GROUNDS FOR DIVORCE

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Preface

THIS book is the product of two research studies, the first of which, the 'Special Procedure' research, was financed by the Joseph Rowntree Memorial Trust, and the second, the 'Conciliation in Divorce' project, was funded by the Nuffield Foundation. Rowntree and Nuffield have given us generous financial backing over some ten years (including, in Rowntree's case, paying Gwynn Davis's salary over the period when he was drafting this manuscript). Without them, there would have been no research and no book. We are particularly indebted to Robin Guthrie of Rowntree and Pat Thomas of Nuffield, each of whom has given us unstinting support.

Both projects were conducted with the help of a research team, and we wish to acknowledge our substantial debt to Kay Bader, Margaret Borkowski, and Alison Macleod, each of whom has been a valued colleague over several years. We were also fortunate to have the services of some highly skilled research interviewers: apart from the above-mentioned colleagues, we relied most heavily on Jenny Bagley, Alison Jackson, Carole Moore, and Petula Smith. The book was typed, with her usual meticulousness, by Pat Lees, who also assisted Gwynn Davis in sifting and ordering the research material.

At each of the courts where we carried out the research we were given generous access and treated with the utmost courtesy. This was despite our making considerable demands on the time of registrars and court staff. We owe particular thanks to Mr Registrar Parmiter, then of Bristol County Court, for his many helpful suggestions.

Perhaps our greatest debt is to the men and women who were prepared to talk to us about their experience of divorce proceedings. As far as we were concerned, their frankness and generosity were beyond price.

Also contributing greatly to our understanding of this subject were the many informal discussions which we had with solicitors. We should like to thank them all for granting us their time, but perhaps especially John Westcott, who has long been a valued adviser and critic.

Sir John Arnold, President of the Family Division, and Lord Justice Dunn MC found time in busy judicial lives to give active encouragement to our various research enterprises.

Two eminent colleagues, Stephen Cretney and Roy Parker, have offered wise counsel at various times over the course of the research. We thank them for their friendship and support.

The two co-authors are each in different ways indebted to the other. They alone are responsible for the views expressed. The task of ordering the material and drafting the manuscript fell, in this instance, to Gwynn Davis.

G.D. and M.M.

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Introduction

THIS book is intended for all those who have an interest in the means by which the ending of marriage is regulated and defined. Our subject is the way in which English divorce law operates in practice. Although we focus on divorce as a legal process, this is by no means a conventional academic law book involving detailed examination of statute and a loving review of the finer points of judicial virtuosity. Instead, we attempt to harness the findings of social research in order to review the present law and discuss options for future reform.

Whilst traditionally the basis upon which the divorce decree is awarded has been regarded as the corner-stone of family law, this issue has faded somewhat from public consciousness since the 1969 Divorce Reform Act. In recent years the main focus of controversy has been the impact of divorce on children and, in the longer term, on the future of the family. We have also witnessed a growing pre-occupation with procedural reform. In 1981, the Lord Chancellor, whilst remarking that matrimonial law had become the chief source of complaints to his office, also commented that 'the battle rages about property, maintenance and children, not about dissolution' (Hailsham, 1981, p. 3).

Nevertheless, as researchers, we have noted that the way in which the law regulates the exit from marriage is still regarded as of fundamental importance by the parties. It is also resuming its former position at the head of policy-makers' agenda for reform.[1] Accordingly, in this book we return to a consideration of the substantive law of divorce. Our focus is on the relationship between the personal experience of the parties and the legal forms of divorce. We utilize the 'consumer' reaction to law and procedure in order to inform the legal and moral debate. Our subject-matter is the accommodation (or the clash) between the legal and the personal. For example, we are interested in the relationship between the

[1] The Law Commission is committed to producing a Discussion Paper on the subject. This is anticipated in April 1988.

'facts' cited in the divorce petition and the parties' understanding of the real reasons for the breakdown of their marriage; and between legal procedures designed to promote 'reconciliation' and the value which the parties themselves place upon maintaining a stable marital and family unit.

We present our evidence step by step, examining the many legal and procedural pitfalls which the parties may encounter *en route* to obtaining their decree. This enables us, in our concluding chapter, to present the case for a fundamental reform of divorce law.

