood has become central to the emotional and psychological welfare of the family. Fathers are identified as having emerged as a loving and nurturing force, as the producer of 'normal' children, and as the 'stabilising anti-delinquency agent' (1991: 485-486). In a similar vein, Collier (1995) refers to the new paternal masculinity as a presence that children 'need', and without which they will suffer.

What is thus being articulated within this constituency is almost the mirror image of Bowlby's (1951) 'maternal deprivation thesis'. It is interesting that this non-traditional role for fathers is emerging from an ideologically conservative constituency, although it could be argued that this simply represents another attempt to reassert the traditional, heterosexual, gender-neutral family. Indeed Segal argues that the 'new' fatherhood actually operates to serve the 'old' pro-family rhetoric. That rhetoric is one that, 'denies legitimacy to the choices or circumstances that have led people to live outside nuclear families', and which has been under attack from rising divorce rates (1997: 53).

It is also notable that fathers are not being blamed for their absence, nor indeed is that absence constructed in terms of irresponsibility. Whilst the woman who leaves her marriage is often cast as irresponsible, it would appear that the same cannot be said of divorced men who leave their children. Furthermore, and in stark contrast to this focus on fathers, mothers seem to have become somewhat invisible. This prompts the question as to whether this relative invisibility might be attributable to the fact that the caring role of mothers is something that constituents simply take for granted.

Underlying the 'reconstruction' of fathers and fatherhood is a pervasive anxiety about the state of masculinity in modern society. For example, Hearn (1998) makes reference to a school of thought that lone parent families fail to produce adequate sons and fathers. Certainly the views articulated by this constituency do seem to reflect the concerns advanced by commentators such as Murray (1990), Etzioni (1995; 1997) and Dennis and Erdos (1992) for whom lone motherhood is held

responsible for at best irresponsibility, and at worst for criminal behaviour in the next generation. One example of the latter can be found in the case of the James Bulger murder. Here significant emphasis was placed upon the fact that the two ten-year-old perpetrators both came from female-headed households - the implication being that they lacked the male role models necessary for development, and / or the discipline necessary to enforce responsible behaviour (Freeman 1997).

For these constituents, part of the problem with divorce lies in its potential for generating male irresponsibility. The implication is that family breakdown leads to the emergence of young men who are weakly socialised, and who are weakly socially controlled when it comes to the responsibilities of spouse and fatherhood. Indeed the claims made by this section of the policy community, do seem to echo Dennis and Erdos' concept of the 'anomie of fatherlessness'. This concept is explained in the following terms:

> 'Families without fathers produce egoists. We become a society of fatherless families, of men temporarily attached to households of a woman and her children, and not an integral and permanent part of them.' (1992: 71).

Divorce is thus held partially responsible for the production of a generation of young men who no longer feel the pressure to be responsible adults and fathers.

The 'Progressives'

As briefly mentioned in the introduction, the 'Progressives' are a much less well-defined group than their Idealist counterparts. A range of perspectives are incorporated within the constituency, from the practical through to the more ideological. The reason for grouping these perspectives together for the purposes of the current discussion, can be located in the fact that a number of the claims made about the problematic state the divorce law were actually found to cut across the various orientations of the different policy-makers. The composition of the constituency was thus made up of policy-makers from various 'interest' groups,

practitioners with the practical experience of dealing 'in' divorce, and also individuals who occupied positions within the formal (state) policy-making apparatus.

The divergence of law and practice

For the various 'legal' constituents, and indeed for several other constituents who possessed a legal background, one key problem with current divorce law is again seen to lie in the gap that exists between the letter and practice of the law. However, in sharp contrast to the Idealists, the problem for this group is not that divorce has become an administrative function. For them the problem lies in the basic fact of divergence. As one constituent remarks:

> 'In effect the law says one thing and does another. It says that it is about reasons, but no-one is interested in looking at them.' [1]

The language used by this group to describe the state of the law, is highly critical. Indeed one constituent makes the claim: 'The present law was nonsense...We had a universal Special Procedure, and the present ground for divorce didn't exist' [1]. In a similar vein, a second constituent refers to the current law as 'a shambles' [6], whilst yet another comments on its 'artificiality' [8].

The failure to really look at the reasons people give for the breakdown of their marriages is also perceived to have had an adverse impact on the integrity of divorce process and practice. For example, one constituent who is a professional working within the divorce process, talks of the practice of sending the particulars of unreasonable behaviour petitions to the other side for the following reason: 'to see if you could make them as anodyne as possible...for the sensitivities of the parties, but sufficiently strong to get them through the court' [6]. He then continues:

> 'The District Judges don't throw out unreasonable behaviour petitions because they're not strong enough generally...they recognise it's a game, it's a means to an end, which is just a sham really.'

Other constituents also refer to the fictional character that divorce petitions can assume, describing the process as 'hypocritical', 'intellectually very dishonest' [2] and 'a charade' [1]. The divorce process is thus perceived to have become a stage-managed performance in which all the players knowingly collude in order to achieve the required result.

There is no implicit suggestion within these discourses that the law should re-assume the judicial role originally accorded to it by statute. For this group, the problem is constructed from a more pragmatic and practical perspective, in terms of what are perceived to be adverse implications for the credibility of law and its practice. For one (non-legal) constituent, this construction was regarded as reflecting a perception that whether or not a marriage had come to an end, was something, 'that you could safely leave to the hands of the partners concerned, and take seriously what they're saying' [14]. However, for another more idealistically orientated constituent, it reflects the recognition of the limits of law when it comes to dealing with intimate relationships: 'no human tribunal is really in a position even after elaborate investigations, to know fully what's gone on' [8].

The problem of 'fault'

A Redundant Provision

Within this broad constituency, several participants claim that fault no longer serves any real purpose – in effect that it has become meaningless. For example, one constituent remarks of the current divorce process:

> 'People say ah yeah but you've got to have grounds, well everybody's got unreasonable behaviour. Show me a marriage where you can't allege unreasonable behaviour...everybody's been unreasonable, whether it's he doesn't do the washing up as regularly as I want or, whether it's violence.' [6]

This view is echoed by a second constituent, recalling conversations with lawyers whose approach to fault he essentially describes as: 'tell me the twenty worst things

he's done in the last ten years and I'll turn it into a divorce petition' [3]. Thus in one sense fault simply reflects the reality of normal married life, rather than some kind of exceptional circumstance that goes to the root of a marriage. In a second sense, however, it can also become a fiction employed by the parties, and which may therefore have no real meaning for them.

The requirement to detail behaviour is not believed to operate as a deterrent to those considering divorce. Indeed one constituent specifically talks about what he describes as, 'the pointless stuff on fault which doesn't act as a deterrent in this society' [3]. As he goes on to observe, the reality now is that there is actually a perverse incentive to adopting the fault-based route to divorce:

> 'One of the curiosities of the present system you see, is that you actually get rewarded for fault…I mean fault actually acts as, I mean maybe in a society where it was regarded as shameful to be divorced, and if you go a hundred years ago it was a shame to be divorced and be named for adultery, maybe fault acted as a deterrent…where if you were named as…co-respondent, it affected your social standing and all this sort of stuff…but I mean that's long gone. We're now in a position where fault actually acts as a passport to a quick divorce.'

The underlying problem thus lies in what has been termed the 'social alienation' of law (Van Houtte 1998). The fact that law has become detached from modern social values has created an effect that was not originally anticipated by legislators. The resulting implication is therefore that the law should have some regard for society's current value system.

In addition to discussing the failure of the matrimonial fault doctrine to reflect the reality of married life and marriage breakdown in the context of the alleged redundancy of fault, this 'gap' between law and reality is also identified as having a further problematic aspect. For example, one constituent makes reference to the fact that 'matrimonial law' has its root in ecclesiastical law:

> 'And I think that's one of the fundamental problems…that people's interpersonal relationships…really don't fit well within an ecclesiastical framework, the requirement to…detail the errors omissions and faults of one party, in order to prove irretrievable breakdown is damaging, to both

> adults and children and one could say, unnecessary. If you were coming at it from an informed point of view that said, people do not walk in and out of marriages thoughtlessly…when people marry they believed it's for life. Life is such that things go wrong.' [10]

Another constituent makes a similar point, stating: 'Usually in a marriage both sides are at fault or maybe they're just incompatible, maybe they haven't done anything wrong.' [15]

A further, very practical construction regarding the loss of function of fault is offered by one of the legal constituents, who remarks: 'if you're looking at fault in divorce…it really doesn't get you anywhere' [15]. The process of allegation and counter allegation simply becomes a circular one that does nothing to progress the situation. As she continues: 'It's like peeling off the layers of an onion…you say that…Bloggs was at fault and then you say well that was because of what you did…it doesn't get you anywhere'. Furthermore, fault has no constructive impact on ancillary matters:

> 'Fault is redundant in the sense that…the fact that you use to prove the ground for divorce doesn't have any impact on anything else…and so you can plead adultery or unreasonable behaviour, except in the very unusual circumstances where it's been absolutely dreadful…it's not going to affect the way in which the disputes about the children and the finances are dealt with. So what's the point of it?'

The 'Impact' of Fault

One clear point of consensus within this broad-based constituency is that the doctrine of matrimonial fault, and the impact that it can have, constitutes a very real problem. At a general level, fault is problematic in that it is 'damaging', 'crude', 'cruel', makes people 'unhappy', and leaves them feeling 'dissatisfied' [2]. The language used by some of the constituents when talking about the impact of fault is, once again, quite emotive. Some referred to their experiences of working with couples going through divorce, whilst one constituent talked of his own personal

experience. Generally, however, what is articulated across the different discourses, is a sense that the mere fact of marital breakdown is a distressing and painful business - the implication arguably being that current law has the potential to make matters even more unpleasant, and that this is not what the law should be about.

A 'Barrier' to Reconciliation

Some constituents construct the impact of fault as additionally problematic in that it does nothing to aid reconciliation. For example, one of the legal constituents asserts:

> 'If I receive a divorce petition from my husband saying that I've done all these awful things, it isn't very helpful because I can probably think of all sorts of things he's done...And so it doesn't...help, it doesn't help any prospect of reconciliation.' [15]

Similarly one of the more ideological constituents argues that the current legislation does nothing, 'to save the saveable marriage' although it should, however, be noted that this comment was made in the light of the terminology that was ultimately incorporated into the 1996 Act [7].

One particular constituent, who was representing what can be described as a 'marriage support organisation', spoke at some length on this issue. The observation is made that one of the criticisms frequently levelled at the current system is that, 'processes could be started in the heat of the moment and gather a momentum on their own'. Indeed this criticism is believed to have some validity:

> 'I think people sometimes go to a solicitor before they've decided whether they want the marriage to end or not, and something can happen which makes things worse rather than better...it may mean that something gets kind of solidified then...it's part of the old adversarial argument you know, that something develops from that contact which wasn't necessarily what was intended at the outset...but you know, if the other partner then gets to hear of or receive some correspondence from the solicitor, that can have an intensely alienating effect and can feel like a major betrayal and...so all I'm saying is that there can be a dynamic in that process, and I do think that

> people sometimes go to a solicitor to sound out whether their marriage is over or not.' [14]

The analogy is drawn between the divorce process and a 'complicated railway crossing' that can switch people on to a variety of different points: 'and you might end up at a particular destination as a result of a myriad of small influences, decisions along the way, and sometimes the points can be switched in another direction' [14]. It is recognised that there are marriages where the situation is clear-cut and, as this constituent observes, 'the trajectory is well defined from the outset' [14]. However, this type of claim does reflect the perception, or at least the hope, that divorce proceedings may be commenced by parties who have not finally decided that their marriage is really over – with the result that the divorce process does have a role to play here. Evidence to support this hope is located in the following fact provided by a second constituent:

> 'quite a high proportion of cases don't proceed to decree absolute after they get the decree nisi…Quite a high proportion of petitions are withdrawn…Quite a lot of people say that they regret having done what they did…A lot of them say 'if only I'd sought help sooner'' [2].

Another participant quantifies this proportion as 'one quarter' of all divorce petitions that are filed with the courts [3].

The Effect on Relationships

For some constituents – in particular the practitioner constituents - another particular aspect of the problem of fault is seen to lie in its impact on the relationship between the parties with regards to both the divorce process itself, and to the resolution of practicalities. For example, one participant argues that even where the particulars of a divorce petition are agreed, and parties understand that those particulars are merely being used as a device to obtain a quicker divorce, problems still remain:

> 'There is nevertheless a minority of people for whom the ground for divorce is actually a bar to acting reasonably within the negotiations that

> follow...It really does matter to them if they've been accused of something, and they can't get beyond that...and it's not helpful.' [6]

This particular constituent doubted whether it would ever really be possible to foster cool and rational behaviour within the divorce arena. However he did, nevertheless, regard the retention of fault as causing significant difficulties. Underlying this discourse is the implication that consensus and co-operation between the parties constitutes an a priori good – in effect the good divorce is constructed as being about co-operation and negotiation, rather than adversarial argument.

Another set of discourses adopt a more forward-looking perspective, constructing the 'problem' in terms of the impact that allegations of fault can have on post-divorce life. The quality of relationships is key to these constructions. For example, one of the constituents who occupied a position within the formal policy-making apparatus makes the claim:

> 'We continue to have a divorce law which because of its retention of fault, and the recycle of those faults, genuine or not...A divorce law which is calculated to inflame, I mean in what is already...they're getting divorced so already you know their relationship has broken down, and what is necessarily a set of poor relationships, the current divorce process actually inflames that situation, and can only be calculated to make their proper carrying out of their subsequent parental responsibilities that much worse, that much less likely.' [3]

Included within those parental responsibilities are, 'the ongoing relationships between parents' [3]. In a similar vein, another practitioner constituent makes the point that a lot of time is spent explaining to people that they remain parents, despite the fact of divorce:

> 'And of course one of the main reasons for no-fault divorce, is [fault] does actually get in the way of the way people feel they can co-operate. If you're slagging somebody off in a petition to get what you want, you feel badly about it, it does actually make it more difficult to be nice to each other when you pick up the children.' [6]

One of the constituents who represented a 'children's organisation', similarly describes the requirement that the parties, 'put everything negative that they can think of, or that their lawyers can manage to embellish on a bit of paper' as creating fundamental difficulties for parents [10]. Indeed she argues that the resulting 'flack' can actually have the effect of dis-empowering parents:

> 'If you acknowledge that the vast majority of people...say that children are best brought up with two parents that live as family, and that people should be empowered to exercise parental responsibility because that's what their kids need, they don't need the state minding them, they need their parents minding them, then surely we should take steps to make that possible, and not punish families.' [10]

The figures for those parents who lose contact with their children within five years of divorce are then cited as evidence of the fact that the current system makes it 'almost impossible' for parents to exercise parental responsibility, 'in any real way'.

Another constituent constructs the problem specifically in terms of the impact that fault has on the parent-child relationship. It is argued that, after divorce, the relationship that parents have with their children, 'is the most important thing' [8]. What is interesting here, is that this particular constituent utilises what he perceives to be the child's perspective in the construction of his claims. For example, reference is made to the tendency to 'exaggerate accusations' when seeking a quick, fault-based divorce:

> 'that has the effect, children get to know it actually, it has the effect of denigrating the parent attacked in the estimation of their own children, or sometimes damaging the attacker if they know the attack is exaggerated or unfounded.' [8]

This concern derives support from one of the 'children's organisation' representatives, who makes the point that one of the things that children want is for their parents to have what she terms 'respectful relationships', both during and post-divorce [10].

It should be noted that underlying these constructions, albeit to varying degrees, is an acceptance of the reality of divorcing behaviour. The 'problem' is now located

principally in the impact that divorce has on parents and parenting, rather than on marriage and the relationship between the parties in their capacity as spouses. As with the Idealists, the ethic of care for children is central to the claims articulated by the Progressive constituents. However, in contrast to the Idealist position, this particular ethic of care is not necessarily deemed to be incompatible with divorce.

The problem of 'speed'

Amongst some of the Progressive constituents there is a sense of unhappiness, at the 'general' level, that current divorce law allows for the possibility of obtaining a very quick divorce. For example, one of the more pragmatically orientated constituents makes the claim: 'Part of the awfulness of the present scheme is that you can get divorced very fast' [1]. Although she does not provide any further elaboration as to exactly why this is problematic, the implication would seem to be that parties should not be able to obtain a divorce as quickly as they are currently able to do.

A discourse that emerges from some constituents occupying positions within the formal policy-making apparatus, is that the speed of the process mitigates against a proper appreciation of the consequences of divorce. As one constituent remarks: 'One of the problems with the present system is that people divorce terribly quickly, and did not realise the consequences financially and practically of what they'd done until afterwards' [2]. The implication is that parties are generally not well informed about what divorce will actually mean for them, and that ideally the formal process should be doing something to provide that information. In addition, the hope that parties might change their minds once that information is provided is also implicit within this type of claim.

This particular constituent also argues that the divorce process does not reflect the reality of divorcing behaviour: 'divorce is not a single process in time…and…to have that provision in the legislation can actually be quite harmful, and quite misleading.' The reality of divorce is viewed as a process over time – a process that

is described as being, 'legal, social, emotional, psychological and practical.' The belief is that, in an ideal situation, the divorce process would be all of these:

> 'and it must recognise that the parties will need to go through all of these stages before divorce in the sort of psychological, social and financial sense, not just the legal dissolution bit of paper can take place.' [2]

The speed of the current process is thus regarded as failing both to take into account the complexity of divorce for the individuals involved, and to recognise that both parties are not necessarily always at the same 'stage' psychologically.

The problem of 'irresponsibility'

A further set of claims constructs an additional aspect of the divorce problem in terms of the length of time that it can potentially take to resolve the ancillary matters of property and money. As one constituent observes, these issues 'can drag on for years' [1]. It is interesting to note that, as with the problem of 'speed', these claims are articulated principally by constituents residing within the formal policy-making apparatus. Amongst practitioners it was generally not considered to be a problem.

The resolution of ancillaries is constructed primarily in terms of 'responsibility': 'This responsibility involves responsibility to children and responsibility to spouses' [1]. Indeed the question is asked by another constituent: 'Why should you be allowed to divorce and remarry, to take a new partner and new children before you have discharged your responsibilities to the first?' [2]. The implication is therefore that the current system allows irresponsibility, particularly it would seem on the part of men. For example, a third participant makes the comment: 'There is evidence that, particularly men get divorced and remarried very quickly' [3]. He then goes on to expand on this point:

> 'The average divorce now takes about six and a half, seven months to process through the courts. The ancillaries if you're going to have a fight about them, can run on if you really want for four or five years...Well maybe if you're a businessman, you get divorced quickly and you remarry

> and you then have a fight with your ex-wife for a few years, or at any rate you can drag it out, there's no incentive to settle the arrangements. Usually men are the economically dominant partner so they've got every incentive to keep stringing the thing out.'

This construction provides an interesting comparison with the analyses offered by the Idealists. Here responsibility, and indeed irresponsibility, is constructed in material economic terms, rather than in terms of morality. Problem construction is also gendered to some extent, although in this instance 'irresponsibility' is primarily attributable to men rather than women.

A further, and slightly different perspective on this problem is offered by another constituent, who provides what can arguably be described as the more 'self-interested' view:

> 'Once somebody's married...the last thing they want is to get new obligations, arising from a previous partnership, suddenly thrust upon them. It causes great resentment by the new partner as well. I mean very often...to take the case of a man who remarries, the relationship between the two wives, the ex and the new wife, is not usually very good.' [P8]

Here the failure to resolve ancillaries is not presented as a problem of irresponsibility, but rather as having an adverse impact on the quality of adult relationships. What is, however, also interesting about this comment, is that it arguably contains echoes of the 'position' in the 1960s. As discussed in Chapter 2, some commentators have argued that the Divorce Reform Act of 1969 effectively 'dealt with' divorce by channelling people towards remarriage. Whilst this constituent certainly does not go that far, there is a sense that divorce law should not prejudice the chances of success of any marriage that the (divorcing) parties might choose to enter into at some point in the future.

The 'Child Advocates'

This third constituency is differentiated from the remainder of the policy community by virtue of its child-centred constructions of the problematic nature of current divorce law. Whilst it is true to say that constituents do share a number of the concerns articulated by the Progressives – the 'Child Advocates' are actually best described as occupying a 'space' within the broader progressive perspective – it is felt that their focus on children justifies their treatment as a distinct group.

The constituency is comprised of three individuals who represent organisations that work with, and are involved in lobbying on behalf of children. In contrast to the other members of the policy community, the key to the 'problematisation' of divorce for this group is located in, 'the part of children in the breaking of relationships' [10]. From this perspective, children are effectively viewed as players in the divorce process. Indeed their 'part' is constructed as follows: 'in terms of what opportunity or not within such situations they have not to be the decision makers, but to have a voice in this whole process' [10].

For this group, one key aspect of the divorce 'problem' lies in the failure of the state to really scrutinise the arrangements that are made with regards to children, particularly in uncontentious situations. Constituents were generally scathing when talking about section 41 of the Matrimonial Causes Act 1973, which effectively places a duty upon the court look at those arrangements, and to consider whether it is in the interests of any children for it to exercise its powers to alter them. For example, one constituent argues: 'there is nothing in there for children whatsoever. One person puts down what's going to happen, the court rubber stamps it, and you get a decree' [10]. Indeed the belief that the provision, in effect, operates as little more than a 'rubber stamp' is articulated by all of the constituents – and indeed is one that is supported by recent research into the practical operation of section 41 (see for example, Murch et al 1999, Douglas et al 2000).

For another constituent, part of the problem lies in the perceived inadequacy of the 'welfare checklist'. Contained in section 1(3) of the Children Act 1989, this checklist sets out a range of factors to which the court must have regard when faced (amongst other circumstances) with a dispute regarding the residence or contact arrangements for children. The argument articulated here is that this checklist is not sufficiently meaningful: 'It provides clues to intervene regarding some children, in some cases it is very obvious, we felt it should be looking much more' [4]. For this constituent, the general reluctance to intervene in private proceedings is also problematic, a fact which inevitably results in the failure to pick up 'what is a very hidden group of children' who constitute problem cases. Indeed one of the other constituents makes the following observation:

> 'The court has the power to intervene, but in reality it doesn't. Nobody looks, what district judges look for five seconds at a statement of arrangements, they know the form tells them nothing, so they don't interfere and everything goes through on the nod. So children in uncontested divorce have no possibility, unless there's a section 8 application under the Children Act, and stuff starts coming out in the wash there. The Court may have the power, but it certainly doesn't exercise it. It's purely tokenistic, and needs a desperate look at.' [10]

These discourses articulated by the Child Advocates represent a very real challenge to the 'rule of optimism' (Dingwall et al 1995) which, as discussed in Chapter 3, can be said to largely underwrite the non-interventionary stance adopted towards divorce by virtue of the 1989 Children Act. For example one constituent, who also works as a mediator, makes the following point:

> 'some Schools of Mediation deem parents always to be competent. Without for a moment wishing to undermine parents, the question is at the time of separation are people actually able, when they are distracted by predominantly adult agendas of survival, are they able to consider children's perspectives? And what is the consequence of that if they are not?' [10]

It is important to note that these claims do not attach any element of blame or criticism to parents. Rather they reflect a recognition that 'family' comprises a set of relationships and individuals with different interests - parents and children are

thus not constituted as some kind of undifferentiated whole. As has been discussed previously, the assignment of responsibility presupposes the capacity for rational action (Hayek 1960). However, within this constituency it is recognised that parents are not always in the position to exercise that rationality. Indeed one constituent talks specifically of the difficulty of being objective – reference is made to friends who are described as normally, 'sensible and rational', but who have been known to 'lose it' whilst going through divorce [4]. Thus the mere fact of parenthood does not constitute sufficient assurance that parents will naturally do the best for their children.

Another problem with the current system, lies in its failure to really involve children. For example, one constituent makes the assertion: 'children want information'. She then goes on to argue that, at no point, does the current divorce process encourage parents to talk to their children: 'We know from parents that they don't tell their children because they feel unable' [10]. Also within the process itself, there are no mechanisms by which the children themselves are able to make their views known. The no-order presumption presumes that if parents are agreed, then all the arrangements are satisfactory: 'there is no mechanism through which the child can access that' [13]. Even where issues are contested, children are not always given the opportunity to express a view: 'Family Court Welfare Officers in the course of their report writing often do not see children. Judges don't see children' [10]. The question is then posed: 'What is it about us as adults that makes us unable to have these dialogues?' [10].

One constituent also makes the additional point that arrangements for children will inevitably need to change as they get older. However, once again, there is no route by which children can formally state their opinions:

'Another problem is that a contact arrangement made when the child is three, may not be appropriate when the child is nine. There is no mechanism for the child to have their say. They may be anxious to raise the issue for fear of upsetting their parents – they have nowhere to go with that.' [13]

The perception amongst constituents that the divorce process is problematic in its failure to afford children the opportunity to comment on the arrangements that parents make for their future, is rooted in practical experience. It is also one that is supported by research, which has revealed that children do actually have a lot to say both about parenting, and the process of divorce (for example, Neale and Smart 1998, Neale et al 1998). For example, one constituent talks of working with children experiencing difficulties following the separation or divorce of their parents. Indeed particular reference is made to the fact that her organisation 'routinely' sees, 'kids who actually want to smash the stuffing out of teddy bears because they're so angry. Because what happens, is thousands of children go up and down motorways the whole weekend, and seldom get to do things which give them some space' [10]. One aspect of the problem is thus that children almost become subsumed in the process. By way of illustration reference is made to the recent 'trend' towards what is effectively 'split residence', and the effect that this has on children:

> 'every second of the child's life is accounted for by its parents' requirement to have more time than the other parent, or to fit in with the parents' work or social activities, which is all okay except…for the person who doesn't get a say about how that would be for them.' [10]

The discourses articulated by the Child Advocate constituency thus reflect a very different conception of what constitutes the child's 'best interests'. Implicit within them is a reconstruction of those best interests to include a responsibility on the part of adults - in this case both the parents and the other 'players' within the divorce process - to consider the child's wishes and feelings, and indeed to act on them where appropriate. This arguably reflects an ideal vision that comprises both the greater democratisation of family life, and the recognition of children as subjective individuals rather than some kind of amorphous category.

Discussion

The Idealists

For the Idealist constituents divorce appears to present a 'problem' primarily because it violates notions of 'family'. In essence, at one 'level', divorce violates constituents' conceptions of what categories of people should actually be allowed to call themselves 'family'.

The discourses articulated by the Idealists reflect a very particular view of 'family' – namely the traditional two-parent unit based on marriage. This constituency thus provides an example of the tendency observed by Ribbens (1994) to conceptualise family as some kind of natural and concrete unit. Indeed 'family' is constructed primarily in terms of its physical characteristics and as an institution that, ideally, stands aloof from social change. This essentially passive notion of family, which is judged principally in terms of the residence of its members within a pre-given structure, is blown apart by divorce. For the Idealists divorce thus effectively signals the death knell for the family.

At another 'level', divorce is a problem in that the Idealists adhere to a morality that asserts that the collection of people called family, is more important than the individuals that make up that family. Divorce, with its prioritisation of the interests of individual spouses, thus represents a violation of this morality. This type of construction is apparent in the recurring suggestions that the behaviour of those who choose to exit from their marriages is not only individualistic, but is also selfish. An example of such a construction can be found in the claim articulated by one of the constituents who asserts: 'we're now in a consumer society in which everybody thinks that their own happiness in the only thing that matters' [12]. Divorce is thus presented as an example of the selfish individualism that is believed to be increasingly populating modern society.

For this constituency, part of the problem would seem to be attributable to the fact that modern marriage is now perceived to be defined in primarily hedonistic terms.

At this point it is useful to briefly consider Giddens' concept of the 'pure relationship', which is defined as a relationship:

> 'entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfactions for each individual to stay within it' (1992: 58)

Underpinning the pure relationship is the concept of 'confluent love'. This, in turn, is described as 'active, contingent love'. Its contingent nature is thus somewhat at odds with, 'the for-ever', 'one-and-only' qualities of the romantic love complex that tends to underpin 'traditional' views of marriage (ibid.: 61).

Giddens regards confluent love as having being dominant since the nineteenth century, at which point people began to marry for love rather than for reasons of finance or family. However, this more negotiated and individualistic framework in which relationships are no longer permanently sealed by marriage, is rejected by the Idealists. Marriage is not only regarded as being 'for life', but is also constructed in broader terms that go beyond the immediate parties. Whilst marriage does, of course, essentially constitute a relationship between two spouses, it is additionally viewed in terms of: 'providing people with stable, committed relationships that tie them into larger society' (Bellah et al 1985: 85).

This broader conception of marriage facilitates a further construction of divorce as a social problem. Indeed divorce is presented as problematic in that it violates the organisational morality of family (Loseke 1999). One theme that emerges through the discourses, is the assertion that the 'family' is central to how social life should be organised on a day-to-day basis. For example, the family is presented as being essential for the raising of socially adjusted, responsible future members of society, and as the bedrock for the wider social structures of society.

Divorce is also constructed as a problem in that it violates a more fundamental (apparently religious) morality. Implicit within the discourses – and indeed echoing the kinds of discourses that were being articulated during the first half of the twentieth century - is the idea that social change has actually brought about moral

decline. Divorce is viewed as an index of fundamental deterioration both in the family, and in the wider society. The Utopian society implicit within these analyses would thus appear to be a morally absolute one, in which fundamental values are there to be recognised, rather than to be simply made-up as one goes along. Indeed for one constituent in particular, these values are to be 'recognised' in the Bible [12]. Morality is thus constructed as being derived from external sources. In addition, moral codes are also seen as the foundation of human well-being – with deviation resulting in unhappiness, as well as a growth in immorality and a lack of care. As one constituent claims, one result of the shift towards cohabitation has been that, 'the sum total of human happiness has decreased' [12].

Morgan notes that, 'ideological constructions of marriage and the family are bound up with ideas of stability and change, with comparisons between the way we were and the way we live now' (1991: 115). To some extent all ideologies address themselves to the question of time – in family ideology one such deployment of time is to look back to a golden age, and thus to talk in terms of decline and loss. Pearson's (1983) study of hooliganism and street crime provides an interesting illustration of just such a deployment of time in action. Indeed the study reveals how successive generations have voiced identical fears that hooliganism and crime are the result of social breakdown and moral degeneration – in essence they are regarded as the product of rapid decline from the stable traditions of the past. Whilst it is recognised that historians have increasingly challenged the idea that families were stronger and more trusted in times past, the myth of relentless decline has nevertheless remained a potent one. According to Pearson, it is nostalgia that constitutes the key to this enduring, but fundamentally flawed construction of history.

What Pearson terms a 'history of respectable fears', is similarly present within the divorce 'context'. For example, what is marked about the discourses articulated by the Idealists is not only the degree to which they echo those of the early twentieth century, but the way in which those earlier discourses also talk of decline and demoralisation in the light of some previous golden age of family and society. One

illustration is provided by the post-war situation discussed in Chapter 2, in which the golden age that policy sought to recapture was accorded a pre-war location.

The claims made by the Idealist constituency certainly appear to be infused with nostalgia - for a 'golden age' where families were characterised by universality and certainty, and for a consensus model of society united by a shared culture, and by agreement as to its fundamental norms and values. Indeed an explicit example of this sense of yearning for a society based on a common social bond is provided by one of the constituents, who was interviewed around the time of the Dunkirk anniversary. This constituent stated that, at the time of Dunkirk, 'everybody felt a responsibility', and 'everybody stood shoulder to shoulder' [12]. She then went on to compare this to what she believed would be the situation if the country went to war today: 'Now of course if you went to war, I mean the television would be saying, well I wonder if we should have gone to war at all'. The (regrettable) difference in modern society is apparently therefore that, 'there isn't any sort of cohesiveness'. Divorce thus constitutes merely one example of the fragmentation of societal values and ideals that is inherently problematic for the Idealists.

The Progressives

In contrast to their Idealist counterparts, the Progressives do not construct the fact of divorce itself as a problem. For this constituency, the 'problem' of divorce is presented as primarily arising out of the workings of current divorce law – with particular emphasis being placed upon the 'operation' of the matrimonial fault doctrine.

Unlike the Idealists, this constituency does not regard 'family' as necessarily ending with divorce. For example, one practitioner constituent makes the following observation with regards to the debate that surrounded the 1996 reforms:

> 'It was as if divorce did actually blow everybody apart, and so then you fought for each…individual…rather than seeing that it's still…there are still bonds between these people, even though the, the married relationship

has ended.' [9]

In a similar vein, one of the 'marriage support' participants articulates the view that law is currently not doing the 'best' for families, and that she would like to see it contributing to, 'better outcomes for families' [5]. For this group 'family is thus not regarded as a unitary concept with some kind of single meaning. Arguably the fact that much of the focus is on the quality of future relationships (see, for example, participants 3 and 8), is reflective of some of the more recent sociological work discussed in Chapter One, and which constructs 'family' primarily in terms of family activities and 'practices'. Implicit within these discourses is also the idea that divorce is primarily about the reorganisation of family and family life - it is that reorganisation that needs to be managed in a better way.

It is therefore argued that, inherent within the discourses articulated by this group, is both a recognition and an acceptance of a more internal 'negotiated' morality. Whilst the Idealists talk in terms of an external, 'top-down' morality, the position adopted here is somewhat different – indeed it might be said that Giddens' concept of the 'pure relationship' would be received somewhat differently by a Progressive audience. For example, one of the more pragmatic constituents talks of commitment that is 'individual', and of the 'private definition of responsibilities' [1]. In addition, neither family nor social change is discussed in terms of deterioration and demise. Indeed taking Morgan's (1991) idea that all ideologies address themselves to the question of time, it can be argued that the Progressives actually look forwards – in particular to creating a system that deals 'better' with the reality of marriage breakdown.

Whilst the issue of morality is discussed in more detail in the next chapter, it is worth noting at this stage that it is perhaps unsurprising that this type of perspective is articulated by a constituency comprised of a number of individuals who have experience of the reality of divorce. Certainly it is a stance that is reflective of recent empirical findings. For example, Smart et al's investigation of post-divorce life explored the possibility that rather than bringing about moral decline, divorce actually heralds moral 'change'. Indeed what they found was that divorce does not

simply pitch individuals into a 'moral abyss'. Instead the experience was actually found to have the effect of pushing people in the following ways:

> 'to negotiate new moral terrains on which they have to make decisions about *how* to act, how to relate, *how* to prioritise, *how* to safeguard the welfare of their children, *how* to balance their own needs against those of others, an ultimately *how* to reconstruct family living.' (1999: 2)

The effect of divorce was thus to provide the stimulus to building a new, more individual morality. These findings are further supported by Lewis et al's (1999, see also Lewis 1999a) study of commitment and cohabitation, which revealed that the removal of prescriptive frameworks in the form of marriage vows has most certainly not heralded the end of moral responsibility in intimate relationships.

The 'problem' of children

Children feature prominently in the 'problem talk' that is articulated across the different constituencies. Again this is perhaps unsurprising in view of the fact that both the importance of children to the future of society, and the moral imperative of caring for them is indisputable. Indeed one result of the importance accorded by society to its children, is that the language and rhetoric of children's welfare is thus rendered an extremely powerful (and useful) tool in the construction of the divorce problem.

The Western cultural concept of parenting has been described as essentially adult-centric and welfarist – parenting is broadly viewed as something that is primarily 'done' to children, whilst little account is taken of children's own subjectivity (James 1999). The result thus tends to be a construction of children as dependent, vulnerable and in need of protection. Just one example of this kind of perspective is provided by Parsons and Fox (1952), who compare the situation of the child within the family to an adult who is sick. Just like the child, a sick individual is unable to fulfil an adult role within society, with the result that care is therefore required.

Dominant conceptions of childhood demonstrate something of a tendency to juxtapose adult and child. The result, as Jenks observes, is that alongside the apparently rational adult the child is viewed as, 'less than fully human, unfinished, or incomplete' (1996: 21). This developmental model in which childhood is perceived as a state of 'becoming', and children are effectively constructed as units of socialisation, is evident within the discourses articulated by both the Idealists, and a number of the Progressives. Indeed the perception of the vulnerable child who may potentially be damaged by the divorce experience – whether that damage is caused by father absence (Idealists), or poor parental or parent-child relationships post-divorce (Progressives) – is very clearly evident.

