

BEHIND THE LAW OF DIVORCE: A MODERN PERSPECTIVE¹

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1. INTRODUCTORY

'Divorce presupposes marriage', said Karl Llewellyn,² 'Without marriage it lacks all meaning. From marriage it takes origin, form, effect. Change the practices of marriage, and divorce, after due lag, will be found readjusting to suit'. In three analagous Common Law jurisdictions — England,³ Canada,⁴ and, most recently, Australia⁵ — readjustment has taken place over the last few years. As will be later observed,⁶ each jurisdiction has adopted a somewhat different approach towards the resolution of the problem of finding a divorce law which reflects adequately the opinions and feelings of the particular society and fulfills properly their needs and aspirations. Accordingly, it is the purpose of this article to consider aspects of the divorce laws of these three countries in relation to modern thought and conditions.

2. DIVORCE AS LAW AND POLICY

There has been a massive change in divorce law throughout the English speaking world, not only since Llewellyn wrote, but over the last few years.⁷ In the United States, there has been a strong movement away from fault based grounds towards such grounds as, 'Breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved'⁸ or, more simply, 'That marriage is irretrievably broken.'⁹ In England and Canada the response has been more cautious. In England, the legislature has chosen to adopt¹⁰ a compromise between the doctrine of

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1. The title 'Behind the Law of Divorce' was originally used by Karl Llewellyn for a two part article at (1932) 32 *Columbia L.R.* 1281, (1933) 33 *Columbia L.R.* 249.

2. (1932) 32 *Columbia L.R.* 1281 at p. 1281.

3. *Divorce Reform Act* 1969, now subsumed into the *Matrimonial Causes Act* 1973.

4. *Divorce Act* 1968.

5. *Family Law Act* 1975.

6. *Infra* text at n. 102 ff.

7. Just how great the change has been may be observed from Freed's two articles both entitled, 'The Grounds for Divorce in American Jurisdictions' (1972) 6 *Fam. L.Q.* 179 and (1974) 8 *Fam. L.Q.* 401.

8. Iowa (Iowa Code Ann. para. 598:17) and Michigan (Mich. Comp. Laws. Ann. para. 552.6).

9. See, for example, Washington (Wash. Rev Code para 26.03).

10. *Divorce Reform Act* 1969 ss.1-2. This Act is now subsumed into the *Matrimonial Causes Act* 1973.

the matrimonial offence and the notion of irretrievable breakdown. Under English legislation, the sole ground for divorce is irretrievable breakdown¹¹ but the marriage will not be held to have been broken down unless the court is satisfied of certain conditions which correspond all too nearly to the old matrimonial offences of adultery,¹² cruelty¹³ and desertion,¹⁴ although provision is made for two no-fault grounds based on separation.¹⁵ In Canada, a breakdown ground, of which specific evidence is required,¹⁶ exists alongside a fragmented fault system.¹⁷ In Australia however, the matrimonial offence doctrine has entirely disappeared: it is provided that¹⁸ the sole ground for dissolution of marriage shall be that, '... the marriage has broken down irretrievably'. The *Family Law Act* 1975 further provides that a decree of dissolution,¹⁹ '... shall be made if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.'

The operation of ss.48(1) and 48(2) is modified by the following subsection which provides that a decree shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed. The *Family Law Act* 1975, indeed, emphasised reconciliation, notably in s.43(d) which states that the court shall have regard to, '... the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage' when exercising its jurisdiction under the Act. Further, a procedure for counselling and reconciliation is set out in ss.14-18 of the Act. However, the present writer has long felt sceptical of the value of such provisions: often they are resorted to far too late in the legal process to be of any real effect and, as the author has elsewhere suggested,²⁰ their existence may only be owed to a legislative disapprobation of divorce as a social phenomenon. It is also clear that the reconciliation provisions in the Australian *Matrimonial Causes Act* 1959-1966²¹ were not a success.²² However, it is early yet to make a judgment and it may be that this commentator will be proved wrong.

11. *Matrimonial Causes Act* 1973 s.1.

12. *Ibid.* s.2(1)(a).

13. *Ibid.* s.2(1)(b).

14. *Ibid.* s.2(1)(c).

15. *Ibid.* ss.2(1)(d) and 2(1)(e).

16. *Divorce Act* 1968 s.4.

17. *Divorce Act* 1968 s.3.

