Family Law in Society

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INTRODUCTION

Law and Society—
the Regulation of Family Relationships

The nature and problems of family relationships are today beginning to be treated in a manner which is becoming progressively more scientific, realistic and effective.

For example, there is an increasing recognition, generally, of the importance of social sciences in dealing with problems of the family; the Welfare State is beginning to play a direct and positive part in the regulation of the family; and marriage guidance is slowly becoming a respected and valued institution.

The part played by the law is, of necessity, limited. In only a narrow and specialised manner, contrary to the beliefs of some lawyers, can laws be effective in maintaining the stability of marriage. On this point it may be revealing to quote the opinions of two quite different authorities. In an address to the National Marriage Guidance Council in May 1967, Lord Gardiner said:

> "I do not believe that people's standards of conduct in their marriages depend upon the state of the divorce law; they spring from social and moral considerations which are independent of the law."[1]

And Professor Donald MacRae, Professor of Sociology in the University of London writing in 1964, agrees:

> ". . . Our society is one in which moral duties are widely recognised . . . where persons—if not property—are concerned. The study of social research in British society reveals a web of obligation that grows rather than diminishes. Society, not the positive laws, is its own strongest sanction for the permanence of marriages'.'[2]

[1] Quoted by Taylor, *A Psychologist's View of Family Law*, in *Family Law Centenary Essays*. Sweet & Maxwell (Wgtn) 1967, p. 104.

[2] *Putting Asunder:* The Report of a Group appointed by the Archbishop of Canterbury, Jan. 1964. Appendix F, Para. 9, p. 166. S.P.C.K. 1966.

Moreover, marriage and all its consequences has complexities which no Court of Law is competent to preside over. The questions which arise are unlike those surrounding a simple business contract, or a crime, or a tort, or the relationship between citizen and State. Although even in some of these areas (and the criminal law provides a striking example) there is growing awareness that contravention of a rule of law is not the only, or even the most important, problem to be investigated.

Clearly, however, the law does have, and must have, a role in the regulation of family relationships, and the Courts must, of course, make the decisions effecting the major changes in these relationships.

What is suggested is that the law and the Courts do not fulfil their role as effectively as is desirable and possible.

Three major shortcomings of present family law procedures are suggested in the next section. These indicate some of the ways in which the law in this area is, to some extent, out of touch with modern methods for dealing with social problems and with present day needs and attitudes.

II Basic Criticisms of Existing Family Law Procedures

(a) *The Adversary System*

One basic shortcoming of the present procedure is the manner in which the Courts deal with matrimonial problems. The Common Law has almost invariably operated on the basis of the adversary system. And so, when the Courts were given jurisdiction in divorce, the adversary system was employed as a matter of course. The concept of the matrimonial offence* obviously lent itself to a procedure which had proved highly effective in searching out the truth in other areas of legal contest. And the same system was used to deal with new jurisdictions in custody disputes, maintenance and related law. There have been some notable attempts to modify this procedure which have met with varying degrees of success, but in essence Family Law is dealt with by the adversary system.

The adversary system has great value in certain areas of law, but in such fields as Family Law it has serious disadvantages. This is because the adversary system and the investigation of relationships which are found quite independently of the law are not really compatible. The real interests involved tend to get obscured or ignored in a system which involves shifting the burden of losses and winning advantages by proving the inadequacies of the other party, or by proving that someone else was at fault. It is said that the community has an interest in the stability of marriage which is different in kind to interest in the

*Imported from the Canon Law where it was used, not for divorce, but for a form of separation—divorce *a mensa et thoro*.

stability of a private contract; but in Court they are dealt with by a process which is basically the same in both cases.

In other words, the system is weighted against a truly effective investigation of the basic issue.

This general criticism applies in all areas of family law. By way of illustration, it will be discussed here in relation to divorce procedure. Three shortcomings may be noted in this respect.

First, under the adversary system, a petitioner for divorce need only present sufficient evidence of a single offence to succeed upon his petition or, in the case of divorce on the ground of a separation agreement, sufficient evidence of that agreement. Thus the facts upon which the Court issues a decree to end a marriage seldom prove that the marriage has in fact ended.

This inadequacy is, of course, attributable more to the substantive law which looks to fault and provides for divorce on the grounds of a matrimonial offence. That offence is usually but one symptom of the breakdown of the marriage, rather than the cause, with limited execptions. Both the substantive and procedural law should be altered in order that the Court may effectively determine whether a marriage has, in fact, irremediably broken down.[3]

The second criticism is that the procedure can lead to abuse. If it is merely sufficient for a petitioner to present evidence on one point, there is wide scope for the unscrupulous. As nine members of the Morton Commission on Marriage and Divorce said:

> "We think it may be said that the law of divorce, as it at present exists, is indeed weighted in favour of the least scrupulous, the least honourable and least sensitive and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage."[4]

No doubt examples of the unscrupulous petitioner are sometimes exaggerated. And it may be that if the spouses are prepared to be unscrupulous, dishonourable and insensitive in their attempts to end a marriage, then the marriage must in all probability have ended in fact. But the process can scarcely bring the law into good repute. And this is so without the further consideration that often there are children involved.