Implicit within the Idealist concerns about father absence, is also the idea that the children of divorce pose a potential threat to society. This, in turn, arguably reflects the assumption that evil represents a key element in the constitution of the child. This image of the evil child can, it is argued, be located in the doctrine of Adamic original sin. As James et al observe:

> 'Children, it is supposed, enter the world as a wilful material energy; but in that their wilfulness is held to be both universal and essential it is not seen as intentional. Rather, children are demonic, harbourers of potentially dark forces which risk being mobilised if, by dereliction of inattention, the adult world allows them to veer away from the 'straight and narrow' path that civilisation has bequeathed to them.' (1998: 10)

Idealist discourse thus represents an example of a claims-making strategy that constructs its claims to fit in with what Loseke (1999) terms 'cultural worries'. These cultural worries are defined as more general worries, which are shared by a large number of people at any particular time. Certainly the idea that children are potentially troublesome or even evil can be seen in contemporary understandings of children's capacity to commit crime, to engage in bullying, and even to commit murder. For example, much of the (popular) discussion surrounding the James Bulger murder centred on whether the two young perpetrators were inherently evil,

what this said about the state of childhood in modern society, and indeed the resulting threat that was posed to the wider collectivity.

For the Child Advocates, the view is a very different one. Here the underlying 'problem' with the divorce process is actually located in the belief that it reflects society's view of children as essentially innocent. In contrast to most of the remainder of the policy community, this constituency does not construct children as unaware objects who are vested with the innocence of ignorance. For example, one constituent makes the statement: 'I don't think there can be any child over three in the UK that really doesn't know what divorce is.' Reference is then made to the latest television series of '7-UP' in order to illustrate the point:

> 'Without exception all the children knew about it, because they all talked about it, every child...there were Muslim children, there were Caribbean children, a boy on the Isle of Mull, a boy in Ulster, they all talked about love, and they were being asked about love, they all talked about divorce. At seven.' [P10]

Part of the problem would therefore seem to lie in the perception within wider society that childhood is a time of innocence, and is thus something to be protected. As this constituent observes: 'I suppose it's divorce is a bit like sex, we don't like to think that children and young people know about it, let alone do it' [10].

As this constituent points out, the reality is that children are 'bombarded...by the media' about divorce, and 'are living in a society where not only do they know about it, they either live it personally or their best mate does, and no-one wants to tell them anything about it'. The problem thus appears to lie both in the general perceptions of children within society, and in the actualisation of those perceptions within the divorce process. For example, she then goes on to highlight the need to recognise that things have changed: 'You have to look at your own perceptions of childhood...And you have to look at the way childhood is today'.

It has been suggested that the dividing line between childhood and adulthood is rapidly eroding (Postman 1994). It is true to say that children's rights and the language of citizenship have gained purchase in certain areas of social life.

However, this would not yet appear to be the case within the family. Certainly a tension does exist between participatory rights for children, and parental responsibility and the need to protect children's welfare. As one constituent observes:

> 'I think it's society that treats children as the chattels of their parents. You only have to look at the great debate that we have at the moment. We are living in a society which deems it right to put children in penal institutions at a fairly young age...and that holds them criminally liable. What do we want from childhood? Do we want children to be culpable little adults when it suits us? What do we mean by childhood? And in effect children are the chattels of their parents as our society functions. Whether they should be or not is a different issue.' [10]

The Child Advocates regard children as active players within the divorce process who both have their own opinions, and are deserving of a voice. This stance can perhaps be best described as reflecting the paradigm outlined by James et al. in which the child is understood not as a unit of 'becoming', but very much in terms of 'being'. As the authors explain:

> 'The child is conceived of as a person, a status, a course of action, a set of needs, rights or differences – in sum as a social actor...this new phenomenon, the 'being' child, can be understood in its own right. It does not have to be approached from the shortfall of competence, reason or significance.' (1998: 207)

Instead of passive objects in need of protection, children are thus constructed as genuine sociological agents, with the ability to shape their own situations and circumstances. Such a construction also facilitates their conceptualisation as individuals in their own right, with their own perspectives on the social world, and whose interests require separate consideration from those of their parents.

Concluding comments

This chapter has explored how the various different constituencies who comprise the national policy-making community construct the 'problem' of divorce. This exploration has provided an effective 'snapshot' of the range of different, and indeed frequently competing ideas, thinking and values that were in play during the Family Law Act process.

One factor that clearly emerges through the discussion, is the very fundamental 'division' that lies at the heart of the policy community. Amongst the Idealists a Devlin-type perspective is evident, in the sense that the divorce 'problem' is underpinned by a universal and absolutist vision of family life and morality. In effect problems are therefore constructed primarily in terms of what the law 'ought' to do. This approach is, however, juxtaposed with a Progressive view largely focussed on what is actually 'going on' with current law. Echoing the legal realist perspective, the 'problem' of divorce for this group is constructed largely in terms of the impact and effect of law and process on individuals and families.

As mentioned at the outset of the discussion, the perceptions of a problem will operate to shape and construct its proposed solution. The next chapter therefore goes on to consider one aspect of that solution – namely the construction of the role of divorce law with particular regard to the 'issue' of marriage.

Chapter 6

The 'Role' of Divorce Law

Introduction

Significant debate surrounds the question as to what the law should, and indeed can do when intimate relationships break down. As has already been observed, the Family Law Act 1996 was notable for (among other things) its express declaration of support for the 'institution of marriage' (section 1(a)), and for the fact that it imposed a framework that was designed to facilitate marriage 'saving'. As revealed by the historical review of divorce law in England, the perception that law does have a 'role' beyond simply ending marriage is not a new one. However, it is interesting that one hundred and fifty years after emerging from ecclesiastical law, the feeling that divorce law should have some 'positive' function with regards to marriage continues to persist.

During the course of the interviews, study participants were asked whether they thought that there was a 'connection' between debates about divorce law and debates about marriage. Of course divorce law will always be 'about' marriage in the sense that it is not possible to have divorce without it. However, this chapter explores - in the light of the thinking and value systems that were revealed in the previous chapter - the nature of the connections that were made by the various national policy-makers, and how those connections feed into different constructions of the 'proper' role for divorce law.

When talking about the 'problem' of divorce, the policy community was broadly divided into three constituencies comprising the Idealists, the Progressives and the Child Advocates. When, however, it came to the question of divorce law and marriage, the various factions within the broad-based Progressive constituency became more clearly defined. Within this chapter the Progressive constituency is thus further broken down into three 'sub-constituencies' – the 'Idealist

Progressives', the 'Pragmatic Progressives' and the 'Middle Ground'. The views of the 'Child Advocates' are, for the purposes of this particular discussion, incorporated into these sub-constituencies where appropriate.

The Idealists

The Idealist constituency is characterised by very clear views about what the law should be doing when relationships break down. Indeed as one constituent explicitly states: 'I think the function of law should be to set a standard, others say it should be to follow behaviour' [11]. As discussed in the previous chapter, this view reflects a general unhappiness on the part of this constituency that modern divorce has evolved into a primarily administrative function. As the second constituent remarks of the diverse nature of modern relationships: 'The law has said...this is really what people want, we should regulate the law to enable them to have it' [12].

For the Idealists, conceptions of marriage are central to the construction of the role or function of divorce law. As revealed by their construction of the 'fact' of divorce as problematic, those conceptions are of marriage as both ideological and functional. Indeed for this group, marriage is constructed both as the 'proper' form of intimacy, and as central to constituents' ideas of 'family'.

Marriage is perceived, firstly, to almost be the 'epitome' of a religious morality. This reflects a very confident Christian morality on the part of the individual constituents. For example, one of the constituents makes the following observation with regards to the 'state' of society today:

> 'I think now we're in a state of transition, and society doesn't know whether it wants to have the Judaeo-Christian tradition, or become secular, and the huge debate that's going on...is about the type of society we want, and the choices before us.' [12]

Implicit within Idealist discourse is the idea that society becomes demoralised when the links between law and religion are severed (Ahdar 2000). However, despite

societal fragmentation and uncertainty, the position of this particular constituent is unquestioned. Indeed she makes the following declaration: 'I stand by the Judaeo-Christian tradition' [12].

In addition to its religious 'base', marriage is also defined in collective terms. Indeed for this group it is constructed as central to the basic organisation of social life - in essence as providing some kind of familial and societal 'cement'. As one constituent argues:

> 'Society is in free-fall...and marriage is at the centre of it, because marriage gave a cohesive whole to the family, it commits you whether you like it or not to your in-laws, to all sorts of relatives, half of whom you probably don't particularly like, but nevertheless you've got this commitment to them...and also commitment to the upbringing of children.' [12].

This constituent then also goes on to make the slightly different point that what many people want, in her view, is 'certainty' or a 'framework'. Although this does not involve outlawing divorce, on the basis that 'life isn't like that', it does involve the making of 'long term commitments'. As an example of just such a commitment, marriage is thus constructed in terms of providing much needed certainty and security within modern society.

'Defining' marriage

For the Idealists, the role of divorce law appears to include that of 'defining' marriage, or perhaps more accurately, of defining the nature of marital obligations. Indeed as one of the Progressive constituents actually observes, the current rules of divorce may be seen as effectively creating 'norms' for marriage:

> 'We define marriage through how you get out of it, I mean we have up to now...correct marital behaviour is defined in terms of the reasons why you can get divorced.' [5]

An example of just such a view is provided by one of the Idealist constituents. For this particular constituent, it is regarded as self-evident that the law (through the mechanism of the divorce process) should be about placing 'moral expectations' on the parties to a marriage. Indeed this is believed to represent the fundamental basis for state involvement in the ending of marriage:

> 'I mean after all why do we, otherwise you say 'oh well the state shouldn't be involved at all'...have no divorce law at all, just say have a completely laissez faire system, if people want to get married...well that's their affair, nothing to do with the state.' [11]

The second constituent discusses the issue in a slightly different way – here connections are made between matrimonial 'fault', and the status of the marriage contract. For example, it is argued that a system of divorce law which is not based upon fault, has the effect of undermining both marriage and the marriage contract:

> 'It suggested that the promises we make at a wedding service before God, and...the civil contract we make with the state, could be broken. And it reduced marriage to something less than say buying a television licence, where if you fail to buy it not only can you be fined, but you could even end up in prison, whereas on something infinitely more important, both church and state were saying it didn't matter.' [12]

The role accorded to divorce law is thus constructed in terms of both 'injecting' the basic moral content into marriage, and of 'enforcing' - and indeed it would seem signalling - the importance of marriage and the marital commitment.

'Supporting' marriage

The faith that is placed in marriage by the Idealists, together with their 'public' construction of marriage and its organisational benefits, provides the basis for an extension of the role of divorce law to include the task of 'supporting' marriage. At the practical instrumental 'level', constituents suggest that the law should operate to discourage parties from proceeding with a divorce. For example, one

constituent says of the divorce process: 'My view is that…we should be making it more difficult.' He then continues:

> 'You've got to accept that some people simply can't live together…I'm not suggesting that we should go back to the pre 1930 legislation where you had to get an Act of Parliament to get divorced…but I do think that the legislation we had…was about right, if it had been implemented properly.' [11]

One solution to the problem of divorce is thus regarded as the retention of matrimonial 'fault', enforced by a proper investigation of the circumstances of marriage breakdown.

For this particular constituent, that 'difficulty' is also constructed in terms of making 'divorce expensive for both parties', and of making it clear to them 'that this is really going to be an unpleasant process'. One example of how the divorce process may be made more 'expensive' and 'unpleasant', is located in the removal of the economic incentives that are perceived to be currently surrounding divorce. Indeed it is suggested that the following should be made clear at the outset of the divorce process:

> 'Everything you've accumulated…during your marriage is going to be divided in half. Judgement of Solomon you know, you've got to accept that…Everything you came into the marriage with, you keep. Everything you have after your marriage, you keep. Everything that you accumulate during your marriage, the equity on the house, the pension, you know the three piece suite, that's divided in half.' [11]

It might be argued that this actually represents a stance that is more accurately described as 'extremist' than idealist. Certainly what is advocated here, is effectively the re-imposition of the 'correctional' code or framework favoured during the first half of the twentieth century. Once again divorce is defined as some kind of pathology that requires a corrective response. The result is that the 'proper' role of divorce law is thus constructed in negative terms – as a mechanism that both seeks to deter parties from seeking a divorce in the first place, and that punishes those who ultimately choose to proceed.

What is interesting is that for this constituency, marriage 'support' appears to be defined in terms of divorce prevention – effectively in restricting the route out of marriage. An 'unpleasant' divorce process is also presented as a legitimate price to pay in order to preserve marriage. It might be argued that the construction of 'support' in terms of restriction and punishment is perhaps unsurprising within a constituency that values structure and certainty – that essentially constructs both the individual and the collective 'good', and indeed morality in absolutist terms. However, in view of the fact that similarly punitive approaches adopted in the past have not been adjudged successful in preventing the exit from marriage, it is not clear how the Idealist 'vision' is likely to function in a society whose value system has arguably become even more fragmented.

The idea of supporting marriage by making divorce more difficult is, nevertheless, also echoed by the second constituent. Once again she argues in favour of a fault-based divorce law, together with a proper examination of the circumstances of marital breakdown. However, in addition, this constituent also goes on to adopt a somewhat broader perspective. A fault based divorce law is thus constructed as part of a broader framework of law and policy that makes it clear that cohabitation should not be equated with marriage. For example, specific reference is made to stopping social assistance for teenage mothers, and to altering the tax system in order to provide financial support to married couples.

Discussion

The public constructions of marriage offered by the Idealists, have the effect of reconstituting the morality of personal relationships in public terms. That morality is thus re-defined as legitimate terrain for the law. What can thus be seen within the discourses articulated by this constituency, are some of the ideas that were advanced by Devlin (1965) – namely that it is legitimate for society to use the law in order to preserve a morality that is essential to its existence. Certainly there is a clear sense amongst the Idealists that 'immorality', as evidenced by the movement away from marriage, is capable of (and indeed has been) damaging society.

As mentioned in Chapter 1 it is interesting that Devlin's (1965) ideas, which are generally out of favour within jurisprudence, do continue to have relevance here. However, whilst the extent to which Devlin's vision of common morality as an essential bonding element within society accorded with social reality during the 1960s is open to question, it undoubtedly represents something of a contrast with the morally fragmented society of today. It might therefore be argued that the Idealist 'vision' is thus actually engaged in taking the role of law one 'stage further' – rather than simply preserving morality, law is actually accorded an additional role of positively injecting morality into society.

The Idealist constituency is also characterised by a faith in what might be termed, the 'symbolic' function of law. Indeed both constituents make several references to the 'message' [11] or 'signal' [12] that they believe law sends to the wider society. For example, one constituent argues: 'I think law is terribly important. All law sends a signal'. She then goes on to reiterate the point: 'I think law does send a signal…and I think this has influenced people' [12]. Neither constituent actually provides evidence as to the existence of this apparently causal connection between law and behaviour. However, the basic belief in its existence does provide some explanation for the constituency's position that law should be setting a standard for behaviour.

Some faith is also placed in the ability of law to influence behaviour at a more 'practical' level. For example one constituent argues that a fault-based divorce law, where that fault is enforced through investigation, does have the ability to change an individual's behaviour:

> 'There's a lot of people who argue that the state can do nothing, they say it's all hopeless, you know everything's changed, this is all ridiculous, the state can't set standards. I don't accept that. But you know, I'm realistic, I mean there's only so much the state can do, to imagine that even if I got my way and divorce law was changed in the way I've suggested…that we could suddenly change people's behaviour to a significant extent is probably an illusion, but it might have an impact in a small number of cases…And in

> my view even if it saves...a thousand marriages year in a population of fifty-eight million...that's a thousand marriages a year saved...it's worth a try.' [11]

This belief is echoed by the second constituent, who makes the following observation:

> 'The law did save marriages for hundreds of years...Now I wouldn't want to go back to what we were in the year 1900...because I think that a lot of people were living in very considerable unhappiness, but a lot of people are living in very considerable unhappiness today...But certainly the law upheld marriage, I think.'

She then continues:

> 'You can't turn the clock back by having one Act of Parliament which would say...as from next year...no-one would get divorced. That would be impossible, and ridiculous...you can only do it bit by bit. It takes...well not so long to fall down, but a very long time to build up.' [12]

Despite this apparently positive view of what can be achieved by reforming the law, another observation made by this second constituent does raise a question mark about the justification for such a belief. Referring to the situation when she was a child, this constituent describes how she was brought up both to respect her parents, and to recognise the responsibilities that she had towards them:

> 'I can hear my father saying it now, and of course you have responsibilities towards the school that you go to, and the country in which you live, and etcetera, etcetera. Now this is not the message that children are getting today...but this message I had as a child, was in a way reinforced by the law.' [12]

Although the context is not a marital one, the comment is useful in that the constituent is describing how she regards law as operating to 'reinforce' more general 'messages' within society. Once again the issue of causality is not made clear. However, the fact that law is constructed as effectively reiterating existing social values, does raise questions as to its efficacy when faced with the task of

actually changing those values. This in turn raises questions about the social basis, and indeed the 'image' of law that is constructed by the constituents.

At this point it is useful to make reference to Ewick and Silbey's work exploring the different ways in which people use and experience law. Indeed their study identifies three narratives that are common to the 'stories' that people tell about law: the first describes law as distant and removed from ordinary life; the second views law as a game involving the manipulation of rules for one's own advantage; whilst the third describes law as an arbitrary product of power that can be resisted (1998: 28). Within these three different narratives people respectively describe their relationships with law as something: (1) 'before which they stand'; (2) 'with which they engage'; and (3) 'against which they struggle' (ibid: 47).

For the Idealists, law would seem to be constructed as something 'before' which one stands. The picture of law painted by the constituents, is of something that should ideally occupy a sphere that is separate from ordinary social life. Indeed as has already been discussed, a central aspect of the divorce 'problem' is perceived in terms of the current law having become so embedded alongside people that it is actually responding to their changing behaviour and value systems. This type of 'vision' is similarly present within Ewick and Silbey's first narrative of law:

> 'Law is experienced as a space outside of everyday life. Law and everyday life are seen in juxtaposition and possible opposition, rather than connected and entwined.' (ibid.: 76).

This fits with the relatively inert, and indeed ahistorical view of law that is held by the Idealists. The nature of the relationship between law and society is regarded as being largely one-way, namely 'top-down'. Law is essentially constructed as an 'independent variable' – framing personal life, yet arguably without any real base or 'presence' within it.

The 'Idealist Progressives'

Situated slightly further along the spectrum of opinion from the Idealists, are what can be termed the 'Idealist Progressives'. This is a small constituency comprising two individuals – one had been part of the formal state policy-making apparatus [8], whilst the other represented a Church body [7].

Both constituents can be firmly located under the broader Progressive umbrella in that they were perfectly willing to engage with reality of marriage breakdown, and were not seeking to somehow 'turn back the clock' to recapture a former vision of society. However despite this, several parallels can be drawn between these more idealist-oriented members of the Progressive constituency, and the Idealists themselves. For example, there is a similar belief that divorce law does have a role in setting standards of behaviour. As one of the constituents observes: 'I think the law ought to set…standards and encourage the best' [8]. In addition, although willing to 'deal' with divorce, there was a lingering sense of what might be described as 'discomfort' with regards to it. Indeed as the second constituent remarks: 'divorce is, it's a problem for us, precisely because we believe in marriage' [7].

Commonalities also exist between the two groups when it comes to the issue of marriage. Indeed for these more Progressive constituents, ideas of what is 'best' continue to centre very firmly around marriage. For example, one constituent expresses the following very clear views about its values and merits:

> 'I'm very conscious of the fact that not every marriage is perfect, but on the whole I think that the public commitment that is involved in marriage is a good thing, and…has good effects for children and their upbringing. There's a sense of security that they have in the public commitment.' [8]

Marriage is thus constructed as an institution with a 'public character' [7]. The nature of that character is, in turn, constructed in terms of the 'security', 'commitment' and 'stability' that marriage brings [8]. It is recognised that there are

other, 'more private' forms of commitment, but marriage is believed to provide additional benefits. As this constituent argues:

> 'I think that...the kind of structure marriage gives...is something that provides...stability which is not easily attained in other relationships.' [8]

For these constituents marriage is not, however, constructed purely in public terms. Fundamentally it is also regarded as a private relationship, 'that gives satisfaction and mutual support for men and women' [8]. Marriage is thus effectively constituted as the 'best' form of intimate relationship both for the individuals directly involved, and also for the wider community. Indeed not only does it provide benefits for the individual spouses and their children, but a broader 'organisational' benefit is also conferred on society.

'Defining' marriage?

Differences do begin to emerge between this constituency and the Idealists when it comes to the connections that are made between marriage and divorce law. For example, one constituent talking specifically about the connection between debates about divorce law and debates about marriage, makes the following point:

> 'There are connections between the two...but not exactly about the desirability of people entering into [marriage].' [8]

This provides an interesting comparison with the position adopted by the Idealists. For this group no connection is made between divorce law and, 'questions like...the status of partnerships that aren't marriage' [8]. The implication would thus appear to be that divorce law is not about shoring-up the status of the marital relationship, not is it concerned with providing a clear delineation between the married and the non-married.

This particular constituent does, however, talk about the link between debates about divorce law and, 'the fundamentals of marriage, and what they should be and so on'. However, once again in contrast to the Idealists, divorce law is not constructed

as having a role in setting out details of the marital obligation. Indeed this constituent makes the following observation with regards to the idea that divorce law has a role when it comes to defining marriage:

> 'Now getting out of it in a sense is...the sort of pathology of marriage. It's like saying that, you know, you describe life by reference to death...how you get out of it. I don't think that's right myself.' [8]

'Supporting' marriage

The faith that the constituents have in marriage, together with the 'dual' private – public constructions of marriage, do legitimate a broader supportive role for divorce law. However, unlike the Idealists, that role is not presented in terms of either preventing or deterring divorce.

Amongst the constituents themselves there does appear to be some concern to draw a distinction between their perspective, and the position that is articulated by the Idealists. For example, one of the constituents talks of the Idealist discomfort with the changes that society has witnessed in social and personal relationships over recent decades. Indeed this is referred to as a, 'conservative...unhappiness with all this change', which has manifested itself in a variety of ways:

> 'And of course, there was a slightly circular element to the argument that, that people would say they didn't much care for the modern world, and the modern world kept getting more like the modern world, and so they cared for it even less and so on and so forth, and somebody ought to do something, and all this, you know, you've gone too far, and it should be stopped.' [7]

This constituent then goes on to make the following observation with regards to this conservative constituency, and the question of divorce law reform: '[they] really had only one speech which was, 'we think marriage is very important', which was not in dispute'. However, what was in dispute according to this constituent, was the way in which that belief in marriage was demonstrated. As he then goes on to explain:

> 'But you know, the way you were...supposed to show you believed in marriage was what? I mean to say that divorce should be illegal? I mean it was quite extraordinary.' [7]

For both of these constituents there was a debate to be had about whether any form of divorce law could be satisfactory. As one constituent states: 'you might sort of say, by definition if you believe that marriage is for life, then...anything that acknowledges that it isn't...is bad law' [7]. However, both also recognise the reality of divorce, and the inevitable limitations of the law when it comes to intimate relationships. For example, one participant talks of the difficulty to 'know fully what's gone on' in a marriage [8]. However, his fellow constituent also makes the following additional observation:

> 'Prevention...doesn't necessarily mean that marriages always succeeded...you can have marriage break-up without...as it were any legal...implications of what you can do about it.' [7]

Another interesting comparison with the Idealists lies in the connections that are made between law and religious values. Like the Idealists, both of these more Progressive constituents hold strong Christian beliefs. Those beliefs 'feed into' constructions of marriage as both the 'ideal' to which one might aspire, and as 'best' in moral terms. For example, one of the constituents actually defines marriage in accordance with religious doctrine:

> 'I say that marriage is defined really by...the...articles that define it in the Prayer Book, and...I think these are, although they were written a long time ago, are very apt still to my mind.' [8]

However, for these constituents, Christianity is constructed as more flexible and tolerant than the version articulated by their Idealist counterparts. Indeed one constituent argues explicitly against the idea that, 'the way in which you stand up for Christian principles is by saying 'no'' [7]. This particular constituent then goes on to talk specifically about the Christian tradition from which he comes. He contrasts this with the 'magisterial' authority, and 'authoritative tradition' of the Catholic Church, saying instead:

> 'You tend to want to get alongside the people who've got the issue, or the problem. So whether it's in relation to marriage and sexual ethics, or business...or the law and penal policy...the first instinct of the tradition I represent is...to sit down with the people who are grappling with the problem, and say 'tell me what's going on here'...You then try and reflect in the light of your Christian faith and tradition...and come to...a judgement.'

This more flexible, and indeed reflexive view of 'Christianity' is not one that is universally accepted across the Christian community. Indeed the participant goes on to describe how one almost invariably has to struggle with what he describes as 'Conservative Christians', who are defined in the following terms:

> 'people who don't think any change could be for the better...or who don't think that there are any questions to be asked because everything is...clear and in the Bible. What we always struggle with, is the idea that in some sense by even discussing questions of this kind, we are selling out.' [7]

This, it would appear, represents just the kind of position that is articulated by the Idealists.

One result of this more flexible 'world view' on the part of the Idealist Progressives, is that their faith in marriage and its various merits is tempered by an acceptance of the reality of divorce. The task of divorce law is thus, in turn, constructed much more in terms of dealing with that reality. As one participant remarks:

> 'We certainly can't say...marriages could be dissolved on demand, but we ought to be able to have some mechanism for recognising that despite every good intention and so on...they can fail, and then recommending a procedure...for how you might actually deal with the notion of irretrievable breakdown.' [7]

In a similar vein, the second participant argues that if people are 'irreconcilable', then 'something' has to be done about it. Although not 'the ideal', this is regarded as something that simply has to be done:

> 'I think that when you recognise that marriages can fail, and they can fail in a way that's impossible to put together again, then it's right to have a system which deals with that in as humane and orderly a fashion as possible.'[8]

Although 'dealing' in reality, this dealing does therefore continue to be framed by the constituency's belief in marriage. For example, whilst recognising that divorce law brings marriages to an end, one constituent also goes on to argue that, 'it ought not to encourage that to happen'. This perspective is underpinned by the following belief:

> 'it ought not to be easy to go in and out of marriage, it's only when marriage has really broken down in a way that can't be put together.' [8]

The end result is that divorce is set within what is described as: 'a better context than just divorce on it's own'. The nature of that better context is one of 'saving marriages' [8]. This construction of divorce law is similarly echoed by his fellow constituent, who also advances the argument: 'The whole point of this exercise ought to be to save the saveable marriage, to strengthen and support the institution' [7].

Discussion

What can be seen within this constituency is a very real shifting away from the intractable absolutist position advocated by the Idealists. Law does arguably retain a role in governing morality – for example, divorce is not constructed as an 'easy' option – whilst its role remains underpinned by a strong faith in marriage and its attendant benefits. This perspective is, however, tempered in two very important ways.

One 'tempering' factor can be found in the acceptance of a more flexible and individual morality. For example one constituent provides the following, very illuminating explanation:

> 'The latest Social Trends says that...the percentage of people who

> believe...what is you know, the formal position of the Churches on sexual relations, that all sexual relations outside marriage are always wrong, is now seven or eight percent. I mean...it is a very remarkable figure, given...the history, and what it is assumed everyone thought only recently. Now, I mean, maybe those seven or eight percent are already in church, but whether or not they are, there must be a huge number of people, who I don't think are totally amoral and promiscuous, but who actually believe that these things are more complicated. And...in some sense that must apply to divorce law as well, I mean we have to find some way of...trying to balance two things that are very difficult to balance.' [7]

In addition to a greater degree of tolerance for individualism, a second factor is located in constituents' greater awareness of societal 'reality'. It would be true to say that the 'image' of law that is presented by this constituency remains one in which law continues to retain a degree of 'distance' from society. However, it is similarly true that it is no longer the magisterial inflexible creature envisaged by the Idealists. Implicit within constituents' discourses is the belief that if it is to be effective, then law needs to be more aware of societal values and behaviour – in essence it is a more 'dynamic' model of law that is required.

The 'Pragmatic Progressives'

If attention is now shifted to the opposite end of the spectrum of opinion spanned by the national policy-makers, it is possible to locate a group of individuals who can be described as the 'Pragmatic Progressives'. In the study sample this group comprised three members, all of whom were drawn from what might be termed the legal 'field'.

In contrast to the two constituencies already discussed, the Pragmatic Progressives regard the divorce 'problem' principally in terms of the lack of credibility possessed by the current law. This is primarily attributed to, as discussed in the previous

chapter, the 'gap' that exists between law and practice. Fault, and the adverse impact that it is perceived to have on the divorce process and those who use it, is also considered to be particularly problematic.

This practical problematisation of divorce 'feeds into' a more practical, and indeed a more administrative approach to the construction of law's role. One example of such an approach is provided by one of the constituents who starts by asking the question: 'What is law for?' She then goes on to offer the following answer: 'It is to make the rules that govern disputes, and to resolve those disputes' [1]. Whether divorce law actually has any broader kind of role beyond this is, for this particular constituent, open to some question:

> 'Can we use the law for more socially desirable goals, to give information, to encourage negotiation, to reflect? I am much more sceptical about this in terms of practicality and appropriateness.' [1]

In a similar vein, a second constituent makes the statement that: 'A divorce law is about divorce, it's about efficiently ending a marriage' [15]. This particular constituent does offer her own personal opinion regarding the form that such a divorce law should take:

> 'In a sense…the best system to have is a system where somebody could just say 'I want a divorce', and they're given a divorce straight away.'

The following reason is given for the adoption of such a position: 'If you're looking at…a law which is designed to end marriages in an efficient manner, well that's the most efficient manner to end them in isn't it?' Thus in an ideal world, law would indeed be a true consumer product, simply responding to what people want. However, as the constituent is keen to stress, this position was never actually advocated during the divorce reform process on the basis that it, 'just isn't a politically and socially acceptable position to have'.

The Pragmatic Progressives are distinguished from the remainder of the policy community by their primarily individualistic constructions of marriage. For example, one of the constituents talks very explicitly about the nature of personal relationships in modern society: 'Some would say that relationships are about

choice and individual commitment, and that responsibilities are defined privately' [1]. A comparison is drawn with the situation in the past: 'Older generations were brought up under a system where there was only one way to commit, i.e. marriage. That is set, and is hard to get out of.' For this particular constituent, however, marriage in today's society is effectively something that one can 'contract into' or, alternatively that one can choose to 'reject'.

A pragmatic, or indeed what might arguably be described as a somewhat cynical view of marriage, is also advanced by one of the other constituents. Having made reference to the continuing popularity of marriage, he then goes on to remark:

> 'The research seems to suggest that it's the idea of the wedding rather than the marriage that's particularly popular. People like a nice day.' [6]

Within this constituency marriage is thus constructed primarily as a relationship between the two parties. Alongside this more private and individualistic construction - and indeed reflecting a recognition of a more private and individualistic morality - is also a much greater acceptance that marriage today actually constitutes just one of a range of 'options' for forming intimate relationships.

'Defining' marriage?

For this constituency, the role of divorce law most definitely does not include defining the nature of the marital contract. Indeed one of the constituents says of divorce law:

> 'People think that it's a question of breaching the marital contract. If you separate without consent that's a breach...and arguably if you do it with consent...If you commit adultery, that's a breach, if you behave unreasonably...But for divorce to define the obligations of the contract is pie in the sky if only because divorce is seen as a punishment, when it is usually what everyone wants.' [1]

This view is reinforced by the claim that, rather than representing damages for breach of contract, financial orders are more accurately described as, 'compensation for marriage related losses' [1].

The idea implicit within the claims advanced by the Idealists, namely that fault is necessary in order to inject a sense of responsibility and morality into marriage, is rejected. For these constituents divorce law is not constructed as the vehicle for somehow shoring-up the moral content of marriage. Furthermore, and in stark contrast to some of the more idealist-oriented participants, the Pragmatic Progressives do not make the connection between divorce law and the status of the marital contract. Rather the connections that are made between marriage and divorce law, are primarily of a practical nature. For example, one constituent states: 'of course you can't divorce the divorce process from the fact that people have to be married in the first place' [6]. For a second constituent the question is, however, a more complex one. Indeed with regards to the connection between debates about divorce law and debates about marriage she remarks: 'This was something which I wrestled with at the time and I could never get my head round it to be honest' [15]. The third constituent is, however, more certain of her position:

> 'My view is that any relationship brings responsibilities, unless you contract out of them...and possibly even then. But you can't foresee what those compromises are going to be. You have to judge on the circumstances at the end of the relationship. That has to be the basis for sorting it all out, not the situation at the start.' [1]

'Supporting' marriage?

The question of whether divorce law should be about supporting, or indeed saving marriage does create something of a dilemma for the Pragmatic Progressives. The instinctive reaction of constituents does, however, appear to be that this is really not an appropriate task for divorce law. For example when asked about 'supporting' marriage, one constituent actually frames her reply in terms of, 'stopping people

getting divorced'. She then goes on to make the assertion: 'that to me is not the point of a divorce law' [15].

In a similar vein, this constituent also observes that most of the participants in the Parliamentary debates on the Family Law Bill, 'were commenting on a saving marriages Bill, they weren't commenting on a divorce reform Bill at all'. In her opinion this is 'completely illogical' – a 'divorce Bill' is simply not the place to be attempting to save marriage. For this constituent there is no question that marriage is something to be supported: 'It's a very worthy objective to want to…make marriages longer and happier.' However, using the law to reduce the divorce rate is not regarded as the way to achieve that objective, 'because what you might end up doing is trapping people in desperately unhappy marriages' [15].

It is important to note, however, that this constituent's position is tempered somewhat by the following caveat:

> 'Obviously you don't want to do anything within the law which could possibly hinder reconciliation…you never ever want to get in the situation where you've managed to draft a law which actually positively prevents people from reconciling. [15]

This comment might be interpreted as representing a genuine faith in marriage and its merits. However, one possible alternative interpretation is that constituents were actually unwilling to speak out against the normative resonance of marriage, or indeed to really challenge traditional ideas of family based on marriage.

Whatever the explanation, the idea of marriage as somehow 'best' is one that is articulated across the constituency. For example, another constituent remarks: 'I do think that marriage provides a better framework' [1]. Specific reference is also made to the general principals of saving and supporting marriage that were ultimately incorporated into the 1996 Act. As a second constituent observes:

> 'In a sense there was no point arguing about those principals because although, you know you might look at them and think well they don't really fit with a divorce law in some ways, at the same time…you know, yes everybody would say that…saving a marriage that can be saved is

something which should be done.' [15]

This view is reiterated by the third member of the constituency, who suggests that 'nobody could actually take issue' with these principles – the reason for this being that they were, as he puts it, 'terribly reasonable' [6].

Discussion

The views articulated by the Pragmatic Progressives are framed by a very clear awareness of what they perceive to be the limits of law. As one constituent remarks: 'People expect a lot from divorce law.' This is, however, followed by the assertion that such expectations are 'idealistic' [1]. For this particular individual, the primary function of divorce law is that of dispute resolution. This prompts the question of whether those disputes should include, 'whether the marriage should be rescued'. The answer to this question takes the form of the following observation:

> 'provided there has been sufficient lapse of time, and at least one party is saying [the marriage] is at an end, then it's over. Of course the law could pretend that it's not, that the obligations continue and should be enforced.' [1]

The clear implication is that policy makers need to recognise the limitations of the law when dealing in intimate relationships. The question as to whether a marriage has broken down is thus a primarily private matter for the parties involved, rather than something to be resolved within the public arena.

The limitations of divorce law are, to some extent, proscribed by the way in which divorce is now perceived within today's society. As previously mentioned, society's value system is such that divorce is no longer seen as a 'punishment' - the fact of divorce thus no longer constitutes any real form of deterrent. Indeed as one constituent observes: 'The reality is that all divorce is, is permission to remarry.' Although she does go on to note that, 'people want the symbol of being divorced, just as they want the symbol of being married' [1].

Another constituent makes the comment: 'I don't know what government can do to strengthen marriage' [15]. The perception that little can in fact be done, is also echoed by a second fellow constituent. Indeed this constituent describes the Act's general principles as, 'a bit anodyne'. Specific reference is made to the provision requiring both courts and individuals 'exercising functions' under the Act to have regard to the general principle, 'that the institution of marriage is supported'. However, he then goes on to make the following observation: 'Well…what's a court official got to do with the institution of marriage being supported? I mean it's just nonsense' [6].

In contrast to his more Idealist-oriented counterparts within the policy community, this constituent constructs law in terms of its practical functions. Here the talk is not of law sending a signal, or somehow symbolically supporting marriage. Instead law is viewed in terms of its practical impact 'on the ground' - essentially in terms of its direct effect on behaviour. With regards to the principle of saving individual marriages, this particular constituent comments: 'Social engineering isn't it? But because it's so anodyne it doesn't make any difference if you put it in or not'. Whether the law should be attempting to operate as some kind of social engineer is open to question, however the clear implication is that it actually has very little capacity to do so successfully.

