

U.K. Divorce Law Reform —Grounds for Divorce—

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Preface

This monograph is intended to discuss the possibility of reform of the ground for divorce in the light of the recent Law Commission's discussion paper “FACING THE FUTURE”. The attention is focused on the concept of ‘fault’ and ‘non-fault’ throughout.

Chapter I and II are devoted to the study of the background of the present law to see how the principle of irretrievable breakdown became the sole ground for divorce. The various arguments for and

against the principle of irretrievable breakdown and that of matrimonial offence are set out.

The operation of the present law is examined in chapter IV. However, because of the limited length of this monograph it is only possible to discuss some of the problems which the present law raises and, accordingly, the treatment of those principles and cases that are not closely related to the main theme is omitted.

In addition, an investigation is made into the operation of S5 of the Matrimonial Causes Act 1973 for the purpose of ascertaining whether, and in what circumstances the courts could now be justified in preserving a marriage which has broken down irretrievably, for the sake of a non-consenting party.

Finally, in the last two chapters attempts are made to evaluate the proposals for reform put forward by the Law Commission.

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Introduction

'Fault'

It has been some time since Western lawyers started to cast doubt on the soundness of the element of 'fault' in divorce law.

Fault is usually expressed in the form of matrimonial offences, such as adultery or cruelty. Where divorce law is fault-based, divorce is by and large regarded as 'just relief' for an innocent spouse who is a victim of the other spouse's committal of some of the matrimonial offences. In other words, for the purpose of sustaining a marriage, a state sets out certain standards in marital behaviour, which, ironically, might be brought to the notice of the parties only when their marriage is at an end.

In Western society fault-based divorce law has been based on the Christian belief that a marriage is a life-long commitment which should not be dissolved except for the extreme cases of unChristian behaviour.

Moreover, it is often assumed that restrictive divorce law can prevent, or indeed cure a marital breakdown by forcing the parties back into the dead marriage.

In recent years the emphasis upon fault in marital dissolution has been on decline and no country any longer has an entirely fault-based system.¹⁾ Many now believe that restricting divorce to cases where a particular fault-based ground has been proved does not buttress the stability of marriage, nor does it ensure justice between the spouses.

Consequently a number of countries have adopted a non-fault law though some of them have a mixed system of fault and non-fault.

‘Non-fault’²⁾

The grounds of non-fault law have so far taken the forms of irretrievable breakdown of marriage, separation, mutual consent, or unilateral demand, all of which have the same merit of being morally neutral and simple, with the effect of avoiding bitterness in divorce process.

The non-fault law is a complete departure from the old ideas of divorce and embodies the new value that everyone should be free to

1) “Facing the future” Law Com. No. 170 (1988) para. 4.2.

2) Ibid., see generally, PART IV.

walk away from a dead marriage, even when he himself caused the death of his own marriage. The non-fault law sets no standard of marital behaviour and is not concerned with the question of how the death of marriage occurred or who was to blame.

In many countries divorce is now available where the marriage has irretrievably broken down. This is known as breakdown principle. It must be noted, however, that there are few countries which have adopted the breakdown principle in its entirety. Apart from the fact that some still retain alternative fault-based grounds, most of the systems which claim to have adopted the principle require the breakdown to be proved by establishing one or more of 'facts'. In these cases, the method of establishing breakdown tends to become *de facto* ground of divorce which may reintroduce the concept of fault.

It has been suggested that divorce by unilateral demand may be the only logical application of the breakdown principle³⁾, because under the principle there is no basis for protecting a spouse who does not wish to be divorced, provided of course that marriage has clearly broken down. Except where there is a realistic possibility of reconciliation, the state no longer has an interest in inquiring into the history of marriage, but the state's real interest lies to protect the welfare of any children of the marriage and the financial position of the spouse who objects divorce.

Summary of the background of the Divorce Reform Act 1969

In England and Wales the present divorce law was introduced by the Divorce Reform Act 1969, which came into effect on 1st January

3) Ibid., para. 4.14.

1971 and is now contained in the Matrimonial Causes Act 1973.

Before the 1857 Act matrimonial remedies were originally available only in the Ecclesiastical Courts. Divorce was possible only by means of private legislation of Parliament. In 1857 jurisdiction in matrimonial cases was transferred to the Secular Courts with a power to grant judicial divorce depending on a proof of matrimonial offence. Until 1960's it was generally thought that the requirement of proving matrimonial offences in order to get a divorce was the only means of ensuring the stability of the institution of marriage.⁴⁾

The 1969 Act replaced the principle of matrimonial offences with the principle of irretrievable breakdown of marriage, which is now in theory the sole ground for divorce. The Act was based on the arguments put forward by the Church of England Advisory Group in 'Putting Assunder'.⁵⁾ This report was later referred to the law Commission, which published the 'Field of Choice'.⁶⁾

In the Field of Choice, the Law Commission declared the objectives for a good divorce law to be;

- “(i) To buttress, rather than to undermine, the stability of marriage and
- (ii) when, regrettably, a 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.”⁷⁾

4) The Royal Commission on Marriage and Divorce (the Morton Report) (1966) Comnd. 9678 para. 65, 69.

5) “A Divorce Law for Contemporary Society” S.P.C.K. 1966.

6) “Reform on the Ground of Divorce (1966) Law Com. No. 6 Comnd. 3123.

7) Ibid., para. 15.

The Commission rejected the judicial inquest into the evidence of breakdown which was proposed by the Church Group. The Commission pointed out that breakdown was not justifiable issue and that any inquiry into the history of marriage would risk the reintroduction of the bitterness and humiliation.⁸⁾

Faced with the difficulty in identifying those marriages which were irretrievably broken down, the Commission and the Archbishop's Group came up with the compromise proposal that, instead of judicial inquest, the petitioner had to prove irretrievable breakdown by showing one or more of five 'facts', three of which, that is, adultery, behaviour and desertion, are old matrimonial offences, and the other two are separations irrespective of fault.⁹⁾

I. Royal Commission on Marriage and Divorce (the Morton Commission): Report 1951-1955¹⁾

Background

Divorces in England and Wales substantially increased after the World War II, from 4,735 in 1937 to 27,471 in 1954.²⁾ At that time divorce law was founded on the doctrine of matrimonial offence, with the exception of incurable insanity. However, it was already part of the law in other jurisdictions such as New Zealand to allow a divorce

8) Ibid., para. 58(i), 71.

