

the marriage bonds. With their judgments distorted by marital unhappiness and tension, the parties cannot be relied upon to keep the interests of society, the children, or even themselves always in mind.

A further cogent objection has been raised by the Scarman Commission. Mutual consent may not always be true consent. There will always be the danger that the stronger partner, especially in the economic sense, may exert pressure on the weaker to give consent to a divorce. It is unlikely that the parties will be in equally strong positions. (Cmnd. 3123, p. 41-42)

Divorce by consent would tend to effect the dissolution of marriages that had not really broken down or been destroyed. Unless some test or provision were introduced to determine this fact, there is the likelihood that many couples would rush into divorce without really giving their marriage a chance to work or without trying to work out what might well be soluble problems.

As the sole ground for divorce, consent would not be practical. Many marriages should be dissolved whether or not both parties consent. While divorce by the consent as the sole ground for divorce is both impractical and objectionable, it has been suggested to your Committee by Mr. John M. MacDonald, Q.C., that it be given serious consideration in the case of childless couples. Certainly, if there are no children, one reason for judicial oversight is removed. However, all the other objections to divorce by consent still apply: the implicit threat to the institution of marriage as a lifelong union; the danger that the weaker party economically may be overborn by the stronger; the possibility that essentially good marriages may be terminated in the heat of a matrimonial dispute.

A test that the marriage has failed would still be required. A period of separation as a test of break-down would be essential. If separation were introduced as a ground in itself, however, the need for divorce by consent would disappear. Marriages could still be dissolved without the public allegations and bitterness that may be present in a proceeding based upon the fault ground. There would be some test of marriage breakdown, and furthermore, the interests of the parties could be safeguarded by the courts.

The Scarman Report also mentions one further final objection to the introduction of divorce by consent for childless couples. This is that it would distinguish between two kinds of marriages. (Cmnd. 3123, p. 41) It would be basically unjust to discriminate between fruitful and fruitless marriages in this way. One objection to making such discrimination is the effect such a distinction could have on the children themselves. Marriages with children are liable to break up as well as those without children. To make special provisions that would in effect make divorce easier or, at least, less troublesome for childless couples, might very well cause resentment on the part of couples with children against their children for being an obstacle to their obtaining matrimonial relief. Since the object of divorce law is to provide relief for marriages that have failed, to distinguish between marriages on criteria other than those of their health and stability would be unreasonable.

III THE MATRIMONIAL OFFENCE CONCEPT

Traditionally, the grounds for divorce have been based upon the concept of matrimonial offence. From a civil point of view, marriage has been seen as a rather special kind of contract with certain rights and duties incumbent upon the