If Ewick and Silbey's (1998) typology of legal narratives is adopted, then the image of law presented by this pragmatic constituency is arguably best described as falling within the second category. Constituents paint a picture of law that is much more closely situated 'alongside' people. Law is something with which individuals can engage (and in certain instances manipulate), and which is ideally rooted in the dynamics of everyday social life. Law is thus constructed as a dynamic creature, framed by daily life, and responding to the society in which it operates. For example, as one constituent says with regards to the 'shift' that she observes in the way that people form relationships: 'My view is that we have to devise a law that recognises this shift' [1].

The 'Middle-Ground'

The remaining policy makers articulate a position that is situated in the 'space' that exists between the poles of opinion occupied by the Idealist and Pragmatic Progressives. The participants that make up this 'Middle-Ground' constituency, are drawn primarily from professional and interest groups (other than 'legal' groups), and from within the formal policy-making apparatus. For these individuals the 'problem' of divorce centres on the fact that law is based upon matrimonial 'fault', and the adverse impact that this is perceived to have.

Commonalities do exist between the views of the Idealist and Pragmatic Progressives, and this central group. For example, some constituents talk about divorce law in very practical terms. As one remarked: 'I think that…a good divorce law would be just that' [5]. Another constituent asks of the law: 'Well what is it for?…I suppose it's to regulate you know the break up of this relationship, to make sure the break up is fair to both parties, and…sufficient support is provided for the children' [3]. In a similar vein, yet another constituent states: 'very largely people wanted the divorce as a practical way of sorting out where they lived, money, children, things like that' [2]. As with the Pragmatic Progressives, the suggestion is therefore that the law should be responding to the society with which it deals, and indeed should be concerning itself with the practical aspect of marriage breakdown.

However, despite these apparently pragmatic views, the 'overall' image of law that is constructed by these participants is one that actually occupies a more centralist position. Indeed some of those constituents who seemed to articulate a pragmatic approach to divorce law, at the same time also appear to accord it a somewhat 'wider' role. For example, the constituent who expressed the opinion that divorce law 'should be just that', subsequently goes on to argue that the process should also, 'be about dealing with people who were clear that they wanted a divorce' [5].

Several constituents talk about law primarily in terms of the consequences of divorce. Here the focus is on, 'what the consequences might be' [14]. The problems – namely, unhappiness, hostility, conflict etc. - created by a process that is

based upon matrimonial fault, has the effect of legitimating a broader 'humanitarian' role for divorce law. For example, one constituent expresses the view: 'I would like to see the law, where it could, contributing to better outcomes for families' [5]. In a similar vein, another constituent makes the following argument:

> 'It's the life of the family after divorce that is important...a divorce law ought to set, if it can...the basis for...constructive post divorce life.' [9]

The conceptions of marriage articulated by this constituency, straddle the individualistic and the collective. At one end of the continuum, links can be drawn with the pragmatic perception of modern relationships as being more about choice and privacy. One example of this type of perspective, is provided by a constituent who comments: 'I've met people who say...we've lived together for eleven years, and you know...I buy...the Christmas presents for his parents sort of thing, but oh no I wouldn't dream of getting married' [3]. What should be emphasised here, is the perception that marriage means different things to different people. As this constituent goes on to observe:

> 'There's...the very narrow legal view that marriage is a system for regulating the onward transmission of property...It's all about inheritance, and it's all about who gets the family estate, you know that's one extreme...And the other extreme is...marriage is a holy estate signifying the unity between Christ and the Church...and everything else in-between' [3]

This particular constituent also asks about the 'added value' that is gained from getting married – indeed he questions whether it is about 'economic protection for women', a 'secure home or 'public commitment'. The conclusion reached is that whilst 'individuals may give a personal answer to that', there does not appear to be a 'collective' view that is prevalent within society [3]. In a related vein, a second constituent articulates what can be described as a more 'dual' conception of marriage. Whilst marriage is recognised as possessing some 'collective' character, this is also juxtaposed with the lack of a firm collective (societal) view. As she remarks:

> 'I would accept [marriage] is an institution but I think that institutions change, and this particular one is now very much sort of a diverse kind of entity.' [5]

Moving slightly further along the continuum of opinion, other constituents within this group articulate a more collective, institutional, and arguably more confident view of marriage. An example of this perspective is provided by one of the constituents occupying a position within the formal policy-making framework. Here marriage is constructed in what she describes as more 'holistic' terms:

> 'It's not just a simple contract, it's more than that, it's a contract between two people and the state…and if they have children, it's a contract that involves their children and their wider family.' [2]

This position is subsequently reiterated as she then goes on to argue: 'This isn't just a broken relationship, this is an institution.'

'Supporting' marriage?

As was the case with the Pragmatic Progressives, the Middle-Ground constituents also question the capacity of divorce law to save and support marriage. For example, one particular constituent questions the Idealist belief that legislation effects the rate at which relationships break down:

> 'that can't possibly be the case…what it does do is either make it easier or harder, or more or less timely for people to proceed to the legal process.' [2]

However, despite the existence of some scepticism, this constituency is also characterised by a greater willingness to actually accept a role for the law in supporting (and saving) marriage. Indeed several constituents were particularly keen to incorporate statutory support for marriage support services – i.e. marriage support, but at an earlier 'stage' in the life of a marriage.

An example of this greater willingness to support marriage within the divorce process itself is provided by one constituent who, despite confessing that she was,

'not a great one for supporting the institution of marriage', then goes on to make the assertion that she would rather 'support marriages' [5]. Another constituent states: 'Now one could say, validly, that what we should do is be focussing on preparing people for marriage and supporting marriage, I mean I'd go along with that' [10]. A third constituent also talks of saving marriages as a 'good' thing. This particular participant makes reference to the fact that one of the 'counter arguments' is the fact that by the time people file for divorce, it is actually too late to save the marriage. It is accepted that this will be true in 'some', but not all cases:

> 'the thinking is that if you can do anything to increase the proportion and save the relationship, you know, all well and good.' [3]

An interesting position is adopted by one of the constituents from within the formal policy-making apparatus. In this instance, the talk is of the importance of divorce law being, 'sensitive to marriage' [2]. This 'sensitivity' is constructed in the following terms:

> 'switching over to a system which wasn't just concerned immediately with dissolving the legal bond and getting it done as quickly and as cheaply as possible, it moved over to a process which recognised the reality.' [2]

What is of particular note here is the 'nature' of the relationship that is constructed between law and reality - in this particular instance, the 'reality' that people experience when relationships break down. Indeed underpinning this position is the very basic view that divorce is not some kind of 'single event', nor indeed is it a 'single process in time'. As mentioned in the previous chapter, the process is actually regarded as 'legal, social, emotional, psychological and practical'. A divorce process that is truly sensitive to marriage is therefore one that is similarly multifaceted, and which is reflective of 'what was going on in people's lives' [2].

Discussion

In common with their more pragmatic colleagues, the views articulated by this constituency are framed by a recognition that the law is subject to limitations.

Certainly several of the constituents are sceptical about the ability of a divorce law to genuinely save and support marriage. For example, one constituent observes: 'the thing is the more you look at it with the law, the more you think well what the hell can it do?' This constituent, who has a background in marriage counselling, then goes on to make the following argument:

> 'true marriage support is not divorce prevention. If your starting point is to prevent people getting divorced, you are probably doing it too late, and then you end up bringing in measures which delay people getting divorced, which in some instances might actually be quite helpful, but generally speaking if you look at evidence...I think...you can really only defend it at an earlier stage because you get caught up in this thing about really...are you supporting marriage, or are you just wanting to stop people getting divorced.' [5]

This idea that marriage support can actually turn into divorce prevention, is echoed by a second constituent who makes reference to, 'holding people back from divorce' [9]. The key for this constituent lies not in a focus on divorce law, but rather in providing much broader marriage support within society. It is only this broader kind of approach that can facilitate a change in 'culture' – namely where it is recognised that marital difficulties are 'normal', and that seeking help is felt to be 'acceptable'.

Although this constituent would rather the 1996 Act was 'a straightforward divorce act', she does not repudiate the need to 'strengthen and...assist marriages that are saveable'. However, the question of whether law can actually do anything positive in this area is questionable. The constituent's background is in mediation, and her perspective is firmly grounded in the experience of working with people whose relationships are breaking down. As she observes:

> 'We'd kept national statistics for years...on who was using mediation, and most of them were living apart by the time they got to mediation. There weren't may who were living together whose marriages were saveable, although we did think that if the law did really...front load the divorce process, then you might have more people uncertain, whose marriages could be saved.' [9]

Despite a real awareness of the limitations of law in this context, what seems to distinguish this constituency from the pragmatists, is thus a 'hope' that law can save marriages, together with a stronger belief that marriage is in fact worth supporting. It should, however, be noted that some members of the constituency are more positive about the ability of the law to save marriages. For example, one constituent makes reference to the fact that 'quite a high proportion' of divorce petitions do not proceed through to decree absolute. She then goes on to argue: 'Quite a lot of people say that they regret having done what they did…a lot of them say 'if only I'd sought help sooner' [2]. This position is subsequently echoed by a second constituent:

> 'At the moment there are 200,000 petitions for divorce every year. There are 150,000 decrees…so one quarter drop out of the system, do not proceed to a divorce right now, that's without…anything. So I mean, no doubt there is a substantial proportion of divorces where by the time people file for divorce it is too late, but equally there's a whole chunk, a quarter where it manifestly isn't too late because they do not proceed to divorce.' [3]

This observation reflects the underlying construction – or perhaps it might be argued a hope - that those parties who commence divorce proceedings have not necessarily reached a final decision as to whether their marriage is over. Such a construction in turn opens up the possibility that law does in fact have a positive role to play when it comes to the issue of supporting marriage.

The support accorded to marriage by this constituency arguably suggests that the terrain of intimate relationships is not constituted as a purely private matter. The role that is played by the state when it comes to morality is explicitly discussed by one of the participants who, firstly, makes the following observation:

> 'either you have a nanny state or you have a laissez-faire kind of community where...everybody lets it hang out really and who's to worry. And in a way I think one's got to hold the tension between those two because…as in any marriage in fact there are private and collective interests that need to be balanced out…and…you've got the kind of

two extremes of narcissm on the one hand, and…a kind of collective imposition on the other.' [14]

In view of the fact that modern society is not a morally absolute one, the observation is made that there is, 'an intense value question underpinning all this'. Indeed the question is then posed:

'If you have a prescriptive body, if not the church, the state – that tries to uphold some agreed standards…and if so, are they agreed and by whom? Or do you…allow individuals as it were to be experts in their own fields, and support them in making their own choices?' [14]

He then continues:

'I mean the latter one sounds more attractive, 'cos actually that's in a sense…the best way, it's about internalising a moral code rather than having it externalised, and that's more likely to result in personal integrity, which I suppose is the goal, that's the 'gold standard'.'

For this particular constituent, an internal morality is thus deemed to constitute the preferable option.

For some of the other constituents, however, it is arguable that marriage actually represents the 'gold standard'. Nevertheless, in contrast to the Idealists, that perception does not feed into the belief that law should seek to deter people from seeking a divorce. For example, one constituent refers to divorce as a 'life event', and suggests that the proper role of divorce law is to find 'a more humane way of managing what was a fact of life' [10]. This is echoed by a fellow constituent, who makes the following statement:

'The more we move away from seeing divorce as offending behaviour to seeing it as, you know, an ordinary life transition so to speak, I think the more one ought to think about transitions as times when people need resources to manage change.' [14]

As with the Pragmatic Progressives, the 'image' constructed by this middle group, is of a law largely based in social reality. For example, one constituent argues, 'law must be cognisant of society…at its time' [10]. This position is, however, also 'influenced' both by a very genuine (and indeed arguably 'idealist') belief in

marriage. The end result is thus what can arguably be described as a 'dual' role for law – namely that of attempting to provide some support for marriage, whilst at the same time working to bring marriages to an end.

Concluding comments

These last few comments from the Middle-Ground constituents would almost seem to represent the wider debate in microcosm. For the Idealists, a confident ideology over which constituents are not prepared to compromise, feeds into a clear vision of law as a prescriptive (and indeed a corrective) framework upholding the marital 'ideal'. Law is thus effectively constructed as a mechanism for achieving constituents' Utopian vision of a society united by shared norms and values.

For the Idealist Progressives, the ideology enshrined within the idea that law should 'set the standard' of marriage is framed by the recognition that it is neither possible, nor is it arguably desirable, to return to a morally absolute society. Inherent within the discourses articulated by this constituency, would seem to be a recognition as to the limits of law when faced with a 'real movement' in family life. As Rodger argues:

> 'Political rhetoric which ignores the fundamental institutional and cultural movements of the times may accomplish short-run legislative change which will retard those movements, but at the risk of creating legal frameworks which are essentially ignored at the social level.' (1995: 14).

For this constituency, reform thus requires that ideals be compromised to some extent. Indeed as one constituent observes: 'we mustn't allow the best to be the enemy of the good' [7].

Amongst the Pragmatic Progressives the view of law is very different. The discourses articulated by these constituents present a picture of law that might be best described as a 'dependent variable' – in essence law is constructed both as

responsive to societal change, and as dealing primarily in the practicalities of relationship breakdown. The relationship between law and society is thus much more 'bottom-up', with individuals granted a greater degree of autonomy to make their own choices and decisions with regards to their intimate relationships.

The policy-making community is thus characterised by a fundamental division of opinion as to whether law should reflect the reality of social behaviour and simply administer what people do, or whether it should reflect some kind of standard. As this chapter has revealed, the division that was evident when constructing the divorce 'problem', crystallises into competing 'visions' as to the broad role or function of divorce law – namely as a mechanism for both supporting marriage, and for bringing marriages to an end. The next chapter therefore goes on to explore how these competing visions were effectively 'worked out' when it came down to the practical issue of the divorce process itself.

Chapter 7

The Divorce 'Process'

Introduction

This chapter examines the national policy-making community's thinking when it comes to the mechanics of the divorce process itself. This is the point at which the values, interests, ideals and policy 'visions' of the various constituents effectively solidify into substantive proposals for reform.

At this more practical or 'instrumental', level both the Idealists and the Pragmatic Progressives remain distinctive constituents within the policy community. However, across the more 'middle-ground', there is once again something of a shift in constituency boundaries. When discussing the role of divorce law at the more esoteric level, participants divided along what might be best described as ideologically oriented lines. However, when it comes down to the mechanics of the divorce process, those ideological divisions effectively 'collapse' back into what is essentially a division along the lines of positions occupied within the policy process. The main division within this middle group is thus between those participants who formed part of the formal policy-making apparatus (the 'Formal' policy-makers) and those representing interest and pressure groups who were involved in consultation and lobbying (the 'Interest Groups'). In view of their child-focussed 'take' on the divorce process, the Child Advocates are also primarily treated as a distinct faction. However, where they have more general (i.e. non child-centred) comments to make, their perspective falls within that of the broader 'Interest Group' constituency.

The Idealists

Marital 'conduct'

For the Idealists, the central task of the divorce process is constructed in terms of investigating the circumstances of marriage breakdown. Indeed one constituent, in particular, argues strongly in favour of such an investigation. The 'problems' raised by some of the other constituencies as being inherent in such a procedure, are regarded as perfectly surmountable:

> 'It's very easy to moralise about this, I haven't got divorced, I don't know, but obviously I think parents who start criticising their former partner in front of the children and things are doing enormous damage...But of course the proponents of this divorce law say, 'oh well that's precisely what the old law did', but not necessarily, it can be done in private you know. It could be done in private in a family court in front of a registrar, in a very humane, sensible way, sitting round a table.' [11]

The cost element of conducting an investigation in every case, is dealt with in a similar fashion:

> 'And then you would say, 'oh we couldn't possibly afford this because they'd be saying this allegation, that allegation it'd go on for weeks you know'...I don't know if it would actually. I think that probably arises from the old divorce courts where these sort of vast and public affairs were sort of producing titbits for the newspapers and things.' [11]

This constituent does recognise that such a procedure may cause difficulties in some instances: 'no doubt in some cases it would be very difficult, perhaps it would be impossible, perhaps some couples would just be shouting at each other the whole time'. However, his overall view remains an optimistic, although indeed some might argue a naïve, one: 'But I...suspect that...most people can be encouraged to talk through the process, it might help a bit'.

For this constituency, marital conduct is also regarded as a factor that should have a positive impact on the outcome of divorce proceedings. As one participant states: 'I

think conduct should impact on for instance custody, and things like that, which it doesn't really at the moment...to any great extent' [11]. Constituents did ultimately succeed in ensuring that the 1996 Act, despite removing 'fault' as a basis for the divorce itself, actually incorporated a provision ensuring that conduct be considered when dealing with the ancillary matters of finance and children. Matrimonial conduct in the form of fault was thus transformed from a primarily symbolic role, into an active function within the new procedure. Indeed as one constituent remarked: 'That was quite a concession we got out of the government. We were quite pleased with that' [11].

This raises several issues for consideration. Firstly, this kind of view reflects the perception held by Idealists, that marital failure can be constructed in terms of conduct – essentially in terms of guilt and innocence. Secondly, it also reflects their belief that the role of divorce law includes defining the nature of the marital obligation. Whilst the Idealists ultimately had to concede the issue with regards to the ground for divorce itself, this provision allows for the law to retain a role in injecting the moral content into marriage. Indeed that role will arguably have much more of a practical impact as the 'guilty' party is punished in very real, rather than merely symbolic terms. Thirdly, it provides some indication as to how this constituency views children. The introduction of conduct as a factor in deciding arrangements for children arguably implies that children effectively constitute property to be 'won' by the more worthy spouse. When asked whether such an approach was in the best interests of children, one constituent did confess that he would have to give the matter further thought. He did, however, continue: 'I think every case is different, and it's got to be judged on its merits...And the only way to judge on the merits, is to hear what people have to say' [11]. Arguably implicit within this comment is the idea that those 'merits' are constructed, at least to some extent, in terms of guilt and innocence.

Information

The Idealists are generally quite sceptical as to the merits of incorporating some form of information into the divorce process. One participant talks in very general terms about the 'need to educate people', linking it to a need for 'a national debate about the kind of society that we want to see' [12]. The efficacy of an information element remains, however, subject to question:

> 'the law can't make people responsible, but it can help to make them responsible, by stopping them from being irresponsible.' [12]

Her fellow constituent also considers the issue of whether information can be used to stimulate more responsible behaviour. In this instance, the concept of responsibility is placed specifically in the context of the situation regarding the children of divorced parents, and the arguments that were advanced by the 'proponents' of incorporating information into the Family Law Bill:

> 'They say that oh it's all about, that it's not divorce itself that's wrong...what's wrong is that people are not educated to stay together with their children.' [11]

This concept of parental education is, however, dismissed. In the opinion of this participant, 'however much people go to these information sessions' saying that they are going to be responsible, 'when it comes to it...it often doesn't work'. Therefore the end result is that children still lose contact with the non-resident parent post-divorce, with what are described as 'devastating' effects. For this participant the solution to the problem of divorce is not therefore located in educating parents about how to manage post-divorce life.

Reflecting their construction of the divorce problem, 'responsibility' for these constituents does appear to be ideally constructed in terms of remaining married. However, the ability of information sessions to actually save marriages is also subject to questioning:

> 'I suppose the proponents of the Bill would say their Bill is more likely to save marriages because...people will...have to go along to these information sessions, but the trouble with these information sessions is they were sort of undertaking, rather undertakers of marriages, not saviours

> of marriages, there was no mechanism to make people go along to have sessions with the old Marriage Guidance Council, or Relate or whatever, and say, look do you really want to get divorced? Have you really thought this through? This is how we could help you, there's all sorts of experience we have, experienced people who can tell you how to get over your problems. I mean there was never any suggestion of that.' [11]

For this constituent, a central task of the divorce process is clearly constructed in terms of saving marriages. In addition, the faith that is placed in professional 'expertise' also appears to reflect something of a lack of trust in the judgement of the individual parties to a marriage. Certainly present within this comment, is a sense of reluctance to allow the parties to really take, and indeed to exercise, personal responsibility about the state of their marital relationship. Arguably what is thus being envisaged here is a variation on Donzelot's (1977) tutelary relationship between the expert and the (private) individual.

Mediation

As with information, little enthusiasm is also displayed within this constituency for the concept of mediation. For example, one constituent remarks:

> 'I'm not against mediation, I mean I think that's a very good thing, and if it can help, and if it can bring people together...And what I was told constantly by people, was that by the time you've actually got to the point of going to do a divorce, you're not prepared to listen to anybody at all. Now whether that's true or not, I don't know.' [12]

This lack of enthusiasm does, once again, appear to be largely attributable to its perceived inability to save marriages. Certainly the Idealists do tend to construct mediation primarily in terms of reconciliation – an interpretation that is at odds with both the mediators, and indeed the majority of the policy community. However, the implicit criticism of mediation that is articulated here does also raise some interesting questions about the emphasis placed by the Idealists on the role of divorce law in supporting and saving marriage more generally. If it is accepted that

relationships have deteriorated to such an extent by the time parties file for divorce, then law's ability to save those marriages is fundamentally questionable. In addition, the result of attempts to discourage divorce via the more 'difficult' process advocated by constituents, is arguably a process primarily engaged in holding people back from divorce rather than positively saving marriages. Although, it may of course be further observed that such a result is perhaps not overly problematic for a constituency that, as previously discussed, prioritises the institution of marriage over the quality of the marital relationship.

Children

As discussed in Chapter 5, the language of children and their 'best interests' features prominently in the social problems 'work' of this Idealist constituency. It is, however, notable that in contrast relatively little is said about the actual 'relationship' between children and the divorce process itself. This raises the issue that was briefly mentioned regarding the impact of conduct on arrangements for children - namely whether the underlying perception is actually of children as parental property or 'chattels'.

Constituents certainly display some 'difficulty' with the concept of children's rights. For example, one constituent says of such rights:

> 'Well I mean any sensible person knows that children have rights. I mean you know, children have a right to be loved, looked after, cared for, not beaten up, not abused, I mean everybody's known that for the last two thousand years.' [11]

Echoing Idealist constructions of the divorce 'problem', it is the child as passive object of welfare that appears to be present once again within this concept of 'rights'. Indeed this kind of construction is reinforced further by the second constituent's comment: 'I'm not very keen on children's rights, because I believe in parents' responsibilities' [12].

In a similar vein, the first constituent also talks about the success of securing an extended 'waiting period' – increased from twelve to eighteen months - where children are involved. The justification given for this, is that 'divorce is more important' where there are children. This greater importance is, in turn, attributable to the 'great implications' that divorce is believed to have for children. One consequence is therefore that, 'people should…think about it even more carefully' [11]. Furthermore, when asked about whether children have any right to be informed about, or to participate in the divorce process, this constituent gave the following response:

> 'How can you? I suppose, I don't know, I mean maybe if they're over sixteen or something maybe, I suppose, it's not an argument which we ever covered really.' [11]

In view of the Parliamentary and Committee debates that were held on these very issues, this latter comment is an interesting one. It may, however, simply be reflective of the fact that constituents did not consider such children-related issues to be of particular importance.

Discussion

The Idealist constituents were extremely vocal when discussing both the 'problem' of divorce, and the 'role' that law should play when marriages break down. However, whilst constituents are both happy and comfortable talking in 'symbolic' terms, they do appear to display less of a willingness (particularly on the part of participant 12) to similarly engage at the more basic instrumental level. A key factor in framing this perspective is arguably the 'position' that they occupy within the policy community. Membership of the political 'elite' creates a distance between the Idealists, and the everyday reality and experience of divorce. Constituents are thus effectively allowed the luxury of conducting the debate primarily in terms of conviction and principle, rather than in terms of procedural detail and practicalities.

The argument in favour of investigating marriage breakdown reflects constituents' perceptions that the state of the marital relationship does constitute legitimate terrain for public scrutiny. However, what is interesting is the juxtaposition between the attitude to public involvement in the marital relationship, and that displayed towards state intervention in the parent-child relationship. For example, one constituent makes the following observation regarding the suggestion of providing a 'Children's Officer' as an independent source of information for children to access:

> 'Well in theory that's alright, but it could be devastating…I mean the thought you're going to have some sort of social security officer, sort of summoning the children into some office…[asking] what their parents are doing and not doing, that's really perhaps taking the involvement of the state a step too far maybe.' [11]

Whilst the involvement of experts is advocated with regards to the marital relationship, the situation is somewhat different when it comes to the relationship between parent and child. Constituents do appear to be prepared to trust the parties in their capacity as parents and in the exercise of parental responsibilities, however the same does not appear to be the case for parties in their capacity as spouses. Whereas the parent-child relationship is defined in more private terms, constituents' (ideological) commitment to marriage appears to justify a much more pro-active and interventionist policy response when it comes to matters of the spousal relationship.

The Pragmatic Progressives

Information

In principle, the Pragmatic Progressives do accept that providing information to parties does constitute a legitimate part of the divorce process. However, constituents are less comfortable with the idea of a meeting as the mechanism for

delivering that information. For example, one constituent talks of envisaging, 'a set of simple leaflets' [1]. She then continues:

> 'There would be a leaflet with information about what you had to do, what had to be sorted out – in other words home and money, about children, and about the help and support that was available.'

What seems implicit within this comment is that information is regarded, at least by this particular constituent, as being about just that – namely information in order to inform and educate. Certainly this type of thinking does seem to be further indicated by the constituent's comments about what she saw as the much more directive ideas about information emerging from government:

> 'If there is a hidden agenda, this is because of the link with mediation. There was a very strong push to stop people using lawyers. The whole idea of gatekeepers as a way of pushing people towards mediation. The information meeting may have been a filter like that.' [1]

The other two participants comprising this pragmatic constituency are both extremely vocal in their opposition to the whole concept of information meetings. For example, one constituent says of the original Green Paper proposals:

> 'the idea of this kind of CSA equivalent 'information gateway', whereby…some undefined and un-specifically trained clerk was going to actually have the whole power over whether you got legal aid or whether it was stopped, and direct you to where you were going, was just so horrible it was untrue.' [6]

It should, however, be recognised that one of the factors in this opposition, does appear to be the self-interest (in the sense of self-preservation) of the legal profession, from which both of these constituents are drawn. Indeed as the second constituent explicitly states:

> 'we feared that the divorce information proposals, you know that whoever provided divorce information was going to be a gatekeeper to the divorce process and…we were afraid that solicitors wouldn't be able to undertake that role…so we thought that solicitors might get cut out there.' [15]

Reflecting the over-arching practical, practitioner-based perspective of this group, constituents construct the 'problem' of information meetings in very practical terms. For example, lack of confidentiality is articulated as a major objection to the group meeting concept originally advanced in the government Green Paper. As one constituent remarks:

> 'the original thing was a group meeting where...you had an information meeting day, and I remember...you know...sort of trying, to...give extreme examples of Princess Diana sitting next to her dustman, both talking about their own divorce...at the information day at the Principal Registry in London, it's just a nightmare.' [6]

For a second constituent, the group meeting 'issue' is articulated primarily in terms of intrusion:

> 'it's actually quite intrusive to have to go to it, and it was very difficult you know, to see how some people were going to get to these meetings...in terms of you know, how is a mum who lives out in the sticks with two toddlers going to get herself to an information meeting? I mean equally a victim of domestic violence, she's going to put herself at great risk by going to an information meeting 'cos people will know where they are, and particularly in rural communities people will see you going into that building and think 'ooh look at her, I know what she's up to.' And before you know it, everybody in the community will know what's going on.' [15]

It is noted that in a large city such as London a 'certain amount' of anonymity might be possible. However, the observation is then made: 'but in any smaller community you haven't got a hope'. The implication is thus that the 'top-down' perspective of policy-makers based in Whitehall, gives insufficient consideration as to how policies will actually impact real people on the ground.

The cost implications of information meetings also constitute a cause for concern. As one constituent notes: 'Hundred and fifty thousand divorces, three hundred thousand people, possibly...linked to the process which is much too late for a lot of people, much too late' [6]. A second constituent also questions whether the money involved in setting up an information process is actually being used in the most effective way:

> 'there was always a threat hanging around that... if the budget was used up on divorce information meetings, then there wouldn't be any money left for actually providing people with the services you'd just told them about...mediation or solicitor's services.' [15]

Constituents also express significant unhappiness with the idea that attendance at an information meeting should be compulsory. Indeed one participant in particular, talks in terms of compulsory attendance as almost an anathema to British culture:

> 'You can make people go to information meetings, in Australia it works, but I think we've got a different culture here, we're not quite, we're not in Australia yet, we're not in America...It never ceases to amaze me who goes on Ricky Lake or whatever and talks about their personal problems, but we're still a fairly sort of anally retentive society here in terms of talking about personal stuff, and the idea of going into a room with lots of other people in a group meeting and talking about your divorce you know, I don't think is particularly attractive to most people.' [6]

The law is thus not perceived with any real confidence as constituting an effective tool, at least when operating in isolation, with which the societal culture can be changed.

This sense of 'discomfort' with a process that involves compulsion also reflects a very particular construction, on the part of constituents, of those parties who choose to enter the divorce process. As one participant argues:

> 'We were dreadfully concerned about what the Government was proposing because it was so prescriptive. You know there are lots and lots of people who don't need divorce information, you know, they know what happens in the divorce process already, whether it's because they've been through it already or because they're family law solicitors or for whatever reason...and we were concerned that people should get divorce information at a time and in a way which suited them...You know some people are perfectly capable of sitting down with a load of leaflets and reading them. Other people might want to see a video, you know, some people might want it to be sent to them by the court, some people might want their solicitors to give it to them.' [15]

This observation raises several issues. Firstly the choice to divorce is not perceived as ill-considered, nor are the parties believed to be irresponsible or necessarily poorly informed. Indeed one constituent expressed particular concern about the fact that the Government appeared to think that people did not take their marriages 'seriously', a fact that she found 'very offensive'. She then goes on to expand on this position in the following terms:

> 'I think all solicitors would tell you that most of their clients that turn up at their door thought long and hard for many, many years, and there has been research into it, not looking at solicitors' clients, but looking at the divorcing public, some years ago you know, which just backs that up, to say that people don't wake up one morning and think 'yeah divorce today!' You know, they've suffered through years of unhappiness before they actually dare to even step into a solicitor's office, so...it's not something which...people just wake up one morning and think yes that would be a good idea for today.' [15]

This view is similarly echoed by another constituent, who observes that by the time people approach solicitors, 'quite frequently they've spent two years agonising over it'. To be given information about counselling, at a stage where many have already actually utilised that option, is thus regarded as both unnecessary and 'patronising' [6].

A second aspect of the compulsion 'problem' is located in the idea that 'one-size-fits-all'. As one constituent observes: 'Everybody's at a different time scale, and to have one system which tries to accurately reflect all those different time scales is... impossible' [6]. In stark contrast to the more collective constructions offered by the Idealists, the discourses articulated by this group are underpinned by a construction of parties primarily as individuals. The task of then tailoring information to those individuals and to their needs is regarded as a difficult one:

> 'some people need different information at different stages. To be blunt some people are more intelligent than others, are better able to assimilate the information that's been given to them. Some people might need...information about their children...some people might not have children so they don't need any information on that.' [15]

This perception that information does not necessarily constitute the appropriate policy response, is reinforced by a second constituent. Here the argument is that what people actually want is information 'tailored' to their particular circumstances. Such information is, however, 'effectively advice':

> 'information meetings are not about advice, they're about giving neutral prescribed information, and everybody says, I've had lots of people coming in to me and saying 'I don't want advice, I just want to know where I stand.' So you start off the appointment and within about ten minutes the first question that comes out is 'what does that mean for me?' And as soon as you try to answer that question, then you're into advice.' [6]

The position adopted by this pragmatic constituency is thus in favour of information in the 'pure' sense – namely information to inform, for it's own sake, and with no connection to any other kind of agenda. Within that, the preference of all constituents is for paper information rather than some form of meeting. As one constituent sums up the position:

> 'There should be nationally prescribed locally targeted information available, but through different gateways. So if somebody chooses to go in to a solicitor first of all, there should be an obligation on the solicitor to provide the prescribed information, probably by means of a pack. If you go into the CAB it should be available, if you go into your doctor's surgery you should have an information pack.' [6]

Mediation

A number of the issues that surround information are similarly evident in the discourses relating to mediation. The concept of mediation receives support, although once again there is a perception that it is being somewhat subordinated to a different government agenda. As one constituent argues: 'the Government sees mediation as a cheap alternative and a way of keeping lawyers out of the process'. He does, however, then go on to remark that there is no reason not to put money into mediation, 'because it can be very valuable' [6].

As with information, the vested interests of the legal profession appear to be a key element in the position adopted by this constituency. Indeed one constituent who was particularly vocal on this issue describes the tendency amongst 'formal' policy-makers to view mediation as, 'a universal panacea':

> 'All you have to do is have mediation, and everybody's going to go off hand in hand, despite the fact that they've been beating each other senseless for the last three years, they're going to go off hand in hand to the mediator and sort things out, it's only the nasty lawyers that get in the way and turn them against each other. Well everybody knew that this was just rubbish.' [6]

The argument advanced was thus for the provision of mediation 'in partnership' with legal advice. Mediation is promoted as working best when supported by independent advice: 'People should have access to legal advice before, during and after mediation as well as when mediation is inappropriate or breaks down' [6].

There are several points to be made with regards to this argument. Once again, as with information, the individuality of parties is recognised. Indeed one constituent argues quite strongly that mediation is not a 'majority activity' [6]. Instead it is suggested that mediation can be good, 'when people are being honest with each other…they're both roughly at the same time-scale…in terms of where they are in relation to their acceptance of the breakdown'. However, it is suggested that 'even with everything going right', mediation will probably not be relevant to more that about 'a quarter' of the divorcing population.

Constituents were generally of the opinion that for mediation to become more 'popular', then a very real culture change would be required. As one remarks:

> 'There's still this feeling that it's sort of leather patches and sandals…you know it's popular in Cambridge, it's popular in Islington with the Guardian reading middle-class white people, it's almost completely useless in ethnic minority situations.' [6]

This perception is reinforced by a second constituent, who really questions the rational 'people like us' model that she believes is underpinning the emphasis on mediation:

> 'The Government seemed to think that...everybody that was getting a divorce was just as...you know, intelligent, and well informed, and wealthy as they were. They didn't seem to have the capacity to understand what it was like...to be...a mother with two small children, on benefits, in a council house...with maybe a smattering of GCSEs and nothing else.' [15]

A further issue that feeds into the constituency's approach to mediation is the focussed construction of divorce as a 'legal' process. This is perhaps unsurprising, given the position that constituents occupy within the policy community. It does, however, provide a very real contrast with the more 'holistic' constructions offered by some participants within other constituencies. For example, one of the constituents articulates her concern about how mediated settlements are reached:

> 'And again that's no criticism of mediation, but it was a fact that the Government didn't seem to think that there was a role for solicitors in giving advice and assistance to their clients while the mediation process was going on...And I mean, you know, divorce is a legal process, it has pretty...draconian legal consequences on...your status, and your financial affairs, your children...you need to know about the legal background and get some advice before you get into mediation, otherwise you know, you're potentially going to sell yourself down the river.' [15]

The law, in the form of solicitors and legal advice (and indeed the courts), is thus presented as offering a security and protection not necessarily present in mediation. Constituents regard it as vitally important that mediated settlements are subject to legal scrutiny and approval. This ensures that 'something fundamental' [6] is not missed, and that agreements are not 'unfair' or 'unworkable' [15]. As one constituent says of the court's role in the checking of consent orders:

> 'it's an argument which you can have about you know, what is the state's role in society? And how does the state fulfil that role? And we thought that, you know, the state had a responsibility to make sure that people, to

> put it bluntly, weren't being ripped off when they got divorced, and that the way you do that is by delegating that job to the courts so the courts can check.' [15]

Receiving the legal stamp of approval is also viewed as having the additional benefit of facilitating the ability to move on with one's life. In the words of one constituent: 'psychologically it gives people a feeling of finality, because...the court has said 'yes this is okay'' [15].

When it comes to mediation in principle, as with the provision of information, constituents are generally in favour. A typical example of the group's stance is provided by the following statement:

> 'We have always supported mediation...We think that...it's right that people should have a range of methods for resolving their disputes, and...you know if mediation works in any particular dispute, well that's fantastic.' [15]

Mediation is regarded as having a legitimate role within the divorce process. However, in common with the view of information, it is valued on the basis of its own merits rather than for its ability to further other agendas. Mediation is thus constructed as an option for people to access where they feel that this is appropriate. It is most definitely not regarded as a substitute for legal practitioners and the law.

Process over time

Constituents' practical and legalistic perspective is also evident in the approach adopted towards the concept of divorce over a period of time. For example, no justification is seen for extending the waiting period either where children are involved, or in the event that one party raises an objection to the divorce. As one constituent observes: 'it's meant to be no-fault divorce, but one party doesn't want it, you give them an extra six months' [15]. In a similar vein, a second constituent argues that to start imposing different time periods in different instances is, 'like snakes and ladders' [6].