9) "Consensus": Law Com. Third Annual Report 1967-1968 (House of Commons Papers 312).

1) Op. cit.

2) Ibid., para. 41.

after a period of separation without the need to prove a matrimonial offence and some began to advocate the proposals to introduce the principle of breakdown of marriage into English law. They argued that matrimonial offences were in many cases merely symptomatic of the breakdown of marriage and that there should be a provision for divorce where, independently of the commission of such offence, the marriage had broken down completely.

In 1951 the Bill was introduced by Mrs Eirene White M. P. containing provisions which would allow a spouse to obtain a divorce after seven years' separation. The Bill was met by severe criticisms by the Church and was later withdrawn on the Government's undertaking to set up a Royal Commission to explore further the possibility of an acceptable law reform.

The basis of the Commission's approach

The Royal Commission chaired by Lord Morton of Henryton consisted of 19 members. They took the view that in the interest of the community as whole it was essential to maintain a secure and stable family life which would ensure the well-being of children and that to achieve this, marriage should be monogamous and last for life,³⁾ except the cases of real hardship in which some acts fundamentally incompatible with the obligation of married life were committed.

The Commission warned of the tendency, especially among the young generation, to take the duties and responsibilities of marriage less seriously than formerly and to regard divorce, not as the last resort, but as "the obvious way out" when things started to go

3) Ibid., para. 35, 37.

wrong.⁴⁾

It was thought that the need to change the general attitude towards divorce lied at the root of the problem, rather than changing the scope of the grounds for divorce. It was felt with confidence that the state could educate the public, for example, by giving a marriage guidance and by providing facilities for conciliation after marriage.⁵⁾

The Commission's belief in marriage as a life-long union was so strong that it led them to say, "...if this tendency continues unchecked, it may become necessary to consider whether the community as a whole would not be happier and more stable if it abolishes divorce altogether."⁶⁾

Views of the Commission

Despite the fact that all the members of the Commission except one⁷⁾ upheld the retention of the doctrine of matrimonial offence which was thought to be the only way to sustain the stability of marriage, the Report made a significant step in the development of the principle of breakdown of marriage in English law. While nine members of the Commission rejected the introduction of the principle completely, nine supported the idea of having additional grounds based on the principle, four of whom went as far as proposing that a divorce should be allowed in certain circumstances even if one spouse objected.

The latter nine members thought that restricting a divorce to cases where a matrimonial offences had been committed was no longer

4) Ibid., para. 47.

5) Ibid., para. 51.

6) Ibid., para. 54.

7) Lord Walker.

in the best interest of the community.⁸⁾ Their proposal was that where the parties had lived apart for seven years either spouse could apply to the court for a decree provided that the other spouse did not object.⁹⁾

The wider proposal made by the four members was to allow a divorce even if the other spouse objected, if it was proved to the satisfaction of the court that the separation was partly due to unreasonable conduct of the other spouse.¹⁰⁾

As these proposals show, the concept of 'guilt' and 'innocence' of the parties was still seen as an indispensable part of divorce law even in the eyes of the supporters of the breakdown principle.

The other nine members who opposed to the introduction of the breakdown principle did not particularly feel the need for a material change in the ground of divorce. The doctrine of matrimonial offence was regarded as "a clear and intelligible principle", which would make for security in marriage, give relief when a "grave injury" had been done to the marriage by one partner, and act as a strong deterrent to the setting up of illicit unions.¹¹⁾

The three options for reform based on the breakdown principle, namely, divorce by consent, divorce after a period of separation and breakdown of marriage as a comprehensive ground, were all rejected, for the reason either of being incompatible with the concept of marriage as a life-long union, with the consequence of doing an irreparable damage to the institution of marriage, or of grave in-

8) *Ibid.*, para. 70.

9) *Ibid.*, para. 70 (viii).

10) *Ibid.*, para. 71 (i).

11) *Ibid.*, para. 69 (xxxvi).

justice to the innocent spouse who objected to a divorce.¹²⁾

Because of the divergence of opinions among the Commissioners law reform did not follow the publication of the Commission's report introducing the doctrine of irretrievable breakdown into divorce law. An attempt to introduce seven-year separation ground in a private member's Bill in 1963¹³⁾ was again failed.

However, the pressure towards non-fault based law continued and ten years later the next two major publications were made.

II. Reform of the Ground of Divorce — “Putting Assunder”¹⁾ “The Field of Choice”²⁾ 1966

The two reports published in 1966 argued for the introduction of the doctrine of irretrievable breakdown into English law—“Putting Assunder”, the Report of a Group appointed by the Archbishop of Canterbury, which was later referred to the Law Commission, which produced “The Field of Choice”.

The Law Commission identified the four major problems in the divorce reform: (i) reconciliation (ii) stable illicit unions (iii) divorce and justice to wives and (iv) the position of the children.

In the light of these problems, three options were discussed:
A. (i) breakdown with inquest (ii) breakdown without inquest
B. divorce by consent C. separation.

12) Ibid., para. 69 (i) (ii) (vii) (xiv) (xxxv).

13) By Leo Abse M. P.

1) Op. cit.

2) Op. cit.

The basis of the approach—"a secular divorce law within the secular sphere"³⁾

By the time when the two reports were published the law had already started to move in the direction of substituting the principle of breakdown for that of matrimonial offence in that, apart from the availability of divorce on the ground of incurable insanity, the two House of Lords decisions in 1964 adopted a non-fault approach in cruelty cases.⁴⁾

The Archbishop's Group made it clear that the Church of England would no longer insist on having the matrimonial offence as the sole basis of dissolving marriage and that the only Christian interests that were relevant would be "the protection of the weak and the preservation and strengthening of those elements in the law which favour lasting marriage and stable family life..."⁵⁾

The Church Group and the Law Commission were of the same opinion that the matrimonial offence principle led to hostile litigations, causing embarrassment, bitterness and distress among the parties and placing obstacles in the way of reconciliation, and that such divorce process frequently had harmful effects on the children.⁶⁾

Apart from the emotional problems, both the Church Group and the Commission were particularly concerned with the large number of illicit unions which could not be regularised because the 'innocent' party refused to dissolve marriage which had irretrievably broken down. It was estimated that there might be about 180,000 illegitimate children under 16 years who could not be legitimated since their

3) "Putting Assunder" op. cit., para. 17.