And thirdly, a procedure which involves the levelling of charges, and often a bitter reaction as a result, is bound to engender deep feeling, embarrassment and hostility. This may be emotionally dis-

[3] See now s.19 of the *Domestic Proceedings Act* 1968. Separation orders on proof of breakdown.

[4] *Report of the Royal Commission on Marriage and Divorce* (1956; Cmd. 9678), p. 23, para. 70 (v).

turbing for one or both of the spouses, and even more so for those children who might be involved, especially in view of the stigma which attaches to matrimonial proceedings.

Considering divorce proceedings independently of ancillary questions, it is true that these features are not always conspicuous. But this is probably so because very few petitions for divorce in New Zealand are defended. In Auckland during 1967, for example, of a total of 808 decrees granted, 20 were heard as defended (2.48%). Nevertheless, embarrassment or bitterness is bound to creep into most proceedings in one way or another.

As the Scarman Commission on Divorce observed:

> "Even in undefended cases . . . few petitioners remain unembarrassed and free from distress while testifying in public to the matrimonial offences of someone they once loved, or while confessing, as they have to do in about one-third of all cases, that they have themselves committed adultery."[5]

One final point may be made with respect to divorce procedure specifically. It may be said, with some justification, that for the Supreme Court Judges a considerable amount of time is wasted in hearing divorce petitions. Such an opinion is bound to be hotly disputed by the many people who believe that the very important question of divorce should be dealt with by the Supreme Court. This may be so, but the law and procedure employed to deal with this and related questions, does not sufficiently measure up to the importance of the issues involved.

This in itself may not be sufficient to justify the criticism that the Judges' time is wasted; until it is pointed out that, because of the shortcomings of the present system, the granting of a decree has become almost mechanical. The average time taken in hearing an undefended petition for divorce is about ten minutes. In Auckland alone this involves approximately 42 Judge days a year. As was suggested by an experienced officer of the Court, the present divorce procedure may be equated with a system which employs a civil engineer to dig a ditch.

(b) *Orientation of the Courts: Reconciliation*

Another basic objection is that the Courts are orientated in the wrong direction for maintaining the stability of marriage. In the Courts the whole emphasis is on whether a marriage has ended (or whether the spouses should be separated). It would be expected in view of the importance attached to preserving marriages that the law and the Courts would be directed positively towards saving marriages. But in practice, if not in theory, the system is weighted in the negative direction of deciding whether marriages have ended.

Connected with this aspect is the fact that the role of the Court is not effectively co-ordinated with the roles of the other institutions

[5] *United Kingdom Law Commission Report on Reform of the Grounds of Divorce* (1966; Cmd. 3123), p. 14, para. 25 (f).

which play a part in family relationships, some of which were mentioned in the introduction. And in fact, it may be said that the Courts are not really effectively integrated into society as a whole in this role. As Dr Inglis has said with some justification, it is probable:

> ". . . that, in the eyes of the general public, the Court is where you go to get a divorce or a separation: the Court is just not interested in whether the marriage can be saved, but only in enquiring into the question whether there are proper grounds for dissolving it."[6]

The present system is criticised, not because the Courts are unable themselves to achieve reconciliation (although this is one possible type of reform which will be discussed below), but because the law and the procedure which surrounds it affords little effective encouragement to this end.

Under Section 4 of the *Matrimonial Proceedings Act* 1963 the Court is under a duty to consider the possibility of reconciliation when any proceedings for separation, restitution of conjugal rights, dissolution of a voidable marriage or divorce have been instituted. There is power to adjourn the proceedings, in certain circumstances, if there is a reasonable possibility of reconciliation. But the benefits to be gained from this provision are, in practice, most often illusory.

Some of the criticisms already made support this contention. The adversary system, for example, is most likely to hinder reconciliation rather than encourage it. One of the circumstances in which the Court may adjourn the proceedings is when it appears from the evidence that a reconciliation is reasonably possible. But the evidence required to decide the issue is seldom evidence which indicates the true state of the marriage.

These points have already been raised. There are a number of other factors which stand in the way of reconciliation.

One is that by the time a matrimonial dispute reaches the Courts the chances of reconciliation are bound to be minimal. As several authorities have pointed out, no one commences divorce or separation proceedings in order to effect a reconciliation. Of course, this attitude is not a direct result of the law or of Court procedure; but the consequences which do follow result from the fact that the Courts are working on wrong principles and in the wrong direction; and they do not effectively co-ordinate with other institutions or organisations designed to preserve marriages. It all means that such provisions as those contained in the *Matrimonial Proceedings Act* are destined to be largely ineffectual.