Although opposed to the concept of extending the process both legal representatives do, however, argue for a power of abridgement in exceptional circumstances:

> 'we didn't...want a coach and horses to be driven through the one year period because if you do that then...you've got a law which says one thing but appears to operate in a completely different way, which is one of the criticisms people have got of the present law...but we did think...if there's terminal illness or some other, you know, dreadful event that's about to occur, that you should have the power to abridge the one year period.' [15]

The question of resolving the ancillary matters of children and property is similarly approached in practical terms. One constituent does suggest that: 'You can use the delay of a remedy to prompt someone to fulfil their responsibilities' [1]. In contrast, however, the remaining two constituents discuss the issue in language that is free from ideological overtones. For example, one comments on the 'logic' of not allowing people to remarry until finances are resolved, but then goes on to express concern about the inherent, 'blackmailing potential'. This anxiety is similarly shared by the second constituent:

> 'What we were concerned about was that, you know, the statistics demonstrate that it is usually women who want the divorce, and they are usually poorer than the man, and if you have...a provision like that, then the man can say well okay you can have your divorce, but only if you agree to my completely unreasonable proposals on what we should do about our finances. So, you know we thought it was a real weapon for a bully.....we feared that people were going to end up having...settlements which were unfair to them and unreasonable...as a result of it.' [15]

Children

Although the pragmatic constituents do have quite a lot to say about children the underlying suggestion does, nevertheless, appear to be that it this is not an entirely appropriate debate to be conducted within the context of divorce law reform. For

example, one constituent refers back to the fact that there was 'nothing' about children in the Bill as originally published:

> 'They hardly got a mention to be honest. And...you know, in a way...there was no need for them to have a mention, because they were already dealt with by the Children Act. You know there is an act called the Children Act, it deals with children. This is a Family Law Bill, which deals with divorce. But of course you know, nobody in Parliament could stomach that, there had to be some mention of children in the Bill for them to be happy...because, you know, it's the children who come off worst when there's a divorce.' [15]

The question as to what the law can (and indeed should) do with regards to parents and children, is something of a vexed one. As one constituent observes: 'You can't use divorce law to tell people how they should look after children' [P1]. The general principle, namely that it is in the best interests of children to maintain contact with both parents, is the subject of general approval within the group. For example, one constituent states: 'You can't really complain about the general principle...that generally speaking children are best served by having continuing contact with both parents' [15]. Another constituent echoes this perspective: 'We know that if there is an established relationship, it is more likely to benefit the child' [1]. It is, however, interesting to note that the third constituent justifies this provision in terms of recent global developments in the law: 'I mean it's reflected in the Human Rights Act '99, the right to family life, it's...nobody's going to disagree with that' [6].

This general acceptance of an effective continuation of the traditional two-parent model is, once again, partially underpinned by pragmatism. For example, one constituent refers to the sheer scale of divorce in modern society: 'the numbers are so large, and they are extremely large, that we need rules of thumb' [1]. There is thus a very clear recognition within this group that the law has to operate, and indeed has to get the job done effectively, in the real world. Indeed, another constituent makes this point in a slightly different way:

> 'You can get very bogged down when you start looking at things line by line, into everything. Sometimes you need to stand back from that, and say is that a sensible statement? Yes generally it is, or let's just treat it at that

> level...and stating a general objective or principle isn't going to stop the court doing what it wants to do in every individual case.' [6]

In the same way that the limitations of the law shape constituents' constructions of the role of law at a general level, this awareness also frames perceptions as to what the law can do at the more basic level. For example, the language articulated by some of the other constituencies, tends to present the whole issue of parent–child contact in terms of 'responsibility'. This type of presentation does, however, appear to be questioned by this more pragmatic section of the policy community. For example one constituent describes what, in her opinion, constitutes real parental responsibility: 'The primary responsibility is to feed, clothe, house, wash and socialise and supervise them. It's a twenty-four hour responsibility that can't be ducked' [1]. Such a conception of 'responsibility' is not, however, what actually underpins the legislation. Indeed as this constituent continues:

> 'What men want is a relationship with their child, to see him, to dangle him at their knee, but not responsibility. Parental responsibility, the basic responsibilities, is not really what most want in my experience. It's potty to say they do, because they don't.'

This particular constituent also raises the possibility of incorporating 'parenting plans' into the divorce process, describing them as good, 'tools for negotiation between parents' [1]. However she then goes on to make the point: 'But what children are going to be living on should be stressed more than who will pay for visits. We are so far away from thinking that'. This provides something of a juxtaposition with the perspective articulated by the Idealists – here the focus is on the day-to-day practical 'responsibilities' regarding children, rather than some ideologically framed vision of both parents fully involved in the post-divorce parenting 'task'.

As with their more idealist-oriented counterparts, some 'difficulty' is similarly evident when constituents discuss both how children fit into the divorce process, and the possibility of incorporating some kind of rights-based model into that process. An example of this is provided by one constituent, who observes:

> 'There is a view that children ought to have a voice. I'm sympathetic to that view, but the question is how to do it without raising their expectations or saying to them that you will get what you want. In a great majority of cases there is no realistic alternative to what emerges.' [1]

This observation raises several issues. Firstly, there is once again a fundamental recognition of the limits that restrict what law can do when dealing in families. In this particular instance, the family does not appear to be constructed as 'private' in ideological terms. However, it is arguable that greater autonomy, and thus 'private' decision-making at least on the part of adults, is perceived as inevitable. As this constituent goes on to remark: 'The reality is that people make their own arrangements, and then go through the legal hoops required' [1].

Secondly, the discourses articulated by this group are also underpinned by the implication that if given a voice, the reality is that children will then use it to make unrealistic demands. Indeed when asked for their views about children's participation in the divorce process, constituents tended to frame their responses in terms of giving children the ability to 'veto' the divorce itself. For example, one constituent remarked: 'Generally it's not thought that divorce should be denied in the interests of children, that's not realistic' [1]. In a similar vein, another constituent replies: 'You can't have your children telling you whether you can get divorced' [6]. Constituents' perspectives thus appear to be informed by an underlying developmental model of childhood – that developmental model being characterised by emotion and irrationality.

One constituent also makes the connection between the position of the child in the divorce process, and the position of children in society. Discussing whether children should have more of a say in the arrangements made for them, it is argued:

> 'Not more than they've got under the Children Act. It's an adult world. I mean you can't...where do you stop and draw the line? A five year old say, you can't ask a five year old where he wants to go, he wants to be told, he doesn't want to make a decision. What you do, is you independently look at them, you take...the Children Act checklist is fine, you take their wishes and feelings into account in accordance with

> their age and understanding. The older they are, you know…fine. But you can't……start wheeling children into court.' [6]

The position of children within wider society is thus used as part of the justification for their position within the divorce process. This provides an interesting comparison with the Child Advocates, for whom children's position in society is actually part of the 'problem'.

In addition, this argument also appears to reflect a very particular view of family life. Indeed when discussing whether the divorce process should allow for the provision of information directly to children, this constituent asserts:

> 'In the same way that you've got parents who object to sex education, I mean you've…you've got to work in…a society run by adults who have the right to, to privacy, and to run their family life for their children as they wish, without…breaching children's rights.' [6]

This assertion carries connotations of both parental autonomy, and indeed of parental 'rights' over children. It should, however, be noted that there is some divergence between this participant and the views of his two fellow constituents, both of whom were in favour of providing information direct to children. For example, one constituent was 'quite keen' on the idea of having a contact at the Family Court Welfare Service, who could be used as a 'support and advice point' for children when requested [1]. In a similar vein, the second participant also supported the provision of 'freely available' information, tailored to children's ages: 'Children…appear to want information, and I don't think anybody could responsibly say that they shouldn't have it' [15].

The end result is that, for this constituency, the role of the divorce process with regards to children is constructed in relatively limited terms. Children thus remain predominantly within the province of their parents. One constituent does make the suggestion that: 'Theoretically it might be a good idea if the divorce process was used to enable some external professional check on children's wishes' [1]. Indeed she argues that this 'would be a better use of resources than the information meeting', but does recognise that it would probably not be practical: 'we can't get the welfare reports that we need now for disputed cases. They're often delayed, or

incomplete.' In contrast, however, a fellow constituent describes such a check as, 'a bit 1984ish' [6]. One possible, and arguably limited solution to the issue is therefore seen to lie in changing the paperwork involved: 'We could have better forms. We could have joint forms...We could have forms that ask whether you have discussed the situation with your child, what children think etcetera' [1].

The courts are similarly accorded a limited role regarding the scrutiny of post-divorce arrangements for children. As one constituent argues: 'The judicial role is to try and pick up cases that need judicial intervention' [1]. Another suggests that the system is 'about risks'. He then continues:

> 'Divorce obviously has to check that there isn't a problem, as part of that process, I'm quite happy with the section 41 equivalent here...you know the checking...of...the arrangements. But...I don't think it should be any more prescriptive than that, I think that would be...a nightmare.' [6]

Discussion

Like their Idealist counterparts, the Pragmatic Progressives have very clear ideas about the problems that exist with regards to the current divorce law, and the functions that the process 'should' be fulfilling. However, in stark contrast to the Idealist constituency, their experience of working with the everyday reality of divorce and divorce law means that the debate is conducted at a much more practical or 'basic' level – essentially in terms of process rather than principle.

The legal practitioner perspective of the three constituents also means that the different aspects of the divorce process are evaluated primarily in terms of how they are perceived to operate on the ground. What is important for this group is not how the process measures up against some kind of ideal standard, but whether it is able to provide 'workable solutions' [1].

It has been suggested that the favouring of non-compulsory information and mediation as options that divorcing parties can either choose or not, reflects a sense

of self-preservation on the part of the legal constituency that participants represent. However, in addition to that, it is also arguably reflective of a broader view that the divorce process should be providing what people think that they need – in essence that it should be providing some kind of service.

This stance is underpinned by the construction of marriage primarily as a private relationship. In contrast to the Idealist view, the personal life of parties in their spousal capacity is much more strongly 'bounded', with the state of personal relationships becoming a matter primarily for the individuals involved. The end result is thus the construction of a divorce process that is situated much more alongside the people with which it deals. Faith is placed in individual choice and personal responsibility, with parties trusted to make their own decisions about the state of their personal relationships.

The Middle Ground

As outlined in the introduction, when discussing the mechanics of the divorce process, the Middle Ground is divided primarily along 'positional' lines. Situated on one side are the 'Formal' policy-makers. Within the study sample this group comprised three individuals, whose position within the state policy-making apparatus appears to be reflected in an adherence to what might be termed the 'official line'. On the other side are the 'Interest Groups' – representatives from organisations dealing 'in' mediation, children, marriage 'support' and religion - whose engagement with the policy process was principally in a consultative or lobbying role.

Both constituencies can, however, be distinguished from their more Idealist and Pragmatic counterparts. In contrast to the Idealists, the recognition that divorce is a life event, combined with the desire to make the situation 'better', engenders a willingness to really engage with the divorce process and the issue of reform. Whilst this willingness to engage with reform is a characteristic shared with the

Pragmatic Progressives, these constituents can be distinguished from this second constituency by their broader perspective on the divorce process. For example, the perception that divorce law is not purely about ending marriages is an important factor feeding into their constructions of that process.

'Formal' policy-makers

Information

This sub-constituency is characterised both by the belief that the provision of information should be formally incorporated into the divorce process, and that such provision should take the form of a meeting. However, when it comes issue of what function that information actually serves, then the picture presented has something of a 'dual' nature. One 'picture' offered by constituents does possess some similarities with the idea of information advanced by their more pragmatic counterparts – namely information to inform and educate. This image of information as an essentially neutral resource is reflected in the comments of one constituent who draws an analogy with what is currently available through solicitors and the Citizens Advice Bureau, but without the 'legal emphasis':

> 'there would be the possibility for those who needed help, they would be caught at the right moment, and not told what to do there and then but given a map…this is the sort of thing you might want to think about, this is the sort of person you might want to go and talk to, these are the leaflets, this is an address list.' [2]

A similar position is articulated by a second constituent, who talks in terms of the new legislation providing, 'self-help for people' [8]. This constituent also makes specific reference to the information pilots, criticising the fact that the decision not to implement Part II of the 1996 Act was framed in terms of the failure of those pilots to direct people into mediation. Of the Lord Chancellor's decision, this constituent says: 'He seemed to think that, at least I read into that statement, that the information meetings had been…to send people to mediation.' He argues that this

was not the original intention, the objective actually being to enable parties, 'to make the choice in the light of the information they got, about what was best for them'.

This presentation of the process as providing a neutral framework for decision-making does, however, contrast with a second, more directive picture of information. Interestingly, one example this more directive agenda is actually provided by the same constituent, who also talks of wanting the information meeting:

> 'to provide all the information necessary, to enable a person to come to a good judgement of whether their marriage was saveable, including the consequences of going ahead with divorce, and then if they thought the marriage was saveable, information about what to do, who to go to and what help was available, and...if not, what the procedures were for dissolution, and what the best way of doing that was.' [8]

The implication would thus arguably appear to be, that the primary objective of information is actually marriage saving. Indeed, as the constituent continues, this objective becomes more explicit: 'I thought that the information meeting, and...the things that could flow from that, were a very important part of keeping saveable marriages in place' [8]. What is, however interesting, is the way in which that information is actually seen to achieve this:

> 'I felt sure that information was quite an important part of the thing, and when people realise what their responsibilities may be after divorce, they may see...their position as not so wonderful...as it looks when they're doing it. So I was anxious to discourage unnecessary divorce, or to save saveable marriages.' [8]

Information thus appears to be constructed almost in terms of deterrence, or at least in terms of discouraging divorce.

Mediation

For this group, the role of mediation is very clearly constructed as not involving marriage saving. As one constituent explicitly states: 'it's not marriage guidance, it's not reconciliation' [3]. It is acknowledged that there are 'a whole set of separate issues' surrounding the extent to which the relationships of those people who file for divorce can be saved through 'therapeutic intervention' in the form of marriage guidance counselling. However, this constituent goes on to make the following statement:

> 'But mediation in a sense kicks in at the point where it has been decided, or you know the parties have reached the conclusion that the relationship cannot be saved, and therefore it is about making…arrangements as amicably as possible for the future, for a life apart.' [3]

As with information, the mediation option is also constructed in terms of an educative tool. An example of this is provided by one constituent, who advances the following argument: 'In many cases, the mediation, I would say…has the advantage of ultimately producing the solution for the parties themselves' [8]. A similar view is articulated by a fellow constituent, who observes: 'the parties learn to negotiate with one another and can then go on doing it for themselves' [3]. Law is thus presented as facilitating individual empowerment although it is arguable that, in view of its limited appeal, such empowerment is inevitably somewhat selective.

The support for mediation within this constituency reflects both the adverse impact that litigation is perceived to have on those involved in the divorce process, and the importance that constituents place upon the quality of 'family' relationships post-divorce. For example, one constituent argues:

> 'I believed that mediation on the whole was the best way of solving many of these problems. Litigation is long, complicated, expensive, and again tends to set people against one another. The mediation process, which is quite complicated too sometimes, depending on the nature of the assets in question and the problems between the two, children and so on…It's a more reconciling process.' [8]

A second constituent echoes this view, suggesting that mediation is 'peculiarly appropriate' in the family context. This is particularly the case where children are involved: 'because the parties are going to have to go on having... significant contact with one another, when the litigation's over' [3]. Mediation thus appears to represent part of the practical manifestation of constituents' more humanitarian perspective – divorce law reform involves not only engaging with reality, but also seeking to 'improve' it.

Ancillary Matters

One 'aspect' of this constituency that is somewhat unique within the policy community can be located in its belief that the absence of any provision requiring the resolution of ancillary financial matters within a given period, is problematic. The result is strong support amongst constituents for: 'the need to settle these matters between the parties before they go on to the next relationship' [8]. In practice, the resolution of ancillaries thus becomes a precondition for obtaining the divorce decree.

What is interesting to note, are the various discourses that surround this provision. When constructing the divorce 'problem', the failure to require ancillaries to be resolved was presented primarily in terms of 'irresponsibility'. However, as with the provision of information, there does appear to be evidence of another agenda at work. For example, one constituent appears to place a more directive or instrumental interpretation upon the incorporation of such a provision:

> 'there are people...one very eminent silk told me that you know, this is sort of the top end of the market, you get the business man in there, and when you've told him that he will lose his house, and he will lose two-thirds of his assets and his wife and children will take it...and he's come in with the new girlfriend...and he says 'I've seen them, face going white, they've never realised how much they'll lose'.' [3]

At another 'level', resolving ancillaries is perceived to reflect the more collective views of marriage articulated by this constituency. An example of this thinking is provided by one constituent, who questions why one should be allowed to remarry and take on a new partner and children before responsibilities towards the first have been resolved. She then continues:

> Therefore you do not get a licence to remarry until you have laid the first to rest...and that was, it was interesting because therefore it was taking a sort of holistic view of marriage...It was saying that it's not just a simple contract, it's more than that, it's a contract between two people and the state...and if they have children, it's a contract that involves their children and their wider family...And so it was trying to broaden the understanding, and that actually was quite a clever way of introducing the whole issue of marriage...This isn't just a broken relationship, this is an institution.' [2]

For this constituency the resolution of ancillaries is thus believed to serve both a practical, and indeed an ideological function.

Children

The importance accorded to children, and in particular to their relationship with parents in the 'problematisation' of divorce by this constituency, is strongly reflected in their subsequent construction of the divorce process. For example, a central objective of the reforms is expressed in terms of producing, 'a system that would benefit the children' and which would give them, 'the best life' possible [8].

Children, together with conceptions of their best interests, once again feature prominently in the justifications offered by constituents for various aspects of the divorce process. For example, the concept of information meetings, particularly during the early stages of the reform process, does appear to have been primarily aimed at parents. As one constituent remarks, one aim was to provide parents with, 'good information about children, about the effects of separation and divorce on children, how some children react, and for parents to be given as much support in that way' [2]. This view is echoed by a second constituent who refers to the giving of information as emphasising the following issues:

> 'how important it is that you…don't fight in front of the kids, don't treat the kids as pawns, don't get the kids to carry messages between you and all that sort of stuff.' [3]

This second constituent also talks about the influence that the group 'parent education meetings' currently operating in North America and Australia, actually had on initial thinking:

> 'the normal provision is on the lines that within twenty-eight, if you're a parent within twenty-eight days of filing for divorce you're required to attend a parental information meeting…and they teach you about mediation, they teach you about on-going parenting, they teach you about not using your child as a pawn to get at the other partner and all that sort of thing…And they've been very successful. Certainly in the US, the typical outcome is, you know people don't want to go to them, they resent being made to go to them, but after they've been they think they're jolly good and everybody else should be made to go…So it was very much drawing on other countries' experience.' [3]

Children are also employed as, 'part of the reason for wanting mediation' [8]. One constituent observes that lawyers currently stress to parents the necessity of learning to, 'co-operate in a way that they never did as spouses' over the upbringing of their children. He then continues:

> 'of course the needs of children change so, a contact pattern which is appropriate you know when the child is four, is not going to be appropriate when the child is nine…So in a sense…the advantage of mediation, is that if couples learn to negotiate for themselves and you know reach agreements themselves, especially about the upbringing of the children that's much better, because they're going to have to go on doing this for the next fifteen years.' [3]

A key justification for mediation is therefore located in the perception that it is able to facilitate a better continuing relationship between parents, which in turn benefits the children.

The 'best interests' of children are thus constructed primarily in terms of both educating parents, and of enhancing the quality of the ongoing parental relationship.

Reflecting constructions of children as 'victims' of the adversarial system – and indeed in common with both the Idealists and the Pragmatic Progressives - is an underlying image of children as the passive 'objects' of welfare. That welfare is, in turn, constructed as dependent upon parents. The link made between parents and the welfare of children is arguably a self-evident one, after all it is a fact that parents are the primary deliverers of 'welfare'. However, what is interesting is the constituency's perception of parents' ability to actually deliver that welfare.

One implication is that parents do require assistance – in the form of information and mediation – in order to do the 'best' for children. However, when discussing the role of the court regarding arrangements for children, constituents display a much greater faith or 'optimism' in parents. It was accepted that the existing power of scrutiny, contained in section 41 of the Matrimonial Causes Act, 'didn't work very well' [2]. However, constituents question the need for a more pro-active, substantive provision. In common with their pragmatic counterparts, the court's role is constructed in the limited terms of identifying 'risk factors' requiring judicial intervention. As one constituent argues:

> 'all we're doing is ensuring that the divorce procedure, at this very crucial moment in time, is adequate to enable the judge to hear warning bells.' [2]

Another constituent does, however, go somewhat further. In this instance, the suggestion is that court intervention can be positively detrimental:

> 'other things being equal, it's better that the court doesn't intervene if it doesn't need to…Because if you have a family that's splitting up and they've sorted it out for themselves, and everybody's happy with the arrangements, that actually having the court in there just makes matters worse, that you can create acrimony where none exists.' [3]

This constituent does recognise that parents will not invariably come to arrangements that are in the 'best interests' of the child. However, the belief is clearly that the circumstances justifying intervention are limited: 'if there's things going seriously wrong, the court may need to intervene to change those, but you need evidence to go in' [3]. The appropriate response is thus viewed in terms of building 'appropriate triggers for intervention' into the divorce process.

Within this constituency there is some appreciation that children do constitute separate individuals in their own right, however the predominant view does appear to be that the interests of those individuals are generally in sympathy with those of their parents. Indeed an example of this 'dual' vision is provided by one constituent, who refers to the 'diverse interests' involved when marriages breakdown. With regards to children vis a vis parents, he then goes on to observe: 'it's hard to say they have no distinct interest, on the other hand it's easy to magnify the distinction of that interest' [8].

This perception of the parent–child relationship, and the predominant underlying image of children as requiring protection, also emerges during discussions surrounding the 'rights' of children to participate in the divorce process. For example, one constituent appears to place those rights firmly in a protectionist framework, arguing for the necessity of ensuring that 'too much responsibility' is not placed on children:

> 'I mean it's right...that their views should be listened to and heard, but the last thing you want to do is to make the children the arbiters between parents and parents' disputes, and there's a terrific risk of doing that.' [8]

The balance is thus regarded as a difficult one to achieve. Indeed this particular constituent suggests that it would be certainly be 'quite difficult' to involve 'young children' in their parents' disputes. He also makes the point that 'one of the emphases' of the Family Law Act was actually to try, so far as possible, to keep children out of the disputes between their parents. However, he then goes on to make the following observation:

> 'It's difficult to get the right balance. I think it's important that their views are taken into account, they're not shunted about...as if they were pieces of property.' [8]

At a slightly different 'level', a second constituent presents the dilemma in more practical terms. Describing it as 'important' and 'necessary' that children's views are taken into account when settling arrangements, he then goes on to question the practicalities: 'you could do it...but you know, it's really a sledgehammer to crack a

nut. I mean there'll be a vast number of cases where it won't make any practical difference' [3]. For this constituent the key factor is thus located in the limits with which law is inevitably faced when it comes to the task of dealing with children.

Discussion

The position that is articulated by this constituency almost bisects the respective stances adopted by the Idealist and Pragmatic members of the policy community. Underpinning the group's approach to the divorce process, is a desire to replace the current fault-based system of ending marriages with something better. However one aspect of making that system better, does appear to involve the incorporation of an ideological element into the process – namely the view of one particularly influential individual that divorce, 'ought to be set in the context of saving marriages' [8].

The issue of what actually constitutes a 'saveable' marriage is an interesting one. The 'deterrent' element, which emerges in the discussions surrounding the provision of information and the resolution of ancillaries, arguably constructs the saveable marriage as one where the parties fail to realise the material consequences of divorce. The implication is that an appreciation of the material realities may prompt a change in behaviour. This view would arguably appear to be underpinned by a rational model of behaviour, with that rationality constructed in the sense of what might be termed 'hard-headed' materialism. As one constituent observes:

> 'there are some people who actually when brought face to face with what the realities of divorce will mean, alright look in terms of losing material assets, will think well, do I really want to marry the new girlfriend or will I try to go on…? I mean there'll be some, I mean it'll be as crude as that. So in that sense, partly that the system was designed to bring people to face the real consequences of divorce, before they happened.' [3]

This comment is an interesting one for several reasons. Firstly, it does appear to echo the underlying position of the Idealists, in the sense that the institution of

marriage almost appears to be accorded greater importance than the quality of the marital relationship. Secondly, it is somewhat at odds with the position adopted with regards to the role of law at a more general level – namely that divorce law is not about difficulty or deterrence. Thirdly, the idea of deterring parties from proceeding with a divorce, arguably provides an interesting point of comparison with the faith previously displayed by some of the constituents in marriage and its intrinsic merits.

The introduction of a marriage-saving role into the process also reflects a fundamental 'duality' within this constituency. At the explicit level, a duality exists between saving and ending marriages. However, at a more implicit level, there is arguably a further duality between the divorce process as the framework for individual decision-making and empowerment, and as the directive framework actively shaping behaviour.

One constituent in particular, talks at length about attempting to create a divorce process that genuinely reflects the reality of divorce. She argues that the aim was to create a 'space' or 'process' that recognised what was, 'going on in the minds, and the hearts, and the emotions of people'. Indeed this is explained in the following terms:

> 'But within that you had the opportunity to look back, and this is where marriage counselling came in, and the opportunity to talk to somebody, at the interview, to say that 'I don't know what's happened and I can't understand it, and I can't think about the future and I can't think about selling the house because I'm so mixed up about all this'…so you needed a process that would allow one party to look back if that's wanted, but at some point look forward…So we thought if you brought this together under the umbrella of the new legal process, you were perhaps more likely than not to mirror what actually happens.' [2]

Question marks do, however, arguably surround this idea that such a process does reflect behaviour. Indeed this particular constituent does go on to raise some initial questions herself:

> 'I know some of my colleagues even said to me…'people do not behave

rationally at this time in their lives, so why try to set up a rational system?' So I said 'the fact that they don't think and behave rationally, and behave in a chaotic manner, doesn't mean you have to have a chaotic system''. [2]

It is therefore arguable that although much of the rhetoric is about reflecting behaviour, the divorce process is actually engaged in the positive provision of some kind of lead or performance indicator for good divorcing behaviour. This, in turn, is underpinned by the assumption that it is indeed possible for the divorce process to engender good or 'rational' behaviour. Such a view would seem to be reflected in another constituent's optimism that mediation does have the potential to offer a 'solution' for the majority of the divorcing population [8].

The 'Interest Groups'

Information

This sub-constituency is characterised by its strong support for the incorporation of information into the divorce process. For example one constituent states, 'I'm all for...having information' [14], whilst a second describes her position as, 'certainly in favour of information' [9]. A third constituent adopts what she terms the, 'research point of view' from which, 'clearly there is reason to give people information.' She then goes on to argue:

> 'if you look at what people say, people say they want more information. People say that there are lots of things they don't know, and the evidence is that in many areas, there is a lot they don't know.' [5]

The law is thus accorded a legitimate role in bridging the information 'gap' that is believed to exist within the divorcing population. The task of bridging that gap is also regarded, in the opinion of this third constituent, as having a beneficial effect on all those involved in the process:

> 'I know that from my experience of giving information to people...that people do value information, and it does give them time to come up for air and reflect, and importantly it gives them time to...make thoughtful and

joint arrangements for their children.' [5]

The form that such information should take is, however, the subject of some debate. In contrast to the Pragmatic Progressives, there is general support for the idea of a meeting. For example, one constituent recalls that there was, 'very little...enthusiasm for the paper material' within her particular organisation. The 'logic' for adopting this position is located in the fact that although written information, 'doesn't invade your privacy' research does suggest that many people simply choose not to read it [9].

Some constituents did consider whether the information should take the form of an individual or a group meeting. Interestingly two constituents, both of whom have a background in mediation, actually express a preference for group meetings. The first constituent argues that the individual format simply provides too much information for people to absorb in detail. In addition, she then goes on to suggest: 'I think the groups were more meaningful, because people felt they were with 'people like us'' [10]. The experience of this particular constituent, who had been personally involved in the information pilots, was that group meetings were generally well attended. Also, in contrast to the Pragmatic Progressives, no real problem was perceived to exist regarding the issue of anonymity:

> 'if you give people a choice of venues where they go, in the same way as you could file a petition in any county court in the jurisdiction...if you want to go out of your area, then you know, you get on a bus.' [10]

Of course this view may well reflect the fact that this particular constituent's work was actually based in a large city.

For the second constituent, the group format is perceived to be a less pressurised one. Making reference to her previous experience of working to find foster homes for children, she makes the following suggestion:

> 'if you interviewed people individually it was very difficult for them to...listen, because they were always thinking, are they going to select me or not? Whereas if we did you know, anybody interested in fostering, we've got a night on Tuesday...come and find out about it, people could be anonymous...they could sit at the back, the could think 'ooh blimey

> I'm not going to do this', and scarper...because there was no pressure on them.' [9]

There were thus felt to be advantages attached to having a forum where it was possible for people to receive information and learn, 'without...having to be visual individually, or be judged, or make decisions or anything' [9].

The question of whether attendance at information meetings should be compulsory is one issue over which there is clear departure from the position articulated by their more 'Formal' counterparts. As one constituent observes:

> 'we thought, yes there are benefits in people having some kind of preparation...about what they were going into...short of compulsory, 'cos you know good old mediators, compulsory is not our ideology.' [9]

This unhappiness with requiring parties to attend meetings is echoed by several other participants. Indeed one appears to sum up what is essentially the broad position of the group:

> 'I'm not at all sure about compulsory information meetings, although I do think that there should be information available for everybody going through this process.' [14]

Several issues underpin this preference for a voluntary system of information. Firstly, as with the Pragmatic Progressives, information is constructed principally in terms of education. For example, one constituent talks in terms of the following as an ideal situation:

> 'ensuring that people starting on their journey thinking about divorce, had the same information whoever they happened to turn up on, and that they got to the right destination, so that they got the service they needed.' [9]

This more 'pure' concept of information is similarly reiterated by a second constituent. Here a degree of discomfort is clearly evident regarding the more directive vision of information that emerged from the 'Formal' constituency during the reform process:

> 'I don't think it should be trying to save marriages, I think it should giving good information about...the process of separation and divorce, about

> what...the procedures are and about what resources are available, which would include you know, marriage counselling, and...some kind of consultative help so to speak, mediation and so forth. But I would go for much more neutral information message so to speak, and...anything that pitches one way or the other actually, I don't think is helpful.' [14]

A third constituent arguably goes a stage further, effectively constructing that unhelpfulness in terms of 'hurdles'. Indeed, she talks about the more directive form of information provision in terms of putting people, 'through hurdles that were not necessarily going to be helpful and would act as a disincentive.' These hurdles are defined as the requirement to meet with a marriage counsellor, and the imposition of an information meeting 'heavily weighted' towards marriage 'in the first instance' [5].

A second factor that appears to underpin support for non-compulsory information is a more individualistic construction of the divorcing parties themselves. Once again, as with the Pragmatic Progressives, there is some scepticism as to whether the divorce process can (and indeed should) employ a 'one-size-fits-all' approach. An example of this is provided by one constituent, who makes the following observation with reference to the information meeting as it was ultimately enacted:

> 'it's first part, is in a sense to provide people with an opportunity to decide whether they are heading straight for the divorce process, or they want to linger a little and think about the issue of whether they want it. Now if it was an effective gateway for that...then maybe it would be possible, so that in a sense you would be able to, in the course of a very clear focussed interview, be able to distinguish the people who're saying 'I'm absolutely, look you know I've not lived with my husband for five years and we know exactly what we're doing, we just want a divorce', from the woman who breaks down in tears and says you know, 'I don't know what else to do...I've just found out that he's having an affair'.....Now they're very different scenarios, but I mean I'm not sure how easy it is to be able to do that as part of a legal process.' [5]

Marriage Counselling

The issue of marriage counselling featured strongly across the discourses articulated by constituents. As hinted at in the previous section, the question of whether a 'marriage counselling' element should be incorporated into the divorce process, did create some difficulties for the group. One interesting factor in this apparent 'difficulty' is that participants advanced their arguments against a background that was broadly favourable to the concept of supporting marriage – indeed several participants actually represented 'marriage support' organisations. Nevertheless, constituents do question both the appropriateness, and indeed the efficacy of including this type of 'support' mechanism into a process that deals in the ending of marriages.

The suggestion made by the Labour Party during the latter Parliamentary stages of the Family Law Bill, namely that marriage counselling should be a compulsory element of the process, receives considerable opposition within this group. As one constituent comments:

> 'I mean how could you prove someone had been, I mean do they get a ticket and a certificate to say they've attended? And what if they sat there for half an hour and didn't say anything?' [7]

Another constituent also argues that, if such counselling is going to work, then attendance must actually be voluntary. However, she then goes on to raise a question mark about the basic efficacy of marriage counselling itself. Indeed the suggestion is made that, 'personally from an evidence point of view' it is not 'terribly effective'. She then continues the argument:

> 'So you know; (a) it wouldn't be successful; but (b) if you put resources into offering something to a group of people where you know probably at most fifteen or twenty percent of them are going to actually value it and use it, that seemed to be potty.' [5]

This more practical, 'bottom-up' perspective, is similarly echoed by another constituent. This particular individual argues in favour of using, 'a more neutral

phrase like consultation...which didn't imply kind of outcome'. The reasons for adopting this position are explained in the following terms:

> 'Meeting with a marriage counsellor implies actually...that you know whatever the intentions of the counsellor, and I know that the intentions from the counselling point of view aren't to try and stick people back together, but I think from the punters' perspective that's what will be read into it. So that, you know, those who really want to save the marriage will use it, the dilemma is of course one party often does and the other party doesn't, and then...it's hard to get both partners to come together, and if you do it's hard to know whether you can really make much inroad at that point.' [14]

For this constituent, the solution is not perceived to lie in providing a model of the 'right' way to approach divorce. Indeed outcomes are not constructed as something to be measured against some kind of ideal. Instead the process is constructed much more in terms of following or responding both to the parties, and to their various needs:

> 'I would argue for something that's a bit more open ended, i.e. where the agenda is set by the couple, rather than shaped by the counsellor, because I think part of the danger is that then the meeting with the marriage counsellor becomes a sort of subsidiary information meeting...rather than actually allowing for the couple, or whoever uses that session just to have a chance to talk and to be listened to.' [14]

Mediation

The concept of mediation does receive broad support within the constituency. For example, one of the constituents remarks:

> 'I suppose mediation as a general principle seems to speak to...at least that part of the Church which, you know doesn't want unpleasantness and fighting, and says 'can't we sort of sort things out?' I mean that's slightly sort of middle Anglican approach. So I think in those very general terms, our...prejudices would be in favour.' [7]

Mediation also receives support from constituents whose essentially practice-based perspective allows them to engage with the debate at a more practical and detailed level. For this group, mediation is clearly constructed as an effective dispute resolution service, 'which assisted communication and benefited children' [9]. Once again, however, it should be noted that there was a clear feeling that mediation should be voluntary – indeed this particular constituent lobbied strongly during the Parliamentary stages of the Bill against tying the availability of legal aid to participation in mediation.

A great deal of concern surrounds the marriage saving function apparently accorded to mediation by both the Idealists, and some of the 'Formal' policy-makers. Indeed one constituent refers to what she terms the, 'emotional extravagance' surrounding mediation and marriage saving. Concern is expressed about how mediation was effectively presented as, 'the answer to everything'. The end result for this constituent was the constant need to 'correct misunderstandings' about mediation, and to 'rescue' it from becoming part of the 'marriage saving agenda'. The essential task was thus described as, 'trying to get it recognised for what it was' – namely a mechanism that seeks principally to set the basis for constructive post-divorce life [9].

Another constituent argues that, in reality, mediation can be a 'complicated' process. She recognises that mediation is 'probably' not as acrimonious as the traditional legal approach to resolving disputes. It is further accepted that it can result in parties shifting their position, and thus acting more 'realistically.' However, she then goes on to make reference to the experience of a friend who had recently opted to mediate: 'when he talks about it, it's tactics in terms of mediation' [5]. It is thus suggested that mediation is not simply a forum for what might be described as 'pure' discussion – a picture that represents something of a challenge to the more neutral co-operative picture presented by the 'Formal' policy-makers.