The History

Present-day legal marriage is grounded in the Christian idea of marriage as a sacrament, or holy union. MacGregor, a social historian, has described how

> [b]y the middle of the twelfth century the previously uncertain beliefs and jurisdiction of the Roman church, dominating Western Christendom, had hardened into settled doctrine. From then until the Reformation the law of marriage was embodied in the law of the Church, the canon law, administered by the Church and its own Courts Christian. The civil law in England and Scotland had neither doctrine concerning nor jurisdiction over marriage and divorce. The law enforced by the Church derived its principles from the prevailing Christian fear of the pleasures of copulation. The mediaeval Church, regarding copulation in much the same way as Victorian temperance reformers thought of drink, accordingly followed St Paul's advice to the Corinthians and recommended marriage as the only means by which the concupiscent generality of men and women might escape the sinful consequences of their incontinence . . . Copulation within marriage, provided it was limited to the occasions necessary for procreation and conducted without anticipated or actual enjoyment, was permissible, though no one could hope to escape some measure of defilement. Without the sacramental protection of marriage, copulation was translated into the deadly sins of fornication and adultery. (MacGregor, 1957, p. 1)

Once entered into, marriage was for life. It came to be regarded as the seat of all social, as well as Christian, virtue. The case for dissolution, whilst it might be justified on humanitarian grounds, had to be resisted because indissoluble marriage was so obviously a force for good in society as a whole. In the nineteenth century the divorce question became a battleground in Europe and the USA.

The traditional view, as expressed by one American cleric prominent in the anti-reform camp, was that '[it] is incomparably better that individuals should suffer than that an Institution, which is the basis of all human good, should be shaken, or endangered' (Dwight, 1816, p. 427). There was also the argument that the happiness of married life was secured by its indissolubility. This view was put most eloquently by Lord Stowell, in 1790, in a legal judgment which expressed the central plank of the 'conservative' position on divorce:

> When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives . . . If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality . . . the happiness of some individuals must be sacrificed to the greater and more general good.[2]

A little later, on the other side of the Atlantic, a private divorce bill passed by the legislature of New York was vetoed on the grounds that

> [w]hile the partial evils of indissoluble matrimony are sometimes witnessed and deplored, we ought to be consoled by the reflection that the peace and character of many thousands of families are preserved by the mutual forbearance and concessions between husband and wife, which are induced by the ever-impressive consideration that the voluntary tie which bound them, can never be dissolved.[3]

Just as there is a traditional argument for the indissolubility of marriage, there is also a traditional argument for reform. This was reflected, for example, in the writings of Joel Prentice Bishop, an American commentator, who offered this jaundiced view of the state of divorce law in England in the mid-nineteenth century:

> It is well known that in England, where divorces from the bond of

[2] *Evans* v. *Evans* (1790) 1 Hag. Com. 35, 36–7.

[3] Council of Revision (1818), vetoing a private divorce bill passed by the legislature of New York (41 Senate J 98–101, 27 Feb. 1818). Quoted in Rheinstein, 1972, pp. 41–2.

matrimony are only obtainable on application to Parliament, in rare instances and at enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries and the birth of illegitimate children are of everyday occurrence, and the crime of polygamy is winked at. (Bishop, 1852, p. 285)

It was in 1857, in England, that civil divorce became possible without the necessity of introducing a private Act of Parliament.[4] Although the legislation was, by today's standard, highly restrictive (adultery was effectively the sole ground) and further reform was slow to follow, some prescient observers considered that divorce reform, once begun, was likely to continue down the path of progressive liberalization. Thus, in *Man and Superman*, written in 1903, George Bernard Shaw remarks that 'nothing is more certain than that in both [England and America] the progressive modification of the marriage contract will be continued until it is no more onerous nor irrevocable than any ordinary commercial deed of partnership'.

Shaw was writing shortly before the next significant change, which occurred in 1923. Prior to that date, a wife could only petition for divorce on the ground of her husband's adultery if his offence were accompanied by some other specified matrimonial transgression. The same restriction did not apply to husbands. In 1923, at a time when women's rights were an issue of public and political concern, the additional conditions imposed on petitioning wives were abolished.[5]

The next radical change—radical for *both* partners to a marriage—occurred when the Matrimonial Causes Act 1937 came into effect on 1 January 1938. This Act—also known as the Herbert Act after its sponsor—extended the grounds on which divorce was admissible to include, besides the previous one of adultery: desertion, cruelty, and supervening incurable insanity. Sir A. P. Herbert had earlier written *Holy Deadlock*, a highly amusing novel whose main and serious purpose was to publicize the need for divorce reform. In this book were recounted the farcical activities of a couple who wished to divorce but were unable to do so unless one partner committed or pretended to commit an act of adultery. It is worth noting that a time-bar to divorce (which in modified form

[4] Matrimonial Causes Act 1857.