18. *Family Law Act* 1975 s.48(1).

19. *Ibid.* s.48(2).

20. 'The Enforcement of Marriage' (1974) 3 *Anglo-Am L.R.* 75 at p.83.

21. Ss. 14-17.

22. See H.A. Finlay, 'The Broken Marriage and the Courts' (1970) 7 *U. Qld. L.J.* 23 at p.31.

One problem which may arise out of the ground for divorce set out in s.48 arises out of s.49(2) of the *Family Law Act* which provides that, 'The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.' Section 49(2) thus raises the spectre of *Hopes v. Hopes*²³ and the two tests therein enunciated by Denning L.J. and Bucknill L.J. The better known test was that posited by Denning L.J. who said that²⁴ spouses could be said to be living separate and apart, '... when they cease to be one household and become two households ...' Bucknill L.J., however, propounded a test based more on intention than fact when he stated²⁵ that, '... there may be desertion although husband and wife are living in the same dwelling, if there is such a forsaking or abandoning by one spouse or the other ...' Despite the fact that the latter test has generally been accepted by Australian courts in connection with the matrimonial offence of desertion,²⁶ it is suggested that Denning L.J.'s test may be more applicable to the *Family Law Act*, because of its factual, as opposed to intentional, nature. Finally, s.49(1) of the Act disposes of the offence doctrine completely by providing that spouses may be held to have separated notwithstanding that the cohabitation was brought to an end '... by the action or conduct of one of the parties.'

Which jurisdiction, then, has adopted the most suitable solution to the problems raised? It is suggested that there can be little or no justification for the continued retention of the matrimonial offence in any form. In the vast majority of cases of marital breakdown it is simply wrong *in fact* to attribute the state of affairs solely to one, or other, indeed, either, party.²⁷ The case law which built up around the particular offences — particularly the desertion and cruelty grounds — is very often difficult and, in fact, the nominate grounds themselves are often scarcely in touch with reality.²⁸ In addition, the existence of the offences tends to lead to a discrepancy between the law as it is written and the law as it exists in fact, and Bodenheimer,²⁹ indeed, considers that the removal of this discrepancy is

23. [1949]P 227. For further comment on the relevant cases see Frank Bates, 'Cohabitation and Separation in the Law of Desertion' (1970) 21 *N.I.L.Q.* 111, 'Separation and Desertion — A Commonwealth Postscript' (1971) 34 *M.L.R.* 418 and J.N. Turner, 'Separate Lives and Section 28(m)' (1970) 2 *A.C.L.R.* 2.

24. [1949] P 227 at p.235.

25. *Ibid.* at p.234.

26. See *Matthews v. Matthews* [1948] V.L.R. 326. *Powell v. Powell* (1948) 77 C.L.R. 521, *Potter v. Potter* (1954) 90 C.L.R. 391 and *Johnson v. Johnson* [1964] V.R. 604.

27. For a more detailed analysis of this proposition see Dominian, *Marital Breakdown* (1968).

28. Thus, in Australia, prior to 1975, one act of adultery without more was grounds for divorce (*Matrimonial Causes Act 1959-1966 s.28(a)*), whereas cruelty had to be habitual and persisted in during one year (*Matrimonial Causes Act 1959-1966 s.28(d)*).

29. 'Reflections on the Future of the Grounds for Divorce' (1968) 8 *J. Fam. L.* 179 at pp.192-3.

central to any satisfactory divorce law. Actual court proceedings, where proof of conduct is required, are often extremely distressing for the parties and, thus, it is suggested that the Australian enactment³⁰ providing for a year's separation is to be welcomed. If no period of separation had been prescribed and the test had been 'irretrievable breakdown of marriage' *simpliciter* then the facts leading up to the alleged breakdown would still have to be proved. It is also better that the offence doctrine should disappear in its entirety as the English experience, where it exists behind camouflage, has shown that it dies hard.³¹ Finally, it is worth bearing in mind that the notion of 'breakdown' as a basis for divorce law is by no means a new phenomenon, being operative in the Swiss *Civil Code* of 1907.³² Of course, as Llewellyn strongly pointed out,³³ there will always be personal and psychological cost to the parties in a divorce action, but the Australian provisions seem likely to cut that cost drastically, particularly when viewed in the context of the *Family Court of Australia*, also created by the Act.³⁴ A valuable guide to the operation of the court is provided by s.97, dealing with procedure, which specifically states that proceedings shall be held in closed courts,³⁵ neither judge nor counsel shall robe,³⁶ that the court shall proceed without undue formality and that it will endeavour to ensure that the proceedings are not protracted.³⁷