Another aspect of mediation's complexity, relates to the position of women. Indeed this particular constituent also argues that the situation of women within the mediation process, does constitute a very real issue:

> 'You see that many women often don't voice their own needs, because they've decided in their heads what's going to be possible, and what isn't. So in a sense they may come in and give...way on things that even maybe the mediator isn't aware of, because that's the way it works.' [5]

Links can thus be made between this constituency, and the more pragmatic assertion that mediation does not constitute a 'universal panacea'. However, in something of a contrast to the Pragmatic Progressives, there is a very genuine belief in the merits of mediation – particularly amongst those constituents with a mediation background. There is also, however, a recognition that it is neither suitable for all, nor does it represent some kind of 'magic' solution. The overall perspective may arguably therefore be summed up in a conversation which one of the constituents [5] had about mediation, in the course of which the following suggestion was made to her: 'people wanted to believe in [mediation]...and the feeling was if only we had more of it, and it was managed better and [was] more professional.'

Process Over Time

Reflecting the concern of constituents as to the damaging effects of a fault-based divorce system, the principle of divorce over a period of time receives strong support. As one constituent remarks, the result of combining that process with a requirement that ancillaries be resolved prior to the granting of the divorce decree, was a shift in focus. The nature of that shift was away from proving whether there were actually grounds for divorce, 'to attending to what the consequences might be and removing the litigative adversarial element from the process' [14].

Reflecting a general concern amongst constituents that divorce law should seek to contribute to better outcomes for all concerned, the process over time is valued for its ability to slow the divorce process down and thereby allow parties time to think. As this particular constituent continues:

> 'I think that's a helpful kind of influence really, and also it's very helpful

particularly when there are children involved, to refocus concerns away from perhaps some of the marital battle to the parenting relationship between them, to get the couple to think about what the implications will be, what plans they've got in mind for how those parenting questions are going to be addressed after a divorce.' [14]

One of the more idealist-oriented members of the constituency adopts a somewhat different approach to this issue. For this constituent, one central concern is the 'general principle' that the divorce process should preserve, 'the public character of marriage'. This, he explains, can be achieved in the following way:

'by saying...it can only be dissolved by some reasonably objective, and public...Not just statement actually, but...evidence of breakdown. Now admittedly that then became not much...more than the passage of the time, but.....could you do much better with available resources. I mean if, if somebody has said, 'I'm leaving, I want to leave you...and the dog, and the children'...and they've been through these various stages of having to think of the implications, and having the financial settlement, and however many months by then it was had passed, and they're still saying you know, I still think...was there actually going to be a much better test?' [7]

The waiting period is thus regarded as the best way to reflect the 'collective' aspect of marriage when faced with the inherently difficult arena of intimate relationships.

The length of the process is also the subject of some discussion amongst constituents. One constituent is highly critical of 'giving loads and loads more time' in certain situations, arguing that this, 'flew in the face of what reality we thought we were faced with' [9]. It was accepted that people should not be allowed to, as she puts it, 'breeze off in three months if they haven't done their work properly'. In addition, support is also articulated for the idea of settling ancillary issues before the divorce can be finalised. However, the idea of a longer waiting period where children are involved is firmly rejected. Reflecting the practically-based criticisms of the Pragmatic Progressives, it is suggested the imposition of different time periods creates the potential for litigation:

'we don't want more litigation, and more children...issues sort of being thought up, in order to try and delay a divorce, because that's totally

counter productive, and what you've been trying to resolve with one hand, you've gone and set fire to with the other.' [9]

A second constituent does, however, recognise the appeal of extending the period where there are children:

'if your belief is and I think some people genuinely believed, and still believe, that there are people who go into divorce and regret it, then you might say it's because you care about the children that you want to delay it, because you want to give the couple the chance to think it through and change their mind. Now I think that's a completely defensible position.' [5]

This constituent does, however, then go on to question whether there is evidence that people really do re-think their position if given the opportunity. Indeed she suggests that, in her opinion, there 'isn't very much'. She elaborates as follows: 'from what I've picked up from various things, people make judgements of the sort of round about maybe fifteen percent' [5].

Children

The image presented by constituents both of children, and of their place within the divorce process, is something of a dual one. On the one hand, children are constructed as the 'objects' of welfare situated within a protectionist framework. For example, this type of construction is evident in one 'mediator' constituent's argument in favour of mediation: 'we are a child-centred process. We are there to help adults talk about and address the needs of their children' [9]. As demonstrated in the previous section, constituents also adopt a similar stance when talking about the benefits of divorce as a process over time.

Another constituent makes reference to: 'the concern of the law to ensure that child welfare issues are properly addressed'. He then goes on to assert that there will be instances in which children, 'need protecting against the arrangements that the parents may come up with privately'. The result is therefore that it may be necessary to have, 'some kind of mediating public influence…in terms of what happens subsequently' [14]. This comment is an interesting one as it represents

both a very real questioning of the idea that parents will always do the best for their children, and the recognition that children are individuals existing separately from their parents. Indeed as the constituent goes on to argue:

> 'the notion that if you just leave people to their own devices they can arrive at solutions which will be the best for all concerned 'ain't true, because the interests of children and parents are often quite different at the point of separation and divorce.' [14]

The law is thus cast as a, 'mediating presence' in family life [14]. That presence is, however, very much a background one. Although parental capacity is subjected to questioning, a basic faith in parents does remain. For example, this constituent then goes on to suggest that, with regards to the issue of keeping children informed, 'it's clearly very helpful if parents can take this on as a parental task themselves and manage that well, with the kids and listen to what the children have to say'. Similarly with regards to the post-divorce arrangements themselves, state intervention is only deemed necessary in a 'small proportion' of cases. The encouragement of 'private ordering' is constructed as preferable, with the state operating very much as a 'safety net' [14].

However, in contrast to these more protectionist constructions of children, there is also evidence of a recognition that children do actually constitute subjects in their own right. An example of this second perspective is provided by one participant, who talks of the 'worthwhile' nature of providing information to children about separation and divorce [5]. This constituent recognises that, in reality, parents often withhold information from their children: 'either because they feel it will upset them, or because they think that their kids don't need it because basically it upsets them as parents'. However, reflecting an underlying construction of children as individuals with their own needs and interests, she then goes on to talk of the need to look at both how information is disseminated to children, and how to 'make sure' that they are kept informed about what is happening. One suggested solution is to make that information available to, 'the kinds of people that kids will turn to':

> 'so it might be that you produce material that's available for pastoral teachers in school, or for teachers generally, so they've got a sense of

how to handle kids when they're going through these things.' [5]

In common with the majority of constituencies comprised within the policy community, the issue of children's 'rights' again creates some difficulties for this group. An example of the confusion is perhaps best summed up by the following comment articulated by one of the constituents. When discussing whether children have any 'right' to information, this particular participant states:

> 'I think they need to know about what they need to know about. There's things that they don't need to know about, and probably shouldn't know about.' [14]

A second constituent recognises that, 'some of us have a problem with children's rights'. The reasons for this 'problem' are explained in the following terms:

> 'children's rights...are as good as their parents' ability to be able to deliver them, and even if the law said that children should, in the end in a way we rely very heavily on their parents' ability to be able to...provide what it is that children need.' [5]

This constituent describes it as 'dreadful' that children do not have the ability to determine some aspects of their lives that are affected by the decision of their parents to separate. However, the reality of the situation is described as being, 'one of those...obvious paradoxes'. The nature of this paradox is then explained:

> 'children are completely dependent on their parents, that's part of being dependent, the parents' decisions, all you can hope to do, is to influence those decisions, and manage those decisions with the best interests of the children in mind...and I'm not sure how you can enforce the children's views.' [5]

The reality of children's position within the family is thus regarded as inevitably hindering their ability to become genuinely 'active' subjects within the divorce context.

Discussion

The discourses advanced by this constituency are articulated against a background of both the desire for 'a straightforward divorce act', and a recognition of the 'need to strengthen and assist marriages' [9]. One strong theme that does, however, come through the various discussions, is a very real scepticism about the ability or appropriateness of a divorce process that seeks to provide a directive model of behaviour.

The arguments advanced in favour of a voluntary framework of information, marriage counselling and mediation arguably reflect a divorce process that is constructed primarily in terms of providing 'resources to manage change' [14]. This, in turn, would seem to reflect the general perception held by constituents that divorce constitutes an ordinary life event. As one constituent suggests:

> 'I think there's a strong argument for you know, providing the kind of resources that people can use and that they may find helpful, which isn't taking over from them but is actually…making available something helpful in terms of information, in terms of a listening ear, in terms of expertise really in, in thinking about how change is managed and helping people just to distil their feelings at these times.' [14]

As with the Idealists, experts are accorded a role within the process. However, in this instance, that role is underpinned by a basic trust in the capacity of the parties themselves to make the decision as to whether or not to access that expertise in the first instance.

This perspective does, in turn, reflect a particular underlying construction of divorcing parties. At one 'level', the rejection of a one-size-fits-all process reflects the individuality of those who choose to divorce. For example, one constituent argues that a particular process will only be of benefit when that individual is in a position to utilise it:

> 'You only absorb things when they have relevance to your life. You only notice how many Volkswagens there are when you are interested in buying one. It is the same for everything. You don't tap into the word "information", or "mediation" or anything, unless you need it.' [10]

In support of her argument, this constituent then goes on to describe the process of finding volunteers to participate in an information pilot scheme that she had been involved in running:

> 'The place that brought the most people to us, was advertising on Heart FM. That's the broken hearts station, it's your Tammy Wynettes, and you know, your love songs. Now what sort of music do you listen to when you're broken hearted? Seriously, we got droves of people. I mean we really had to think this one through, but I was fixated on getting to where people would be open to it, so we hit on that.' [10]

At another 'level', constituents also recognise the 'emotional turmoil' that divorce can generate [14]. In contrast to their more 'Formal' counterparts, constituents are somewhat sceptical about the ability of a rational process to induce rational behaviour. For example, one constituent describes the following 'issue' that she had with information meetings – namely the expectation that someone, 'at the height of family breakdown crisis' should attend a meeting at which 'totally impartial information' was given, but no questions would be answered. Indeed from her own experience of operating such meetings, she found that attendees were generally 'desperate' to ask questions that were relevant to their particular situation – yet this was one thing that she had not been able to do.

A second constituent articulates a similar argument with regards to the issue of mediation:

> 'it's going back to the reality of what it's like you know, in the end...we're talking about people who are getting divorced because they have difficulties with their relationship. I mean it's a bit like post-divorce parenting when people say, you know, this is what you do, and part of me thinks well of course, but the fact is, you've got two people who've found it quite difficult to co-operate, so you know we...have to recognise that we may be limited here.' [5]

Within this constituency the 'rational' model of behaviour that appears to underpin 'Formal' constructions of the divorce process is thus subjected to some serious questioning.

The Child Advocates

The 'mechanics' of divorce

Reflecting their construction of the divorce 'problem' in terms of the dependency status accorded to children within both society and family, the Child Advocates argue for the central positioning of children within the divorce process. Indeed as one constituent remarks, there was significant concern about the fact that the Family Law Bill did not actually mention children. As she observes:

> 'although the rhetoric and posturing was about protecting children… children were not visible on the face of the Bill.' [13]

The provision of information within the divorce process is seen by some constituents to represent an opportunity to contribute to this repositioning of children. For example, one constituent makes the following comment with regards to the incorporation of an information element: 'One good thing is that it is an opportunity to talk to parents about what is best for children' [4]. However, it should be noted that providing information, at least in the form of a compulsory information meeting, does not command the support of the whole constituency. For example, a second constituent remarks:

> 'I was never convinced by the information giving session. The research confirmed that parents don't talk to their children, and have a set of excuses for not doing so.' [13]

The third constituent does articulate a more positive outlook when it comes to the basic concept of information meetings. This constituent, who actually was involved in piloting such meetings for parents, advances the following argument in favour:

> 'people did get the message, it helped them to stop and think, they got information, and it was seen as part of a process rather than a big deal. It was sort of…going down the educational road, but not in a preachy way.' [10]

The concept of incorporating a mediation element into the divorce process also receives general support within the constituency. For example, one constituent regards mediation as being very much in the 'best interests' of children [4]. It is interesting to note that, in contrast to the rest of the policy community, the Child Advocates construct mediation very much in child-centred terms. Indeed whilst one constituent talks of the important work currently being done around giving access to children and allowing them to express their concerns as part of the overall mediation process [13], a second talks of the importance of making children 'present' in the process – even though they may not be physically present in the mediation room [10].

For this second constituent, good practice is thus viewed very much in terms of making children visible from the outset. This is achieved through the mechanism of asking a lot of 'child focussed' questions. For example, parents can be asked the following questions at the beginning of mediation: 'What do children understand, and how would you and your partner envisage their views, wishes and feelings being reflected in the outcome of mediation?' This can then be followed up by the offer of information for the child: 'That could be seeing a specialist children's worker, could be letting them watch the CD-ROM. They can click in and out and follow the bits that they want to'. If it is revealed that parents have not really spoken to their children, then the mediation process can also work with them in order to consider how they might do that, 'because they're the best people to do it' [10].

Whilst strongly supporting the concept of divorce over a process of time, some disagreement is evident as to both the length of that process, and to the question of whether resolving ancillaries should be a pre-condition of granting the divorce decree. For example, one constituent expresses strong disagreement with the idea of extending the time period where children are involved. Referring to research into the effects of divorce on children, she argues:

> 'Children suffer from their parents' depression, anxiety and conflict…
> And requiring people to stay together until the finances and the

arrangements are sorted out, is not the way to protect children.' [13]

In stark contrast to this position, a second constituent actually regards the requirement to resolve ancillaries as, 'extremely sound'. It is recognised that such a provision cannot prevent people from actually going off and forming new relationships. Nevertheless, it is felt that the requirement can have several beneficial 'knock on effects'. In essence children would be rendered more visible to the various adult actors within the divorce process:

> 'It will cause the Court to look more carefully at the exercise of its powers and duties, and it will cause parents I think to separate children out from the house, the car...' [10]

This particular constituent also supports an extended waiting period where the parties have minor children. Reflecting the more individualistic constructions of divorcing parties offered by certain of the other constituencies, the belief is that a longer waiting period can actually 'facilitate' the use of mediation:

> 'Many people when they come to mediation, are not able to use it when they first encounter it. Some people use it well before they separate, to work on how they might manage their children. Some people use it better when they've had the initial sharp shock of being in the court, and realise how bloody all that experience is, and at various stages in-between.' [10]

Underpinning this stance is the belief that the provision of 'space and time' can enable two individuals, who are often at very different stages 'psychologically and emotionally', to effectively be 'pulled together' [10]. This perspective arguably reflects the constituent's mediation background. However, she does go on to then address the argument that a longer time period creates uncertainty and distress for children. She does not accept that the waiting period prevents people from 'getting on with their own lives'. This is underlined by drawing a comparison with children who are, 'drifting in care', and whose future cannot be determined until a care order is made. In contrast, children within the divorce context remain, 'within their families, and getting on with their lives' [10]. Such a view arguably reflects a more robust view of children - rather than passively waiting for parents to resolve matters children are, in effect, active subjects positively getting on with things.

Reflecting both constituents' more limited faith in the ability of parents to always do the 'best' for children, and their clear construction of children as individuals separate from their parents, the court's role regarding arrangements for children commands a much greater degree of unanimity. For example, one constituent argues that the courts should be vested with, 'greater ability to scrutinise arrangements for children'. Indeed she suggests that an 'onus' should be placed upon the court, 'to seek to ensure that children have been properly consulted, and offered the opportunity to talk…to parents' [13]. The necessity for a 'different' mechanism for court intervention is also supported by a second constituent:

> 'there needs to be a mechanism in every single case for the court to scrutinise, to have the opportunity to scrutinise the arrangements for the children, and to dig further behind it if it feels it needs to.' [10]

This constituent goes on to suggest that any failure of both parties to sign the statement of arrangements should result in a court appointment to look at the reasons why. The 'welfare' of children is thus regarded as justifying an expanded role for the state, with the concomitant reduction in family privacy and parental autonomy.

Children's 'rights'

The concept of children's 'rights' is, unsurprisingly, embraced much more strongly by the Child Advocate constituency. Indeed it is the case that a number of the arguments in favour of children's participation in the divorce process are actually framed in language of rights. For example, with regards to information, one constituent advances the argument that children have, 'the right to access information' [10].

The provision of information about divorce to children, is something that receives strong support amongst constituents. As one constituent observes, research demonstrates that children both 'want information', and 'are particularly concerned about the law, what happens when mum goes into the solicitor's office, because

they equate it with Crown Court and crime and punishment' [10]. That 'want' on children's part is deemed to be a perfectly legitimate one. Law is thus perceived to have an equally legitimate role in its satisfaction. A second constituent supports this position, arguing that research also demonstrates that children do, 'get a sense that something is going on', but that the whole process is more frightening if they are excluded from it. The argument is therefore advanced that: 'Children need somewhere to go, and someone to talk to' [13].

The question of circumventing parents by providing information directly to children is the subject of some discussion. One constituent makes the observation that: 'A lot of people might be threatened by having children going to third parties' [13]. Indeed it is arguable that this fear is present in some of the discourses articulated by both the Pragmatic Progressives and the 'Formal' policy-makers – particularly in the sense that the provision of information is discussed in terms of children dictating to adults, and undermining parents' 'rights' to run their family life as they see fit.

In a similar vein, another constituent refers to the balancing act involved in such provision: 'it's a fine balance…between…letting children access information and undermining parents, and that's quite a big thing' [10]. This particular constituent was working on the development of a web site for children experiencing divorce, and had been partially responsible for a CD-ROM that provides similar information and is now available in schools. Reflecting the belief discussed in Chapter 5, namely the fact that children in modern society are very aware of divorce, it is argued that a 'duty' is actually owed to children in this context:

> 'I believe that we actually have a duty to give children information, or facilitate their access to information that is simple and non-judgemental, but also…helps them to find people to talk to about it.' [10]

Children are also regarded as having a substantive role within the mediation process. As one constituent argues:

> 'What's important is not that parents do that business, but that children have the opportunity (if they wanted it) to contribute their thoughts. That children

> have the opportunity (if they wanted it) to meet with their parents and the mediator to discuss the plans. Mum and dad could tell them what they thought the arrangements might be, and see how that would be for them.' [10]

It is clearly recognised that some children will not want to take up this opportunity. This is, however, balanced by the fact that there will be those who do. Mediation is thus not constructed as an adult negotiating process in which parents exercise parental responsibility, and the children have no part.

All three constituents are also in favour of divorce legislation with improved rights of (legal) representation and access to advocacy for children. An example of this is provided by one participant, who makes the following observation: 'We wanted a recognition that children ought to have independent and best legal advice' [4]. In a similar vein, a second constituent suggests that, 'children should have the right to be represented', although it is recognised that this should not automatically be the case in all proceedings [P13]. The third constituent also explains how, during the lobbying process, children's organisations pushed hard for the child's 'right to be independently represented' in all contested proceedings. One constituent also advanced an additional argument in favour of a 'Children's Rights Advocate'. It was envisaged that such an individual would be based primarily at court, but would also visit schools and raise awareness amongst pupils. He or she would thus effectively constitute:

> 'Someone to whom children could go to if their parents were divorcing, who could perhaps try to set up some kind of mediation with parents, and then if necessary the child could then get representation.' [13]

Discussion

It should be emphasised that the Child Advocates do share a number of the views articulated by their counterparts who comprise the Interest Groups constituency. For example, all three were extremely keen to see fault removed from the process. In addition, some potential benefit to adult spouses was seen in the incorporation of non-compulsory marriage counselling and mediation elements. However, the

central concern for the Child Advocates is very much the interests of children. As one constituent states: 'We were very clear that our interest was promoting the best interests of children' [4]. Amongst the participants there is a sense that one way of promoting those interests, is to make children 'visible' or 'present' to the various adult actors within the divorce process. As one remarks, a central question for her organisation was how to incorporate the 'carrots and sticks' to help parents to really think about their children.

Although generally supportive of both information and mediation for the adults, constituents do stress that more is required if children's interests are to be truly served. For example, one constituent draws the comparison between the English experience and the situation that exists in Australia. With reference to the provision of information, she describes how parties attending the Australian divorce court are automatically given an appointment to join a group information meeting. The message that is imparted at such meetings, is described as follows: it's your family, it's your case, we're here to help you, here's all the steps and the legal process'. The point emphasised by this participant is not only is the Australian information 'heavily weighted' about children, its provision is also part of system in which 'the messages' are constantly reinforced through various different mechanisms [10].

This constituent then goes on to also compare the situation with regards to mediation in the two countries:

> 'The difference is, that in the Australian Court there are far superior facilities for children, and there are court counselling services and things, so they have the buttressing that makes people who are unable to negotiate say in mediation, have the space in which they can get themselves to a place where they could negotiate.' [10]

The implication is therefore that both information and mediation do constitute a fundamentally good thing. Indeed they are mechanisms that operate to provide an aid to communication and negotiation, both of which are inherently beneficial to children. However, the suggestion is also that if the 'best' is really going to be achieved for children, then an integrated system of support for families is required.

Stand-alone information meetings or mediation sessions for adults are not viewed as sufficient to achieve the genuinely child-centred process that is sought.

What also comes very strongly through the discourses articulated by this group, is the very clear perception that children do have a legitimate opinion when it comes to post-divorce relationships. In contrast to a number of other constituents within the broader policy community, this voice is not constructed as either irrational or unrealistic – constructions that are often used by those other constituents to justify the failure to accord a more active role to children. Indeed the competency of children is specifically underlined by one constituent who talks about how adults can get, 'all stewed up' about the 'logistics' of post-divorce arrangements. In contrast, however, children are described as 'wonderful' at problem solving, and can on many occasions 'fairly soon sort it out' [10].

It is also important to note that, unlike some of the other constituencies, the Child Advocates do not construct the child's role in terms of actually making a 'decision'. An example of this (re)orientation is provided by the following statement made by one of the constituents of the need for what she terms 'different conversations' to be held with children at 'different times':

> 'we shouldn't view it as consulting with children, but affording children and young people an opportunity to comment upon the arrangements that their parents make for their future parenting.' [10]

This stance removes one of the further objections cited within other constituencies - namely that it is wrong to place children in the position of having to decide between parents or, indeed, to decide about the divorce itself. As a second constituent argues, it is not 'down to children' to determine whether their parents' marriage is 'viable' - that is a matter for the two individuals directly involved. She does, however, then go on to make the following statement: 'But the children do have an absolute right to be taken seriously, and to have their views considered' [13].

Concluding comments

This discussion clearly reveals how the values and perspectives of the various members of the national policy-making community crystallised into very different, and in many instances fundamentally opposing, demands upon the divorce process. At one end of the spectrum of opinion is the Idealist vision of a divorce law engaged in what might be described as the 'practical' subordination of individuals to the values of marriage and family. However, within the reform process this was juxtaposed with the starkly contrasting perspective of the Pragmatic Progressives, for whom the divorce process is constructed in terms of bringing marriages to an end in the 'best' and most effective way. A further set of demands is also introduced by the Child Advocates, for whom divorce law is cast into the additional role of actively engaging with and serving the interests of children.

In view of the fundamental divisions of opinion amongst constituents it is perhaps unsurprising that the divorce process ultimately contained within the Family Law Act of 1996, was something of a mixture of saving and ending marriages. It does, however raise a further set of questions about divorce 'policy' more generally – in particular whether this dual vision is unique to the national policy community, or is something that is shared with those who are actually working directly with families at street level. Indeed in view of the 'problems' experienced by the Act subsequent to its enactment, the additional question as to whether the street-level perspective actually has any lessons for national policy-makers is also prompted. These are issues that will therefore be explored in course of the next two chapters.

Chapter 8

The 'Local' Perspective

Introduction

At the local level, family breakdown represents a dynamic area of policy. Indeed local groups and organisations offer a wide variety of services and programmes to families and children that span the voluntary, statutory, and in some instances the private sectors. Whilst the focus for some of these stakeholders is separation and divorce, for the majority, families in such situations do not constitute key client groups. Rather they tend to represent part of a broader client base that comprises families who are deemed to be experiencing more acute problems and difficulties requiring help and support. This suggests that, at least with regards to more comprehensive traditional 'social' services type provision requiring some kind of referral, that the fact of divorce itself is not regarded as problematic and automatically needing assistance.

The street-level 'approach'

One theme that runs through the discourses articulated by a number of participants, highlights the degree of similarity in the way that local organisations perceive their role vis a vis the individuals and families who constitute their 'clientele'. Participants frequently describe their work in terms of 'support', although in practice that support actually ranges from being at the end of a telephone line, to quite intensive one-to-one work and the provision of a comprehensive range of 'social' services and programmes.

The type of support provided locally, can take the form of either the practical or the emotional / relational. For example, one participant describes the 'support service'

for families provided by his organisation as involving a 'huge variety of work'. That work covers both practical parenting skills, and work relating to 'social relationships....and dynamics within the family'. The latter is explained in the following terms:

> 'that could work on levels of...helping communication within the family. It could help in kind of looking at behaviour management in the family, and looking at the consequences of why certain behaviour happens.' [A]

Similarly Participant K, whose 'support work in families' involves visiting them in their own homes, also describes that support in dual terms. In some instances her work might involve providing 'practical help', such as providing assistance with regards to a child's nursery place. Alternatively, however, it might be described as follows: 'just emotional support really, having somebody else to talk to'.

Another central ethos of local work is that it is very much about 'involving' families and individuals. Participant F provides one example of this orientation. The philosophy of her organisation, which concentrates much of its work on families who are on the verge of breakdown, is that of working 'in partnership' with parents. Indeed the literature explaining the various procedures to parents, reiterates the aim of achieving just such a relationship:

> 'We want to work in partnership with you in sorting out the problems that you are having in caring for your child / children.'

For this particular participant, the key to putting together a 'support plan' aimed at keeping a child with his or her family is to, 'involve parents and children in the process'. Involvement is thus constructed very much in terms of active participation.

The importance of actively involving people in the various services offered is reflected in the methods of working that are employed by local organisations and workers. For example, group work, or indeed the group 'format' is utilised by a number of participants. In some instances this work might simply involve talking in the presence of a group of people who are in a similar situation. For example, Participant L describes his organisation as follows: 'It's basically what we call

'walk-in', 'talk-in'. So people come in with a problem...and we try and talk it through'. He then continues: 'So we act as a...you know, like Alcoholics Anonymous or something, somewhere to sit and just blow it all off'. For others, however, the group approach appears to assume what might be described as a more pro-active form. For example, Participant A uses 'group work' to deal with 'specific issues' such as parenting skills and behaviour management. The methodology employed is primarily discussion-based:

> 'We try to get group members to feed into the group...to create a kind of learning environment for people.'

This type of approach is echoed by several of the other participants. For example, Participant D also utilises group work in order to explore issues of race and parenting. The experiences and issues of the parents themselves constitute a central focus of that work. Indeed this participant describes her role as being there primarily, 'to facilitate'. As she explains:

> 'Yes we had information and background, but really the group based on what they knew, would help a woman come up with her issue. So it ended up problem solving for the group.'

Similarly, a second participant talks about parenting courses provided by his organisation as being, 'very participative'. He then expands on this, describing them as involving: 'kind of sharing of difficulties and then arriving at solutions, you know how you might go forward with it' [C].

The involvement of service users also underpins some of the more individually focussed work that is done by participants. For example, Participant F talks about some of the more intensive work that is done with parents and children who are experiencing relational and behavioural difficulties. One approach adopted, is to use what is termed, 'brief solution focussed therapy'. This is described as follows:

> 'It's a talking therapy, but it works with parents and children.....and it's trying to get them to re-frame their way of looking at the problems.'

Alternatively, where parents and children are 'in conflict', work might be done with parents 'on setting up a behaviour management programme', and with teenagers 'on family contracts, so what's allowed behaviour and what isn't allowed'. The result

is that, as with the group-based approaches, the focus is once again on the experiences, feelings and wishes of the particular individuals involved.

In a similar vein, Participant K describes how the involvement of parents is also central to the way in which she works:

> 'what I tend to do is I write my records in the house so they don't feel that anything's being written about them, because it won't be, and...But I just think if I do it in the house, they actually understand. They don't read what I've written, but I usually run through it with them, what I've written. And if good or bad, if it's something bad that you've to write, I say I have to record this, I have no choice but to record this, so I have to write it down somewhere, and how do you think we should phrase it, and try to get them to negotiate that.'

If the situation is such that it is deemed necessary to bring in another organisation, then every referral is discussed, 'and they have to be...in agreement'. In the event that parents do not agree then, once again, negotiation is emphasised as the mechanism utilised in order to progress the situation.

Conceptions of 'family'

All the local participants talk about 'family' in a non-prescriptive sense. 'Family' is used to describe a variety of situations and living arrangements, including instances where there has been a divorce. For example, the 'Volunteer Induction Training' literature produced by Participant J's organisation highlights the fact that 'families' are 'different', and 'diverse'. Examples of these different families include, 'families from ethnic backgrounds, mixed heritage families, step-families, same sex families'.

The general 'taken-for-grantedness' that underpins this perspective is perhaps unsurprising, as it is articulated by individuals who deal with the diversity and fluidity of family life on a daily basis. However, this 'local view' does provide a very real contrast to the extremely restricted conceptions of family displayed by the

Idealists at national level. For example Participant P, who is a solicitor-mediator, describes an occasion on which she met a (court-based) mediator whose motivation was apparently 'to stop the rot'. In her opinion 'too many' families were breaking up, and this 'absolutely' had to stop. However, as this participant observes, the reality is that 'families do split up, and that's what it's about'. In addition it is arguable that the local 'world view' also provides an interesting comparison to the efforts of elements within the broad Progressive constituency to venerate the biological nuclear family – albeit, in the post-divorce context, with parenthood rather than the marital bond at its centre.

The valuing of individual experiences of family life is a theme articulated by a number of the participants. Indeed this is the case even amongst those who may at first appear to articulate ideas that mirror those displayed at national level. For example, one participant who represents a Christian-based organisation, makes the following point:

> 'Obviously from a Christian point of view, we do believe in marriage and family life, the sanctity of marriage and family life. However, you know we don't exclude anyone, and…all of our centres and all of our services will accept…a couple, an unmarried couple in a stable relationship, whether it be straight or gay, or whatever. I think stability and love is…as important as a marriage certificate – it's not the be all and end all.' [H]

This participant then expands on this point, arguing that 'we all know' of many people who have cohabited for years, 'just because they don't have a bit of paper, doesn't mean they don't provide good family life'. The important thing, for both this participant and his organisation is thus not to be, as he puts it, 'narrow-minded'.

In a similar vein Participant E, although not actually representing a church organisation, makes the following statement regarding her organisation's work with divorced and separated families: 'it is driven for a large number of us…by our religious faith…and we're doing it because we are Christians'. Participant C also talks of both 'human values' and 'Christian values' running through his organisation, and fundamentally shaping its approach.

This interpretation of Christianity represents something of a contrast to the 'Christian' view of family life articulated by the Idealists within the national debate. For the Idealist constituency, a personal Christian morality constitutes the key element in constructing a definition of family that is based upon marriage. However, at street-level, religious beliefs inform perspectives and policy responses in a very different way. Some parallels can arguably be drawn with the more reflexive beliefs articulated by the Idealist Progressives although, here at the 'sharp end' of policy delivery, work is characterised by a high degree of flexibility.

This acceptance of families, and in particular the way in which they 'do' family life, is reinforced by Participant I. For example, she talks about how the training given to her organisation's volunteer workers, who provide 'support' to parents with very young children, includes a session on what is termed 'family values'. In stark contrast to the way in which this terminology is utilised within the political context, family values are essentially defined as: 'looking at what you value in a family'. This includes a consideration of the following questions: 'What is it from your childhood that you've brought to your children? What values?...And why?' This reflexive approach to training, which also employs a group-based format, is believed to facilitate an understanding of the diversity of modern family practices:

> 'It's a brilliant way, because people have got so many different experiences of looking and thinking – well I didn't do it that way, but they're still an alright person.'

Accepting difference is incorporated into the formal training offered by several of the local organisations. For example, Participant J refers to a training session that deals specifically with 'family diversity'. The training literature explains how this involves individuals reflecting, firstly, 'on their own attitudes, stereotypes and assumptions'. They are then asked to consider how these might, 'get in the way' of their work. The underlying philosophy is thus very much about valuing the range of skills and experiences that different individuals possess, and respecting their different approaches and opinions. Indeed a key aspect of the training is expressed in the following terms – namely: 'to emphasise, enjoy and highlight the value of difference and diversity'. An appreciation of that value is deemed essential if

volunteers are to provide effective help and support to families. As Participant I observes:

> 'You can go out and visit a family who's got very different ground rules and outlook on life than you have, but it doesn't matter. You know, we're all aiming to do the best for our children, but we haven't always got...the same information.....I think if somebody comes to you as you are, where you are, accepting of everything, then you build a bond, and I think people move on from that because they learn to trust you.'

This experiential focus, and indeed the value that is placed upon that experience, is also carried over into the work that is done with families themselves. One example of this can be found in the presence that it clearly has in the 'positive parenting' work that is done by several of the organisations. As one participant explains, the philosophy employed by positive parenting can be described in the following terms:

> 'Trying to understand how...your actual parenting and your upbringing has...impacted on your beliefs and how you...raise your own children. Some of that can be very positive and very strong, some of it may be very negative, and it's trying to enable the parent to...evaluate their strengths and what they feel they're good at, and also try to evaluate well maybe this isn't quite right, and maybe this isn't quite right because I don't really know any better, I've never really been educated into something different.' [A]

This type of approach is also echoed by Participant M, who makes the following observation with regards to the parenting courses offered by her organisation: 'A lot of it's working from your own experience of being parented...so that you get the feeling of what we're talking about.'

The 'social basis' of policy

Connected to the acceptance of family diversity is a belief amongst local participants in the need to work alongside families, and for support and services to be rooted in the social reality and experiences of those families and their various

members. One participant provides a very explicit example, describing her role in the following terms: 'being where somebody is, wherever that is in their life' [I]. In a similar vein, the training literature produced by J's organisation highlights the importance of 'empathy' with families. This is defined as: 'the ability to enter another person's world and understand from the heart what it is like to be that person'.

For Participant I, the key to working effectively with parents, lies in listening to what the parents themselves have to say:

> 'Whatever the circumstances, it's just about being where they are at that minute, and listening to how they're feeling about what's happening to them. And…I think once you start listening to how they feel about what's happening to them, you get to know them, and then……you can help them look at the situation they're in a different way, so that they can deal with it.'

The importance accorded to really listening to people, is similarly emphasised by a number of the other participants. For example, Participant J explains, 'you try to explore with them, because like I said before we're basically a listening service, you try to explore and get to the bottom of what it is that really worries them, or really upset them, so that they then can take steps'. In a similar vein, Participant M describes 'the spirit' in which her organisation works in terms of, 'listening and supporting people'. For this particular participant, listening constitutes an essential pre-condition to enabling people to, 'really explore for themselves what they're feeling'.

At the local level, 'support' is thus constructed as operating alongside families, rather than as setting some kind of standard or performance indicator for them. As Participant I observes: 'it's about helping people through'. That help does certainly not involve saying to people, 'well…there is this perfect parent'. This type of perspective is again echoed by Participant K, who asserts that when it comes to parenting, 'there is no black and white way'.

The philosophy underpinning much of the work done locally thus appears to be that of supporting people in doing the best that they can. For example, the core values of J's organisation include the belief that, 'people are doing their best, given their backgrounds, upbringing, opportunities or lack of opportunities in life, to cope with what is happening to them'. A similar view is articulated by Participant M, who talks of the importance of concluding each session of her parenting courses with a brief discussion. The nature of this discussion is described as follows:

> 'everybody going round saying what they appreciate about themselves, or what they've done this week, because that's so difficult for us to do in our society, and it's so important...And really, really support the feeling that, that you're doing the best you can with where you are, and that, and that's fine...And just support and encourage people with what they're doing. You know, and it might be a tiny thing. Somebody might be feeling totally overwhelmed and totally depressed, and feel that they're absolutely hopeless parents, but they manage to get their children to school that week, you know, which at times can feel like an absolute miracle. Or they manage to have a bath or something, and we really try and celebrate, you know, the positive, not be always looking for the negative.'

This concept of building on the positives is echoed by Participant A, who describes his organisation's approach as being about: 'valuing each parent as an individual, valuing each family as an individual structure with positives and negatives within that.' Participant K, whose work is done primarily with parents in their own homes, similarly stresses the following fact: 'you have to be careful you don't...give other people your values'. She does, however, go on to observe that this kind of approach can be extremely difficult:

> 'you go in now and you have this negative view, and you have to really search hard to look for positives. And once you.....build on those positives, then you can address the negatives.'