4) *Gollins v Gollins* [1964] AC 644, *Williams v Williams* [1964] AC 698.

5) "Putting Assunder", op. cit., para. 18.

6) *Ibid.*, para. 25.

parents were unable to marry and that some 19,000 children were born annually into such unions.⁷⁾ The problem of these stable illicit unions was described by the Archbishop's Group as "a social evil that calls for remedy".⁸⁾ It was considered to be in the public interest to allow the guilty spouse to obtain divorce so as to enable the union to be regularised and the children legitimated, provided that that could be done without disproportionate hardship to the lawful spouse and children.⁹⁾

In short, the elimination of the question of fault from the actual divorce process had become recognised as crucial in improving the law. It was also expected that to confine the determination of fault to the subsequent private hearing in which maintenance was assessed might not only minimise some of the bitterness felt in divorce litigations but also lead to a fair award of maintenance based on a truer assessment of the parties' responsibility in causing the breakdown.

"Breakdown with Inquest"

The Archbishop's Group proposed the abolition of all existing grounds of divorce and the substitution of breakdown of marriage as one comprehensive ground. Significantly, they expressed very strong objections to the introduction of the breakdown principle as an addition to, instead of a substitute for, the principle of matrimonial offence, arguing that it would render the breakdown principle inoperative since the two principles were mutually incompatible, making

7) The Field of Choice, op. cit., para. 66.

8) "Putting Assunder", op. cit., para. 39.

9) The Field of Choice, op. cit., para. 25, 33.

divorce easier to obtain without really improving the law.¹⁰⁾

The proposal also included that there should be an inquest by the court into each marriage to see whether it had broken down irretrievably, which was later rejected by the Law Commission as “procedurally impracticable”.¹¹⁾

The complete substitution of principle was also rejected by the Commission, who favoured the introduction of the breakdown principle as an additional ground to the existing grounds based on matrimonial offence for the reasons discussed below, arguing, in addition, that each of the two principles could serve different situations as proved by the similar systems which were working satisfactorily in Australia and New Zealand.¹²⁾

The “Field of choice” Reform

The Law Commission summarized the objectives of a good divorce law as follows:

- “(a) the support of marriages which have a chance of survival and
- (b) the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead.”¹³⁾

The Commission concluded that the principle of matrimonial offence did not adequately achieve these objectives and that it was desirable to reform the law by introducing a non-fault ground.

10) “Putting Assunder”, op. cit., para. 44, 69. (It is now clear that the Archbishop’s Group *was* right on this point.)

11) The Field of Choice, op. cit., para. 120 (5).

12) Ibid., para. 105.

13) Ibid., para. 120 (1): see also p. 2 (note 7).

Some basic assumptions made by the Commission included, for example, that public opinion would not accept any substantial increase in the difficulty of obtaining a divorce or of the time it took, and that breakdown of marriage usually preceded the matrimonial offence with the result that the chances of reconciliation between the parties had become almost negligible by the time that a petition was filed. It followed that, as in the Morton Commission, the introduction of the compulsory conciliation procedures after the petition was again rejected, more emphasis being placed upon the prevention of breakdown by marriage guidances.¹⁴⁾

(a) Breakdown without Inquest

The first proposal made by the Law Commission was that the court, on proof of a period of separation and in the absence of evidence to the contrary, assume that the marriage had broken down. However, it was not considered feasible to make this the sole comprehensive ground for divorce, since the need to give prompt relief in some cruelty cases meant that the period of separation should not be much more than six months prior to the filing of the petition, which was too short to be acceptable unless there were other grounds to be available.¹⁵⁾

(b) Divorce by Consent

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- 14) S6(1) of the MCA 1973 which requires a solicitor to file a certificate stating whether he has discussed the possibility of reconciliation with his client has not achieved its object because of the extension of the special procedure: "Facing the future", *op. cit.*, para. 3.9, 5.31.
- 15) The Field of Choice, *op. cit.*, para. 72, 120(6)(a).

This was also thought practicable only as an additional, and not a sole comprehensive, ground, the main problem being that it might lead to the dissolution of marriages that had not broken down irretrievably. The Commission considered the danger of the will of the economically weaker party (normally the wife) being overborne by that of the stronger and concluded that divorce by consent would only be acceptable if coupled with a period of separation.¹⁶⁾

(c) Separation Ground

As has already been mentioned above, there had been continuous pressure towards the introduction of an additional ground for divorce based on a number of year' separation, primarily, in order to provide a solution for the serious social problem of stable illicit unions and their issue.

The Commission considered that a period should not be so short that it might undermine the stability of marriage but not so long that it would force the parties to petition on the ground of matrimonial offence,¹⁷⁾ and proposed two different periods of separation—two years, if the other party consented or did not object, and five years, if the other objected.

Since these periods were substantially longer than six months¹⁸⁾ this ground was to be introduced only as an addition to the existing grounds of matrimonial offence.¹⁹⁾

(d) 'safeguards'

16) Ibid., para. 80–84, 120(6)(b).

17) Ibid., para. 93.

18) See the proposal (a) (note 15).

19) Ibid., para. 85ff, 120(6)(c).

The Law Commission, as the Archbishop's Group, regarded it as essential to provide the safeguard of an absolute bar for an 'innocent' wife who could be divorced against her will if some of the above proposals were enacted. However, unlike the Morton Commission, 'justice to wives' was no longer the sole criterion. Four other interests to be taken into account in deciding whether to refuse a divorce were that of the children of the marriage, that of any partner in the petitioner's illicit union and any children of that union, the petitioner's disregard of his matrimonial obligations and finally public interest in ending "empty ties".²⁰⁾

As a result of much effort to strike a right balance between these different interests, the Hardship Bar, which is now S5 of the MCA1973 was enacted.²¹⁾

III. Social Trends

Before discussing the operation of the present divorce law it may be necessary to make some observations from the factual situation appeared in statistics.¹⁾

(1) Divorce rate

The number of divorce has increased dramatically over the last 20 years. In 1970, for example, there were 58,000 divorces in England and Wales. In 1980, there were 148,000, which was 2½ times more than in 1970. (Fig. 1) The divorce rates of Great Britain overtook

20) Ibid., para. 118, 38ff.

21) For the discussion on this provision, see Chapter IV. p. 23.