Of course, the grounds for divorce themselves do not provide the whole answer to the problems which must be faced in the formulation of a realistic and humane divorce law. Of particular importance, as Llewellyn has stated,³⁸ is the protection of the economic position of the aggrieved wife. Despite the apparent change in the economic position of women, the remarks of Simon P in the important case of *Povey v. Povey*³⁹ remain true: '... the wife,' he said, 'may be entirely dependent on the husband, because with the functional division of labour between husband and wife, she may have sacrificed her own financial or economic prospects in order to free him to pursue his ...' The problem has been raised in graphic form by the decision of the Supreme Court of Canada in *Murdoch v. Murdoch*⁴⁰ where a wife who had significantly contributed to the accumulation of

30. *Family Law Act* 1975 s.48(2).

31. See the remarks of Bagnall J. in *Ash v. Ash* [1972] 2 W.L.R. 347 at p.351 for a graphic example. For a detailed discussion see Finlay, 'Reluctant, but Inevitable: The Retreat of Matrimonial Fault' (1975) 38 M.L.R. 153.

32. Section 142. Although the principle was modified by a provision to the effect that where breakdown was the fault of one spouse alone, that spouse was precluded from being the plaintiff in an action. See Friedmann *op.cit.* at p.241.

33. (1933) 33 *Columbia L.R.* 249 at pp.274-276.

34. *Family Law Act* 1975 ss.20-38.

35. S.97 (1) and see also s.97(2).

36. S.97(3).

37. S.97(4).

38. *Supra* at n.81.

39. [1972] Fam. 40 at p.51.

40. (1974) 41 D.L.R. (3d) 367.

the matrimonial finances by reason of physical labour performed in various ranching operations on successive properties was refused⁴¹ a half-interest in the marital property on the grounds that she had made no direct financial contribution. The implications of the *Murdoch* case have been denounced by the Law Reform Commission of Canada in their Working Paper, *Family Property* where they state, 'The object of property sharing should be on equal participation by both spouses in the financial gains of the marriage, regardless of the internal divisions of functions in the marriage – that is, who worked outside the home, who managed the household and who cared for children – before sharing took place'. In England, the powers of the court to adjust property rights⁴² are limited and do not really get to grips with the problems raised by *Murdoch v. Murdoch*. The property provisions, however, in the Australian *Family Law Act 1975* go very much further. In s.79(1), the court is empowered, with regard to marital property, to, '... make such order as it thinks fit altering the interests of the parties in the property ...' Amongst the matters which the court is required to take into account is,⁴³ '... the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent'. Although members of the Australian legal profession, with whom the writer has discussed the matter, are of the view that s.79 will be productive of litigation, it seems, to the present matter, that it attempts squarely to tackle the issues raised by *Murdoch* and the Canadian Law Reform Commission. It will be interesting to see its practical results.

A further cost of divorce, upon which Llewellyn laid major emphasis,⁴⁴ is the cost to children. In particular, Llewellyn referred⁴⁵ to the increased likelihood of delinquent behaviour amongst children of divorced parents. However, there is empirical evidence that effects of divorce on children are frequently exaggerated. Most recently, Burchinal,⁴⁶ in a study of children in Iowa, has found that no significant differences in either personality characteristics, existed amongst adolescents from unbroken, broken or reconstituted families. 'Inimical effects', he states⁴⁷ 'associated with divorce or separation ... were almost uniformly absent in the populations studied'. As regards delinquent behaviour, Nye⁴⁸ has adduced evidence to the effect that there is less delinquent behaviour amongst the children of

41. Laskin J. dissenting. No.8 (1975) at p.44.

42. *Matrimonial Causes Act 1973* s.24(1).

43. *Family Law Act 1975*. s.79(4)(b).

44. (1933) 33 *Columbia L.R.*

45. *Ibid.* at p.266.

46. 'Characteristics of Adolescents from Unbroken, Broken and Reconstituted Families' (1964) 26 *J. Marriage and Family* 44.

47. *Ibid.* at p.51.