Once again this perspective represents something of a discontinuity with much of the thinking at national level. It is particularly interesting to note the comments of Participant H, who represents a Christian organisation. For this participant, the success of his organisation is discussed in terms of the 'development' of the

individuals with whom it works. He remarks that this development, 'may never be to our standard, but we're not there to judge, just to try to enable and encourage'. He also makes the following observation regarding the organisation's philosophy – an observation that provides a stark contrast to the ideological tones and relative intransigence evidenced by the Idealists at national level:

> 'A Christian response, which we feel if you profess to be a Christian, that must be demonstrated in practical ways. It's no good talking up in the air and staying there, you must live down here and help fellow man. It's very, as simple as that. If we profess…to love God, we must show it by the way we treat other people.'

This philosophy is described by Participant H as being, 'very basic'. However it can, to an extent, be applied across the organisations operating locally. At street level, neither morality nor merit (in the sense of 'good' parenting or family life), is deemed to be the preserve of any particular family form. Rather they are 'individual' qualities both in the sense of being 'internal' and (to some extent), being exclusive to that particular service-user. Local work is thus informed not by a tendency to measure people against some kind of idealised standard, but rather by an appreciation of the reality of family life and a fundamental respect for the ways in which people are actually managing that reality.

The location of 'expertise'

The non-prescriptive, and indeed the non-judgemental stance adopted by local participants, reflects a particular conception of 'expertise' when it comes to the task of 'doing' family. For example, one of the core values outlined in the literature produced by J's organisation is set out as follows: 'People know what is best for them, even though sometimes that information is buried so deep inside them they cannot reach it without help'. Similarly, the literature given to parents by Participant F, contains the following assertion: 'You know best what is happening in your family and how you would like things to be'. Participant K also describes how, at the outset, she makes the point of outlining her role to parents with the

statement: 'I'm not here to boss you around and tell you how to bring up your child, because you're the experts as far as your child is concerned'. She then continues:

> 'You have to be calm, and you have to admit that you don't know everything, and I don't think you should, you know…well I don't think any of us do, we'd never go, you know, and say we are the experts, you're not.'

Expertise is not constructed in terms of qualifications or training, and is consequently not regarded as the exclusive preserve of the professional. Instead it is perceived to be primarily about both experience, and the individual. Indeed as Participant A explicitly argues:

> 'I think…again that parents in their family with their children, they are kind of experts in their situation, they know everything about that situation, and we just kind of look from the outside looking in. So they bring an awful lot of knowledge and skills with them…We've got to kind of acknowledge that, and acknowledge, yes you've done, you've been, you know people that've looked after children to teenagers, they've had all that experience, all those years of knowledge to get to that point, and if they can do that, the little hurdles and barriers that they face in here can be quickly overcome with appropriate…intervention and appropriate support really.'

For the local participants, education is thus not seen simply as some kind of one-way, top-down experience. For example, the 'learning environment' that Participant A seeks to create through the use of group work, is described as one in which, 'people aren't just learning from us as professionals, but they're actually learning from…other people, their peer groups really'. Professionals are not perceived as being invariably vested with the right answer – indeed for these providers there generally is no right answer, but rather a range of different possible ones. For example, Participant M dismisses the idea that there is, 'a right way or a wrong way to parent'. Instead, it is argued, 'there's the way that feels right to you as an individual parent'. The approach employed in her parenting courses is not therefore about saying that something is 'right' or 'wrong': 'it's like suggesting that you try this, we find it works for lots of people…see if it fits for you'. Participant A

echoes this approach, describing the 'professional' worker's role in the following terms:

> 'we can give them different models, different information, different ways of doing things, and they can actually select one that they feel comfortable with, that fits…their needs.'

This more dynamic, two-way, and indeed more equal relationship between service providers and users, also clearly underpins the parenting courses provided by Participant M:

> 'I very much…don't see it as…me being a teacher, and other people learning. I see it as I see everything in life, as we're all on a journey together and we're all at particular stages, we've all got particular skills and…griefs, and hurts and joys and sorrows that we can share and learn from each other…And I get as much from it as other people, I just see myself as…as someone who…has a particular thing to offer, which I'm working on myself at the same time, so we're totally as equals.'

In a similar vein, Participant A is critical of parenting programmes that fail to utilise this type of interactional approach. Such programmes are believed to effectively deny the 'strength' of parents: 'it's like saying we know best, we know everything, and…we are all knowledgeable and we are all powerful, and I don't think that's the case really. I think we can learn a lot from the parents themselves.'

'Empowerment' of service users

A 'connected' theme that also informs the work of local organisations is the concept of 'empowerment'. For example, Participant J describes the aim of the telephone help-line provided by her organisation in the following terms:

> 'It's basically to help people…clarify their problem, and sort of empower them to take the next step to get out of their problems. So what we try to do, is listen to them. We don't give advice although we help them, you know, maybe with suggestions.'

This approach reflects one of the core values of the organisation, namely the belief that, 'most people like to feel in control of their lives'. Similarly Participant N, who represents a support organisation for lone parents, states that her role is neither about telling people what to do, nor providing them with a solution: 'the idea is all self-help and mutual aid. So I'm not here to do things for people'. Even amongst those participants who provide what can be termed more educational services, the approach is very similar. For example, Participant M talks of 'guiding' people to look for the solution, 'rather than at any time suggesting' one. Participant H also makes reference to what he describes as, 'gentle intervention'. Such intervention takes the form of asking what people think, or making suggestions – the intention being to, 'try and help them learn and achieve, rather than do[ing] for them'.

The concept of empowerment is also present within the mediation context. For example Participant O, who is a solicitor mediator, describes a key part of her role in the following terms: 'you've got to empower them, and enable them to take charge and take responsibility'. Indeed she goes on to argue that 'responsibility' for the success or otherwise of mediation, lies with the parties themselves: 'if they want to make it work, it will work. And if they don't want to make it work, that's their problem really'. The mediator's task is to 'facilitate', 'assist', and suggest 'proposals and options' for consideration. It does not, however, include coming up with 'a solution'. This type of stance is reiterated by Participant P, although she does admit to being 'fairly directive' in the event that the parties find themselves unable to speak either to each other, or indeed to her.

Arguably a more practical approach to empowerment is offered by Participant K, who describes a central element of her work as follows:

> 'to encourage them to do things for themselves, because we're not…able to take on everything for them, so if they do have a problem, perhaps you know, the first step might be to give them the advice about where to go to try and sort it out for themselves depending on what the problem is.'

This participant does regard the provision of advice as a legitimate part of her role. She does, however, also stress the importance of clients actually helping

themselves: 'they have to…realise that you will help them, but you're not going to do it every single time'.

This particular participant also raises a slightly different perspective on empowerment, making the point that although one might want to do more, the decision to accept help is ultimately up to the individual: 'You kind of learn I think, that you offer as much support, and it's up to them whether they take it'. She then continues:

> 'you want to make everything better, but as time goes on you've learnt that you offer it, and if they refuse it…you just continue to offer it next time you have contact with them again, but you can't make them accept anything.' [K]

For national policy-makers, the empowerment of parents does seem to be constructed primarily in terms of the provision of information, and the mediation option. As revealed in the preceding chapters, constructions of both information and mediation are the subject of some discussion amongst the national policy-making community. What can, however, be broadly said for present purposes is that within the context of information, empowerment (such as it is) is constructed largely in terms of enabling 'choice'. With regards to mediation, proponents construct the process in terms of providing both the requisite tools for negotiation, and enhanced control over the agenda for discussion.

For the local participants empowerment appears, in comparison, to constitute a much more active and dynamic concept. For example, one participant talks about helping parents to 'own' their problems, thereby enabling them to really take control of the situation [I]. This particular participant explains how she stresses to the organisation's volunteer workers, that problems belong firmly to their clients: 'It's their problem, they own it. We do our best. If you start taking it away from them, then it diminishes what you're giving'. In a similar vein, J's training literature highlights the following:

> 'We cannot solve caller's problems and we are not responsible for their problems. Giving them time and space may help the caller to feel more

in control and therefore more able to manage their own life.'

Another participant also talks about involving parents in service provision:

> 'If you can actually get parents to run groups for parents, and to look at issues that they feel they need to look at, then they can empower themselves and enable real change to happen.' [A]

For this participant, the philosophy underlying his organisation's work can be summed up in the phrase: 'to enable people to reach their full potential…to work in a positive way with people'. This philosophy is informed by both a fundamentally positive construction of parents, and a belief in their abilities and personal resources.

Linked to the concept of empowerment, is the objective articulated by several of the participants – namely that service users are able to achieve independence. One example of this perspective is provided by Participant I, who states that a central objective of her organisation is: 'to make people independent of any support, so they don't need other agencies to give them support, you know that they can stand on their own two feet'. Echoing this idea that empowerment facilitates independence, Participant H sets out the aims of the various work undertaken by his organisation:

> 'Essentially to achieve a level of awareness and skill in, within the family setting…of what it means, or what it takes to live in an acceptable way. I don't mean that in a judgemental way. To live in an acceptable way, bringing children up…which is like, basically acceptable so as not to get into trouble, not to harm…and giving the necessary teaching, training, skills, love, care, in order to try and achieve just a little of independent living where they can cope, and bring up a child without any, you know, negative worries and stuff like that.'

'Perceptions' of children

Children, constructions of children, and conceptions of their 'best interests' feature prominently across the different discourses articulated by local workers. It is perhaps unsurprising that one feature of the discourses articulated by those participants whose work brings them into contact with 'older' children, is a general perception of children as active subjects. For example the 'mission' of Participant B's organisation, which works with children of varying ages, 'is very much to do things on children's and young people's terms'. Similarly Participant C, who also represents a children's organisation, discusses the aim of operating, 'with children at the centre' very much in active terms. For example, he talks about ongoing work with children around the 'New Deal for Communities' initiative. Whilst this project, the aim of which is 'to promote children's participation in determining what happens to that money' does fall outside the family policy arena, it is illustrative of the perceptions of children that generally inform the organisation's work. Indeed the approach utilised in this project is described as the, 'economic enfranchisement' of children: 'it's about promoting…their voice in the development of policy'.

In comparison to the constructions articulated by a proportion of the national policy-making community, children are not vested with the innocence of ignorance. Nor indeed is there the perception that such childhood innocence constitutes a desirable state of affairs. However, it is also the case that children are generally not constructed – as they are by the Idealists – as essentially 'evil' or in some way inherently problematic. For example, Participant D refutes the idea that in families experiencing difficulties, 'young people are the problem'. Similarly Participant E talks of the tendency, where parents are separating, for 'the system' to focus on the child. For this participant the 'problem' is not the child or his behaviour: 'it was that the parents had lost all trust and respect for each other'.

Participant B talks in detail about children who contact his organisation regarding parental separation and divorce. Several of the points that he makes, reflect the concerns articulated by the Child Advocates within the national forum:

> 'We have…young people whose parents might take a very over protective

> role, and think it's not good to tell them anything, must protect the children. And so we get bewildered young people…They know what's going on, in terms of things aren't right. They may have their own version of why it happened, and really feel they're unable to approach parents who are struggling themselves through problems.'

This participant also stresses both the individuality of children, and the variety of scenarios about which they contact the organisation. This view of children is echoed by a number of the participants including Participant G, who describes them as, 'a very varied commodity'. However, Participant B goes on to make the following general point:

> 'What is very clear is a generalist thing about what children and young people are saying, is that they do need to know what's going on, or they create their own wild fantasies about it…And there'll be lots of people out there as adults…who still don't know why their parents got divorced, and may never be able to answer that.'

A lack of information is thus regarded as potentially more harmful than involving children in the family situation, however uncomfortable that might be.

The importance of both communicating with children, and keeping them informed of the situation, is a theme that is echoed by several participants. For example, Participant G remarks that when it comes to separation or divorce, 'we would always push towards the telling rather than the family secrets'. However, the difficulties that exist for parents when it comes to actually communicating with their children, are considered by Participant J:

> 'Parents find it difficult, and they especially find it difficult because a lot of them have not been used to that approach themselves. They've come from families where things like that weren't talked through, or weren't talked about. They've come maybe from very strict schools where again they've been treated like children rather than growing adults with their own right and their own view.'

This comment is an interesting one in that it does contain echoes of the argument articulated by the Pragmatic Progressives at national level – namely the difficulties

faced by law and policy that seeks to change the dominant culture. However, this participant also goes on to advance the following argument:

> 'I think a lot of the problems now are there because on the one hand schools and society demand from young children an awful lot of responsibility, and on the other hand they're not given that responsibility by their parents, or their grandparents, or their teachers, so that's where the conflict starts. And again it comes down to lack of communication... and we feel that if you make that clear to people, that being honest about things, at the right level, is very often much better than trying to protect or hide...we find that a lot in divorce problems.....Or simply, yeah, not discussing anything at all, and just set strict rules...And then of course you get, you know, people rebel against it, or get upset about it.' [J]

Echoing the discourses articulated by the Child Advocates, this observation reflects the somewhat confused and 'dual image of children in modern society – namely that despite developments in various areas of social life, the family remains one site in society where children are simply not accorded responsibility.

The promotional literature produced by J's organisation, talks of children as possessing, 'a mind of their own'. The parent-child relationship is thus regarded in the following terms: 'always complicated and developing – it is a two-way street'. This concept provides a stark contrast to the more one-way, parent-as-trustee type model that informs much of the national debate. However, the literature is also interesting in that it suggests that parents should make the effort both to try to see things from their child's point of view, and to give children opportunities to talk about their feelings. Indeed the basic philosophy is articulated in terms of, 'talking and listening to children'. This philosophy is operationalised through the following exhortations: 'try to be honest and straightforward with your child' and, 'ask your child about their point of view on key decisions'.

The language of 'children's rights' is specifically used, in the divorce context, by Participant B. He recognises that the 'age thing' does constitute an issue, however, the organisation mainly deals with children aged ten and upwards: 'so they've got a reasonable comprehension usually of what's going on around them'. There is an acknowledgement – and this was a concern highlighted by several of the national

policy-makers – that children may have unrealistic wishes, such as wanting their parents stay to stay together. However, what clearly comes through the various discourses is the construction of children as social actors, whose views and feelings should be taken seriously. This can be seen in the following description of his organisation's role: 'The most valuable thing we do is we listen in an unbiased way, and perhaps a way that...they don't get from other adults'.

Again this reflects the kind of perspective articulated by the Child Advocates - namely the reluctance of adult society to both 'involve' children, and to accord their views sufficient respect. As Participant B continues:

> 'We're not a problem-solving organisation. We don't give them smart Alec answers. Our approach very much is to help them tell their stories so that both they and we get a nice wide view of what's going on...it's enabling them to tell it in a way that allows them to get a much wider look at what's going on you know, about where they fit in and where other people's behaviour fits in it...What's going on for mum? What's going on for dad? What's going on for them? What's going on for siblings? And to have a look about what's probably a quite complex family system that's going on...And trying to acknowledge and understand how they're feeling.'

For this participant, the role of his organisation is thus to look at ways forward, and to give children some kind of practical idea as to how they might proceed. However, the next step is always rooted in the ideas that the child herself may have. The counsellor's role is constructed very much in terms of possibly providing some additional ideas, but primarily helping the child to, 'go away with a better understanding of what's happening to them'. This is interesting in that such a role effectively mirrors that of those organisations who work primarily with adults. Once again the implication is that professionals do not invariably know best. The approach is informed by a basic respect both for children, and for their capacity as rational subjects. The counsellor may help children to think about the options, but an ultimate aim of the process does appear to be the empowerment of children.

The perception articulated by Participant B, namely that children lack a real voice within adult society, is echoed by several of the participants. An example is

provided by Participant D, who argues, 'children haven't got enough status'. In a similar vein Participant C talks, in general terms, about how children and young people are, 'disenfranchised from decision-making processes'. Indeed for this participant, one of the 'problems' within society is that fact that, 'we've got profound ageism in respect of kids. Nobody ever listens to what they've got to say'.

In stark contrast to this societal 'view' of children, the work of a number of the local participants is based very much on their involvement. The theme of 'involvement' evident in work with adults is thus similarly extended to children. For example, Participant F states that a child would generally be included in those meetings held with his family and relevant professional workers, with the aim of exploring possible ways forward for them:

> 'It's difficult about the stage at which you say children can participate. Generally I would expect any child over ten to be part of the meeting'.

In a similar vein, Participant D also talks of her current involvement in developing programmes for children aged nine and upwards, that explore issues of race and parenting. In addition Participant G, who occupies a position within the formal legal 'process' dealing with separation and divorce, states that children will generally be seen from the age of four: 'where you can actually have some kind of interaction or interview with them...albeit limited in the case of the younger ones'. Thus what appears to be articulated by these different participants is what might be described as a general principle of inclusivity. Children are constructed as individuals, with their own views about the problems and issues that impact upon them. Those views are regarded as deserving of consideration - a perspective that, in turn, would appear to reflect an underlying respect for the children who articulate them.

Within the divorce process itself, the situation regarding children does become what might be described as somewhat less clear. Participant G states that where separation or divorce involves a dispute regarding children, then the children will be seen, 'unless there are very good reasons why not'. She explains that this approach

contrasts sharply with the situation that existed prior to the introduction of the Children Act 1989, when the focus of work was actually the 'dispute' itself. Before the 1989 Act a, 'sort of systemic family therapy type approach' was utilised, 'where you might or might not involve the children, but you were actually trying to work with parents on their conflicts'. The result was that, in a number of cases, children were simply not seen at all. The Children Act would thus appear to be an example of legislation that has actually had a very real, and indeed fundamental impact on the work being done at street-level.

It is, however, interesting to note that one of the apparently 'good' reasons for not seeing the children might be, 'that neither parent wants us to see the children' – although it should by noted that a court order may be sought if it was felt that seeing them was 'really' necessary [G]. This appears to reflect a perception of the sanctity of family boundaries and parental authority. Similarly, where an agreement is reached between the parties, 'it isn't necessary to see the children, you've...sorted it really'. The implication would thus appear to be that where there is no longer any dispute, there is also no 'welfare issue' with regards to the children. Arguably therefore in the absence of any dispute, there is almost a blurring of the interests of children and their parents. It may be that this view simply reflects the reality of the children's position in the family, and indeed the pressures on Participant G and her organisation. Nevertheless, this situation does appear to represent something of a crystallisation of the concerns articulated by the Child Advocates during the Family Law Act debates.

When it comes to mediation, neither of the solicitor-mediators within the study sample saw, or indeed felt equipped to deal with children. This is particularly interesting in view of the fact that Participant O also worked regularly with children in care proceedings. Although such 'public' law work involved asking children what they would like her to tell the judge, and ensuring that they had an appropriate understanding of the legal process, the divorce situation is regarded very differently: 'this would be looking at wishes, feelings and emotions of a child, it's a very different area'.

For Participant P, the incorporation of children into the mediation process is very much a matter of 'last resort'. Indeed it is generally felt not to be 'appropriate' to discuss the issues with children, and to involve putting 'pressure' on them. In contrast, however, Participant O describes the inability to include children's wishes as making her feel 'a bit powerless'. Although believing that in the 'vast majority of cases' it is fine for parents to make the decisions, she suggests that this will not work in every instance: 'the children should have some route for their views and feelings to be taken into account'.

The picture that is presented within this context does provide something of an interesting contrast with the views articulated by Participant B. For this latter participant, children and young people are very clearly constructed as 'separate' from their parents, with their own needs and interests. For example, he makes the following statement:

> 'I think particularly with sort of mid-adolescents and getting to that stage, and kids getting very much into being able to organise their own activities and their own social life, not needing to be accompanied by a parent to go and do things and having boyfriends and girlfriends. There's a real kind of dilemma there about kids wanting to be home based, wanting to be able to do their own thing and be around their mates. And if two divorced or separated parents don't live on the same patch, creates real adolescent headaches.'

This view that children have their own lives to lead, and do not simply constitute some kind of chattel to be shared between parents, once again represents a clear continuity with the position adopted by the Child Advocates.

Participant G describes her role as that of obtaining an 'independent' view of children's wishes and feelings. Some of the practical issues articulated by this participant, again reflect concerns that came through the national debate. For example, reference is made to children who do not want to be held responsible for decision-making:

> 'they don't want to be put in a conflict of loyalties, so they either don't say anything at all and just look at you and…keep changing the subject, or they…say things that make it impossible. So they'll say things like

> they want to spend half the time with one, and half the time with the other…or they love both of them equally. And…so there's some very sensible children really, 'cos then they don't get to be blamed for anything.'

This observation echoes anxieties articulated particularly by the 'Formal' national policy-makers – namely that allowing children to express an opinion places too much responsibility on them. In a similar vein, Participant B talks of children with, 'real split loyalties sometimes if…they view both their parents as good parents'.

It is also interesting to note what is said about the weight that is accorded to children's views. Participant G highlights the subjectivity of the legal 'process', particularly in view of the difficult balancing act that it has to perform between hearing the children 'and trying to understand where they're coming from', and not making them 'inappropriately responsible' for what happens. Courts may disagree with the front-line professionals as to the weight to be given to children's views, however a central issue appears to be the essential variability of the system:

> 'I think it's just so variable from court to court, and judge to judge…children have been known to change residence on the strength of their views, from about seven. But on the other hand, other children's wishes have been totally ignored. And sometimes children who've been talking about fairly abusive situations, have actually been ordered to have supervised contact…Sometimes, even in the face of a child who's adamantly hostile to the notion of contact, the court can actually expect some contact to be tried out.'

Participant G argues that the presumption in favour of contact is not now as strong as it has been in the past. The domestic violence lobby, in particular, is perceived to have really made people question whether contact is invariably best for children. She also says of the presumption: 'we have been questioning it for years, but it was sometimes difficult to convince a court'. However she then goes on to make the following observation:

> 'You might have big question marks about the quality of contact, or whether it's really such a good idea, but on the other hand you perhaps haven't got enough evidence. And…it is quite a draconian thing to say a parent shouldn't actually see children, so…you'd have to be slow to

reach that conclusion really.'

This observation can arguably be interpreted as reflecting a belief in the parent's 'right' to have contact with his or her child – which raises the question of whether parental 'responsibilities' have effectively been reconstructed as parental rights. However, this participant talks about the philosophy underlying her work in terms of both, 'protecting the best interests of the child', and of children's 'rights'. Indeed she goes on to state:

> 'We believe that it's the child's right to have a relationship with both parents…And you would do everything possible to keep doors open, and allow a child to grow with the knowledge…and…if everything's okay, a relationship with the absent parent. But even if it isn't…the sort of absent parent that you could have a relationship with, I think we would still want children to grow up with an identity about their natural parentage, and we would want to keep doors open, and keep choices available for them to make when they're of an age to make them freely.'

Interestingly there is no corresponding right for children not to have a relationship with a parent. Overall therefore, something of a mixed picture is presented as to who knows what is 'best' for children, what indeed is 'best' for them, how to treat children's views, and thus implicitly how to actually constitute children themselves. When it comes specifically to the divorce context, work does appear to be influenced by preconceived ideas about the nature and merits of the parent-child relationship, and what parents 'should' be doing vis a vis their children post-divorce. Also there is a hint here that the professionals know best - in the sense that they know better than the children themselves. In this instance, expertise is thus constructed largely in terms of professionalism and qualifications.

The literature produced by Participant E's organisation, also constructs contact in terms of children's rights. Indeed the organisation is described as frequently acting as a: 'bridge between no contact at all, and the restoration of a child's right to keep in touch with both parents'. For this particular participant, contact is constructed in terms of something that children want. Arguably, however, this construction

reflects the fact that this organisation both 'supports' existing contact arrangements made elsewhere, and deals predominantly with young children.

For Participant E, the parent-child relationship is perceived to be of central importance. Implicit throughout the discussion, is the belief that it is the 'responsibility' of parents to ensure that this relationship is maintained. This, in turn, has implications for the parental relationship – indeed there is some recognition of the difficulties that, according to various academic commentators, this entails. For example, the following statement is made with regards to contact:

> 'We see it time and time again, if parents can only bring themselves...and I know it's very difficult, I really do know it's difficult...If parents can only bring themselves to see, as long as children want to, and I mean not all children want to and that's fair enough...But if they can only accept that, and brace themselves to let that be part of the child's routine without being snide about the other parent, then at the end of the day they have a better relationship.'

The difficult situation in which parents are placed is recognised by several participants. However, it is interesting to note that, as a general rule, parents are not accorded any blame for failing to communicate with or really listen to their children. For example, Participant B makes reference to the difficulty of acknowledging young people's feelings about family breakdown:

> 'It's hard to find from a parent who's perhaps dealing with their own needs as well. It's a complex dynamic, it's a family system, all those things going on.'

Another participant makes reference to the 'hostility', 'aggression', 'mud-slinging' and 'attempts to discredit the other side' that can characterise separation and divorce. The divorce 'situation' is summed up as one in which there is, 'a lot of unhelpful stuff' that is not in the interests of children:

> 'But parents that are hurting, sometimes find it difficult to think how taking revenge on their other half might just actually end up...you know the people who are going to count the cost are actually the kids. But they can't always see that, the need for revenge is too strong.' [G]

This participant talks about children being, as she describes it, 'triangulated in the conflict'. As she goes on to explain:

> 'Children will have been told all sorts of totally inappropriate stuff about finance, and the house, and...they've been interrogated as to...say what mummy's doing, and who's in bed with her and night...and all manner of very abusive things.'

However, once again parents are not condemned for this. The point is made that where parents are hurting or feel aggrieved, it is 'probably unrealistic' to think that some of that is not going to get transmitted to the children: 'Inevitably it does, and you see children...allying themselves with the party that they feel is the victim'.

Assessing 'outcomes'

For local participants, the issue of assessing the outcomes of their work is something of a vexed one. A number of participants talk of the difficulty that surrounds this task, and indeed some organisations do not actually carry out any real form of assessment at all. Participant E provides an example of this stance, explaining that although her organisation used to produce a feedback form for parents to complete, they ultimately found that it 'wasn't helpful'. This participant, who provides a forum for parents to have contact with their children, argues:

> 'We've always felt that what we're there for is the basic, to be a neutral, relaxed venue, and if you're into forms and questionnaires it destroys some of that feeling...and we feel that is our advantage really.'

Participant B also conducts no 'formal' assessment, articulating the belief that 'we're getting something right', based upon the fact that children and young people consistently use the service provided. Participant J who, like B, represents an organisation providing a telephone-based service, describes how volunteers complete forms detailing their own feelings about each call. However, all that they really have to go on are their own impressions, in addition to anything that the caller may say to them at the end of the call. Such 'assessment' cannot therefore really be

tested. Some participants do talk about formal evaluation in terms of targets and figures. However, such evaluation does appear to be produced primarily for funders, in order to provide evidence that agreed work has in fact been carried out.

Assessment is made more difficult by the nature of the work done by several of the participants. For example, Participant K talks of the 'huge problems' that surround any attempts to measure the success of her work: 'A lot of advice we give is preventative, and how can you prove that you've prevented something from happening?' Participant M adopts a slightly different perspective, highlighting the ongoing influence of the parenting courses that she provides. Indeed when asked as to the possibility of assessing the outcomes of her work, she remarks that this is possible 'to a point'. She then continues on to make the following point:

> 'but something like this is ongoing for the rest of people's lives, and I know that from my own experience. You know, there are things that...I dimly picked up on one or the other of the courses, that later on suddenly click into place, so I don't think you can say.'

This relative fluidity of outcomes is also raised by participant E, who states: 'I mean what today is a success, tomorrow might be a disaster because some families actually come back. So it was a success last year and now we're back to square one. Was it a success?'

Much of the difficulty that surrounds the assessment of outcomes also reflects the variety and individuality of the parents and children with whom the local participants work. For example, Participant A makes the following observation:

> 'A good outcome is...I suppose on different levels. I suppose if it's a...child and a parent...being able to communicate their own needs to one another, and to be able to live in a more harmonious way. I would say that's a big success...because it's preventing family break-up, it's preventing...lots of other kind of sideline issues that could happen in that family...To enable...parents to question authority, to question the support they get, to actually ask for support, I would say that's a big success. To provide a safe environment for children and families to come and talk to professionals without being stigmatised, judged or labelled, I would say that's a big success. Also looking at...new projects...trying to enable

> parents to run their own groups and educate themselves, to access information, they're successes.'

Similarly for Participant I, 'success' is also individual rather than something that can be judged by the 'outside world'. This participant quotes the example of one woman who, with the support of her organisation, has now gained professional qualifications and is building a career. This is then contrasted with a second woman who, when she first became involved with the organisation, was 'not really interested' in her children. She has now progressed to the stage where she gets them to school on time, appreciates the importance of education, and keeps all school and hospital appointments. Participant I then remarks: 'And I think those two women have moved just as far. But to the outside world, who's the success?' For this participant, the outcome of her organisation's work is assessed in terms of, 'the fact that we make people aware of children's needs', and 'we encourage very slow steps…very small steps with families'. For Participant H, work is also assessed in terms of 'development in the person'. However once again, that 'development' is an individual, and consequently a somewhat intangible concept.

Participant O makes the observation that she does not look at mediation in terms of 'success or failure'. Instead it is regarded as part of the overall process: 'it fits into the continuum of the divorce and the financial settlement process'. Even though the parties may get no further than discussing basic financial information, that can still be 'valuable'. Indeed as Participant P notes, if mediation does break down at that stage, they have all the information necessary to take the matter to court and get it finally resolved.

This local approach to assessment, and to the construction of 'good' outcomes, contrasts with the much more fixed models that tend to underpin policy at the national level. Indeed Participant N provides an explicit example of this, outlining how her definitions of 'success' are somewhat different to the measures employed by her national office. This participant, whose work is conducted with lone parents, describes her 'measurement of success' in terms of bringing parents together:

> 'If they start a group, then that's against my targets, that's a different

type of success. But I don't go out and say, ooh you've got to start a group otherwise I don't want anything to do with you, and...you know, to me anybody that meets anybody through [organisation], and if I've in someway supported that relationship, that new friendship, that to me is a success. You can't measure it, it's intangible...But the tangible stuff is a new group. That's a measure of success. That keeps my national office happy, that keeps the national office board happy. What I would say, is if they actually came out and saw the work that we did in the regions, and saw the friendships that formed between people, that should be a stronger measure of success than any amount of groups that are set up.'

This observation also suggests that the nature of street-level work and the inherent individuality of its outcomes, does not fit well within the national arena – namely where there is a tendency to require something that is both tangible and measurable to show for one's efforts.

Perspectives on national policy

Social Reality

The views of local participants regarding family policy at the national level are strongly reflective of both their flexible constructions of 'family', and their general belief in the need for policy responses to be rooted in the reality and experiences of those families. As Participant A observes, family life is changing in fundamental ways: 'People...are changing, their views have changed and we've got to kind of respect that and...value that'. The result is that policy therefore needs to move away from trying to: 'stick [people] back again in a two parent family with one child that's married and white middle class'.

A theme that underpins the different discourses is that 'family' is essentially active. Rather than adopting the Idealist view of family as some kind of passive institution that stands outside and above social change, it is actually regarded as a fundamental part of that change. Policy, it is therefore suggested, needs to take note of this.

Indeed one participant makes the following argument with regards to what he describes as, 'the political stuff regarding...divorce and keeping families together':

> 'They're trying to sell, you need to be a happily married couple. You know, you've only got to look at the divorce rates and family break-ups , and the trend is not like that any more.....We're prehistoric aren't we? We're fossilised in our views of what parents are really doing to this country, and what they should be...We need to be looking forward, we need to be kind of embracing that as much as we can, not trying to harp back to old beliefs and old structures because they just don't apply any more, they just don't apply. I'm not saying that we should disrespect them, we should try to...value them and learn from them, but we can't hold onto the past, it's not going to work, we can't.' [A]

Marriage

At national level, a belief in the value and merits of marriage resonates right across the various constituencies that comprise the policy-making community. Even amongst the more pragmatic constituents, there is a marked reluctance to be seen to be contradicting the idea that marriage is somehow 'best'. The presentation of marriage as the ideal, and consequently as a state of affairs to be encouraged, is therefore largely unquestioned. However, at the local level, this assumption that tends almost to 'sit' at the centre of national debate and policy, is subjected to very serious challenge.

Participants question the idea that marriage is invariably better than alternative family forms. For example, Participant N talks of the need to 'smash the stereotypes' that surround lone parenthood, and to challenge negative perceptions by presenting an alternative 'positive image'. This task is, however, a difficult one when polices are geared towards the family unit based on marriage:

> 'family units are great if they work, but it doesn't have to be a mother and father...and two point two children. It can be two women, it can be two men, it can be you know.....it can be a mother bringing up the children. At the root of everything it's got to be a stable home to bring

a child up, or children up in.'

A second participant adopts a slightly different perspective towards the issue of marriage. However, once again, the feeling is that separation and divorce can be viewed in positive terms. As he argues:

> 'I think that's good, because females don't need to rely on men to keep them any more, there's a whole structure that's enabling females to say 'well I can stand up on my own now as a female, and I can be a good parent'.' [A]

Again this approach represents a very real contrast to the discourses articulated particularly by the Idealists at national level. The law and policy, condemned by Idealist constituents for equating marriage with other forms of intimate relationships and family life, actually finds support here. In addition, the behaviour of women who choose to leave men is constructed in terms of liberation, rather than the language of irresponsibility or bad parenting. Indeed the quality of parenting is not perceived to be dependent upon the presence of two parents. As this participant observes, there is a general perception within society that, 'there's something going wrong with parenting'. However, this is a view with which this participant begs to differ:

> 'I think there's a lot going right with parenting, I think it's just going through massive changes. The structure of parenting is changing, because the structure of society's changing, and we just don't react to that in a positive way.' [A]

Another participant highlights the 'implication' within much of national policy, that problems simply do not occur if one conforms to the traditional two-parent family model. As this participant observes, this is simply not the reality – even for those who publicly advocate the merits of marriage: 'Tony Blair's son drunk, Straw's smoking dope…serves them right for their piety really. It's kind of what happens to people' [C]. In a similar vein, a second participant makes the following remark:

> 'I actually feel puzzled still by this government's approach towards family, because more and more it's clear that there isn't such a thing as a nuclear family, that more people actually live in completely different circumstances,

and that also within the nuclear family which are still the majority of calls we get are mega, mega problems. So on paper it might look as……you know, mum, dad and two point four children, but, a lot of the problems people call us about, are actually taking part in that so-called wonderful unit that should be, you know, the basis of our society, so…it is interesting to see.' [J]

Parenting

When it comes to the issue of parenting, some clear continuities do exist between national priorities and local approaches. For example, there is a concern amongst several local participants that parents 'should' remain in contact with their children. The implication that continuing contact is generally in the best interests of children, does suggest that there may be some merit in the recent focus of policy (as highlighted by several academic commentators) on the rebuilding of the family around the parent-child bond. However, despite being generally in favour, it is important to recognise that local participants do not regard parent-child contact as an unconditional good.

Participant L suggests that experience shows that if parents are willing, then the 'best' situation for children 'is to see as much as possible of both parents'. Participant N describes access to the 'other' parent, as something that is 'very much supported' by her organisation. She then continues:

> 'we don't say, 'oh gawd the man's left you…never see him again, and you should keep your children'. Contact should always be retained with the absent parent if it's a good, and it's a positive experience for the child and, you know, and for the whole family.'

In a similar vein, Participant E makes the following statement - although it is interesting to note that this is phrased in terms of the children's wishes: 'parents should at least give the children the chance to stay in touch if they wanted to'.

Within some of the local discourses there is, however, the implication that this reconstitution of the family post-separation or divorce may be somewhat simplistic.

As Participant E states with reference to her organisation: 'the purpose is to provide the parents and children opportunity to spend time together'. She then continues: 'People come to us…while they sort themselves out'. It is therefore recognised that maintaining contact with children after the adult relationship has broken down, can often be an extremely difficult task.

Managing the actual contact itself, is also not always easy. For example, as Participant E remarks:

> 'Now…we do get particularly fathers, we do get some parents who just haven't got a clue what to do with the children at all…now if a volunteer spots that well then we'll go and sort of, 'shall we build some Lego', 'hey have you read him this story this week', kind of approach.'

This observation reflects the arguments advanced by academic commentators such as Backett (1987), Smart (1999) and Neale and Smart (1997), namely that fathers often lack both the base, and indeed the basic skills to enable them to fulfil the parenting role after separation or divorce. A second participant makes a similar point, providing a recent example of how her organisation supported a father and his relationship with his children, following the breakdown of his marriage. In this instance support consisted of the following:

> 'Looking at what he could be doing when he'd got the children, and sort of generally helping him through that initial period of not being in the home. Wanting to care for the children, but basically having no…sort of foundation or ground of what to do.'

Participant G raises a slightly different point, referring to the difficulties involved in ongoing work with parents post-separation – in particular the fact that most people really do not want any outside assistance. Indeed she makes the observation:

> 'Most people really wish their other half to drop dead, or move off and stop causing them any aggro. So even if they don't wish them dead, they just want to be left alone to get on with their lives…to put their lives back together without the constant need to accommodate the other person.'

