



Divorce in English Law

Justice John GF Carey¹

¹Adjunct Professor of Law, Griffith University, Brisbane, Australia.
Fellow, Commonwealth Judicial Education Institute, Halifax, Canada.

Divorce in the context of Family Law represents a fascinating yet sobering reality. Prior to 1857 the ecclesiastical (church) courts determined the law on divorce.¹ Hence, a substantive obstacle to those wanting to pursue such a course. The only form of divorce was by an Act of Parliament which was hugely expensive.² An alternative to this position was developed and legislated in the Matrimonial Causes Act 1857 which allowed the courts to handle divorce proceedings.

Understanding the aims of the divorce law has been the subject of much debate over the years. Divorce became more acceptable in the 1960s.³ Liberalising the law was important as society generally felt the need for changes that facilitated divorce. It is important to understand that the decree of divorce occurs in two stages with the first stage being called decree nisi and the second stage named decree absolute.⁴

The Matrimonial Causes Act 1973 outlines that the court may hear a petition for divorce on the ground that the marriage is irretrievably broken. Further, there are only five ways in which this condition can exist. They are: adultery, unreasonable behavior, desertion for at least two years immediately preceding the petition, the parties have lived apart continuously for two years and both consent to a divorce decree and the parties have lived apart for five years continuously preceding the petition.⁵ The development of the grounds for divorce from the introduction of the adultery root cause has reached an established position.

Societal norms may change and therefore have an effect on legislative reforms in relation to a multiplicity of subjects inclusive of divorce. In the 1960s there was divorce reform and the introduction of the Divorce Reform Act, 1969. “The stated aims of the architects of the Divorce Reform Act were to promote “stability of marriage, reconciliation, maximum fairness, protection of children and the economically weaker spouse,” the regularisation of what were then called “illicit unions” and “bastards,” and the use of the two-year separation ground of divorce.”⁶

¹ For a discussion of the history of divorce law see Smart (2000a); Cretney (2003a).

² Herring, Jonathan, Family Law, 4th Edition, Pearson Education Limited, 2009 at pp.106

³ Ibid., at 107

⁴ Ibid., at 109

⁵ Matrimonial Causes Act 1973, s.1, s2

⁶ Deech, Ruth, Divorce law and empirical studies, L.Q.R., 1990, 106 (April), pp. 229 - 245

Interestingly, reforms are meant to bring about positive changes and in the 1960s the divorce rate was substantially lower than it is in the 21st century. This reality suggests that the application of the law is far more relevant today than it was previously and for all the criticisms of the present law that abounds, the need for reform becomes more noticeably imperative in order to meet the changing times and needs of society.

Grounds for divorce may not be the main problem in divorce law but the financial issues associated with separation and breakdown and lack of permanent commitment with the husband as provider.⁷ Current divorce law is based on the Matrimonial Causes Act 1973 and there are particular procedures that must be followed in the court in order to petition for divorce. Delay in getting a divorce is an issue which continues to be of concern to those using the apparatus of divorce law to progress their lives. One must petition the court for divorce and this person is known as the petitioner. The other party to the marriage would then be known as the respondent who has the option to defend or ignore. It is understood that in order for a divorce decree to be granted the marriage must be determined by the courts to have been irretrievably broken down. Historically, the divorce law was based on a fault based system where adultery characterized the grounds upon which one could be granted a divorce. The present law while not fault based in principle has specific reasons suggesting a root cause to the breakdown of the marriage. In essence it promotes a more fact based perspective although there is an element of fault in “the why” the marriage has become irretrievably broken down. “English law therefore operates a ‘mixed system’ of divorce, comprising both fault-based and no-fault elements.”⁸

Eekelaar took issue with the utilization of the institutions of law for the furtherance of obstructing an individual’s access to the rights conferred on them by law in relation to divorce.⁹ His criticism was proffered in reference to the rule of law based on the Government’s position in reforms which suggested to parties to seek mediators instead of lawyers in regard to divorce. In the manner and form in which reform was attempted at this particular stage in the 1990s it was evident that its failings were indicative of the views of the public at large and the legal community.