[5] Matrimonial Causes Act 1923.

exists to this day) was introduced for the first time in the Herbert Act solely as a tactical device to counter criticism that the Bill's widening of the grounds of divorce would weaken the institution of marriage. (At that time the stipulation was that no petition could be presented before the third anniversary of the marriage.) The Church of England had been particularly vociferous in its opposition to the Act, not surprisingly given that the sole ground of adultery had originally been based on biblical text and precedent.

It is important to recognize that the Herbert Act did not challenge the presumption that divorce law was intended to achieve a verdict on the morality of the parties' conduct whilst married. This was reflected in the clear system of rewards and punishments consequent upon the award of a decree. The prize for the innocent party lay in the associated benefits of child custody and financial support (or, for the husband, freedom from the obligation to provide such support).

Reflecting the fact that divorce continued to be based on the doctrine of the matrimonial offence, there were introduced a number of 'bars' to the award of a decree. These were: condonation (acceptance or reinstatement of a spouse whose 'fault' was known); connivance (acquiescence in the fault); conduct conducive to the fault; and collusion (the parties seeking, through collaboration with one another, to obtain a divorce). Nevertheless, the Herbert Act did introduce one crack in the matrimonial offence principle. This element of 'no fault' divorce was contained in the provision that a decree might be obtained on the basis of the respondent's incurable unsoundness of mind.

By the 1950s the fault-based law had fallen into disrepute. If one wanted a quick divorce, adultery, real or imagined, was the usual way of getting it. As C. P. Harvey described,

> It has long been recognised that it is unnecessary actually to commit it. The essence of the thing is that one should go through the motions from which adultery will be inferred . . . These involve a certain amount of trouble and expense in mobilising chambermaids, hotel registers and private enquiry agents and the experience (which some people find embarrassing) of taking early morning tea in a bedroom with a stranger of the opposite sex . . . These arrangements can be perfected in three months or so instead of the three years required for desertion, and if proper care is exercised in making them one can be reasonably sure that the necessary inference will emerge. (Harvey, 1953, p. 131)

Professor Gower, in written evidence to the Royal Commission on Marriage and Divorce, gave his opinion that 'among the upper-income groups, well over half the total of undefended cases . . . are collusive or based on bogus grounds' (quoted in MacGregor, 1957, p. 134). Given the prevalence of this kind of thing, it was hardly surprising that fault-based divorce came to be regarded as little more than a charade. Those who opposed the fault principle argued that both parties were usually to blame in some degree, that in any event it was an impossible task for courts accurately to apportion blame, and that matrimonial 'offences' were symptoms rather than causes of breakdown. It was further argued that in an increasingly secular society it was wrong for the state to base its law of marriage on Christian notions of indissolubility; there were simply too many exceptions for that to be sustained. Furthermore, no social purpose was served through preserving the form of marriage when cohabitation had ceased.

The next really significant developments occurred in the mid-1960s, against the background of a steadily rising divorce rate, when two reports were published, one by the established church and one secular, which between them were to form the basis for the 1969 Divorce Reform Act. The first report was *Putting Asunder*, produced in 1966 by a group convened by the Archbishop of Canterbury. It made the central and far-reaching recommendation that the matrimonial offence be abandoned as the test for the award of the divorce decree. Instead, it proposed that divorce be based on the established breakdown of marriage. The court would be charged with conducting an investigation of the current marital circumstances in order to discover whether the marriage was still viable; 'fault' was to be abandoned as the basis for divorce (although the group recognized that blame might still be laid by one party against the other in the course of the investigation). But essentially it proposed that the law should concern itself with the *current* state of the marriage, rather than with its history. This was an abrupt reversal of the church's position as presented to the Royal Commission on Marriage and Divorce a decade earlier (Priest, 1983). Indeed, according to the Finer report, *Putting Asunder* 'was one major factor in releasing the log-jam obstructing reform of the divorce law.'[6]

[6] *Report of the Committee on One-Parent Families* (Finer Report), 1974, Cmnd. 5629.

A few months later, the Law Commission produced its own, highly influential paper: *Reform of the Grounds of Divorce: The Field of Choice*.[7] The Commission adopted as its starting point the proposition that the state had a duty to support marriage, especially when children were involved. Divorce 'by consent', without objective evidence of breakdown, would turn marriage into a private contract, thereby ignoring the community interest. The Commission defined the objectives of a good divorce law as follows:

1. to buttress rather than undermine the stability of marriage;
2. when, regrettably, marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.