These observations all highlight the fact that the rhetoric and theory that underpins family policy (including the Family Law Act), is not always easy to put into practice. For some parents, the basis for some kind of joint parenting may simply not be there – they may lack the basic emotional and practical resources required. For others, the change in circumstances resulting from the breakdown in the parental relationship may have effectively 'shifted the goalposts', with the result that any pre-existing foundation is effectively removed. Local workers also recognise the difficult reality of moving forward with one's life, whilst at the same time having to deal with the continued presence of an ex-partner.

External 'pressures'

Some local participants also articulate concerns about the potential impact that the focus within national policy on marriage and models of 'good' parenting, can actually have on individual parents. Policy priorities and directions are regarded almost as an external 'pressure' impacting on parents and their perceptions of parenting and family life. For example, Participant M describes how her parenting courses include a session that, 'looks at what it's like to be a parent, what it means to us, what our expectations of ourselves and others are as parents, what we feel are the expectations of society on us'. In a similar vein, the groups run by A's organisation explore 'identity' issues. These issues are described in the following terms:

> 'it's exploring…issues of stereotypes, issues of how the media impacts on how you feel, and your identity within, within social frameworks really. So it's just exploring how identity can change and be moulded.'

A third participant advances the argument that parents often feel a pressure to conform to some kind of 'standard':

> 'I think a lot of the people do phone because they either feel, whether it is the government policy or the strict way they were brought up themselves, they feel that they've failed if they, if they do split up, or if they don't know how to handle, you know, aggressive behaviour in their teenage children or something like that. I…do feel that there is a lot of pressure of not doing

it right...and getting the blame for something...I do feel that that is a tendency that's there.' [J]

This particular participant also raises the possibility that parents who deviate from the family models approved by society often feel that their deviation is responsible for any resulting 'problems'. Indeed she makes reference to the fact that parents may blame their divorce for the subsequent behaviour of their children:

'And sometimes it really helps to separate for instance the difficulties they feel, the experiences, and they put down to divorce, whereas you think, you know, that's just a normal fourteen year old behaviour, yeah? Might not be pleasant, but you know, any teenager that age has got that tendency. So it's not because you divorced your husband three years ago, it's simply because he or she is now fourteen, and more than likely if you would still be together they would show the same behaviour, because you know, it's the hormones, or it's the peer pressure or whatever...And it can help that people, that people find out that you know, they're not alone in it, and that it is, it's normal although not pleasant.' [J]

Sections of the national policy community do see divorce as the source of many problems for children. Whilst not totally denying this, the local view is that causation cannot always be simply attributed to family breakdown.

Participant J also makes the additional point that parents often find it difficult to ask for help. She remarks that many people telephone her organisation either because they have tried everything else, or that they simply want to talk to someone they do not know. As she observes, if you do have a problem, 'to admit it to your sister or your neighbour is much more difficult than to phone someone that you can't see, that doesn't know you, but you just need...to unload it'. This view receives strong support from Participant A, who suggests that a 'huge stigma' surrounds the whole education issue. A comparison is drawn with going on a computer course, which he suggests people 'wouldn't think twice about'. When, however, it comes to parenting, there is a general sense that 'you should know how to do it by now'. He therefore makes the following assertion:

'I feel that any parent that, that can come here and say I need some support, I think that's a very big step for any parent to take, to actually identify 'hang

on a minute I'm struggling here', because I don't think in society that it's acceptable for parents to do that. So I've got a lot of respect for parents that can actually ask for help.'

Gender

An interesting issue that is raised by one of the local participants relates to gender roles within the family. As the only male child-care worker based at his organisation's centre of operations, this participant expressed quite strongly his opinion that society generally, 'doesn't promote masculinity in parenting' [A]. Both society, and organisations such as his own, are viewed as having tended to 'stick' with traditional gender roles and divides. Indeed he remarks that his organisation no longer conducts work that is specifically focussed on fathers. The predominant feeling is therefore that both masculinity, and the importance of fathers are issues requiring promotion within the media and legislation.

This view is mirrored to an extent in the discourses articulated by Participant L. Coming from an organisation that represents fathers, this participant's views may be described as somewhat extreme. For example, it is argued that it should constitute a criminal offence for one parent to stop the other from seeing the child – unless that other parent is 'an unsuitable person'. However, this participant goes on to suggest that even where the father has been doing 'most of the caring', courts still tend to resolve disputes in favour of the mother. This is particularly the case where the child is very young, the dominant view being that the man, 'can't look after this child without someone else being there'.

It is arguable that the perception that fatherhood is not currently being promoted is a surprising one – particularly in view of legislative developments (of which the Family Law Act is a part) and policy statements attempting to promote forms of joint and co-operative parenting. As discussed in Chapter 3, it is certainly the view of a number of academic commentators that developments over the last decade are essentially aimed at fathers and enhancing the paternal role. Although Participant L

suggests that rather than saying that the father should 'stay involved with the children', legislation actually sends the message that he 'should continue to pay' for them.

It is, however, also arguable that the kind of view articulated by Participant A merely reflects the pretence – 'created' by the gender neutral, jointly responsible 'parent' that inhabits recent legislation – that fatherhood is actually an active relationship, rather than a passive status. This fiction of active fatherhood also receives some support from an observation made by participant E who makes the following remark:

> 'We do get, particularly fathers, we do get some parents who just haven't got a clue what to do with the children at all.'

Participant A also makes reference to the feminisation of parenting and its taken-for-granted nature. Indeed it is argued that parenting has always been both seen and judged in the following way:

> 'a natural skill that women should have, and…it's not important, it's not valued in society, it's not given the credit it deserves…the kind of skills that you need to be a parent, to be an effective parent are huge, it's one of the hardest jobs that anybody could do.'

It was suggested in the discussion of the Idealist focus on fathers that this might be a factor in the relative invisibility of motherhood within the national debate. This idea is certainly reiterated here – namely that women's assumed role of 'caring for' (Tronto 1989) children effectively renders them not worth discussing.

The 'approach' to divorce

Three of the local participants, all of whom operate within the formal divorce 'process', do make reference to the reforms contained within the 1996 Family Law Act. In the opinion of both Participants G and O, the concept of no-fault divorce is regarded as a fundamentally good thing. For Participant O, the debates surrounding who should issue the divorce petition, whether the behaviour detailed in the petition

is accepted or not, and questions about whether allegations of adultery can actually be proved, are described as 'nonsense' and 'ridiculous'. In addition, fault is regarded as having a potentially adverse impact on attempts to mediate:

> 'the other thing that comes through when you're doing [divorce] as a mediator is...the sort of fault and blame that you should pay for it. You know, you walked out, why should I have to sell the house? And all the rest of it. And I think the divorce process as it now is, encourages people to have this sort of blame culture. You know it's his fault, I'm divorcing him on his unreasonable behaviour...why should I have to put myself out and move to a small two bedroom house? So I would've welcomed that...principle...of no-fault divorce.'

Participant G employs the interests of children in her argument in favour of a no-fault framework:

> 'I was quite in sympathy with something that would stop a lot of the silly game playing that sometimes goes on. And certainly when we're trying to sort out children, one of the things we try and do is get off the blame thing. And it's difficult for parents if they're feeling aggrieved and that they've been wrongly done to. So theoretically no fault divorce would fit quite well with our philosophy about relationship breakdown, and how really the only thing you have to do is to try and pick up the pieces, and look to the future, and sort that out as best you can.'

Although having reservations about the 'cooling-off 'periods set out in the 1996 Act, Participant G expresses support for both mediation and, 'the provision of a good service of information...that explained to people the range of options, and what they might need to do, and how you go about it'. Information is regarded as a fundamentally good thing, as is the opportunity to obtain it 'from places other than lawyers'. For this particular participant, information is 'about quality of life issues'. She then continues:

> 'I think it is investing in children, because it's got to help children, for parents to feel empowered, to feel freer, to be able to make clear and sensible choices, and to really weigh up the pros and cons. But I don't think the links are made between providing that kind of service for parents, and actually 'well that's probably going to be better for the

kids'.'

When it comes to the issue of mediation, the picture that is presented by the two solicitor mediators is something of a mixed one. Participant O, whose clientele was fairly evenly split between legal aid and private fee paying, is relatively optimistic. Although accepting that a 'cultural shift' in favour of mediation is some way off, she argues that things are moving: 'people are actually starting to come along, and ringing up and saying…'I've heard about mediation, or my solicitor's recommended mediation''. In contrast, however, the view offered by Participant P is more pessimistic. Over ninety percent of this participant's clients were legally aided, and in her view it simply does not possess appeal beyond this limited group: 'not many private intelligent people are keyed into it I don't think'.

The way in which mediation has been received by the legal profession is also somewhat mixed. Both participants emphasise that mediation is not a substitute for legal advice – there will always be cases that are unsuitable, whilst the mediator will also invariably send the parties back to talk to their solicitors about any proposals that are made. Once again, Participant O provides the optimistic view:

> 'at the end of the day, family lawyers I think are very different from a lot of other lawyers, you know we wouldn't actually be doing the job if we didn't have care and concern for our clients, and wanted to achieve things in the best way, which sounds very corny, but I think it is actually true.'

For this participant, mediation is viewed as having a positive future. It is increasingly gaining acceptance within the profession and, 'it slots into the current processes perfectly alright'. However, Participant P suggests that the future is much more uncertain. Whilst some solicitors are very keen - primarily she suggests because the clients that they refer have limited earning potential for them - others are described as 'just completely anti'. Although viewing mediation very much as the 'way forward', this is tempered by the underlying concern that 'it might also die a death'.

One interesting factor that emerges from these discourses, does suggest that there may be some (albeit limited) merit to the suggestion made by the Formal policy-makers during the Family Law Act debates, namely that financial issues can impact on behaviour. For example, Participant O observes that people are beginning to come to mediation: 'people who are earning…very good incomes who think, especially the men actually, I want to get it sorted, and so I'll…instigate it'. In a similar vein, Participant P makes the point that parties attending for mediation are required to fill in the same financial form that is required by the court. In the event that mediation breaks down, it is then possible to proceed to court with minimum delay. This participant remarks that for privately paying clients, it is cheaper to do this in mediation that it is to pay a solicitor: 'And so they're quite into that'.

A 'bottom up' approach

A common theme amongst the participants is that policy needs to be more, 'bottom up'. Indeed for those organisations also possessing a national presence, their role is perceived to include the 'feeding back' of what it is that service users need and want. Indeed one participant talks of the 'dual purpose' of his organisation. In addition to helping children, the organisation has what can effectively be described as a second role:

> 'to campaign on children's behalf, because we hear from so many individual children we can use information collectively to say this is what children are saying about this issue, and whether that's comment in the media or campaigning to government, or comment on a White Paper, but to campaign on children's behalf about provision and their rights as well.' [B]

Similarly Participant C describes his organisation as a, 'social justice organisation'. He then goes on to explain that 'social justice' involves both service provision, and a movement towards a position, 'where the bits of practice that we do could inform…what's called influencing or lobby work in an attempt to produce policy changes at national level…which are focussed on justice for children'.

A bottom up perspective is seen to better serve the needs of both individuals, and the communities in which they live. Participant E highlights one aspect of this, pointing out that, 'every family's needs are different'. The recognition that one (policy) size does not invariably fit all, is echoed by a second participant. Although talking specifically about back to work policies, Participant N articulates the general local belief in the importance of sufficient flexibility in order to accommodate both individuality and choice. With regards to (what was then) the forthcoming policy requiring all parents signing on for income support to attend compulsory interviews, she advances the following argument:

> 'that's great, do it in a really, really positive way, but don't force people. People must have the choice, and they know, most people know what's best for their children. For some lone parents it's for them to be at work, and the children to be cared for elsewhere, or for their children to be at school and supported through that way. So build a network to support individual lone parents' needs, and be there.'

Participant B argues that the result of employing a more grounded approach to policy would be, 'that communities themselves define and describe the services they need, and that services are delivered on their terms in the most helpful way to them'. With regards to national policy he makes the following observation:

> 'It appears that governments do feel the need to nanny us, and the need to write policy that has kind of a public comfort in how it prescribes.'

Although this comment is specifically made with reference to social work and child protection, the observation is arguably transferable to family policy generally. For example, what seems to come through the national debate on divorce is a 'comfort' factor in supporting the traditional value of marriage.

Participant A offers a rather critical assessment of national approaches to parenting. Reference is made to, 'top-heavy parenting and institutional stuff', which provokes the following comment:

> 'It can be…unmeaningful to the actual parents, it could mean nothing to them. It could be very patronising to the parents…It's like the health campaigns. We need to stop people smoking, we need…people eating less fat in their diet you know, and when you get to a family that's…living

on the breadline, you know a packet of fags keep the sanity in the household. It's just totally unrealistic, and their needs are so far removed from what's actually happening.'

The belief here is that policies should be 'dynamic', rather than operating as some kind of, 'conveyer belt of education'. Indeed this participant talks of the need to deal with parents on three different levels, if behaviour is to be effectively influenced behaviour. These levels are described as: 'A think level, a feel level, and a do level'. The reasoning underpinning this approach is that although it is always possible to tell parents what to do, they will not actually do it unless they really, as he puts it, 'think and feel what they're doing'. Policy therefore needs to be both relevant, and to make 'sense' to those with which it seeks to engage.

This perspective represents a basic challenge to the efficacy of both 'top-down' policies and models of behaviour, and to the 'people like us' approach that arguably underpins them. As Participant A also argues:

'I think when you look at your own learning, it's exactly the same. If somebody says well I'm telling you how to do it because I know the right way, you're going to automatically think well…it's not enabling learning to take place, and it's against all kind of learning philosophy and learning, learning behaviour really.'

Certainly Participant J would appear to echo the futility of trying to educate people about the 'right' way to behave. Indeed she draws a parallel with the response to teenage pregnancy in order to underline the point:

'It's the same with teenage pregnancies, the way they again… get on their high horse here and say, ooh look if we give them, you know, contraception then they're going to have sex even more. Rubbish! Absolute rubbish!…it will eventually filter through that it isn't all going to be solved by saying okay you know, wait with having sex until you're twenty-one, and then get married and sort it out. There's going to be so much proof that that is not what reality is about, I think so anyway.'

Participant F also seems to connect with the idea of making policy relevant to people. For example, the following comment is made with reference to 'parenting education' in the teenage context:

> 'This notion that you can offer teenagers in a way, some parenting education so that later on they will be better parents...my own experience is until you've got kids you haven't got a clue what it's like. Most teenagers have lovely romantic notions, including teenage girls who might even get pregnant quite early, and don't relate problems to them. And you're wasting your time really, at that stage trying to put anything that might be called parenting education.'

This participant also discusses her previous experiences of running parenting classes. Such classes can be successful, however she makes a point of stressing that they have to be both 'quite specific', and run by people who understand the circumstances of the participants.

Policy agendas

The majority of organisations operating outside the statutory and divorce frameworks do receive some form of funding from either local or central government. A number also take referrals from statutory authorities. The impact that funding is perceived to have on the organisations' respective agendas is, however, a somewhat mixed one. Several participants express the opinion that funding arrangements do not impinge upon their work (for example, Participants B and D). Participant H also makes the following assertion: 'We don't compromise our standards in order to get the funding...If you want us to do it, you want us to do it because we do it in a particular way'. He then continues: 'everybody sees us as independent'. In a similar vein, Participant E refers to the value of independence: 'one of the things that was said to me almost universally by parents, was that thank goodness you're not part of the system'. Participant I also argues that her organisation follows its own agenda, with its own 'aims and objectives', 'constitution' and 'ethos'.

In contrast, Participant C remarks on the impossibility of voluntary organisations refusing to compromise: 'because that just doesn't happen, that's not the way the world works, and you'd quickly go under if you did'. This participant's organisation was involved in explicitly marketing itself with local authorities and central government funding agencies, with the result that most of its projects had up to 50% local authority money in them. However, he refers to an ongoing debate within the organisation about whether to keep to this level of public funding:

> 'so therefore to retain our autonomy in terms of our values, you know our values base, and some autonomy in terms of what we actually do, or whether in order to expand we ought to take more central or local government money'.

What had apparently happened in this situation, was a gradual shift in the emphasis of the organisation's work in order to secure funding:

> 'I suppose that happens on an incremental basis really, you know each time we get into a negotiation with the local authority they'll say…'oh we want this and we want that', and we'll say 'we wont give you that but we'll give you this'…and there's a sort of process of negotiation. Certainly what we provide is…is compromised by what the local authorities are wanting.' [C]

The result of the whole process is thus a 'compromise' or 'clash' between 'central government political agenda, coming directly from central government into the local economy', 'the local authority itself having it's own political agenda to respond to' and the organisation.

Participant J also makes reference to the impact that central government agendas may have in the future. Her organisation had recently received additional funding from government, however concern is expressed over the possible effects that the increasing emphasis on marriage within national policy, may have on work done locally:

> 'And I think this will grow, because with us getting bigger, and needing more money, and needing to expand, there will be….a definite view that there are a lot more problems going on…and…that trying to talk people back into stable relationships is not going to solve those problems.'

For Participant A, as a small organisation chasing limited funding, a significant amount of time is spent reacting to funders: 'We jump through hoops if we know there's...social services or the council saying well, this in the next two years we'll be aiming for...We need to keep a track of that and keep moulding our service to what they need'. One result is that the organisation is now beginning to provide what are described as 'main theme choices', rather than 'selective choice'. The services available are thus, to some extent, responding to funders rather than the needs of the clients. However, he also expresses the opinion that the organisation does go its own way to some degree – and indeed that the presentation of services can be altered in order to secure funding: 'It's like flower arranging – same flowers, different arrangement'. Therefore although national and local government agendas are having some influence, it can arguably be said that the majority of local organisations do not regard their work as being subordinated to such outside influences.

Concluding comments

In contrast to a number of their national counterparts, the local 'family policy community' clearly does not regard the fact of divorce itself as fundamentally problematic. Nor indeed is separation and divorce approached with any underlying sense of unease or discomfort. Implicit within the street-level discourses is the perception that the breakdown of relationships is a fact of life to be dealt with, and through which families and their various members are to be supported.

The nature of that support is generally 'inclusive' in the sense that it is based upon the active involvement of service users. This inclusion is evident within the various programmes, courses and fora operated across the groups and organisations, and indeed within the agendas around which these are constructed. For example, Participant D describes how her work on race and parenting employs a service-user based agenda:

> 'we had like a consultation process before we even...[started]...because the course was based on the consultation from the parents, they would talk about what was happening for them as parents.'

One dominant message emerging from the Family Law Act debates is the idea that spouses, parents and families are effectively measured against some kind of ideal model. However, for local workers such an approach is not only considered inappropriate, but as potentially problematic. Whilst 'Formal' policy-makers regard divorce law as an opportunity to induce what they regard as ideal or 'rational' behaviour, local participants view its focus on marriage and particular 'types' of behaviour as factors that may actually operate to inhibit how people in a range of very different situations actually 'do' family life. For example, the inability to match up to the policy 'model' can engender feelings of inadequacy and personal failure.

This issue of children within the local context is an interesting one. The view articulated by a number of participants, in particular those from organisations working with children, echoes that of the Child Advocates – namely that listening to, and the active participation of children in the family 'situation' is key. However, particularly with regards to those participants working within the formal divorce process, there is some evidence of children also being viewed more as the objects of welfare. This prompts the question as to whether this 'dual' image actually reflects a deeper sense of uncertainty about children and the nature of childhood within modern society. Certainly some sense of uncertainty does appear to be reflected in some of the discourses articulated at national level. This, in turn, suggests that this is an issue that requires further consideration by those involved at all levels of policy formulation and delivery.

Underpinning the local approach is a very particular conception of family – and indeed one that represents a major discontinuity with national policy and the focus of national debates. At the local level there is not just an acceptance that families come in all shapes and sizes, but rather a celebration of that fact. For example, the values and philosophy set out in the literature provided by Participant A's

organisation, include a belief in, 'respecting and valuing the uniqueness and diversity of each individual'. Similarly, the principles underpinning the services provided to children and families by Participant F, seek to 'value every child and young person as a unique individual'. What can thus be seen within local work is an effective crystallisation of the recent sociological 'take' on family – namely that families are what families do. This, in turn, raises a fundamental question regarding the relevance of those more limited concepts of 'family' that are circulating at national level.

An additional key factor that underlies local work, relates to the range of personal and social circumstances that are believed to impact on family life and behaviour. One example was mentioned in the discussion surrounding the difficulties involved in maintaining contact with children after divorce. A second illustration is provided by Participant J, who makes the following comment with regards to parent 'education':

> 'Well then again, you see these thing that, that, by sending you know, parents of unruly children to parenting classes again, that you're going to solve it. Because why are these kids so unhappy? They're not just unhappy because of the way that they live, they're unhappy because their needs aren't met at school either, they've been let down by the system in several guises, not just because their mum is a single mum, or their father is you know, maybe drinking too much or having an affair with a neighbour or something like that.'

The clear implication is that top-down models of how to 'do' family are overly simplistic, and fail to appreciate the complexity of factors, circumstances and issues that impact very fundamentally on people's ability to conform to them. This, in turn, suggests the need for a greater appreciation on the part of policy-makers that real life is not always as simple as it may appear in a policy statement.

The flexible and reflexive approach offered by local participants provides an extremely interesting contrast to national approaches. Of course it is true national policy will always be constrained in the sense that it is about providing general rules or frameworks for the mass of population. However, the work that is being done at street level – and in particular their conceptions of family, and appreciation of the

reality of modern family life – do raise some very fundamental questions about the nature of the family policy that is being formulated at national level.

Chapter 9

Conclusion

Introduction

The story of the Family Law Act 1996 is largely one of tension, negotiation and, ultimately, of a somewhat 'uncomfortable' compromise. The study data reveals that one basic 'tension' existing within the national policy-making community surrounds the issue of marriage and, in particular, the nature of the connections that are made between divorce law and marriage. The picture provided by the data is far from being a simple black and white one – indeed the discourses articulated by some of the constituents are both shifting and complex. However, what is clear is the fact that the national policy-making community is effectively attempting to operate on a stage that encompasses a broad continuum of opinion. Situated on one side of this continuum are the Idealist constituents, for whom divorce law is cast firmly in the role of 'supporting' marriage. This view is set against, at the opposite end of the continuum, those views articulated by the pragmatic constituents. Amongst the Pragmatic Progressives, the attempt to utilise divorce law in order to support marriage is viewed as illogical, inappropriate, and largely irrelevant (in that they doubt its efficacy). Instead the 'proper' role of law is constructed in terms of bringing marriages to an end in the best and most efficient way possible – essentially to resolve disputes involving children, property and finances and, for some participants, to attempt to maximise the potential for constructive post-divorce relations.

Underpinning this 'tension' surrounding the role or function of divorce law, is an even more basic tension between the different 'world-views' held by those constituents who comprise the national policy-making community. Indeed it is these basic views and values that provide the essential 'frame' for constituents' contributions to the whole divorce debate. An insight into the fundamentally different world-views that are juxtaposed within the policy reform process, are

revealed by the competing ways in which both the 'problem' of divorce, and the broad legal 'role' are constructed and discussed.

Amongst the Idealist constituents, there is a strong sense that some kind of 'moral' malaise underlies the changes that society is witnessing in family structures. These changes include an apparent increase in the rate of divorce, and reflect the perception of the nuclear family as uniquely beneficial to the well being of both individuals and the wider society. One result is that divorce thus becomes problematised principally on moral grounds - as violating both religious norms, and also notions of 'family' and personal responsibility. This vision of deterioration and decline, within which the law is conceptualised as a complicit actor, reflects a Utopian vision of an ideal society based upon a common social bond of shared values, and populated by the traditional family.

The 'backward' facing vision provided by the Idealists, which reaches back towards an elusive 'golden age' of society and family, in turn provides the foundation for the construction of law as a vehicle for the realisation of that ideal society. Law thus becomes cast as a mechanism for social change. The mechanism by which that support is to be achieved involves a degree of turning back the divorce 'clock'. The fact of marriage breakdown is reconstructed as a 'public' matter, and is thus subjected to investigation and, ultimately, to adjudication by the courts. Personal relationships are therefore constituted as a legitimate site of legal regulation, and the law is accorded a role in the enforcement of personal morality.

This Idealist discourse echoes some of the arguments advanced by Devlin (1965), namely that the law may legitimately intervene in individual morality in order to preserve the fabric of society. In this particular instance, it would seem that the fabric that Idealist constituents wish to preserve has in fact already unravelled, which raises fundamental questions about the extent of the influence that the idealistic vision has on the policy process. However, what can be said is that law is constructed in terms of doctrine – as being about 'first principles'. Part of its role is thus the setting and enforcing of standards.

The issue with which policy-makers are wrestling in this context, is largely one of social control or regulation. Of course social order constitutes a fundamental pre-requisite for society. For example, as Douglas observes, society is only possible to the extent that its members share certain symbolic meanings. However, whilst society demands constraint and a sharing of values, at the same time what he terms the 'necessity of meaning' creates opposing demands of freedom, individuality, choice and differentiation of self. The 'problem' of social order is thus described in the following terms:

> 'essentially the problem of producing some sharedness of meanings and some coordination of activities of the members of any society sufficient to allow them to achieve what they consider to be adequate gratification of their needs and desires through their everyday lives.' (1971: 3)

Amongst Idealists, the dominant perception is that social 'deviance' (in this instance divorce and the movement away from the traditional nuclear family) produces social disorder and disintegration. Strong suggests that this position echoes views that he describes as, 'little more than intellectualised forms of the ancient belief that "moral decay causes social decay"' (ibid.: 5). However for these particular constituents, and indeed arguably for much of the broader political constituency itself social rules, and in particular moral rules, are identified as the specific kind of shared meaning that produces social order. Legislation incorporating universal or absolutist moral 'rules' thus provides the solution to a fragmented society and value system.

Within the Family Law Act process itself, this 'perspective' crystallised as pressure in favour of an explicitly coercive divorce law – in effect for the re-imposition of an external moral code. Law is perceived as a tool with which to shape and define the parameters of behaviour of those couples whose relationship is breaking down. Arguably the aim is thus to accomplish a measure of social engineering – in this instance to 'encourage' people to stay married. The mechanism by which this result is to be achieved, is through the institutionalisation of disincentives to divorce. In essence a more difficult and unpleasant divorce process is advocated, with the aim of deterring those who are contemplating the possibility.

Amongst the more pragmatic constituents, the 'problem' of divorce is constructed primarily in practical rather than moral terms. Here the focus is on the difficulties allegedly created by the operation of existing divorce law. Therefore, in essence, discourses are framed by what can be described as a 'legal realist' or 'law in action' perspective. The 'problem' is conceptualised largely in terms of how the law actually performs, and the way in which it impacts upon families, individuals, and the nature and quality of the various family relationships. Particular concern is reserved for those relationships that necessarily survive the granting of the divorce decree – namely those involving children.

It is inevitably much harder to identify some kind of Utopian vision underpinning the perspective articulated by these more pragmatic members of the policy community. Arguably it is not even appropriate to talk in those terms, as an assertion that marriage is 'best' or the 'ideal' often co-exists alongside the belief that society needs to accept and deal with the reality of divorce in a 'better' way. However, what can be said about the more pragmatic 'world views' is that in contrast to the idealist visions, they do pay very real attention to the conditions of existence of modern family life. Furthermore they also display a general respect for those conditions.

The view of society offered by the Pragmatic Progressives - and indeed by much of the broad Progressive constituency - can be described as a 'forward' facing one. It is accepting, albeit to varying degrees, of the changes that have taken place in social and familial behaviour and values. This 'societal view' in turn provides a foundation for the construction of a law that reflects those changes. Here the questions to be asked of law are less concerned with how things 'ought' to be, focussing instead on how they 'are'. How they 'are' relates back to the reality of society and social life, to the 'performance' of law, and indeed to the limitations of law when dealing with intimate relationships. This recognition that marriage and family life have changed, combined with the view that the law is limited in what it can do to transform such deeply entrenched social changes, generates pressure for a different form of legal process – one that reflects social pressures for a more 'open'

approach to marriage, and which seeks to facilitate the best possible outcome for failed marriages.

A question of compromise

One interesting aspect of the process, that was to ultimately prove crucial to the final form of the Family Law Act, was that neither the Idealists nor the most pragmatic members of the Progressive constituency were ultimately able to carry the day. The end result was therefore one of compromise. The form of that compromise was a piece of legislation that sought to satisfy more pragmatic constituents with its introduction of no-fault divorce, whilst at the same time seeking the approval of the more idealist-oriented constituents through its emphasis on marriage. The Act thus attempted to create law with an essentially 'dual' character. The new divorce law both looked 'backwards' in that it was premised on the principles of saving and supporting marriage – as one of the national participants suggests, marriage was cast as the 'gold standard' [14]. At the same time, however, the law also looked 'forwards' through its administration of the reality of marriage breakdown – although that administrative function was also subject to a default standard of the 'good' divorce.

This duality may be partly attributable to the fact that neither constituency seems to have felt able to argue its position through to the logical conclusion. Despite their strongly held personal views, the Idealists do recognise both the extent to which society has changed, and some of the limitations of law in the context of intimate relationships. This recognition does seem to prevent them from arguing in favour of what would appear to be the logical conclusion to their analyses – namely a law that prevents divorce. Similarly, the Pragmatic Progressives are not prepared to argue in favour of a process that would bring marriages to an end in the most efficient manner – namely divorce on demand as a purely administrative process. One example of just such a process is evident in Sweden. Here a waiting period is only necessary where there are minor children, or one spouse disagrees with the

divorce. The parties are responsible for their own economic support post-divorce, marital property is divided evenly between the spouses and children (born within or legitimated by marriage) are subject to a 'joint custody' rule (Olah: 2001). In comparison, however, constituents appear to deem such a position to be both socially and politically unacceptable within the English context.

A degree of 'compromise' would thus already seem to exist at either end of the policy spectrum, with constituencies apparently feeling some degree of constraint deriving from the 'opposing' perspective. However, another factor at work would also seem to be the inherent appeal of the middle ground. For example, the idea of saving 'saveable' marriages was particularly identified as a concept possessing the ability to appeal across the policy community, with the result that it ultimately represented a key site of compromise:

> 'That was a phrase…and it really caught…people's imagination because I think they feel the concept of saving the saveable marriage, isn't about interfering in people and saying don't get divorced, its about saying let's find out the ones that are saveable, the people who in a sense get caught up in the whole process…So I think that phrase encapsulated a sort of national hope that we could actually make a difference, and we could do that in a way that wouldn't be intrusive, and we wouldn't be telling people what to do, and it was just simply you know something that we could all say, you know yes of course we want to save the saveable marriage.' [5]

This 'compromise' was able to dovetail with the marriage-saving agenda of the Idealists. At the same time it was accepted by several of the Pragmatic Progressives, who anticipated that it would have no practical effect – it consequently represented a concession that actually involved no loss on their part. In addition, the concept also allowed those constituents who naturally occupied the more central ground to both feel that they were doing something positive, and to demonstrate their belief in the importance and primacy of marriage.

An alternative perspective

An interesting contrast to the debates being conducted at national level is provided by the 'street-level' perspective, as articulated by local participants in the study. For local workers, the role of policy is constructed primarily in responsive terms. In common with some of the more pragmatic national constituents, the view is that policy should have a social basis – namely that it should be rooted in the social reality of individuals and families. Indeed to invoke Rodger's (1995) distinction between 'moral regulation' and 'family policy' – whilst national policy falls somewhat between the two, work at the local level clearly belongs to the category of family policy. Local stakeholders do not construct policy as some kind of tool for moralisation, nor do they see their role as somehow 'policing' families. Instead the function of policy is to provide a non-judgemental 'service' that caters to the diversity of families, and to their needs and circumstances. This may crystallise in, for example, helping people through a particular situation, or in supporting them to 'do' family life in the best way that *they* can.

This construction of the policy 'role' is based upon a world-view that does not simply accept social and familial diversity (and indeed underpinning that, moral diversity), but is happy to go a step further and actually celebrate it. Amongst local participants there is a general valuing of families, and a fundamental respect for their individual experience and the way in which they deal with family life. Morality is therefore regarded as a largely private issue. It is, however, important to recognise that the approach is not a completely laissez-faire one in the sense that 'anything goes'. Whilst emphasis is placed upon individuals negotiating their own 'moral terrains' (see for example, Smart et al 1999), intervention seeks to ensure the achievement of 'good enough' parenting and family life (see for example, participants F, H). The basis for regulatory intervention at local level is thus more akin to that of Mill's (1974) 'harm principle'.

It is arguable that this alternative approach is partially underpinned by a different societal 'vision'. Here neither social order, nor indeed the continued existence of society itself, is viewed in terms of integration and adherence to an absolute set of

values. Instead it is the responsible exercise of individual freedom of choice that it key. Furthermore, there is also a fundamental willingness to place trust in the parties themselves. Individuals are generally deemed to be the 'experts' when it comes to their particular situation, and it is they rather than the practitioner who will often know what is best for them. Pound's (1908) individual 'human factor' is thus central to local practice. Rather than adopting the (national) role of social engineer, local family policy therefore appears to operate more in the role of a mechanic involved in 'tuning-up' – essentially in assisting or improving family functioning. Arguably therefore parallels can be drawn between the local workers and Llewellyn's (1960) judges – both are guided by their 'situation sense', and indeed are working at the level of 'isness' rather than 'oughtness'.

What is also particularly notable when comparing the local and national contexts is, firstly, the degree of consensus that exists within the local policy community. Whilst much of the national debate is characterised by tension, local stakeholders demonstrate a marked degree of solidarity in their thinking and approach. Secondly, and again in contrast to the 'difficulties' experienced with national policy, the assessments of the work that is being done locally are largely positive. Of course these self-assessments do come with the inevitable 'health warning', in that service providers are unlikely to be openly critical of their own services. However, in view of the dependence of local groups upon client satisfaction in order to secure the funding necessary for their continual survival, it is legitimate to suggest that they must indeed be doing something 'right'.

This issue of funding does mean that it should be recognised that the relative absence of idealism at this level may not be wholly attributable to a more individualistic and flexible 'world view' on the part of local participants. It is arguable that local policy, particularly within the voluntary sector, is to some extent a 'consumer product'. Local organisations must therefore respond positively to the diverse situations and demands of the individuals and families who constitute their markets. However as discussed in the preceding chapter, the fact that local workers are explicitly critical of the idealist and universal tone of national policy, does suggest the presence of a genuinely different value system at ground level.

The 'failure' of compromise

Following its receipt of Royal Assent on 4 July 1996, the life of the Family Law Act has proved to be both controversial, and relatively brief. Part II of the 1996 Act, which contains the new divorce provisions, was originally scheduled for implementation in 2000. However, On 17 June 1999, the Lord Chancellor confirmed in a written answer to a Parliamentary question that the Government was no longer intending to implement Part II as originally planned.

The reasons given for this decision were located in what have been described as the 'disappointing' interim findings from the information meeting pilots. Indeed the Lord Chancellor's answer stated that the requirement to attend an information meeting prior to initiating divorce proceedings, was actually failing to satisfy either of its two objectives – namely those of supporting families, and of reducing conflict in divorce. The following was provided as one apparent example of this failure:

> 'only 7% of those attending the pilots had been diverted into mediation, and 39% of those attending had reported they were more likely than before to go to a solicitor.' (Lord Chancellor's Department: No. 159/99)

On 16 January 2001 it was finally announced that when there was sufficient Parliamentary time, the Government intended to ask Parliament to repeal Part II of the Family Law Act. The accompanying Press Notice (Lord Chancellor's Department 20/01) emphasised the centrality of compulsory information meetings to the new divorce process, describing them as intended to help couples either to save their marriages, or to end them with minimum acrimony and distress. However, the Press Notice then went on to state that none of the six models tested in the pilot schemes had ultimately proved to be 'good enough' to justify the implementation of the new process on a national scale.

The Press Notice did expand on the situation, stating that the research conducted into the pilot schemes showed that although those attending did find the provision of information to be valuable, the information meetings themselves were generally not effective in helping most people to save their marriages. The main reason for

this was the fact that the meetings simply came too late in the day. The research was also reported to show that the meeting tended to incline those who were unsure about the state of their marriage, towards seeking a divorce.

Additional 'problems' included that the format of meetings was insufficiently flexible to provide people with information tailored to their needs. Furthermore, the marriage counselling, conciliatory divorce and mediation promoted by the meeting were all dependent upon the willing involvement of both parties. However, it was generally only the party petitioning for divorce who actually attended the information meeting. Some concern was also expressed that the complexity of the new divorce process might actually create delay and uncertainty – something that was not in the best interest of either the parties or their children.