48. 'Child Adjustment in Broken and in Unhappy Unbroken Homes' (1957) 19 *Marriage and Family Living* 7.

broken homes than amongst those of unhappy unbroken homes. Similarly, the Gluecks have shown⁴⁹ that the tendency towards delinquency is greater in homes broken by death than by divorce.

Despite findings of this kind, however, the problem of disputes over custody remains intractable. '[T]here is no branch of the law', said Herron C.J. of the Supreme Court of New South Wales in *Kocis v. Statz*⁵⁰ 'which is more difficult than the question of custody of a young child'. The difficulty is often exacerbated by parents who use children as weapons in their fight against one another. Thus, Landis reports⁵¹ that almost half the children studied by him stated that their parents had played on the children's sympathy, had tried to obtain information about the other parent, had lied about the other parent and had attempted to involve the children in their continuing quarrels. There is little that statute law can do directly to alleviate these problems. England⁵² Canada⁵³ and Australia⁵⁴ have all given the courts a wide discretion in such matters, subject to the proviso that the welfare of the child shall be the paramount consideration.⁵⁵ It is equally clear that although lip-service has been paid to the criterion of the child's *welfare*, other criteria have often been given precedence over it. Factors such as parental conduct,⁵⁶ the preferred role of one parent,⁵⁷ the desirability of a religious upbringing⁵⁸ and the maintenance of the blood-tie⁵⁹ have all, at one time or another, been regarded as crucial. It is essential that the courts cease to rely on rules of thumb such as those and approach questions of custody from a properly scientific standpoint. Fortunately, in Australia, at least, there is recent evidence that courts are now becoming more willing to do this. In the case of *Barnett v. Barnett*,⁶⁰ Hutley J.A. of the New South Wales Court of Appeal relied strongly on the evidence of a child psychologist and specifically refuted many of the criteria used in the past for deciding custody cases. In *Campbell v. Campbell*⁶¹ Bright J. of the Supreme Court of South Australia granted the custody of two young boys to their mother, who was living in a homosexual relationship, on the condition *inter alia* that they be seen

49. *Unravelling Juvenile Delinquency* (1950).

50. [1964] N.S.W.R. 667 at p.669. See also the remark of Singleton L.J. in *Willoughby v. Willoughby* [1951] P 184 at p.191.

51. 'The Trauma of Children When Parents Divorce' (1960) 22 *Marriage and Family Living* 7.

52. *Guardianship of Minors Act* 1971 s.1.

53. *Divorce Act* 1968 s.28(c).

54. *Family Law Act* 1975 s.64.

55. Not given statutory effect in Canadian Divorce legislation, but see *McKee v. McKee* [1951] D.L.R. 657 at p.666.

56. See, for example, *Re L (Infants)* [1962] 3 All E.R. 1 at p.4 per Harman L.J.

57. See, for example, *Kades v. Kades* (1961) 35 A.L.J.R. 251 at p.254 per the High Court of Australia.

58. See, for example, *In re Besant* (1879) 11 Ch.D. 508.

59. See, for example, *Re Agar-Ellis* (1883) 24 Ch.D. 317.

60. (1972-3) 2 A.L.R. 19. For more detailed comments see Bates, 'Custody of Children: Towards a New Approach' (1975) 49 A.L.J. 129.

61. (1974) 9 S.A.S.R. 25.

annually by a particular child psychiatrist. These cases represent, it is suggested, a notable and heartening development in that they seem to show that the courts are treating expert evidence with more respect than they have done in the past.⁶² If any kind of rational answer to the custody problem is to be found, it must lie in a proper, scientific judicial approach to the matter and to the issues which are involved rather than in any legislative enactment.

Australia, however, has adopted a particularly significant measure which, although well known in the United States,⁶³ marks a new departure elsewhere in Common Law jurisdictions.⁶⁴ It is provided by s.65 of the *Family Law Act* 1975 that, 'Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may of its own motion, or on the application of the child or of an organisation concerned with the welfare of children or of any other person, order that the child be separately represented . . .' The child is not regarded as a party in divorce proceedings and, thus, has no power to call or cross examine witnesses in proceedings which may well play a crucial part in his future development. Hence, s.65, it is suggested is an important and significant advance, which goes at least some way towards ensuring that the child's welfare is truly the paramount consideration.