In *Buffery v Buffery*¹⁰ it was not enough for a party to assert that the marriage had irretrievably broken down. Ensuring that a case is justiciable is more likely when there is this fact based analysis. The present divorce law is predicated on the original developments of the objectives set in 1966.¹¹ There have been criticisms of the current law. The Booth Committee Report in 1985 began reform discussions on the Matrimonial Causes Act 1973.¹² The report asserted that there was increase in ill-will and disappointment as a result of defended divorces and disputes headed to court should be minimized while parties should work to amicably resolve issues. Hence, it is

⁷Deech, Ruth, *Divorce law and empirical studies*, L.Q.R., 1990, 106 (April), pp. 229 - 245

⁸ Harris-Short, Sonia and Miles, Joanna, *Family Law, Text, Cases, and Materials*, Oxford University Press, 2007, at pp. 349

⁹Eekelaar, J, *Family Law: keeping us “on message”*, F.L.Q., 1999, pp 396

¹⁰ [1988] 2 FLR 365

¹¹ Harris-Short, Sonia and Miles, Joanna, *Family Law, Text, Cases, and Materials*, Oxford University Press, 2007, at pp. 387

¹² The Booth Committee Report, J.P., 1986, 150(2), 18-19

clear from this period that there were noticeable areas of concern for reform of the divorce law. Furthermore, there were recommendations related to the time frame for initial hearings upon filing by parties who had children or where it was expected the respondent would oppose. While this is in no way exhaustive of the recommendations by the Booth Committee it is noteworthy that no actions were taken on most.

Criticisms of the law did not end at this time frame, particularly because we are still functioning to a large extent on the divorce law from the 1960s. The Law Commission criticized the present law and indicated substantial reforms of the law.¹³ “The substantial law of divorce in England and Wales remains as set out in the Matrimonial Causes Act 1973, and the “special procedure” with all its well substantiated imperfections continues to govern the divorce process.”¹⁴ With reform proposals being put forward as a result of the criticisms of divorce law, there was legislation that was developed. The Family Law Act 1996 was the legislation developed to address a lot of the criticisms, however, the Act was not brought into force because of the uncertainty and concerns raised by various stakeholders to its ability to meet the society’s needs in relation to divorce law reform.

The Law Reform Commission’s Proposals were outlined in six key points.

‘It is confusing and misleading’

The state of the divorce law is such that one may be led to believe that is a no fault based system given the only grounds for divorce is in the case of a marriage being irretrievably broken down. However, in order for a petitioner to strengthen his or her case, there may be claims made that are put forward to substantiate that which is unable to be fairly scrutinized.

‘It is discriminatory and unjust’

Individuals who are unable to financially sustain themselves will have a difficulty in the use of the two year separation grounds. Further, fault based grounds may not really be representative of the root cause of the marital breakdown.

‘It provokes unnecessary hostility and bitterness’

In using a mixed approach of fault based to bolster the fact that the marriage has been irretrievably broken down, there can be the creation of ill feelings because of the perception of wrong doing attached to a party to the divorce. This in essence enhances the adversarial perspective.

‘It distorts parties’ bargaining positions’

In matters related to financial arrangements and custody dispute as well as the actual completion of the divorce process, the position taken by parties may be distorted as there may be conflicting agendas related to all which either weakens or strengthens the parties to the divorce proceedings.

¹³ Law Commission Report 192 (1990)

¹⁴ Cretney, Stephen M., Masson, Judith M., and Bailey-Harris, Rebecca, Principles of Family Law, 7th Edition, Sweet & Maxwell, 2003, pp. 308

‘It does nothing to save the marriage’

The divorce process encourages developments of arguments based on allegations against the parties and as such does not foster any conciliatory action.

‘It can make things worse for children’

Conflict between parents does not assist in aiding proper growth and development of the child. Reducing the conflict in divorce proceedings is not encouraged in the actions of the parties and it increases the possibility of it because of the adversarial nature of the process.

The criticisms of the 1973 Act show that the law requires reform. Progressives had a challenge in addressing the issue of whether divorce law should be about saving marriages.¹⁵ There is a wide spectrum of viewpoints on divorce law reform and the role of the law.