Another point is that, under the existing law, a petitioner is advised to remain at arms length from his or her spouse, in order not to prejudice the petition. Collusion is a bar to a decree under s.31 of the

[6] Inglis, *The Hearing of Matrimonial and Custody Cases*, in *Family Law Centenary Essays*, pp. 36–37.

Matrimonial Proceedings Act and under s.29 condonation, except in certain cases, is also a bar.

There are obvious and important reasons for these provisions, but they have the detrimental effect of deterring many petitioners from attempting a reconciliation. This drawback is partially offset by Sections 26, 29(5) and 34(2)[7] relating to cohabitation for a continuous period of not more than three months when reconciliation is the sole or principal motive. Nevertheless, this is an entirely arbitrary rule by which the law seeks to prescribe the point at which a marriage is either viable or foundering.

Similar obstacles lay in the way of conciliation procedures under the *Destitute Persons Act* 1910. The important changes and additions in the *Domestic Proceedings Act* 1968, however, will hopefully make conciliation in the Magistrates' Courts a meaningful process. Some of these new provisions will be noted below.

(c) *Special Skills*

The third basic criticism is that problems which arise in family law often require special non-legal skills for their solution, but these skills are not always made available, or fully utilized. This question may be discussed in relation to custody, an area in which it has particular significance.

Section 23(1) of the *Guardianship Act* 1968 (not yet in force) provides that:

> "In any proceedings where any matter relating to the custody or guardianship of or access to a child . . . is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."

This general and important provision is supported by positive sanctions, such as s.49 of the *Matrimonial Proceedings Act* 1963.[8] By virtue of this section no final decree of divorce or dissolution of marriage shall be made unless the Court is satisfied that satisfactory arrangements have been made for the custody and welfare of the children of the marriage.

It cannot be doubted that the Courts have applied this provision as effectively as possible in most cases. But several factors have tended to act against the most beneficial operation of the section. Some shortcomings of a procedural nature will now be discussed.

One difficulty is that although the Courts are required to, and do, give first and paramount consideration to what is the best interests of the child, they are not in some respects best qualified to make the decision. There will often be much more involved in deciding what is in the child's best interests than many judicial officers are trained, or able, to discern and evaluate.

[7] As amended by the *Matrimonial Proceedings Amendment Act* 1968, s.3.

[8] As amended by the *Matrimonial Proceedings Amendment Act* 1968, s.5.

Certain provisions are designed to help the Court in making the best decision, but these in themselves have shortcomings.

First, the parties are required to disclose all the arrangements intended for the children. But the parties are deeply involved and very interested participants. Both sides will present evidence most favourable to their cases and, as noted above, the Court may have difficulty in deciding which of the proposed arrangements will be most suitable for the children. And when a decision is reached there can be a tendency to give a rubber-stamp endorsement to the arrangements proposed by the successful petitioner.

This leads to a second point. The Courts can call for the assistance of a Child Welfare Officer who, when requested, will submit a report on various matters concerning the child's welfare seen from an experienced point of view. Unfortunately, the effects of this valuable service have been limited. One reason for this is that the powers of investigation are, perhaps of necessity, limited. But more important, there is an apparent reluctance on the part of the Courts to use the Welfare Service. In 1965, for example, there were only 114 reports prepared on the custody of children, but there were 1364 families in respect of whom the Child Welfare Division considered reports might well have been obtained.[9]

This could be attributable in part to a rather sensitive attitude of the Courts towards the independence of their jurisdiction, but it also suggests a general lack of co-ordination between the Courts and the social sciences.

Indeed, the fact that the Court and not the Welfare Officer decides whether a report is necessary would seem to bear this out. A report is called for in order to assist the Court in dealing with a problem for which a lawyer has no special qualification. How, therefore, can a lawyer accurately determine whether or not a particular case is of such a nature as to warrant the professional investigation of a Welfare Officer?

A third procedure which may be useful to a Judge or Magistrate is the practice of interviewing the child or children in Chambers. On occasions this will be particularly helpful because the Judge or Magistrate is able to supplement the evidence of contesting parents with his own independent assessment at first hand. But this practice is subject to the objection already made—Judges and Magistrates are not equipped with any special skills necessary for such interviews, and immediate impression could lead to a wrong decision.

In conclusion two further points may be briefly noted. First, there is a rather common practice in custody proceedings for the Judge to base his decision, in part or in whole, on one of a number of assumptions. For example, the most common is, perhaps, the "mother prin-

[9] Child Welfare Division Statistics, quoted by Taylor, *op. cit.*, p. 102.

ciple" which holds that young children and especially girls, are generally best cared for by the mother. There are obvious dangers in placing too much reliance in the particular case on this very general assumption. Here psychology, among other things, must play its part.