3. DIVORCE AS FACT

'[T]he highest of all costs accompanying divorce,' said Llewellyn,⁶⁵ 'is the possible cost to the institution of wedlock. The permanence of marriage at large is faced with threat, in the interest of particular couples or persons who have missed out in their particular marriage'. Yet Llewellyn goes still further when he states,⁶⁶ ' . . . the growing *normality* of divorce may do, may now be doing, what the mere legal *possibility* of divorce did not originally suggest, unless as a calamity of the then distant future: it may be producing a spread of light-hearted, irresponsible wedding, of what-the-hell-its-worth-a-try attitude towards the life-work wedding presages'. Although Llewellyn's comments might well have seemed a fair and reasonable observation when he wrote, it is suggested that, in fact, they should be treated with very considerable caution. It is quite clear that there has been a vast increase in the numbers of divorces in all western coun-

62. See, for example, *Lynch v. Lynch* (1967) 8 F.L.R. 433.

63. See *Revised Uniform Marriage and Divorce Act* s.310.

64. It seems likely that some similar enactment will be effected in England as part of the controversial *Children Bill* 1975.

65. (1933) 32 *Columbia L.R.* 249 at p.276.

66. *Ibid.*

tries over the years.⁶⁷ Llewellyn called it a 'Galloping Increase' in 1932, when, in fact, the rate per 1,000 married females had dropped appreciably in the United States from the rate in the mid-1920s.⁶⁸ The first point to be made, therefore, is that considering numbers of divorces *in vacuo* is quite meaningless. Many other factors must be taken into account in order to appraise such statistics accurately: the general social climate, the number of marriages (and, as has been observed, the popularity of marriage is in no way declining), economic circumstances and, even, the increasing numbers of people available to be married or divorced. In addition, the most real increase in the rate of divorce may not be as great as at first sight appears: in Australia, Krupinski and Yule⁶⁹ have described the increase in divorces per 1,000 marriages, almost certainly the most effective and accurate criterion over recent years, as 'slight'. Goode has also pointed out⁷⁰ that figures relating to divorces per number of marriages have not always been available. Hence, attempting to draw wide conclusions from divorce statistics may well be a hazardous and unsatisfactory process.

There are other reasons why Llewellyn's suggestions may not be correct. First, statistics concerning divorce merely tell us about divorces, they do not tell us about marital conflict and marital disruption. Not every marriage which breaks down ends in divorce: the spouses may simply separate or they may continue to live together, in a greater or lesser state of disharmony, for a variety of reasons.⁷¹ If divorce and marital breakdown automatically meant the same, then, in countries such as the Republic of Ireland⁷² where no divorce law exists, marital breakdown would not exist either: yet experience has shown that this is not the case.⁷³ Further any correlation between a prevalent rate of divorce and any suggested collapse of the institutions of family and marriage is, at least, hard to prove. '[T]he traditional view', states Ailsa Burns in a recent paper,⁷⁴ 'that a high divorce rate betokens the breakdown of the family is without foundation'. In support of her contention she cites the findings of

67. For figures, in the United States, see Nye and Berardo *op.cit.* at pp.468-478. For Australia, see Krupinski and Yule *op.cit.* n.60 at p.241. For England and Wales, see Eekelaar, *Family Security and Family Breakdown* (1971) at p.34.

68. See Nye and Berardo *op.cit.* at p.467.

69. *Op.cit.* p.220.

70. *Loc.cit.* at n.74 at p.498.

71. One or both parties have a religious objection to divorce (See *Painter v. Painter*, ante. n.36), they may think it better for the children (ante n.75).

72. See *Constitution of Ireland* Art. 41(3)(2).

73. The immediate consequences of the absence of divorce law are a larger number of *de facto* relationships and a high illegitimacy rate. For information regarding the embryonic Family Law in Ireland I am indebted to Mr. William Binchy of the Department of Justice, Dublin, Mr. Patrick Horgan of the Faculty of Law University College Cork and Mr. William Duncan of the Faculty of Law, University of Dublin.

74. 'Marital Breakdown and Divorce' in *Families* (1974, ed Dawson) 33 at p.38.

such eminent commentators as McGregor,⁷⁵ O'Neill⁷⁶ and Carter and Glick.⁷⁷ A similar view is taken by Krupinski and Yule⁷⁸ who say that there is no evidence that mental conflict is more common than in the past. There is even less evidence, it is suggested, for Llewellyn's view that less severe divorce laws will encourage people to enter the marriage relationship lightly. Few, if any, people ever consider the possibility of divorce when they contemplate, or enter into, marriage.