The failure of the Family Law Act 1996 has caused the process of divorce reform to be stagnant and the current law continues to be criticized by academics and jurists alike. “The present law on divorce is in a strange state.”¹⁶ The Government’s decision to keep the divorce law in its current state indicates the complexity of the divorce law reform that has been advocated for 40 years. “The most recent reform is 40 years ago.”¹⁷ This is indicative of the challenge that lies ahead in addressing divorce law. Interestingly, there has not been a clarion call by members of the public for the Judiciary and/or Parliament to address divorce law. While this in itself does not intimate one way or the other the satisfaction of the public with the present divorce law, it was clear from pilot studies done that there is a need to review the present divorce law and the manner in which it should be reformed moving forward.

According to Lord Justice Thorpe, “statutory and case law relating to ancillary relief in England and Wales has developed since the Divorce Reform Act 1969, from a paternalistic approach to one encouraging financial independence after divorce.”¹⁸ The perceived failure of the information meetings by the Government was a key contributor to their failure to implement the Family Law Act 1996. In spite of the decision to not implement this act, there were key points gathered from the information meetings to assist in further analysis for divorce reform. These include the view that divorce varies by parties and is not identical and persons involved in the divorce process are more inclined to discussions versus a dictatorial diatribe.¹⁹ Reconciliation was one of the main aims of the Family Law Act 1996.²⁰ While this may be a noble and erstwhile goal for any civilization, reform should involve procedural efficiency, minimum conflict and amicable resolution to financial and family matters.

¹⁵ Hasson, Ezra, Setting a standard or reflecting reality? The “role” of divorce law, *Int. J.L.P.F.*, 2003 17(3), pp. 350

¹⁶ Herring, Jonathan, *Family Law*, 4th Edition, Pearson Education Limited, 2009 at pp.145

¹⁷ Deech, Baroness Ruth, *Divorce – A Disaster?* *Family Law*, 2009, Vol. 39, pp. 1050

¹⁸ Thorpe, Lord Justice, *London-the divorce capital of the world*, 2009, *Fam. Law*, pp.1

¹⁹ Herring, Jonathan, *Family Law*, 4th Edition, Pearson Education Limited, 2009 at pp.121

²⁰ Mackay, Lord (2000)

“The reality is that marital breakdown is a fact of life to be dealt with, rather than something to be corrected or discouraged.”²¹ In relating to this reality, it is important that divorce law reform addresses the issues resulting from the failure of a marriage. Financial orders and the welfare of children are crucial aspects of the divorce process. Reform of divorce law to include no-fault versus fault based divorce is arguably a proposition to be examined further. With respect to children and finances, fault has no relevance generally.²² The length of time for divorce has been postured to be a discouragement to people from getting married.²³ Whether this is indeed the case or not there are some who would argue that point. It should be acknowledged that it is not plausible that Parliament will legislate reforms to the divorce law which can produce happy marriages.²⁴

Arrangements for the future with reference to financial affairs and children would have had to be concluded prior to a divorce being granted under the Family Law Act 1996, whereas under the present Matrimonial Causes Act 1973 divorce can be granted without these arrangements being complete. The protracted approach to the present law leaves much to be desired in terms of the emotional and financial cost.

The Matrimonial Causes Act 1973 cannot be challenged under the Human Rights Act 1998. This position would have also applied to the Family Law Act 1996. Based on *Dennis v Dennis*²⁵ the state would not unduly restrict access to marriage or remarriage. In recent years there has been an encouragement of mediation by couples who are seeking to divorce. This seems logical for those who argue that lawyers would be obstacles in the communication process between parties because they are adversarial in approach as they use the present law and follow procedures in good faith in the best interest of their clients to successfully “win” their argument. Invariably there have been studies over the years to examine the benefits mediation versus litigation although in this instance the issue is usually between lawyers.²⁶ All persons who receive public funds for family dispute must be involved in mediation with a mediator as this is mandated by the Law Services Commission.²⁷

Post divorce relations and the ability of parties to amicably exist in relation to their behavior toward each other especially when there are children involved is an obvious intent of the reformists of the divorce law. There are also concerns that divorce should not be so easy to achieve that the value of marriage is diminished in the eyes of those who would consider getting married. The progressives and reactionaries compromised in the first instance of the divorce law as outlined in our present Matrimonial Clauses Act 1973.