The second point is that the provisions of the *Guardianship of Infants Act* can only be of effect when there are proceedings before the Court which affect the children. As one writer has observed.[10]

> ". . . the overwhelming majority of divorce cases have been preceded by a period of separation during which the custody of the children is left entirely to the parents."

The figure is put at approximately 66%, with the added observation that in perhaps 50% of adultery cases the parties have been living apart for a time.

There are a number of other areas of Family Law which could be examined where there is scope for improvement. However, no attempt will be made to investigate these areas, although some of the general criticisms already made are relevant, and the broad proposals made in the following pages would cover other categories of Family Law.

III Reform

The Objectives

The objectives of reform are as follows:

(1) The first and paramount objective of the law and its administration should be the maintenance of the stability of marriage.

It was noted above[11] that the role of the law in this respect is of necessity limited. However, it was also pointed out that even in this limited role the Courts are not orientated positively towards saving marriages. In the next section changes are proposed which would shift the initial emphasis towards this positive end.

(2) The second objective is that when marriages have irremediably broken down in fact, the "empty legal shell [should] be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation."[12]

There is a need to sever all legal ties which do not exist in fact, and to do this in a manner which will not make relationships between the parties worse. If there is no stigma attached to divorce, and if harmonious relationships between the parties and their children are encouraged, then divorce will become in the eyes of the law, and society generally, a constructive rather than a destructive operation.

(3) Thirdly, all matters ancillary to divorce or separation proceedings

[10] Black, "An examination of some aspects of the Law relating to the Rights of Children Whose Parents Live Apart". Paper presented to the Int. Business and Law Symposium, Auck. 1968, A.U.

[11] In the introduction.

[12] *United Kingdom Law Commission Report on Reform of the grounds of Divorce*, (1966; Cmd. 3123), p. 10, para. 15 (ii).

must be dealt with by the most effective and efficient means in order that the real interests involved are given the maximum consideration and protection.

(4) Successful implementation of these objectives will attain the fourth of them: in the area of Family Law, which is pre-eminently social in nature and is liable to affect everyone in one way or another, the law and its administration must be respected and understood.

Before turning to the proposed reforms it will be appropriate to make one observation on the nature of these recommendations. What is proposed is put forward as an outline of a total reform. It is clear that if certain recommendations were implemented out of the total context the consequences might involve a step back rather than forward.

For example, having a reformed Court procedure intended to give greater emphasis to reconciliation in cases that warrant it would be of little value if there were not the trained counsellors available to deal with the problem; as occurred under the *Domestic Proceedings Act* 1939.

And again, it is apparent that many of the objections raised against particular proposals are based on their impracticability under the present system.

For example, one argument of the Scarman Commission against an investigatory procedure for divorce proceeds along these lines: undefended divorces take only ten minutes, which means that a Judge cannot make a thorough investigation and therefore investigation is not feasible.[13] But it is not suggested that an investigatory procedure should be forced into the present ten-minute and largely mechanical operation.

It is also argued by the Commission[14] that introducing a new ground for divorce would probably raise the number of divorces. But introduction of the whole proposed system would be aimed at raising the number of marriages saved.

Admittedly the Scarman Commission does recognise the important difference between introducing changes into the present Court structure and introducing changes into a completely re-organised structure.[15] It must therefore be stressed that the proposed changes involve a complete reorganisation.

IV Reform

The Proposals

The proposals put forward here deal with major changes in the structure and procedure of the Courts. It is not within the scope of this

[13] *United Kingdom Law Commission Report on Reform of the grounds of Divorce*, (1966; Cmd. 3123), pp. 31–32 para. 60.
[14] *ibid.*, 34–35, paras. 67–69.
[15] *ibid.*, 32, para. 61; and see p. 6, para. 4.

paper to further examine the need for reform of the substantive law. Nevertheless, substantive reforms are considered to be necessary, and would in fact have to be made in conjunction with the recommended changes in procedure and structure. The nature of such reforms will be indicated where necessary in the following pages.

(a) *A New Court*

It is recommended that a special Family Court be established to deal with all Family Law questions. What follows is a description of the jurisdiction, status, composition, and broad functions of this new Court. The manner in which it would function in certain particular areas of Family Law will be discussed in the succeeding subsections.

Jurisdiction: The new Court would have jurisdiction in all questions of Family Law. The status of this Court is a question of some importance. There would undoubtedly be opposition to any change which removed present Family Law jurisdiction from the Supreme Court. The status of the Court, it is said, must reflect the importance of the issues involved.

This point has some validity, but it is clear that the bulk of Family Law work is carried out in the Magistrates' Court.