1) Annual Abstract of Statistics (1988), Social Trends 18 (1988) (Central Statistical Office); "Facing the future", op. cit., PART II.

those of Germany in 1971 and those of Denmark in 1978, and are now the highest of all the EC countries.²⁾

The reason for the increase in divorce rate may be explained by the various changes which have occurred throughout industrial state during this century. Examples of these changes are; (i) economic changes such as the increase in the number of employed women (ii) social changes, i.e. minimized social or religious pressure towards divorce and remarriage (iii) demographic changes, e.g. extended life-span and decrease in the number of children in each household (iv) change in the nature of or people's attitude towards marriage from economic union to emotional union and (v) change in divorce law, i.e. the shift from the fault-based restricted divorce law to non-fault based law. (for (iii) see Fig. 9 for (v) see Fig. 1)

Whilst it is sometimes said that the liberalisation of divorce law is not the only cause in bringing about the increase in marital breakdown, change in divorce procedure often had an impact on the divorce figures. (see Fig. 1 below)

To sum up, (i)-(iv) may account for the number of marital breakdown which started increasing in 1960's, independently of the introduction of the principle of irretrievable breakdown into divorce law, while (v) may simply have brought those broken marriages, including, presumably, those which were not so completely broken, to an end.

The first major procedural change in the sixties took place in 1967, when the jurisdiction in divorce cases was extended from the High Court to the County Court, which made divorce more accessible

2) Social Trends 18, op. cit., 2.17.

	1961	1965	1970	1971	1972	1977	1978	1980	1984	1985	1986
Decree absolute (E & W)	24936	37785	58239	74437	119025	129053	143667*	148301	144501	160300*	153903
Duration of Marriage (0—4 years)		4288	8183	9659	15275	23506*	25807	28517	30500	45776	38637
Divorce in which there were children		28820	43056	53980	88201	91235	100602	102967	102670	108388	106573
Children under 16 of divorcing couples (thousands)				85	110	150	163	163	150	155	151
Remarriages (GB) Rate per 1000 eligible	(M) 45	50	60	62	90	80	82	75	61	60	58
Men and Women	(W) 13	15	16	17	22	25	26	23	22	21	20
Petition filed	31124	42070	70575	110017	109822	167074	162450	170882	178940	190481	179844
(by husband)		16917	25543	43792	38745	44410	46810	48890	48940	52090	49480
(by wife)		25153	45032	66225	71077	122660*	115610	121990	13000	138390	130370
Birth (UK) (thousands)	(1920—22) 1018	(1930—32) 750	(1960—62) 946	(1975) 698	(1986) 755						

Fig. 1

(Source: Social Trends 18, Annual Abstract of statistics (1988))

to many people.

In 1973 'special procedure' was introduced in limited circumstances and was extended to all undefended cases in 1977, which made divorce quick, simple and cheap to obtain. (Fig. 1*)

In 1984 the Matrimonial and Family Proceeding Act replaced the old restriction to prohibit divorce within three years of marriage with one year, which also increased the number of divorce in the following year. (Fig. 1**)

(2) Duration of marriage

These procedural changes certainly had an effect on divorce which took place within four years of marriage. The reason for the increase in the number of those divorces in 1985 could be attributable to the introduction of one-year-bar, instead of three, by the MFPA 1984. The reason for the increase in 1977 may deeply be related to the fact that 'special procedure' became available to all the parties in undefended cases in that year. (Fig. 2*)

(3) Special procedure

'Special procedure' is now used in about 99% of all divorces.

This is a procedure whereby the petitioner verifies the facts alleged in the petition by affidavit, the respondent having acknowledged the service of petition and declined to defend. The Registrar checks the papers to see whether the case for divorce has been sufficiently established. However, in practice, the Registrar has no means of ensuring that the facts alleged are true; for example, how can he, by simply looking at the file, know that the petitioner in five-year

separation cases had the requisite mental element? The practice has proved that in undefended cases where the special procedure is used the requirement of proving fault has become a meaningless formality.

The procedure was introduced primarily for two reasons. First of all, since there are only about 60 county courts in the country it is not in practice possible for the courts to spend long time and much resources on each case. Secondly, in 1977 the public money used for providing legal aid amounted to 34.5 million pounds. The acute shortage of resources required to cut down the money spent on legal aid through, inter alia, simplification of divorce procedure. Legal aid was withdrawn from the cases using the new procedure in 1977.³⁾

As mentioned earlier, in 1977 when the special procedure was introduced to all undefended cases there was an increase in the number of divorces within four years of marriage. Moreover the figures also show that the proportion of decree granted to wives rose from 61% in 1970 to 73% in 1977 and has remained roughly the same from that year. (Fig. 8*)

(4) Children in divorce

As the number of divorce substantially increased over the last 15 years the number of children under 16 who are directly involved in their parents' divorce also increased by 2½ times from 1970, to the peaks of 163 thousand in 1978 and 1980. It is predicted that if this trend continues one in five children will experience their parents' divorce by the time they reach 16 in the near future.⁴⁾ (Fig. 4)

3) N. Kawada "Divorce in England" (Journal of Comparative Law Studies, vol. 47 (1985) published by the Research Centre of Sociology of Law of Tokyo University, pp. 77-78).

4) Ibid., p. 76: Family Policy Studies Centre, Briefing Paper submitted

(5) Remarriages

Although the rate of remarriages after divorce have been declining for both men and women (Fig. 5), a study shows that about one-third of both divorced men and women remarried within 2½ year of divorce.⁵⁾

(6) Marriages

Despite the increase in the divorce rate, the number of marriages remain unaffected even after the 1969 legislation,⁶⁾ which runs counter to the argument put forward by some people that the relaxed divorce laws have fundamentally weakened the institution of marriage.

IV. The Matrimonial Causes Act 1973 — Section 1 & 5

Adultery and intolerability

S1(2)(a) reads as follows;

“...the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent”

A single act of adultery alone is insufficient to prove breakdown, but the petitioner must also satisfy the court that she finds it intolerable to live with the respondent. The test is subjective and it is immaterial that a reasonable person might not find so.

to the Special Standing Committee on Matrimonial and Family Proceedings Bill.

5) Social Trends 18, op. cit., 12.20.

6) Ibid., 2.15.