²¹ Hasson, Ezra, Setting a standard or reflecting reality? The “role” of divorce law, *Int. J.L.P.F.*, 2003 17(3), pp. 362

²² Deech, Baroness Ruth, Divorce – A Disaster? *Family Law*, 2009, Vol. 39, pp. 1050

²³ Bainham, A, Changing families and changing concepts: Reforming the language of family law, *Ch.F.L.Q.* 1, 1-15

²⁴ *Ibid.*, at 365

²⁵ [2000] 2 FLR 231

²⁶ Eekelaar, Maclean and Beinart (2000)

²⁷ Legal Services Commission, Criteria for Funding Code, 2004

“On balance I would not advocate any wholesale reform of the divorce grounds themselves.”²⁸ Baroness Deech suggests that to reform would be dangerous and we would see an increase in divorce. Further, in advocating a remedy which is counter culture to liberalizing divorce law, she suggests that there be a waiting period introduced to stop divorce being granted quickly.

Parliamentary intervention through legislative enactment will be necessary to produce the desired result that is encapsulated in a more perfect divorce law. The possibility of future reform cannot be dismissed when reviewed in concert with the deficiencies of the present law by the Law Commission.²⁹ Reversing the trend of seeing increases in divorce is a societal need to keep families together. However, with the normalcy of cohabitation, there are those who would view any discussion on divorce law reform as non-sensical and unnecessary as they are unaffected by it. The reality is that there should be a conscientious effort to enhance and promote family life for the preservation of wholesome and productive societies. The extent to which divorce law promotes the harmonious growth and development of a society, in spite of the stigma of personal failure attached to it, is the expectation that reform will be beneficial to all parties involved in divorce.

Disclaimer

The views expressed in this article are those of the author in his personal capacity as a scholar and do not represent the views of the judiciary, any court, or the academic institution with which the author is affiliated.

References

- Bainham, A (1998), ‘Changing families and changing concepts: Reforming the language of family law’, *Child and Family Law Quarterly* 1, 1-15
- Cretney, Stephen M., Masson, Judith M., and Bailey-Harris, Rebecca (2003), *Principles of Family Law*, 7th Edition, Sweet and Maxwell Ltd., London
- Deech, Ruth (1990), *Divorce law and empirical studies*, *L.Q.R.* 106(Apr), 229-245
- Deech, Baroness Ruth (2009), *Divorce – A Disaster?*, *Family Law*, Vol. 39, 1048 - 1055
- Eekelaar, J (1999), ‘Family Law: keeping us “on message”’, *F.L.Q.* 387, 395-6
- Eekelaar, J., Maclean, M. and Beinart, S. (2000), *Family Lawyers*, Oxford: Hart
- Harris-Short, Sonia and Miles, Joanna (2007), *Family Law, Text, Cases and Materials*, Oxford University Press, New York, USA
- Hasson, Ezra (2003), *Setting a standard or reflecting reality? The “role” of divorce law, and the case of the Family Law Act 1996*, *Int. J.L.P.F.* 2003, 17(3), 338-365
- Herring, Jonathan (2009), *Family Law*, 4th Edition, Pearson Education Limited, England

²⁸Deech, Baroness Ruth, *Divorce – A Disaster?* *Family Law*, 2009, Vol. 39, pp. 1053

²⁹Lowe, N.V. and Douglas, G, *Bromley’s Family Law*, 10th Edition, Oxford University Press, 2007 at pp.299

Law Commission (1990) *Family Law. The Ground for Divorce*, Law Commission No. 192, London, UK: HMSO.

Legal Services Commission (2004) *Criteria for Funding Code*, London: LSC

Lowe, N.V. and Douglas, G (2007), *Bromley's Family Law*, 10th Edition, Oxford University Press, New York, USA

Mackay, Lord (2000), 'Family Law Reform', in S. Cretney (ed.) *Family Law – Essays for the New Millennium*, Bristol: Jordans

Thorpe, Lord Justice (2009), London – the divorce capital of the world, *Family Law* 2009, 39(Jan), 21-29