Statistics from Auckland during 1967 reveal this fact. In the Magistrates' Court there were over 1400 orders and variations of orders under the *Destitute Persons Act* 1910 alone. In the Supreme Court, there were 28 applications under the *Matrimonial Property Act* 1963, 66 applications for ancillary relief, and 808 decrees nisi granted. This disparity is even more revealing when detailed figures for divorce are considered. Almost 98% of the petitions were undefended and each was therefore, as indicated above, dealt with in about ten minutes. And 62% of the decrees were based on separation, either orders originating from the Magistrates' Court or agreements between the parties.

The recent Family Law legislation appears to have given even greater emphasis to the importance of the Magistrates' Court.

The *Domestic Proceedings Act* 1968 requires specialist Magistrates to exercise sole jurisdiction in domestic law.[16]

The Magistrates' Court has been given wider jurisdiction in guardianship questions[17] and, under the *Matrimonial Property Act*,[18] over the matrimonial name and other property.

The concept of marriage breakdown has been made the only real ground for a separation order,[19] which is now a ground for divorce

[16] *Domestic Proceedings Act* 1968, s.7.

[17] *Guardianship Act* 1968, s.4, cf *Guardianship of Infants Act* 1926, s.7.

[18] *Matrimonial Property Act* 1963, s.5, as amended by *Matrimonial Property Amendment Act* 1968, s.2.

[19] *Domestic Proceedings Act* 1968, s.19.

after two years.[20] The separation order, or the agreement which is also a ground for divorce after two years, may attract an even greater number of petitioners by posing a course of action more desirable than desertion or a divorce petition on the grounds of adultery.[21] This would further reduce the real jurisdiction of the Supreme Court.[22]

Since it is apparent that Family Law questions are now dealt with mainly by the Magistrates' Court, with the implementation of improved machinery, it is possible as well as desirable to create an independent Family Court. This would be similar in status to the present Magistrates' Court. Provision should be made, however, for a right to seek a hearing before a Judge of the Supreme Court in cases of particular importance or difficulty, and with a right of appeal to the Supreme Court with leave in all cases previously heard in the Family Court.

Such a system would combine the advantages of a summary jurisdiction as well as reflecting in sufficient measure the importance of the issues involved. A special Court of this nature is also necessary for carrying out the procedures suggested below.

Composition: The Court would be presided over by a Commissioner who would be a qualified lawyer of seven years standing, specially appointed to the Court by virtue of personal qualification and expertise in the area of Family Law. The Commissioners could be either permanent or part-time, depending on the locality.

The Court would be assisted by officers trained in dealing with social problems relating to the family. Such a proposal is not over-ambitious. Some machinery already exists, and the system can be fully implemented by constructive use of existing marriage guidance organisations and of the trained staff of the Social Security Department and the Child Welfare Division.

In all cases when it is deemed necessary, the Court would have power to appoint solicitors or Counsel to make investigations which are outside the competence of the "Welfare Officers"; and to act as Counsel for unrepresented parties (notably children), or for the Crown.[23]

General Procedure and Functions: The general functions of the Official Solicitors and Counsel have already been described. The duties and functions of the "Welfare Officers" will be described below.

The important point to emphasise here is that the Court procedure must lose the existing rigid formality and technicality whilst reflecting

[20] *Matrimonial Proceedings Act* 1963, s.21 (1) (n), as amended by *Matrimonial Proceedings Amendment Act* 1968, s.2 (e).

[21] Which at present are the only other important grounds for divorce: Auckland, 1967—Adultery 29%; Desertion about 8%.

[22] Attention may also be drawn to the proposal of the Presbyterian Church which would make adultery a ground for a separation order but not for divorce.

[23] Note *Matrimonial Proceedings Act* 1963, s.71, and *Domestic Proceedings Act* 1968, s.10.

the seriousness of the issues involved. It is suggested that this would be achieved by abolishing the adversary procedure and substituting a procedure which has the form and substance of an investigation.[24] This will necessarily involve changes in the substantive law, especially the existing grounds for divorce;[25] some of the rules of evidence; and, in terms of procedure some of the techniques of Counsel.

The objectives in such a change, which will be elaborated below, are to remedy the shortcomings of the present procedure described in Section II. The bitterness, embarrassment and hostility produced by the adversary system will be reduced to a minimum; the stigma attached to some matrimonial proceedings will be lost; and, most importantly, the Courts will be able to make a thorough and effective investigation of the real issues.

This major procedural change would be accompanied by more detailed reforms, two of which will be noted in this section.

First, it would be highly desirable if divorce and all ancillary questions were dealt with during one hearing. The advantages inherent in this are several. The compounded bitterness and frustration of fragmented proceedings would be avoided, as would unnecessary expenditure of money and time. And with expanded pleadings covering all relevant issues the Court would be better able to deal effectively and justly with every interest involved. This is of especial importance with respect to the maintenance and custody of any children involved.

Secondly, there is a need to examine the existing powers of the Supreme Court to hear evidence *in camera.* It is suggested that the Court's discretionary power under s.83 of the *Matrimonial Proceedings Act* should be extended beyond a discretion to be exercised "in the interests of public morals".