The entire argument can, indeed, be taken a step further as represented by O'Neill's comment⁷⁹ that, '... divorce is not an anomaly or flaw of the conjugal marriage system but an essential feature of it.' Friedmann has expressed⁸⁰ the same view, in slightly different terms, when describing alternatives to the modern Catholic concept of marriage: 'People should be able to live out their lives as joyfully as possible under conditions which enable them to develop their personal capacities and potentialities. This means the right to correct errors, the right to cast off a burden that has become intolerable and may lead to the sapping of vital energies and the moral fibre of the affected parties'. Friedmann also views⁸¹ divorce from a different, though in no way incomparable, standpoint when he regards, '... the family as an intimate social unit, a community in miniature, which can be disrupted by an unhappy marriage to the detriment not only of the spouses, but of the children'. Thus, we can see divorce as *human fact*, a fact which must exist both for the development of the individual's personality and his social relations.

4. MARRIAGE, THE FAMILY AND SOCIETY

Although it is clear that the social institutions of marriage and family are closely interrelated, it is suggested that their interrelationship is more complex than at first sight appears. Immediately, there is dispute as to which is the more fundamental concept. Leslie,⁸² relying on Murdock,⁸³ describes marriage as, '... the complex of customs which regulates the relationship between [the couple themselves] and which provides for the creation of a family. Marriage specifies the appropriate way of establishing a relationship, the normative structure for ordering the relationship, and often includes

75. *Divorce in England: A Centenary Study* (1957), *Separated Spouses* (1970).

76. *Divorce in the Progressive Era* (1967).

77. *Marriage and Divorce: A Social and Economic Study* (1970).

78. *Op. cit.* n.60 at p.220.

79. *Op. cit.* n.93

80. *Law in a Changing Society* (2nd Ed, 1972) at p.239.

81. *Ibid.* at pp.240-241.

82. *The Family in Social Context* (1973) at p.14.

83. *Social Structure* (1949) at p.1.

provision for termination of it. From the legal point of view, the basic definition at common law may be found in the judgment of Lord Penzance in the case of *Hyde v. Hyde*⁸⁴ where it was said, 'I conceive that marriage as understood in Christendom may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others.' Implicit in the interpretation of this definition is the view that marriage is the basic institution.⁸⁵ Perhaps the most uncompromising statement may be found in the *Constitution of the Republic of Ireland*⁸⁶ which provides that, 'The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack'. There can, indeed, be little doubt that the law has continually taken the view that marriage is the basic institution and must be defended as such. For example, Romer L.J. in the case of *Cohen v. Cohen*⁸⁷ said that, 'The Divorce Court does not exist for the purpose of promoting the dissolution of marriage, but for the purpose of discharging the painful duty of dissolving them when all reasonable hope of reconciliation between the parties has come to an end'. Similarly, Bucknill L.J. in the later case of *Mole v. Mole*⁸⁸ stated that, ' . . . one must bear in mind that in all matrimonial disputes the state is also an interested party: it is more interested in reconciliation than divorce'. A similar policy has been adopted by courts in the United States: in an early Supreme Court case,⁸⁹ Field J. commented that once the relationship of marriage has been entered into, ' . . . the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested for it is the foundation of the family and of society, without which there would be neither civilisation nor progress'. A more recent, though remarkably similar view, may be found in the judgment of Curron D.J. in *Gage v. Gage*⁹⁰ where it was stated that, 'The public is directly interested in the institution of marriage, which is subject to proper regulation and control by the state in which it exists. The public policy has always been to foster and protect it, to make it permanent, to encourage the parties to live together, and to prevent separation'.

However, the opinion of the anthropologist is somewhat different and may, perhaps, be best encapsulated in Westermarck's aphor-

84. (1886) L.R.P. & D. 130 at p.133. Until recently adopted by statute in Australia by the *Family Law Act 1975* (Com.) s.43 (a).

85. For a more detailed discussion of the implications of Lord Penzance's *dictum* see Bates, 'The Enforcement of Marriage' (1974) 3 *Anglo-Am L.R.* 75.

86. Art.41 (3)(1).

87. [1940] A.C. 631 at p.645.

88. [1951] P.21 at p.23.

89. *Maynard v. Hill* 125 U.S. 190 at p.211 (1887).