In *Clearly v Clearly*¹⁾, the Court of Appeal held that there is no need for a link between adultery and intolerability. This interpretation of the section has been accepted as consistent with the aim of the legislation to make breakdown the sole ground for divorce. In other words, where adultery has been established, the court infers breakdown of marriage and the petitioner should normally be entitled to a divorce, even though adultery is not a cause, but rather the effect of the breakdown.²⁾

It was intended by the legislature that the additional requirement would make adultery fact more difficult to rely on.³⁾ However, practice has shown that a respondent who has committed adultery has no defence, no matter how unreasonable the petitioner's attitude be in relation to the intolerability requirement.

S2(1) and (2) provides that the fact of cohabitation which is less than six months after the discovery of the respondent's adultery is to be disregarded in establishing intolerability. This is aimed at facilitating reconciliation between the parties. Conversely, if the petitioner continues to live with the respondent for more than six months, she is debarred from petitioning on ground of adultery.

However, the objective of encouraging reconciliation has not been achieved due to the extension of the special procedure.⁴⁾

Behaviour

S1(2) (b) reads;

- 1) [1974] 1WLR73.
- 2) "Consensus", op. cit.
- 3) Hansard 6 December 1968, vol. 774, col. 2039.
- 4) "Facing the future", op. cit., para. 3.9, 5.31.

“...the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”

The test is partially subjective and partially objective in that the court has to consider whether a particular petitioner and not a ‘hypothetical reasonable husband or wife’ can or cannot reasonably be expected to withstand the respondent’s behaviour, taking into account all the relevant circumstances.¹⁾

The objective part meant that mere incompatibility of the parties is not sufficient to prove breakdown. However, in *Livingston-Stallard v Livingston-Stallard*²⁾ the court suggested that the level of toleration for incompatible personalities and lifestyle need not be high. The result is that the petitioner might allege extremely trivial facts such as the respondent’s way of washing his underwear.³⁾ As the Law Society claims, “after several years of marriage, virtually any spouse can assume a list of events which, taken out of context, can be presented as unreasonable (sic) behaviour on which to found a divorce petition.”⁴⁾

If a petition is undefended, such allegations would lead to a finding that the respondent is substantially, albeit not solely, to blame for the breakdown of marriage, leaving the petitioner’s own conduct unquestioned. Even if the respondent wishes to challenge the allegations made in the petition it may not be financially practicable to do so.

The unfairness of such outcome creates bitterness in the mind of the respondents; indeed, a study has shown that 89% of the sample of divorced men who were respondents felt that divorce law favoured

1) *Ash v Ash* [1972] Fam. 135.

2) [1974] Fam. 47.

3) *Ibid.*

4) “A Better Way Out” (1979) 1023.

women.⁵⁾

Another feature of the behaviour fact is that although it is one of the old matrimonial offences it does not necessarily involve fault on the part of the respondent. Unreasonable behaviour may be the result of the respondent's physical or mental illness or injury, which may be caused involuntarily.⁶⁾

The conduct of mentally ill spouse was intended to be covered by the section. Indeed, incurable mental illness as a ground of divorce is a clear example of breakdown principle. In *Thurlow v Thurlow*,⁷⁾ a husband was granted a decree against his wife who was suffering from epilepsy and was bed-ridden.

Illness as a ground also raises a question of whether the respondent's inactivity would constitute a behaviour. Under the old law of matrimonial offence of cruelty, omission such as unjustified refusal of sexual intercourse or a husband's failure to do any work causing wife to do all the earnings and housework were held to constitute cruelty. However, the inactivity by reason of illness may be more difficult to establish as 'behaviour' and in *Thurlow v Thurlow*, the court left open the question of whether a human vegetable condition of a spouse due to a sudden road accident could amount to behaviour.

Despite the unfortunate result of such petition, it seems a logical conclusion from the breakdown principle to allow divorce in those cases. If that happens, it will no longer be necessary nor desirable for the courts to discuss the nature of the obligations of married life, including "the normal duty to accept and share the burden

5) P Ambrose, J Harper and R Pemberton "Surviving Divorce" (1983).

6) See Hansard 12 June 1969 vol. 1784.

7) [1976] Fam. 32.

imposed upon the family as a result of the mental or physical ill-health of one member”, which was still thought to be a relevant consideration in deciding divorce petition in the mid 1970’s.⁸⁾

S2(3) under which cohabitation up to six months is to be disregarded, is inserted for the same object as in the case of adultery fact of enabling the parties to attempt reconciliation after the behaviour in question.⁹⁾

Desertion

S1(2) (c) provides;

“...the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition”

Desertion is one of the old matrimonial offences and involves proof of the fact of separation and the intention to desert (*animus deserendi*). The latter consists of a lack of consent and justification for separation together with the respondent’s capacity to form the intention to desert.

Because of the *animus deserendi* requirement the operation of this provision has been complex. In practice, however, the desertion fact is least relied on (less than 2% of all petitions in 1986)¹⁾ due to the availability of separation fact (s1(2) (d) two-year separation with consent and s1(2) (e) five-year separation without consent).

8) Ibid., (Rees J).

9) See p. 15 note 4.

1) See below p. 21.

Unlike the separation fact, the 'fault' of the respondent is always relevant in desertion fact. Indeed, desertion may now be the only 'fact' which is purely fault-based, considering the consensual nature of some of the modern divorces based on adultery or behaviour fact.

In pre-1969 divorces, the emphasis upon fault sometimes led the court to reinforce stereotyped sex roles in granting a decree on the ground of desertion. In *Mansey v Mansey*²⁾, for example, it was suggested that the husband was entitled to choose the family home simply because of his status as head of the family so that the wife who refused to join him there was automatically in desertion. Similarly, while in *Bartholomew v Bartholomew*³⁾ the wife who refused to look after house was not guilty of constructive desertion, in *Gollins v Gollins*⁴⁾ the House of Lords held that a inexcusably lazy husband who refused to go out to work making the wife to do all the earnings and housework was guilty of constructive desertion. The outcome of these cases is not compatible with the changing social climate when a considerable number of women enter into employment, some becoming a breadwinner themselves.

Under S2(5) resumption of cohabitation not exceeding six months altogether is to be disregarded, though it does not count as part of the period of desertion.

Separation

S1(2)(d) provides;

-
- 2) [1940] P 139.
 - 3) [1952] 2ALLER 1035.
 - 4) [1964] AC 644.