(b) *Reconciliation*

A problem of considerable magnitude which has already been discussed is that, once a matrimonial dispute reaches the stage of divorce or separation proceedings, the possibility of reconciliation is slight. This is not a problem which can be overcome merely by making technical rules for conciliation within a framework of substantive and procedural law which tends to defeat the object.

The fundamental basis of the following proposals involves a complete shift in the initial emphasis of the law to the positive objective of saving marriages, and an effective co-ordination of all institutions involved in maintaining marital stability.

It is impossible to make a detailed examination of the changes necessary to achieve this objective, but the broad proposals may be outlined as follows:

[24] See *Putting Asunder*, p. 67, para. 84, and Appendix C, p. 117, para. 5.

[25] Below, subsection (c).

(1) Marriage guidance and conciliation, whatever form it may take, must be given real financial support;* it must attract and train highly qualified personnel; it must win the attention, support and respect of the community; it must, of course, win the confidence and support of the law.

(2) The need for an interview with a trained conciliator must be emphasised by various means as an initial and beneficial step to be taken by spouses who have been unable to solve their marital problems by themselves. At the present time there are good grounds for believing that many people see divorce or separation as the easiest way out of their difficulties,[26] when in fact they would rather save their marriage if they thought it possible.[27] By allowing divorce on the ground of a single matrimonial offence this attitude is clearly encouraged.

(3) There are a number of ways in which spouses may be encouraged to seek the aid of a marriage guidance counsellor before seeking separation or divorce through the Courts, if that is necessary.

Most English proposals favour emphasis on private counselling and conciliation, arguing that compulsory conciliation is self-defeating.[28] As well as recommending the support of private agencies as outlined in (1) above, the English Commissions favour placing initial emphasis on conciliation when the dispute reaches a lawyer or the Courts. The Scarman Commission, for example, favour, *inter alia*, the introduction of a law similar to that contained in Rule 15 of the Australian Matrimonial Causes Rules.[29] This rule requires that "when a matrimonial petition is filed the solicitor acting for the petitioner must certify, *inter alia*, that he has brought the names of available marriage guidance organisations to the attention of his client and has discussed with him the possibility of a reconciliation being effected, either with or without the assistance of such an organisation".[30]

In Toledo and Los Angeles, conciliation procedures are operated by special Family Courts. In Toledo conciliation is put into operation on the filing of any matrimonial proceedings; always when there are children under fourteen; and otherwise whenever it is considered worthwhile. Apparently only a few more than 50% of the cases which come to Court end in divorce, even though the Court may order the attendance of both spouses.

*NOTE: The Justice Department appropriations for this purpose were quadrupled in 1968.

[26] *Putting Asunder*, Appendix D—Psychological Considerations. p. 144, para. 8.

[27] *ibid.*, 141, para. 2, n. 2. In one survey it was found that only about 50% of those divorced in U.K. (1964) sought help from Marriage Guidance Councellor.

[28] e.g.: *Morton Commission* (Cmd. 9678), para. 340; *Putting Asunder*, para. 76; *Scarman Commission* (Cmd. 3123), para. 30.

[29] (Cmd. 3123), para. 31.

[30] See also *Matrimonial Causes Act* 1959 (*Aust.*), s.14 (1) (b)—with the consent of both parties the Judge may interview them in Chambers, with or without Counsel.

In Los Angeles the system is similar with the addition of a novel procedure called a petition for reconciliation. The object of this procedure is that either spouse may implement a Court procedure which is positively directed towards saving marriages before divorce or separation are considered. The statistics given by Dr Inglis indicate that 60% of these petitions are successful.[31]

The attraction of the American procedures lies in their proven success, and there are good grounds for suggesting that a modified system along the same lines would be successful in New Zealand. In fact, the *Domestic Proceedings Act* 1968 introduces conciliation procedures for the Magistrates' Court which are similar in some respects to the American systems. There is a general duty cast on the Court and lawyers to consider the possibility of reconciliation, (s.13); and there is provision for adjournment, (s.15). But more importantly, it is possible to obtain Court authorised conciliation without instituting other proceedings, (s.14); the Court may issue a summons requiring a party to attend before a conciliator, (s.16(4)); and may approve any agreement reached, (s.17).

Provisions similar to these would be incorporated into the new system. It is desirable to emphasise voluntary conciliation initially, with a power vested in the Court to enforce conciliation where necessary. In this respect the special officers of the Court would play an important role, but it would be the object of the proposals outlined in (1) and (2) above, and in the next subsection, to ensure that few marital disputes that reach the stage of divorce or separation proceedings would necessitate Court enforced conciliation.