The Commission also identified four major problems as requiring solution:

(*a*) the need to promote reconciliation;
(*b*) the prevalence of stable, illicit unions;
(*c*) injustice to the economically weaker party;
(*d*) the need to protect children.

The Commission endorsed the *Putting Asunder* criticisms of fault, but rejected the proposal of the Archbishop's group that this should be proved by a judicial inquest into the current state of the marriage. They regarded this as too expensive and also too dependent on subjective interpretation. As far as they were concerned, the concept of 'breakdown' was not triable. Instead, the Commission sought a practical, simply administered objective test.

A period of separation seemed the obvious choice, but this would cause hardship for those parties who were entitled to immediate divorce under the existing legislation. The Commission therefore concluded that the fault-based grounds had still to be available. They considered, nevertheless, that most people would be willing to opt for two years separation as a basis for divorce in order to avoid 'a public finding of guilt'.

In due course a compromise was worked out between the Archbishop's group and the Law Commission.[8] 'Breakdown'

[7] Law Commission, *The Field of Choice: Report on a Reference Under Section 3 (1) (e) of the Law Commissions Act 1965*, 1966, Cmnd. 3123.

[8] See the Law Commission's 3rd Annual Report, No. 15, 1967–8. Appendix III, pp. 30–2.

should replace the matrimonial offence and become the sole and comprehensive ground for divorce. But in place of the proposed inquest, the court was directed to infer breakdown on proof of the existence of certain 'matrimonial situations'.

The Divorce Reform Act 1969 (since consolidated in the Matrimonial Causes Act 1973) followed these recommendations. The new Act, which came into effect on 1 January 1971 and which, with only a few minor amendments, is still operative, introduced a new, comprehensive ground for divorce, namely, the irretrievable breakdown of marriage. Such breakdown had to be demonstrated by the petitioner proving one or more of the following five 'facts':

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

As is immediately apparent, three of the above 'facts' are merely the old 'fault' grounds for divorce in a new guise. It is only the two separation criteria which truly express the 'no fault' principle. The two-year separation clause effectively introduced divorce by consent, whilst the five-year separation basis proved, at the time of its introduction, even more controversial because it introduced divorce without consent *and* without fault. This element of the Act was dubbed 'the Casanova's charter' because it enabled an 'innocent' spouse to be divorced against his or her will, albeit following a five-year separation period.

Whilst the 1969 legislation was nominally based on 'breakdown', rather than on the matrimonial offence, it in fact introduced a hybrid system (Eekelaar, 1984, pp. 40ff.). Lord Simon, then President of the Family Division, even went so far as to say that s. 1 of the new Act (in which the principle of 'breakdown' was

enshrined) 'was of no legal significance' because its definition was confined to the five 'facts' set out in s. 2 and the courts could not try 'breakdown'.[9]

In fact, the situation was more complicated than that because, under s. 3 of the new Act, the court was placed under a duty 'to inquire, so far as it reasonably can, into the facts alleged'. Furthermore, if any one of the five facts were 'proved', but the court nevertheless was of the view, based on the evidence before it, that the marriage had not irretrievably broken down, then the decree should be refused. This provision was to give rise to several highly technical and legalistic judgments which bedevilled the early years of the new legislation. As a result, some divorces were refused where 'irretrievable breakdown' was clearly established, but the necessary 'fact' was not. In later years the courts (and, as a consequence, legal practitioners) appeared to retreat from this rigorous interpretation of the 1969 legislation.

Finally, it is worth noting that the 1969 Act did not alter the three-year 'bar' to divorce, operating from the date of marriage. Given the availability of the 'adultery' and 'behaviour' facts, which of themselves imposed no time limit, this was all that prevented one or other party petitioning for divorce on the afternoon of their marriage. However, in 1980 the Law Commission published a Working Paper on the three-year bar and recommended that it be reduced to one year. This further liberalizing measure formed one element (not the most controversial, so it excited little public comment) in the 1984 Matrimonial and Family Proceedings Act.

Procedural Change

Until the mid-1970s divorce petitions had to be 'proved' in open court. In the majority of cases the petitioner was represented by a solicitor or barrister who took the petitioner through the details of the facts supporting the allegation of breakdown. Despite the changes in the substantive law introduced by the 1969 Act, the *procedure* employed in the courts for dealing with undefended divorce remained much as described by Harvey in 1953.

The hearing of an undefended suit commonly takes between ten and fifteen

[9] Lord Simon, in the 1970 Riddell lecture (Rayden, 11th edn., at p. 3233).