“... 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”

S1(2)(e) provides;

“... the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the petition”

It is convenient to deal with both two-year and five-year separation here, since they involve same principles and rules, the only difference being the lack of the respondent's consent and defence of hardship available in five-year separation fact which is to be discussed in the next section.¹⁾

At first sight 'separation' seems a simple concept, but the cases have proved that it is not as simple as it might appear. The courts have held that both physical and mental element must be present in order to constitute separation. In *Santos v Santos*²⁾ the Court of Appeal held that 'living apart' starts when one party recognises that the marriage is at an end, although it is not necessary for him to communicate the fact to the other spouse.

With regard to the physical element, S2(6) provides that "... a husband and wife shall be treated as living apart, unless they are living with each other in the same household ...". In other words 'separation' means a cessation of consortium, which makes it possible for the parties to obtain a divorce even though they have continued to live under the same roof provided they have been having a completely separate household.

1) P. p. 23ff.

2) [1972] Fam. 247.

In *Mouncer v Mouncer*³⁾ there was no separation of households when the husband and wife took meals together and the wife did cleaning of the house. The separation of bedrooms was not enough to constitute 'living apart'. On the other hand in *Fuller v Fuller*⁴⁾ the husband could not live on his own because of illness and went back from hospital to live with his wife who was living with her lover and daughter. The wife did cooking and washing for the husband, who paid weekly for her services and slept in a back bedroom. The Court of Appeal, distinguishing *Mouncer* (cup) held that 'living apart' meant not living with each other 'as husband and wife'. The decree was granted since the husband lived as lodger and not as husband. There was no problem of the Mens Rea of living apart as stressed in *Santos v Santos* (*supra*).

The notion of separation under one roof in S2(6) no doubt stemmed from the conceived housing problems. Whilst separation under one roof might help women in lower socio-economic classes and especially those with dependent children who are least able to effect a separation⁵⁾, this method has obvious disadvantage of prolonged uncertainty and tension among the family, for which children are most often victims.

[Use of the 'five facts']

Adultery and behaviour—immediate consensual divorce?

Divorce by simple consent without any judicial involvement has

3) [1972] 1WLR321.

4) [1973] 1WLR730.

5) "Facing the future" *op. cit.*, para. 2.11.

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	1961	1965	1970	1971	1972	1977	1978	1980	1984	1985	1986
Petition filed	31124	42070	70575	110017	109822	167074	162450	170882	178940	190481	179844
Adultery	13876	19847	36474	27284	30920	43100 ↗	43260	47920	50720	53330	51730
Behaviour	5144	8618	17534	20604	25424	62580 ↗	56330	64880	73340	81220	81590
Desertion	8820	9596	12266	11277	8650	6110 ↘	5500	4480	3060	8000	2580
Two-year separation				16057	20187	36400 →	40170	39760	38950	36460	32760
Five-year separation				29911 *	19270	14590 ↘	14960	12510	10780	10210	10200
Petition (by husband)		16917	25543	43792	38745	44410	46840	48890	48940	52090	49480
(by wife)		25153	45032	66225	71077	122660	115610	121990	13000	138390	130370
Decree absolute (E & W)	24936	37785	58239	74437	119025	129053	143667	148301	144501	160300	153903

(Source : Social Trends 18, Annual Abstract of Statistics (1988))

Use of the 'Five facts'

never been part of English law, largely due to the Christian belief that a marriage is a life-long commitment which should not be abandoned at will and also to the difficulty in ensuring the validity of consent.¹⁾

Divorce by consent was first introduced into English law by the 1969 Act providing the two-year separation fact as one of the non-fault grounds. However, even before the enactment of the 1969 Act there had been no real barrier to a consensual divorce by both parties 'agreeing to commit' a matrimonial offence.²⁾ Today because of the availability of the special procedure the parties relying on adultery or behaviour fact can obtain a divorce within seven to eight months from the petition, without having to wait for two years even when they consent to a divorce.

Since 1973 most common fact which wives used has been behaviour of their husbands, accounting for more than 50% of all decrees in 1980. By contrast husband most commonly used their wives' adultery amounting to 44% of all decrees in 1986.³⁾

Petitions based on adultery or behaviour (71.4% of all decrees in 1986)⁴⁾ together with the proportion of undefended cases (93% of all divorces) would indicate the wide use of these facts as a consent ground.

Five-year separation—no fault, no consent

The 1969 legislation for the first time allowed a divorce on the ground of five-year separation, which resulted in the high proportion

1) The Morton Report, *op. cit.*, p. 15 (viii), p. 16 (ix).

2) *Ibid.*, para. 70; see also MCA ss30, 31.

3) Social Trends 18, *op. cit.*, 2.18.

4) "Facing the future", *op. cit.*, (Appendix B).

of decrees granted based on that ground in 1971. However, this proportion has declined ever since, representing a backlog effect of the 1971 figure. (Fig. *)

The Law Commission in 1966 predicted that if separation were introduced as an additional ground for divorce there might be "appreciable diminution in the number of petitions based on cruelty or adultery..."⁵⁾ Clearly, as the above figures show, this has not happened.

Hardship Bar

S5(1) provides;

"The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree on the ground that the dissolution of marriage will result in grave financial or other hardship to him and that it would in all circumstances be wrong to dissolve marriage."

Under S5(2) the Court has to dismiss the petition by virtue of the opposition made by the respondent if the court is satisfied that the divorce will cause grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage.

S5(3) further provides;

"...hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved."

5) The Field of Choice, op. cit., para. 93.

During the debates on the 1969 Bill it was strongly argued by a woman MP. that to abandon the fault principle would prejudice the middle aged dependent housewives and that it was necessary to protect their financial position.¹⁾ It was also said that there was a need to safeguard those who oppose divorce on religious or other grounds.²⁾

[grave financial hardship]

Under the 1867 Act the economically weaker party (normally the wife) had the safeguard that she could not be divorced against her will so long as she did not commit a matrimonial offence. The introduction of separation without consent ground meant that an 'innocent' party could be forced into divorce even if she objected.

Although S5 Bar was inserted so as to provide those innocent spouses a safeguard, it was not intended to make the grant of divorce discretionary.³⁾ It was intended that the court would grant a divorce if the interest of the respondent and children were adequately protected.