90. 89 F.Supp. 987 at p.991 (1950).

ism⁹¹ that, '... marriage is rooted in the family rather than the family in marriage'. Very important considerations arise from Westermarck's approach for not only does his view contradict judicial views on the nature of marriage but also ecclesiastical opinion. In Pope Pius XI's basic encyclical *Casti Conubii*⁹² it is stated, '... let us recall this immutable, inviolable, and fundamental truth: Matrimony was not instituted or re-established by men but by God...' and later, 'It is evident that even in the state of nature and at all events long before it was raised to the dignity of a sacrament properly so called, marriage was divinely constituted in such a way as to involve a perpetual and indissoluble bond, which consequently cannot be dissolved by any civil law'.⁹³ Fletcher⁹⁴ has denounced assertions such as these as being theological interpretations of facts which have no supporting evidence apart from the particular religious belief itself. In addition, he contends⁹⁵ that in many primitive societies marriage was simply a secular contract and, as such, was frequently attended by the payment of a 'bride price' and could be dissolved. Lucy Mair, on the other hand, suggests⁹⁶ that the ideal of marital indissolubility is by no means confined to Christendom: thus, for example, the Hindus base their conception of marriage as an indissoluble union, like the Christian, on its sacramental nature.⁹⁷ However, divorce is permitted in Islamic countries⁹⁸ and in the majority of African countries south of the Sahara desert and is clear from the work of Lucy Mair⁹⁹ and Esther Goody,¹⁰⁰ in particular¹⁰¹ that formalised termination of marriage in most primitive societies is not regarded as unnatural or, often, unusual.

A further problem occurs in relation to the legal nature of marriage itself, a matter exacerbated by the two terms the *contract to marry* and the *contract of marriage*. The former is an ordinary civil contract, within the terms of Pollock's definition as,¹⁰² '... a promise or set of promises which the law will enforce' and which gives rise to an action in damages, although the action is obsolescent¹⁰³ and

91. *A Short History of Marriage* (1926) at p.30.

92. December 31, 1930.

93. See also *A Catholic Guide to Social and Political Action* (1955).

94. *The Family and Marriage in Britain* (1966, Reprint) at p.23.

95. *Ibid.*

96. *Marriage* (1971) at p.177.

97. *Ibid.* at p.179.

98. Hence, Cunnison, *Baggara Arabs* (1966) at p.90, reports that about 55% of marriages contracted among a tribe of Baggara Arabs in the Sudan ended in divorce. Similar rates appear to prevail in Asian Islamic communities. See Djamour, *Malay Kinship and Marriage in Singapore* at pp.132-7.

99. *Op.cit.*

100. 'Separation and Divorce among the Gonja' in *Marriage in Tribal Societies* (ed. Fortes) at p.53.

101. See also Richards, *Bemba Marriage and Present Economic Conditions* (1940) and Colson, *Marriage and Family among the Plateau Tonga* (1958).

102. *Principles of Contract* (13th Ed, 1950) at p.1.

103. But not obsolete, for two recent cases where quite substantial damages were awarded see the British Columbia case of *Tuttle v. Swanson* 9 R.F.L. 59, and the New Zealand case of *A v. B* [1974] 1 N.Z.L.R.673.

has been abolished in England.¹⁰⁴ The *contract of marriage*, however, is a much wider and more complex concept which involves matters such as the right of sexual intercourse,¹⁰⁵ the protection of marital confidences¹⁰⁶ and a right to decide jointly where the matrimonial home should be.¹⁰⁷ The matrimonial relationship and all its varied incidents can be summed up in the term *consortium vitae* which has been loosely described by Rosen¹⁰⁸ as meaning, '... living together in the same house as man and wife, which usually includes sleeping and eating together, and the usual association of man and wife'. The terminology of the law of contract is scarcely applicable to such a relationship, a view which the United States Supreme Court have adopted in the case of *Maynard v. Hill*,¹⁰⁹ referred to earlier. There, Field J. stated that, '... whilst marriage is often termed by text writers and in decisions of courts as a civil contract ... it is something more than a mere contract'. The fact that few people would regard marriage in the same way as they would a contract, say, of sale is well illustrated by the South Australian case of *Painter v. Painter*.¹¹⁰ In that case, the respondent claimed that it would be 'harsh and oppressive'¹¹¹ for a decree to be granted against her under s.28(m)¹¹² of the 1959 *Matrimonial Causes Act*. Not least¹¹³ of her contentions was that she would lose the *status*¹¹⁴ of a married woman; although her argument did not succeed, it is suggested that it is significant in that it was made in that particular form and that the Court expressed sympathy with her. The converse, however, has also been strongly argued by a member of the Australian House of Representatives, Mr. Millar.¹¹⁵ During the debate on the Second Reading of the *Family Law Bill*, he referred to the marriage ceremony and went on to say, 'For better or worse we enter into a contract to uphold the terms of it. Theoretically we are familiar with those terms prior to the event but, as is often the case, the small print is ignored. If we are to ignore the small print in the marriage contract or any other contract it must necessarily follow that the contract in itself is of little consequence because of so doing'. From both a legal and social point of view, Millar's analogy is totally false: the case on