(4) The law and procedure of the Courts must reflect these positive efforts aimed at saving marriages. It has already been suggested that the part played by the Court in the actual process of reconciliation will not be great. But the Court would be indirectly, and occasionally directly, effective in encouraging reconciliation by providing assistance when necessary through the trained officers of the Court; by abolishing the technical rules as to condonation and collusion (except where there is an attempt to pervert the course of justice); by allowing proceedings to be abandoned at any stage;[32] and by virtue of the general and less formal Court procedures outlined in Section (a), which would encourage harmonious relationships between the spouses at all stages of the proceedings.

(c) *Divorce*

In the field of divorce major reforms are considered to be necessary both in the substantive law and in the procedure of the Courts. Introduction of the procedural changes envisaged in this section would have

[31] Inglis, *Centenary Essays*, p. 46.

[32] See *Domestic Proceedings Act* 1968, s.22.

to be accompanied by introduction of a single ground for divorce—that the marriage has irremediably broken down. It is not possible to examine here the advantages and disadvantages in this single ground for divorce, although some of the arguments in its favour have already been made. It is clear, however, that divorce on the single ground that the marriage had irremediably broken down is both highly suited to and necessary for the proposals for a new general procedure made here. The following recommended procedure, described in general terms, is designed for divorce on this ground, and is intended to achieve the second objective outlined in Section III, which includes a thorough investigation into the real issue which should decide any divorce proceeding.

One of the bases of this new procedure for divorce is that the reformed system of marriage guidance counselling, already described, will be effectively implemented. The whole system of conciliation will be geared to the positive end of saving marriages and will thus constitute the most effective means for discovering whether or not a marriage is still basically intact.

For this reason it is suggested that if the reconciliation system is worked successfully, not many cases will reach the stage of divorce (or separation) proceedings when the marriage has not in fact broken down. In this case a major part of the investigation into the state of the marriage will have already been carried out, and carried out by persons who are, in one respect, most qualified to make the investigation. This is one example of the co-ordination between the Courts and the social sciences which is envisaged.

It is also a procedure which will overcome the difficulty often raised by critics of an "investigation" into the alleged "breakdown of a marriage"—that such a procedure would be slow and cannot be practically managed by the Courts.

It is, of course, too much to expect that in all cases which reach the state of divorce proceedings the marriage will have broken down, or perhaps more correctly, that this question has been properly investigated outside the Courts—if at all. For this reason there must be procedure to check on the true nature of any attempts at reconciliation and to investigate whether reconciliation has been attempted at all. In this area the Court officers will operate.

In all cases it will be necessary before instituting Court proceedings, to discover whether reconciliation has been attempted. If not, the Court may suggest or order conciliation in those cases where, on the basis of a report by the Court officer, it is considered to be useful. It must be emphasised that if the whole concept of the reforms is implemented, such orders will not result in a mere formality of conciliation. The reasons for this have been made clear enough elsewhere. The whole

basis and orientation of the proceedings will be aimed at making it possible to achieve reconciliation at any stage. (In Hungary, where breakdown is the sole ground for divorce and where reconciliation is emphasised—the Judge may also take an active part in the proceedings —25% to 30% of petitions actually filed never come up for final deliberation.[33])

In some cases it may be necessary for the Court officers to make a thorough investigation in particular cases but it is intended, and to be desired, that the reconciliation system will make these occasions few.

Once in Court the proceedings need not be unduly drawn out because, by this stage, the true state of the marriage will have been thoroughly investigated. It will still be necessary, however, that the presumption be made that the marriage is still intact until it is proved otherwise. This will allow for the possibility of reconciliation even at this stage: and such a possibility will be given constructive encouragement by the tenor and substance of the procedure described in subsection (a) above.

The petition, as well as covering all ancillary matters, should set out the alleged causes of breakdown, an account of the attempts made to achieve reconciliation, and a review of any salient features of the matrimonial history considered necessary to support the allegation. A few observations may be made on this part of the proceedings in conclusion.

First, a major part of the investigation will have already been carried out, and therefore positive proof of the failure of real attempts at reconciliation will be in many cases strong evidence that the marriage has broken down.

This leads to the second point. The marriage guidance counsellor involved would be required to state only that reconciliation had been attempted and failed. If the conciliation procedure is as effective and successful as envisaged, there is no reason why a counsellor should be required to reveal the substance of his interviews—a requirement which would be highly prejudicial to the whole object of marriage guidance counselling. The safeguard would be an independent investigation by the trained officers of the Court if it was ever considered necessary. It would also be possible to order an interview with a Court appointed counsellor, or the Court officers.

The third point is that, since the procedure involves an investigation of breakdown of the marriage and not what amounts to a trial of one spouse, it would be desirable and possible to encourage the attendance of both spouses. It would be desirable in order to hear the other side of the story (which in all probability would in many cases be similar

[33] See *Putting Asunder*, Appendix B, pp. 112–114 paras. 24–31.

since over 98% of divorces are undefended*). And it would be possible to encourage attendance of the other spouse, because he or she would encourage reasonably harmonious relations between the spouses; and because the Court would also be disposing of all other matters outstanding between the husband and wife.