In practice, 'financial hardship' has been confined to the loss of expectation of an occupational widow's pension for which the husband is unable to compensate. This is because hardship is usually caused by five-year separation and will not be increased by divorce save the loss of substantial widow's pension. It may be noted that the courts have no power to reallocate occupational retirement or widow's pension under ss23-25A of the MCA1973 (as amended by the MHPA1981 and MFPA1984).

1) Hansard 12 June 1969, vol. 784 col. 1955-63 (Mrs Knight).

2) Ibid., col. 1964-5 (Mr Mahon).

3) The Field of Choice, op. cit., para. 114-9; "Consensus", op. cit., (note 7).

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In *Julian v Julian*⁴⁾, the husband was 61 and the wife was 58, neither of whom was in good health. The wife would be entitled to a police widow's pension of £790 per annum if there was no decree, while the husband could only compensate £215. The court held that there was grave hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage. It could not be said to be hard on the husband to deprive him of the chance to remarry given his age, health and circumstances.

In *Dorrell v Dorrell*⁵⁾, the wife would be entitled to £6 per week as state pension if there was no decree absolute or husband's death. If there was no decree she would receive £2 a week as widow's pension from the local government. Sir George Baker P held that the wife had established grave financial hardship when the loss of her pension rights represented a loss of the wife of £2 a week out of her total income of £8 per week. The fact that she would soon be on receipt of social security benefit of £8-25p, whether decree absolute or husband's death was disregarded. This was disapproved in some later cases. In *Reiterbund v Reiterbund*⁶⁾, for example, where the wife was 52 and the husband was 54, the wife would be entitled to a retirement pension on attaining the age of 60 when the widow's pension would cease. The Court of Appeal held that although the loss of the chance of acquiring a widow's pension would constitute financial hardship within S5 the hardship would not be 'grave', taking into account the wife's entitlement to social security benefits. Megaw LJ said "why should it be said that there is hardship to the wife—grave financial hardship—when, the divorce having taken place, and

4) [1972] 116 Sol. Jo. 763; See also *Johnson v Johnson* (1981) 12 Fam. Law 116.

5) [1972] 3AllER343.

6) [1975] 1AllER280.

the husband having died, the wife gets precisely the same amount from the public funds, though from a different account in the public funds?"⁷⁾

On the other hand even if the financial hardship is held to be 'grave', the petitioner may not be able to rely on the hardship bar if such a hardship can be compensated by the respondent himself. In *Parker v Parker*⁸⁾ where the husband was found to be able to raise money by way of a second mortgage to his house, the court held that the loss of police widow's pension constituting grave hardship could be off-set by payment by the husband.

Similarly in *Le Merchant v Le Merchant*⁹⁾ where the loss of a contingent right to an index-linked pension constituted grave financial hardship, the husband obtained a decree by making a reasonable proposals to compensate the wife for the loss.

[other hardship]

The question was raised as to whether the word 'grave' in S5 referred to 'other hardship' as well as 'financial hardship'. The Court of Appeal answered it in the affirmative in *Rukat v Rukat*.¹⁾ The wife was Roman Catholic coming from Sicily where most people were of the same religion. She lived separately from her husband for 25 years in Sicily while the husband lived in England with another woman. The husband petitioned for divorce in England and the wife objected on the ground of hardship based on religious and social ground claiming that she would not be accepted by her community.

7) Ibid., p. 286 C.

8) [1977] 1ALLER410.

9) [1977] 3ALLER610.

1) [1975] 1ALLER 343.

It was held that the wife failed to establish that she would suffer 'grave' hardship because of divorce.

In *Balraj v Balraj*²⁾ the Hindu wife's objection to divorce on the ground of (i) the loss of her own social status in her community in India and (ii) the adverse effect on the prospect of her daughter's marriage also failed for not being 'grave'.

In *Grenfell v Grenfell*³⁾ a Greek Orthodox wife petitioned for divorce for her husband's behaviour. But when her husband cross-petitioned on the ground of five-year separation the wife opposed it on grounds of 'grave hardship', arguing that her conscience would be affected if the marriage were to be dissolved otherwise than for the grounds of substance. Omrod LJ held that the purpose of S5 was to prevent dissolution of marriage and not to prevent dissolution at the suit of the other party or on a particular ground. The wife's appeal was dismissed.

As the above cases show it is difficult to establish 'other grave hardship' under S5 and there has been no reported case in which a respondent has succeeded in doing so. The reason for such difficulty is either that although there is hardship it is not grave enough, or that the hardship, although grave, is caused by separation rather than by divorce itself.⁴⁾

[divorce would be wrong in all the circumstances]

Even if a respondent has succeeded in establishing 'grave hardship' divorce would still be granted if it would not in all the circum-

2) [1980] 11Fam Law 110.

3) [1978] 1AllER 561.

4) See e.g. *Talbot v Talbot* [1971] 115 S.J. 870.

stances be wrong to dissolve the marriage. In *Mathias v Mathias*⁵⁾ the Court of Appeal stated the relevant factors to be considered in deciding whether it would be wrong to dissolve the marriage, which included; whether the parties are still young and healthy, whether the husband desires to marry another woman and the length of the parties' cohabitation and separation.

The parties in *Mathias* married when the husband was 25 and the wife was 22 and had one child. Nearly three years after marriage, the husband left his wife to live with another woman and the couple did not resume cohabitation for almost seven years. The husband wished to marry his girlfriend with whom he was living. The court held that the wife had not established 'grave hardship' and further that from the circumstances of the case the public interest required that the marriage should be dissolved. Stephenson LJ considered it to be more difficult for young women to succeed in pleading the hardship bar, which was intended to protect middle aged wives from losing security, especially her widow's pension rights.

The respondent's conduct or history of marriage may be relevant in some cases. In *Brickell v Brickell*⁶⁾ the wife deserted her husband, who petitioned for divorce on the ground of five-year separation. Although the loss of pension right of £232 a year constituted a grave financial hardship, it was not wrong to dissolve the marriage having regard to the fact of the wife's desertion.

This may suggest that a respondent who is guilty of old matrimonial offences will rarely be successful in pleading a hardship bar. This, together with the difficulty in establishing 'grave hardship' itself, makes the hardship bar almost impossible to invoke affording little

5) [1972] 3ALLER 1.

6) [1973] 3ALLER 508.

safeguard to the respondents in five-year separation cases.