The Final Evaluation Report on the Information Meeting pilots was also published on 16 January 2001. As stated in the Government Press Notice, and indeed echoing points articulated by some of the study participants, the Report (Lord Chancellor's Department 2001) found that those attending the Information Meetings were a diverse bunch. Some were unsure what to do about their marriages, others were certain that they wanted a divorce, whilst a further group sought information on specific issues. Generally, however, it was the case that attendees expected information to be more personally tailored to their individual needs. Rather than simply providing a forum for the provision of information, they also expected that their questions would be answered. Thus the Report concludes that what people seemed to want was an individual meeting that was sensitive both to their personal situation, and to the particular stage that they had reached in the process of marriage breakdown.

Although not highlighted by the Government, the Report does also place a significant emphasis on the fact that those who attended the meetings did find the provision of information to be valuable. However, echoing some of the criticism that has been aimed at the 1996 Act as a whole, issues do surround the dual nature of the function accorded to the meetings. For example it is noted that a basic tension exists between presenting and receiving information about both marriage

saving and the divorce process within the context of the same meeting. Indeed this is something that is also articulated by one of the study participants:

> 'The concern is...that there may in effect have been a trade-off, that the price of having a meeting which is better for saving a few extra saveable marriages, may actually be worse in terms of its effectiveness at giving people information about parenting, mediation and the divorce processes because it comes too early.' [3]

One additional interesting observation arising out of a comparison between the Report and the Government's Press Notice, is that the Report appears to be underpinned by a slightly different 'take' on the basic purpose of the information meetings. For example, whilst the Government emphasises the objectives of saving marriages and promoting conciliatory divorce, the Report argues that the meetings actually have 'two principal objectives'. The first of these is described as directing the individual's attention to those issues that should be considered when contemplating bringing one's marriage to an end. The second is to provide information on the various options for the resolution of difficulties, and the support services available.

With regards to supporting and saving marriage, the Report agrees that information about marriage support came too late for many parties. Indeed over half were already separated by the time that they attended a meeting. However, arguably in contrast to the assumptions that appear to underpin much of the new divorce process, it notes that many people had actually already made attempts to save their marriage. Consequently at this stage, counselling was only of limited success in dissuading people from going ahead with divorce.

Despite this finding, the incorporation of a counselling element was not regarded as being without merit. Indeed it is reported that the meeting with a marriage counsellor appears to have had a positive impact on the quality of spousal relationships, and to have helped people to examine their options and to decide what further help might be needed. In essence therefore 'marriage counselling' was helpful both in ending the uncertainty, and in helping attendees to move on with

their lives and face the future more positively. Thus what comes through the Report, is almost a questioning as to whether the law really 'should' be involved in social engineering, either in the sense of trying to get people to stay together, or by encouraging them to follow a particular 'route' through the divorce process.

To some extent, the tone of the Evaluation Report on Information Meetings echoes the work of the research team commissioned by the Legal Services Commission to monitor the pilots of the 1996 Act's mediation component. Their report had been published by the Commission in December of 2000 (LSC 2000). The background to this report lay in the hope that the new legislation would result in mediation, rather than lawyers, becoming the principal method of resolving disputes. In addition to utilising the Information Meeting to raise the possibility of mediation, Part III of the Act also provides that parties seeking legal aid must consider the mediation option. Indeed anyone seeking legal aid for lawyer representation is required to first attend a meeting with a mediator (subject to certain exceptions), the purpose of which is to determine whether mediation is suitable in the light of the nature of the dispute and the relationship between the parties. This requirement extends to all disputes involving money, property or children (section 29).

One of the Report's findings, was that public funding did not have an immediate impact on the volume of mediation work. Although the requirement that potential legal aid applicants first explore the option of mediation did significantly increase the number of cases referred to mediation providers, only a small increase in the number of mediation starts ultimately resulted (para. 7.1 Summary). In addition, and although people's experience of mediation was generally positive (para. 17 Summary), the response to solicitors was even more favourable. Indeed the partisanship of solicitors was found to constitute an important factor, in that it was highly valued by those facing the stress of separation and divorce (para. 20.1 Summary). As Gwynn Davis, the Academic Director of the research team notes, the Act envisaged mediation as part of the mainstream. However the reality, as indeed was emphasised by several of the study participants, is that it actually constitutes only a 'minority taste' (Davis 2000).

The findings of both of these reports arguably represent a fundamental challenge to the idea that divorce law actually 'can' fulfil the role of a social engineer – in essence that law can change behaviour in the sphere of intimate relationships. Consequently they also constitute a challenge to the basic Idealist position itself, and to the universal models of morality and behaviour that underpin it. In contrast, however, the Government response to the findings suggests that it is law in the particular form of the Family Law Act that is not able to secure a change in behaviour. This seems to suggest either a continued adherence to the belief that this constitutes a legitimate and achievable role for law, or alternatively a fundamental unwillingness within Government to really challenge the Idealist view that this is indeed how the proper role of law should be constructed.

The national focus

The apparent inability of the new divorce process to either support or save marriages in practice, represents something of a crystallisation of the views expressed by a number of the national policy-makers who participated in the study. Furthermore, it would also seem to reinforce much of the criticism articulated locally with regards to the 'marriage-centric' nature of national policy and thinking.

In view of both this, and particularly of the fact that work being conducted at local level does appear to be achieving positive results, a key question prompted by the data is thus why the perspective of local workers – which arguably constitutes the 'genuine' voice of pragmatism - does not appear to be articulated at national level. Indeed one central finding of the study, is the fact that the perception that marriage is somehow 'best' continues to resonate right across the national policy-making community. The failure to challenge what seems to be the commonsense idea 'that everybody knows' marriage is best, is a marked one.

As evidenced by the chapters detailing the history of divorce law, this perception of marriage is a long-standing one. Just one example of its continued endurance

beyond the direct question of divorce law reform, was provided by a House of Lords debate on 'Marriage and Family Values', held on 17 January 2001. The Lord Bishop of St Albans represents just one example of the 'traditional' idealist position:

> 'Of course I recognise that not all marriages are good and I recognise that relationships break down. But surely we have a moral duty to ensure that marriages survive. Exhortation is not enough. We need to engineer our society legally, educationally and financially so that fewer of our children are caught up in the anguish of family breakdown.' (vol. 620, col. 1136).

In contrast, Lord Janner of Braunstone offers an example of the more pragmatic view:

> 'we must recognise reality, and reality is changing. The reality is diversity and the fact that some of our children live in ways that are different from the way in which we have decided to live our lives. The reality is that we must help them and, above all, their children.' (ibid., col. 1137)

However, as with the Family Law Act debates, this position is once again prefaced by what seems to be the inevitable caveat: 'We believe in marriage and, yes, we believe in virtue…and in all that is best in the world' (loc. cit..).

At national level there is a tendency, principally among 'political' constituents, to seek to apply personal beliefs to policy. Discourses make frequent reference to personal beliefs, convictions and experiences of family life. The task of law and policy is then constructed in terms of those beliefs. This contrasts sharply with the local situation, where 'the personal' is constructed much more in terms of what can be learnt from the experiences of others. Indeed, at this level, there is an awareness that personal views can potentially inhibit one's ability to work effectively with the variety of people and situations with whom local organisations come into contact. Policy (and thinking) is thus not constructed through the lens of personal belief systems.

As alluded to earlier in the thesis, this divergence of perspective may well be partly attributable to the cultural and experiential 'gap' that exists between those operating

at street-level, vis a vis the relative detachment of national politics. Local practice is inevitably shaped and constrained by the situations and needs of service users. In comparison, the distance at which politics operates from street-level, arguably affords politicians the comparative luxury of being able to articulate their personal views.

It is also suggested that one further possible reason for the pre-eminence of these absolutist visions of society, may lie in the fact that such visions require others to see the world in the same way. As Douglas observes:

> 'There can be no other legitimate view of the world. The assumption of absolutism in beliefs or morality, then, is a form of *mental imperialism* which, if successful, constrains others to act so as to best serve our own interests. The acceptance of our absolutist theory would order the world in complete accord with our own best interests (as we see them).'
> (1971: 245)

An absolutist approach to social rules and social order may thus possess an inherent appeal, particularly for those occupying positions of influence.

A question, however, remains as to why there was no real articulated challenge to the national focus on marriage, and ultimately to the general principles of saving and supporting marriages, from those participants who do not constitute part of the formal political constituency. Indeed this absence is particularly surprising in view of the preference expressed by several participants for a 'straightforward divorce act' [9]. As one participant, who actually represented a marriage support organisation, observed:

> 'a good divorce law would actually be just that, it would be about dealing with people who...were clear that they wanted a divorce, but of course that's in an ideal world.' [5]

Although some constituents did regard the making of connections between divorce law and marriage to be inappropriate, they did not feel that it was possible to mount an argument against them. As discussed in previous chapters, the reasons for this included that such an argument was not felt to be 'acceptable'. Furthermore the aim of supporting marriage was regarded as so 'reasonable' that one simply could not

oppose it, whilst the general principles were viewed as the political 'price' of achieving no-fault divorce.

One further aspect of the relative absence of challenge to the primacy placed on marriage, appears to reflect an awareness amongst study participants of the broader context within which divorce reform is conducted, and the inherent difficulties that this creates for the reform process. As one participant remarked of the whole reform issue:

> 'it's a political hot potato, it always has been. This was the first government sponsored reform of divorce procedure since the mid-nineteenth century, and the reason is because any time anybody does anything on family issues, or homosexuality or anything like that, the Daily Mail jumps on them, and Middle England is up in arms.' [6]

This broader context was exacerbated by the political make-up of the House of Commons at the time – in particular the Conservative Government's small majority, and its consequent reliance on support from the Labour opposition. As this participant then goes on to observe:

> 'the problem the Conservatives had, was that they had a majority of seven, and its own backbenchers…all the family people, were using it as a means of getting their own points across.' [6]

It was also recognised that within the broader political and social contexts, divorce law is an issue that resonates beyond simply dealing with the breakdown of marriage. As another constituent observes:

> 'Politically, to bring in divorce law is a killer…because, it kind of becomes the vehicle for all these other kind of issues to do with women, and to do with…fairness, and to do with men, and to do with morality and sexual morality, and…you name it.' [5]

The need to ensure that reform was politically acceptable thus became a central influence in the shaping of the new law. A key element of that acceptability lay in the connections made between the law and marriage. As this constituent suggests:

'They must've known that they wouldn't bring through a change in divorce law if they didn't appear to be supporting marriage [5]'.

One result of this pressure was ultimately the incorporation of the concept of saving the saveable marriage. However, the need to secure political acceptance, also impacted upon the concept of 'responsibility'. A divorce law that ensured spouses accepted responsibility for children and partners, was perceived to make no-fault divorce more acceptable - particularly amongst those idealist constituencies for whom no-fault equated to 'easy' divorce. As one constituent stated:

> 'If on the one hand one lobby is saying 'please don't make divorce easier' and the other is saying 'well don't make it easier but could you not make it less stressful, could you just not make it a more sensible thing'...And what was quite interesting, if you analyse the objections of both and put them together, it seemed to be resolved by the requirement that the taking of responsibility...And if you like that became the key determinant of divorce reform. The system and philosophy should be enabling people to better understand their responsibility, and to discharge that responsibility before they took on new responsibility.' [2]

Consequently there appears to be the perception amongst policy-makers that in order to have an effective voice at national level, and indeed to be taken seriously, it is necessary to conduct the debate with the broader, more ideologically charged and generally pro-marriage context. This is reinforced by the demonstration amongst participants of an acute awareness as to the 'political' nature of divorce law reform – 'politics', with both a small and a capital 'p', operates as a significant influence on the construction of divorce law and the nature of its role.

One example of this awareness is provided by participants who described the necessity of 'selling' their position within the political arena. Indeed several talked at some length about their lobbying experiences, and the careful framing of arguments in order to secure a receptive 'political' audience. The skills involved in briefing effectively were described by one particular participant:

> 'I learnt what it means if it's going to be effective, it doesn't mean making a lot of noise, it means knowing exactly where to lob your ball

> if you like. So if you think of the image of lobbing the ball, I mean a good tennis player knows precisely how to lob, exactly were, when. So I mean lobbying really is that kind of skill.' [9]

A further example of the 'political' nature of the whole reform process is provided by constituents who talk explicitly about the way in which it was utilised in order to advance their own position. An illustration of this is provided by one constituent, who referred to the exercise of 'sheer optimism' on the part of her interest group. This particular constituent represented a marriage organisation, and whilst accepting that 'it's probably true' that divorce law might not be the place to be trying to support marriage, she then goes on to ask the question, 'but where else can you get it in?' [5]

Divorce law reform thus offered an invaluable opportunity for certain organisations to make themselves heard: 'The need to reform divorce would obviously become a point at which we could engage politically, and…from a policy point of view' [5]. She says of the Family Law Act process: 'It was a very clear example that if you have a policy concern…you find a piece of legislation that you might be able to attach to.' This constituent was aware that her organisation would be used by government in order to combat some of the more heavily ideological arguments advanced by political opponents to the legislation, and was thus keen to ensure that they also gained from the process. With particular regards to the issue of funding for marriage support services (which was ultimately incorporated into section 22 of the Act), she states: 'Government needed the middle-ground, and we'd got the middle-ground backing things' [5].

The 'issue' of children

The children 'question' is an interesting one. Within the study sample, the Child Advocates displayed some concern that the reform process had relatively little to say about children. It should, however, be noted that the Family Law Act itself has

been described as embodying, 'a far more child-centred divorce law than any previous UK statute' (Reece 2000: 85-6). This latter position is illustrated by the argument that section 11(3) of the Act witnessed the first introduction of the 'paramountcy principle' into the law of divorce. By virtue of section 11(2) the court also has power to postpone divorce indefinitely if the circumstances are likely to require it to exercise any of its powers under the Children Act, it is not in a position to do so without further consideration, and the circumstances are exceptional. In deciding whether circumstances are likely to require it to exercise its powers, the court is instructed to treat the child's welfare as paramount (section 11(3)).

Despite this divergence in interpretation, the study clearly demonstrates that children featured very strongly in both the debates surrounding the 1996 Act, and the thinking that underpinned it. Indeed children are employed to justify the different stances adopted by various national policy-makers – whether that stance takes the shape of restricting divorce, reducing conflict between parents, or seeking to enhance good relationships with both parents post-divorce. As one of the national participants states:

> 'I felt, especially for the children…that I had that responsibility to do what I could to give them the best life that was within my power.' [8]

Family law has been accused of operating according to a 'dependency framework', into which a limited notion of children's agency is slotted (Neale and Smart 1998: 14). Certainly what comes through the majority of discourses articulated at national level is that children's competence to speak within the divorce context is strictly limited, and that their welfare is generally best served by parents. It is, however, suggested that such a construction of welfare is unsurprising. As King and Piper observe:

> 'It is hardly surprising that the law's utterances on children's well-being concentrate upon the parent-child relationship. The law 'knows' children through the parent or parents. Parents have legal rights, duties and responsibilities. These not merely empower the parents to take decisions about their children's lives, but they are the very threads which the law attaches to people who become legal

> parents, jerking them into response when things go 'wrong' in the child's life.' (1995: 55)

The study reveals a predominant national construction of children caught up in separation and divorce as the recipients of both parental and adult responsibilities and duties. Indeed the widely presumed needs of children have prompted an emphasis on the continuing participation of both parents in the child's life after separation. However, as King and Piper (1995) have also noted, within certain areas of law children are now increasingly being defined in terms of the rights attributed to them. Thus in certain quarters the child is beginning to be constructed as a legal person whose interests must be represented at court hearings, and whose views must be sought on issues concerning his or her future welfare. Whilst the Child Advocates argue in favour of the introduction of such a legal construct into the divorce context, the local participants in the study suggest that a street-level version is actually already operating on the ground.

The work being done locally also reveals that children do need to talk about family breakdown, that they have views that deserve to be heard and respected, and indeed that they want to have some positive input into the whole process. This local 'picture' derives support from various research studies that have recently looked at how children experience parental separation and divorce. For example, Bretherton's study of thirty children of divorced parents, found that only forty-four percent felt that they had been involved in the decision-making process. In comparison, eighty-three percent of the children said that they would have liked to be so involved. As the author observes:

> 'They felt that as the person most affected by the decision, they should be involved in the process'. They did not expect or want to have the final decision, but wanted to have their say.' (2002: 453)

Interestingly these responses were obtained despite the fact that all of the children had actually met with a Family Court Welfare Officer at some point during the process, who had then gone on to prepare a welfare report.

In a similar vein, Butler et al found that children wanted to be told what was going on, even if it was sometimes difficult for them to comprehend. With regards to issues of contact and residence, they were strongly of the belief that their opinion was important, and that to be asked for it was even more so. As the study observes, children are involved in divorce in the sense that they do 'experience' it: 'probably on much the same terms as adults' (2002: 98). It is therefore important that this experience is both respected and valued within the process.

Some of the national participants did question whether children had any place within the formal divorce process. However, and particularly in light of the local findings, it is argued that such a position requires adjustment. Indeed what is needed, is a new 'child responsiveness' (King and Piper 1995) on the part of both the courts, and the various adults who are faced with children-related issues. At this point it is useful to make reference to Smart and Neale, who suggest that children should be entitled to what they term 'self-defined' rights to be listened to (1998: 40). In essence, the task of defining and operationalising rights is down to the children themselves – children should be invited to participate but how to proceed, and whether indeed to do so is their decision. The 'flip-side' of this will thus involve adults learning to trust children's judgement, and according them the competence to decide whether and how to exercise their right to be heard.

This reorientation does involve placing a whole new set of demands upon the divorce system. In addition it also represents a challenge to some fairly set preconceptions about family, parents and children. Indeed as Butler et al argue:

> 'any informed understanding of how a child is or might be 'involved' with their parents' divorce implies as much a change in our collective understanding and attitudes towards children as it implies the development of a new repertoire of skills in talking and listening to children.' (2002: 89-90)

The fact that the task is a difficult one does not, however, mean that it is one that policy-makers and the law should continue to duck. In the light of the Family Law Act, the Lord Chancellor's Department has sponsored the production of a series of 'Divorce and Separation Leaflets' for children of varying ages, aimed at helping

them to understand what is going on within their families and providing information about courts and divorce proceedings. These leaflets can be downloaded from the internet, or are available through a range of other sources. A parallel leaflet, providing information and guidance to parents on how to discuss the issues with their children, is also available. This does represent the beginnings of a movement towards a greater recognition of children, however, there remains a very long way to go if they are going to be genuinely recognised as competent individual subjects within a modern divorce process.

Developments in 'family policy'

Despite the difficulties resulting from the Family Law Act's focus on marriage, family policy at the national level has continued to negotiate the ground between advocating absolutism in the form of marriage, and embracing diversity. One example of this is provided by the publication of the New Labour Government's Consultation Paper, 'Supporting Families' in November 1998, which conducts something of a balancing act between extolling the virtues of marriage and attempting not to be overly prescriptive:

> 'This Government believes that marriage provides a strong foundation for stable relationships. This does not mean trying to make people marry, or criticising or penalising people who choose not to. We do not believe that the Government should interfere in people's lives in that way. But we do share the belief of the majority of people that marriage provides the most reliable framework for raising children.'
> (Home Office 1998: para. 4.3)

The Consultation Paper is a substantial document, that sets out the five following key areas for action: (1) Better services and support for parents; (2) Financial support; (3) Helping families balance work and home; (4) Strengthening marriage; and (5) Better support for serious family problems. The Paper has been described as moving parenting to the heart of policy (Maclean, M.: 'Governments and Families Conference', University of Nottingham, 9 April 1999). What is, however,

of particular interest, are those measures that are particularly proposed in order to support marriage. Very briefly these include: providing couples intending to marry with a guide to the rights and responsibilities involved in marriage (Home Office 1998: para. 4.13); an acceptance of pre-nuptial agreements, on the basis that the greater security they provide on property matters may make it more likely that people will marry rather than simply live together (para 4.22); an enhanced role for Registrars which would incorporate making information about marriage (including marriage preparation packs and information about pre-marriage support services) available to couples, (para. 4.26); and an enhanced, and thus more meaningful and personal marriage ceremony (para. 4.28).

The extent to which these measures might actually succeed in strengthening marriage is somewhat open to question (see, for example, Fox Harding 2000), as indeed is the legitimacy of attempting to strengthen marriage itself. Certainly responses to the Consultation Paper were mixed. Whilst some respondents felt that the proposals did not go far enough, others were of the opinion that the focus was placed too heavily on marriage at the expense of other relationships (Home Office 1999).

This 'division' of opinion is also reflected, to some extent, amongst academic commentators. For example, Weeks refers to the Consultation Paper as, 'the most liberal intervention in debates on the family ever to come out of Whitehall' (1999: 225). He suggests that the endorsement of any particular family form is avoided, while the overall tone of the document is actually one of pragmatic adjustment to the changing social realities. Indeed the defence of marriage is conducted, 'in terms of pragmatism, the needs of children and the majority choices of the British people rather than principle, whether Christian or secular communitarianism' (225). However, despite this apparent movement away from moral absolutism, he does suggest that government remains unable to fully endorse the diversity of modern family life: 'it cannot quite bring itself to question the institution of marriage, or the primacy of the two-parent (heterosexual) family' (229).

Other commentators have arguably placed a different interpretation on this policy development. For example, Barlow and Duncan (2000a) argue that the Consultation Paper represents the codification of New Labour's desire to use legislation to promote what it sees as desirable family forms, and to discourage other less favoured family practices. They make the point that alternative partnership and parenting forms are barely mentioned, whilst nothing is said about same sex parenting (2000b). Even an awareness of the scale of marriage breakdown is not regarded as undermining the essential benefits of the institution:

> 'All observations and proposals seem almost entirely premised upon the essential superiority of the married family form, which merely requires strengthening before it is able to flourish again.' (2000b: 131)

In a similar vein, Fox Harding does refer to the 'laissez-faire disclaimers' present within the document. This, she suggests, reflects an anticipation on the part of government, that it might be criticised for attempting to lecture or pressure people into particular family forms. However, despite this, she then goes on to identify certain values and preferences as emerging from the Consultation Paper. Those preferences are stated as follows:

> 'for stable relationships, for long-term commitment, for good quality and dedicated parenting, and indeed for marriage rather than some other basis for sexual and parenting partnerships.' (2000: 11-2).

Adrian James ('Governments and Families Conference', University of Nottingham, 9 April 1999) agrees that the Paper does not explicitly deny alternative family forms. However, he also makes the additional suggestion that marriage, parenting and family are taken to apply to the same thing. In reality, therefore, diverse family forms are not supported. Indeed change is positively resisted through the support accorded to marriage. The result is therefore that the 'words and music' do not match within the context of the Paper.

James also questions whether 'Supporting Families' is actually about providing support or exercising control. Fox Harding suggests that the majority of the Paper's proposals actually fall into the relatively non-directive 'support' category. She

does, however, characterise the Paper as 'subtly controlling' in that it seeks to change the culture when it comes to seeking help and advice. Seeking help is a matter that should be left to individuals, however government aims to change the culture in order that they want to seek such help: 'What is proposed is a change in people's thinking and their internal controls, a change of consciousness' (2000: 27).

The Consultation Paper is also characterised as reflecting a more explicit focussing on the relationship between government and parenting, a focus that may be producing a more controlling, prescriptive, coherent and targeted approach to individuals in their parenting roles. Consequently Government is now identified as 'traditional' on family in the sense that the policy emphasis is placed on stable marriages, and also on partnerships that closely resemble marriage (Fox Harding 2000: 28).

This idea of an evolving emphasis on partnerships that resemble marriage is a policy theme that has been endorsed in the recently published report: 'Moving Forward Together. A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond' (Advisory Group on Marriage and Relationship Support, Lord Chancellor's Department, April 2002). Within this report is a recognition of the need for an effective support strategy that takes account of the structure of modern relationships and families (ibid.: para. 4.1). Secondly, what is also required is a more, 'long-term proactive, positive and preventative approach'. Such an approach is believed to foster a 'better understanding of what makes relationships succeed', and an 'investing in relationships'. This broader strategy is regarded as likely to offer more effective support for relationships, than the simple provision of an 'Accident and Emergency service' once crisis point is reached (ibid.: para. 7.5).

The tone of the Advisory Group's report reflects both the arguments advanced by several study participants, and arguably also the deficiencies within the Family Law Act scheme itself. However, although it does appear to represent something of a shift away from the policy adherence to marriage, concerns about the falling annual rates of marriage and the fact that 'over two in every five marriages will end in

divorce' remain (ibid.: para. 3, Summary). In addition, it is the achievement of the 'pseudo-marriage' model of family that remains a central aim of policy:

> 'The adult couple...is the cornerstone of the family. Strong and stable relationships benefit all in society. There is a growing body of evidence in this country which demonstrates the health benefits, and benefits to children, of committed couple relationships. In arguing for greater support for the couple, we do not in any sense question the validity or stability provided by other relationships, such as lone parent families. We are not proposing that there should be some effort to make people marry, or that there should be any criticism of, or penalty for, those who choose not to. But the adverse effects on society of relationship breakdown, and the positive benefits of stable couple relationships, make a strong case for action.' (ibid.: para. 10.1)

The way forward?

Announcing the abandonment of the 1996 Act, Lord Irvine stressed the Government's commitment, 'to supporting marriage and to supporting families when relationships fail'. The Family Law Act was presented as, 'not the way to achieve those aims.' (LCD 2001: 20/01) Yet just over a year earlier, the introduction to the 'Supporting Families' Consultation Paper had asserted that there was a tendency for family policy to suffer from the 'misguided view' that there were 'large levers' that governments could pull in order to influence how families behave:

> 'The truth is that families are, and always will be, mainly shaped by private choices well beyond the influence of government.'
> (Home Office 1998: 5)

Despite this assertion there does, however, appear to have been something of a reluctance amongst national policy makers to abandon the view of law as providing such levers. As discussed earlier in this chapter, 'Supporting Families' itself does seem to be somewhat illustrative of that reluctance. Indeed one commentator

remarked shortly after its publication that although the document recognised that there had never been a 'golden age' of the family, its tenor was very much that of attempting to create one tomorrow (David Morgan.: ESRC Seminar Group, 'Postmodern' Kinship, University of Leeds, 6 November1998). In January of 2001, the Lord Chancellor, Lord Irvine reiterated New Labour's position on marriage and family values:

> 'The role of the state is to encourage, not to compel; to provide practical help, not to preach. I can assure noble Lords that the Government are certainly not neutral. We have made clear our support for the institution of marriage and for the family.'
>
> (House of Lords Debates, 17 January 2001, vol.620, col. 1164)

This stance appears to have been largely reiterated in his forward to the recent 2002 Paper on marriage and relationship support. Although stating that the Government, 'has no desire to tell people how to live their lives', he then continues to make the following assertion: 'But if couples' lives can be improved – and those of their children – then that is something worth doing' (Lord Chancellor's Department 2002: 2).

One result of this reluctance has been that of problematic policy compromise – in particular compromise in order to accommodate the Idealist position. Within the context of divorce law, legislators have long wrestled with the issue of how to regulate the breakdown of the marital relationship. That the law has fundamental 'jobs' that must be fulfilled – namely the resolution of disputes, the allocation of property and finances, and securing the welfare of minor children – is undisputed. However, beyond that, the issue of whether divorcing parties should be subject to some form of universal moral code or simply allowed to negotiate their own moral terrains remains open to question.

The Family Law Act attempted to negotiate a route between 'moral regulation' and 'family policy' (Rodger 1995) – between the promotion of a common morality a la Devlin, and an appreciation that law needs to engage with real life as it *is*. The end result is thus, according to Bainham (1998), an Act whose most notable feature is the inconsistency in its ideological base. The concept of no-fault, non-adversarial

divorce is promoted. However, at the same time, procedures are also incorporated that make the obtaining of a divorce more difficult – indeed it is suggested that the procedural complexity and built-in delay is actually demonstrative of official disapproval of divorce. Furthermore, the Act claims to be in favour of marriage, yet through its focus on post-divorce relationships, it effectively stretches the notion of family well beyond the confines of marriage.

As anticipated by both a number of study participants and academic commentators, the information meeting and mediation pilots demonstrated that individuals do not invariably match up to preferred models of behaviour that enshrined within legislation. Indeed some very basic questions surround whether such 'soft' or 'internal' control is actually vested with the capacity to change and shape personal behaviour in this context. For example, Barlow and Duncan (2000b) suggest that the very idea that providing information or establishing 'models' of behaviour will prompt people to act in the 'right' way, is fundamentally flawed. Indeed the attempt to alter decision-making about partnering and parenting by changing legal parameters, may be rendered irrelevant by what they term the 'rationality mistake' – namely that people do not go about making decisions in the way in which government assumes that they do.

With specific regard to the 'Supporting Families' Consultation Paper, and using recent empirical research on mothers' views on marriage and cohabitation, Barlow and Duncan question whether marriage can be strengthened by continuing to focus legal privileges on it. With its revelation that very few mothers actually see marriage as a superior form of either partnering or parenting, the research casts very serious doubt on the efficacy of the Paper's provisions. Indeed the decisive factor for most mothers was actually the quality of the relationship with their partner – something that appeared to be unaffected by marital status. Furthermore, marriage was also seen as largely irrelevant to the welfare of children (2000b: 138). These findings thus lead the authors to suggest that government has misunderstood the ways in which people make decisions about partnering, with the result that it 'misplaces' the role of family law – in effect people will not choose marriage on the basis of the fact that it comes with certain legal privileges.

The gap identified by Barlow and Duncan as existing between actual moral behaviour and that assumed by the Consultation Paper, does appear to be similarly present in the context of relationship breakdown and the Family Law Act 1996. Certainly this view is reinforced by the comment made by Maclean and Richards – namely that the Family Law Act model, 'may mistakenly assume a rational and well-disposed divorcing population' (1999: 269).

The Family Law Act represented an attempt to impose universal codes of behaviour through a combination of both external (in the sense of coercive process that must be adhered to) and internal (in the sense of the model divorce that may be aspired to) mechanisms. However, the lessons of history suggest that there are some very real problems surrounding the efficacy of attempting to impose some kind of universal or absolute code through the medium of divorce law. Whatever the situation in the past, this kind of vision simply no longer 'fits' with the lived reality of large sections of modern society. As Douglas argues, in today's pluralist western societies, absolutist rules or laws no longer represent an effective mechanism for the achievement of social order. Indeed they assume a degree of congruence between legislation and societal values that simply no longer exist. The only effective route to achieving social order is thus through its purposeful construction by individuals – provided that they 'choose wisely in doing that constructive work' (1971: 320).

It is interesting to note that even one of the study's staunchest advocates in favour of returning to a more restrictive process, does question the ability of law to genuinely save marriages. With reference to the piloting of the 1996 Act's provisions, the following comment is made:

> 'Perhaps, not, I don't know. In the light of those findings perhaps it can't. I don't think it does any harm…I think it does no harm for people to go through a process.' [11]

This suggests that the 'value' of an absolutist process may thus lie not in its functionalism in the sense of positively changing behaviour, but rather in its symbolism – namely its 'ability' to symbolise the importance of marriage. Indeed it has been suggested that the current divorce law effectively provides something for

everyone – the retention of the concept of matrimonial fault satisfies the Idealist constituencies, whilst the practice of divorce enables those who wish to do so, to effectively work 'around' it (Mavis Maclean: Socio-Legal Studies Association Annual Conference, University of Bristol, 6 April 2001).

Whilst this may be true, the question remains as to whether, in the twenty-first century, the law should continue to employ a corrective framework based on punishment and deterrence. Indeed as one of the national participants observes:

> 'If at the end of the day [marriage] is gone, does society need to have fault at the centre of this process? Now if your answer to that is yes, my question is whose benefit is that for? If your answer is no, the mere fact that a marriage has broken down irretrievably is sufficient, then it must follow that we have to reform the law. If your agenda is to punish people who fail in their marriage, or to make a statement of social disapproval, you don't need to reform the law.' [10]

The failure of one's marriage is not evidence of some kind of deviance or pathology that requires correction or punishment. Furthermore, the idealist adherence to universalist values and the concept of matrimonial fault have both created very real problems and difficulties for families and their various members, and have led to the manipulation and avoidance of the law. The history of divorce law has largely been one of compromise between idealism and pragmatism – in effect between supporting and ending marriage. However, as history has also demonstrated, that compromise has often proved to be an uncomfortable and ineffective one. Indeed in the case of the Family Law Act, it has proved to be one of outright failure. At the outset of the thesis, it was suggested that one of the central issues for policy-makers was whether law should be about the world as it is, or as they would like it to be. The reality is that the world has changed, and it is time for divorce law to face up to and deal with it.

With its institutionalisation of disincentives to divorce, the Family Law Act sought to eliminate, or at least to deny some of the pluralist and complex social reality with which it was faced. However, as demonstrated by the pilots, the end result was the production of a legal framework that was essentially ignored at the social level. To

reconstruct the context of debate away from fundamental moral precepts, towards an embracing of the diversity of family life and a trust of more individual morality will require a good deal of political courage. The inherently 'political' nature of marriage and its breakdown, combined with the historical 'baggage' that comes with it, makes divorce law reform a controversial issue. Furthermore, the correctional approach to policy based on punishment and the institutionalisation of deterrence, is an influential one that reaches well beyond the 'family' context. For example within the criminal justice field, the Crime and Disorder Act 1998 has introduced a number of new initiatives – including Parenting Orders, Child Safety Orders, local child curfews and final warnings – that have been described as, 'a relatively directive and punitive response to anti social child and youth behaviour and the assumed associated poor parenting' (Fox Harding 2000: 26).

Despite the undisputed difficulty that is involved, divorce law reform is not an issue that should continue be ducked. Indeed Lady Justice Hale who is - as both the Commissioner in charge of the Law Commission's work in family law during the much of the divorce reform process, and a member of the judiciary – uniquely qualified to comment on these issues, has made the following observation when it comes to divorce policy:

> 'The idea of offering the public a service is commonplace in many other areas of activity but something of a novelty in this context.' (2000: 146)

The time to provide just such a service that recognises and deals with individual moral choice has now arrived. The vast majority of (national) participants within the study favoured the introduction of no-fault divorce, together with the provision of information and opportunities for mediation. This is a view that is strongly supported amongst practitioners, professionals, and indeed a number of academic commentators. It is not possible to legislate either for 'happy' marriages or for some kind of moral 'truth' – and it is time for attempts to do so to cease. The 'good' or 'moral' life does not reside in family structures, but rather in the ethics of behaviour and the morality of relationships (Morgan 1996).

It is recognised that it is highly unlikely that the present Government will be prepared to confront the Idealist elements within both politics and the media, who continue to exert a pivotal influence over family policy. Nevertheless, the basic reality is one that needs to be recognised within the policy context. Llewellyn (1931) argues that it is impossible to really understand the meaning and effect of law without studying the person upon whom it impacts. Policy makers must therefore abandon their traditional adherence to marriage and instead look to the reflexive, creative and fundamentally non-judgemental work that it is being done at street-level, if workable divorce reform is to be achieved within the foreseeable future.

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Appendix 1

National Participants

1 Member of law review and reform body.

2 Representative of government department charged with task of reforming divorce law.

3 Representative of government department charged with task of reforming divorce law.

4 Director of Public Policy: Children's Organisation.

5 Director of Marriage 'Support' and Research Organisation.

6 Executive Officer: Family Solicitors' Organisation. Practising family solicitor.

7 Church of England representative.

8 Government Minister.

9 Director: National Mediation Organisation.

10 Mediation Advisor: Children's Organisation. Also involved in the management of divorce information meeting pilots.

11 Member of House of Commons: Conservative.

12 Member of House of Lords: Conservative.

13 National Co-ordinator: Children's Rights Organisation.

14 Director: Marriage Support Organisation.

15 Advisor on Family Law: Solicitors' Organisation.

Nine of the Participants were female, and six were male.

Appendix 2

Local Participants

A Family Support Supervisor: Locally based voluntary organisation providing a range of family support services.

B Director: Telephone help-line for children and young people.

C Regional Manager: National Children's Organisation.

D Project Leader: National Children's Organisation.
Project works with the parents of 'black' children, and aims to explore parenting experiences and develop parenting skills.

E Co-ordinator: Child Contact Centre.

F Family Resource Panel Manager: Local Social Services Department.

G Senior Probation Officer: Family Court Welfare Service.

H Director of Social Services: National Christian Organisation.

I Local Co-ordinator: National Parent Visiting and Support Organisation.

J Call-taker and Trainer: Telephone help-line for parents.

K Health Visitor.

L Local Co-ordinator: National Organisation providing Support and Information to Fathers experiencing Family Breakdown.

M Local Facilitator: Runs Parenting Courses for National Parent Support Organisation.

N Regional Development Worker: National Organisation supporting Lone Parents.

O Solicitor-Mediator.

P Solicitor-Mediator.

Eleven of the Participants were female, and five were male.