(d) *Custody*

There is obvious scope for procedural (and substantive) reform in many other areas of Family Law. The new procedures proposed would be suitable for dealing with such questions as maintenance of the children and one spouse, the division of matrimonial property, investigation into illegitimacy and paternity, and separation (which may be included partly in the discussion of divorce). It is intended, however, to conclude this paper with a brief discussion of reforms in custody proceedings only.

It must be noted that the procedures at present available to the Courts in question of custody, are potentially most effective. But, for the reasons set out above, they have not been fully utilized. Provisions have now been made under the *Guardianship Act* 1968 (s.30) and the *Domestic Proceedings Act* 1968 (s. 10) for Court appointed solicitors and Counsel, but these officers may be used as infrequently as the Child Welfare Officers.

It is difficult, of course, to overcome the possibly oversensitive, if understandable, attitude of the Courts to the independence of their jurisdiction. It is of basic importance, however, that custody along with all matters relating to the family, should be regarded as a social problem with legal aspects; and not the opposite. And, therefore, provisions for Welfare reports and special solicitors and Counsel must be made, and recognized as, a part of and not an adjunct to, the operation of the Court.

The reforms outlined below are aimed at achieving these ends and at giving greatest effect to the general principles of the *Guardianship Act* 1968.

(1) The general proposals already made as to the social orientation and investigatory procedure would, in the first place, put the Court in a position to give real and effective consideration to the child's welfare.

(2) The trained and experienced Welfare Officers would be of prime importance. It is suggested, first, that these officers, and not the presiding Commissioner, should decide in all cases whether or not a Welfare report is necessary. Secondly, their powers of investigation

*Although, of course, in a certain proportion of the cases the other spouse would be opposed to the divorce but unwilling, for one or more of a number of reasons, to attend and defend it. On the other hand, a number of divorces are defended only in order to secure advantages in disputes over ancillary matters.

should be extended in order that the Court may have available a report which covers all circumstances which are relevant for deciding what arrangements are in the best interests of the child or children. The officer would be in Court whenever necessary and provision should be made for the officer to be present at interviews of a child in Chambers.

These proposals, it is suggested, would provide for an effective employment of the facilities of the Child Welfare Department. In all necessary cases a report will be available from a person who is qualified to decide what is in the best interests of an infant from a non-legal point of view; it will be an independent report against which the arrangements proposed by the parties may be checked by the Court; a highly desirable flexibility will be introduced into the Court to the extent that the Judge, through the Court officers, will be able to get within the "four walls of the home"; and it will mean that the Court's decisions are founded on sound principles, incorporating child welfare experience, psychology, sociology and law.

(3) The other special officers of the Court are the Official Solicitors and Counsel whose general functions were described above. In custody proceedings these officials would be empowered to make independent investigations of law and fact not within the competence of the "Welfare Officers". This would provide a check on the allegations of the parties to the proceedings and would ensure, wherever necessary, that particular points of law or fact were not overlooked by the Court. Counsel would also be appointed to represent the children whenever the Court considered this desirable.

(4) One other problem in relation to custody may be partially overcome. Since it is envisaged that emphasis be given to conciliation at an early stage of matrimonial dispute, it will mean that the question of a child's welfare may also be brought early to official notice.[34] This would certainly be possible where one party seeks a Court order for conciliation (i.e. without instituting other proceedings).[35] From the conciliator's report the Court would know the outcome of the attempt at reconciliation and thus the possible predicament of any child.

V Conclusion

Attention in this paper has been directed essentially to some general problems of law in society and not to a detailed consideration of Family Law in isolation. The criticisms and proposals are broad outlines of basic problems and ways of solving them and not intended to be definitive.

Penetrating investigations of existing statutes and rules of procedure are, of course, essential whenever there is a need to remedy shortcomings in the law. But it is always important to remember that faults arise in

[34] *ante*, p. 50 *et. seq.*

[35] *Domestic Proceedings Act* 1968, s.14.

the law because it is not effectively serving society. There is a tendency on the part of many lawyers to regard the law as an end in itself and as their special preserve. For this reason they often view the law in isolation from its proper social context.

Good law is not made for the convenience of lawyers. It is administered by lawyers for the benefit of society. The law must be viewed first and foremost from this perspective. Therefore, reform in any particular area of law should be directed towards society as a whole.

The social implications of Family Law are perhaps more obvious than in any other field of law. This law and its administration must be integrated into the whole social framework surrounding the family unit and made to serve the real needs and interests of society to the fullest extent; it must be effectively co-ordinated with the other social institutions involved in regulating family relationships; and it must be orientated positively towards promoting stability in the family.

The proposals for reform suggested in this paper attempt to direct the law towards this end.