The cases considered above show the court's unwillingness to prevent divorce in petitions based on a non-fault ground, which may be indicative of the fact that under the breakdown principle public interest no longer lies in protecting an innocent spouse who objects divorce, except her financial position and welfare of her children.

V. Further Reform — "Facing the Future" 1988¹⁾

The recent Law Commission's discussion paper "Facing the future" which was published in May of 1988 conducts an extensive review of the operation of the present law in the light of the "Field of choice" criteria of good divorce law. This includes the questions of whether the law (a) buttresses the stability of marriages (b) enables the "empty legal shell" of a dead marriage to be destroyed (c) promotes "maximum fairness" (d) promotes "minimum bitterness, distress and humiliation (e) avoids injustice to an economically weak spouse, usually the wife (f) adequately protects the interests of the children of failed marriages, and (g) is understanding and respected.

The Commission decides against the retention of fault-based grounds, stressing the bitterness and humiliation felt by the parties as well as the unfairness of the outcome of divorce based on fault-ground for the respondents in undefended cases.²⁾

The Commission concludes that the present divorce process is far from satisfactory and has manifestly failed to achieve the "Field of choice" objectives, stating that "[a]bove all, the present law fails to

1) *Op. cit.*

2) *Ibid.*, PART III.

recognise that divorce is not a final product but part of a massive transition for the parties and their children.”³⁾

The basis for reform

If divorce law is powerless to prevent marital breakdown and continues to be based on the principle of irretrievable breakdown, the aim of the reform of divorce law today must be to modify the law so as to achieve the “Field of Choice” objectives formulated back in the late 1960’s when the principle was first introduced into English law. Those objectives may be rephrased in the following way;

- (i) To ensure that legal process of divorce does not provoke conflict between the parties and diminish the possibility of reconciliation;
- (ii) to promote agreement between the parties about the consequences of divorce, primarily through conciliation and
- (iii) “to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.”⁴⁾

In order to achieve these, divorce “should be truly and not merely artificially based upon a non-fault ground and 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 (Booth Committee on Procedure on Matrimonial Causes).”⁵⁾

To sum up, divorce law should be reformed with due consideration

3) Ibid., para. 3.50.

4) Lord Scarman in *Minton v Minton* [1979] AC 593, 608.

5) Report of the Matrimonial Causes Procedure Committee (1985) para. 2.9.

of its effect on the post-divorce settlement of the parties without giving them a bargaining power over such issues as money and children. If good continuing relationship with both parents is encouraged through divorce process, the problems associated with children from broken marriages may be diminished, although they may never disappear completely.

Options for reform⁶⁾

The Law Commission sets out four options for reform; (i) mutual consent (ii) immediate unilateral demand (iii) separation as a sole ground and (iv) 'a process over time'.

The Commission favours option (iii) and (iv). As to the former its advantages and disadvantages have already been discussed. It would suffice to add that under the Matrimonial Homes Act 1983 S1(2) and (3) the element of fault would reappear in effecting a separation.

(iv) 'a process over time'

This is a procedure which involves initiation of divorce proceedings by one party or possibly by joint application, followed by a 'transitional period' in which to resolve the matters relating children, money and property. The parties are given the opportunity of an initial hearing by the court at an early stage of the transition period at which orders in relation to issues such as money and children would be made. Divorce is available as of right at the end of the period by the application for a decree by either party. Decree nisi is to be abolished.

The principle of irretrievable breakdown is retained as the sole

6) "Facing the future", *op. cit.*, PART V.

ground for divorce without the need to prove any 'facts' or fault of either party. Breakdown being a non-justiciable issue the only test of breakdown is that one or both parties consider marriage at an end, which would be established by the written statement of one or both parties to that effect.

The proposal is a logical conclusion from the breakdown principle, providing in addition a period of transition and reflection.

With regard to the resources to be required in the new divorce process, the Law Commission points out that given the number of divorces "it is unrealistic to make any proposal for reform of the ground for divorce which would involve increased public resources, for example, by requiring more judicial time."⁷⁾ Presumably for this reason, any reference as to the special provisions for the victims of domestic violence who may need an immediate divorce in order to secure a public accommodation under the present housing policy are omitted in the Commission's proposal, for it would involve a great deal of public expenditure and be outside the scope of the law reform.

The hardship bar available to the respondent in five-year separation cases under S5 of the MCA1973 has disappeared; instead, the proposal seeks to protect the interest of the economically disadvantaged spouse or children through the parties' own agreement by making a full use of the divorce process. Increase in expenditure on conciliation and counselling services would be welcomed for this purpose.

Finally the court has a power to postpone the grant of the decree where at the end of the transition period matters relating to money, children or property have not been resolved.

7) Ibid., para. 5.4.

VI. Conclusion

It has been said that the rise in the number of divorces is not necessarily an indication of an increase in the proportion of broken homes.¹⁾ Although it must be very largely due to the readier availability of divorce rather than to an increase in the number of broken marriages²⁾, it is still not known to what extent the liberalisation in divorce law is a contributory cause of marital breakdown.

The Law Commission said in 1966, “[from a secular point of view, divorce is socially harmful only when the possibility of obtaining it leads to the break-up of a home which would not have occurred if the parties had known that in no circumstances could the legal tie be severed.]”³⁾

The “FACING THE FUTURE” leaves the question of what effect, if at all, the completely non-fault based law would have on English family life if their proposals were enacted. The Commission emphasises that the new “process over time” system is not designed to make divorce more freely available than under the present system, but rather to focus the attention of the law and the parties on more relevant issues, such as those relating to children, money and property⁴⁾ and expects that, given the state of divorce rate today, changes in divorce laws are unlikely to lead to any increase in the rate of divorce itself. “What would change”, says the Commission, “is not the numbers of divorces but the way in which those same divorces would

1) The Field of Choice, *op. cit.*, para. 7.

2) See Chapter III ((i) Divorce rate).

3) The Field of Choice, *op. cit.*, para. 6.

4) “Facing the future”, *op. cit.*, para. 5.28.

take place.”⁵⁾

Given the discussions in the preceding chapters it is clear that the principle that divorce should be available when, but only when, a marriage has irretrievably broken down is a sound one. But if a system based on the principle whereby the parties will become the sole judges of their marriage is to be introduced, the state might have a new task of considering its own role in divorce proceedings in future.

5) *Ibid.*, para. 5.3.