104. See *Law Reform (Miscellaneous Provisions) Act 1970* ss.1-3.

105. See *R. v. Miller* [1954] 2 Q.B. 282.

106. *Argyll v. Argyll* [1967] Ch.302.

107. See *Dunn v. Dunn* [1949] P 98, *McGowan v. McGowan* [1948] 2 All E.R. 1032, *Walter v. Walter* (1949) 65 T.L.R. 680 and *Hosegood v. Hosegood* (1950) 66 T.L.R. (Pt. 1) 735.

108. *Matrimonial Offences* (2nd Ed, 1965) at p.32. The word 'loosely' is used advisedly as the present writer doubts whether *cohabitation*, the term described by Rosen, can ever really mean the same as *consortium*.

109. 125 U.S. 190 at p.210 (1887).

110. (1963) 4 F.L.R. 216.

111. See *Matrimonial Causes Act 1959-1966* (Com.) s.37(1).

112. Separation for five years.

113. She also claimed that she had a religious objection to divorce and that her health would be detrimentally affected.

114. Author's italics.

115. See *Parliamentary Debates (House of Representatives)* (1975) at p.1161.

'small print' in contracts such as *Chapleton v. Barry U.D.C.*,¹¹⁶ which involved the hire of a deck chair, and *Gore v. Van der Lann (Liverpool Corporation Intervening)*,¹¹⁷ which involved conditions relating to a free pass for travel on buses, are scarcely applicable to any marital situation. Even Goldberg,¹¹⁸ who regards the two important cases of *Gollins v. Gollins*¹¹⁹ and *Williams v. Williams*¹²⁰ as examples of a species of breach of contract, would scarcely go all the way with Millar.¹²¹ Marriage is a status in the eyes both of the law and the people who enter into it.¹²²

Llewellyn saw¹²³ the institution of marriage as having four major functions: sexual, group-perpetuation, economic and personal. Within the sexual function he specified¹²⁴ the regulation of sex contacts and, in particular, the prevention of conflict between men and women which was difficult to achieve without permanency of relationship, which was also a physical hygienic value. Llewellyn also asserted that a system of lasting concubinage was unsatisfactory as a partner who could leave at will was, in his own words, '... still on the market'.¹²⁵ The group-perpetuation function included the assurance of a supply of children, the support of the ageing wife/mother¹²⁶ and the raising of the future generation. The economic function comprised the encouragement – described by Llewellyn as 'the kicking' – of the husband to maintain the family, the building of an economic unit, the accumulation of capital, the regulation of distribution of wealth and distribution of wealth in the event of death.¹²⁷ The more personal functions, as described by Llewellyn,¹²⁸ were somewhat more amorphous including 'conjugal affection' which he restrictively describes¹²⁹ as meaning, 'This woman – this woman beyond any other woman – not only to have her, but to have around, to know that *she* will stay around'. The second of these personal functions he sees¹³⁰ as the fulfilment of a variety of spiritual needs: '[B]eing the "master" of some house; a shoulder to cry on; a place where you can really say what's on your chest; one

116. [1940] 1 K.B. 532.

117. [1967] 1 Q.B. 31.

118. 'Ad Justum Matrimonium' (1971-2) *Ottwa L.R.* 296. at p.298.

119. [1964] A.C. 644.

120. [1963] A.C. 698.

121. Nor does he, for he later specifically denies that marriage can validly be regarded as a variety of partnership (*loc.cit.* at p.322).

122. See Graveson, *Status in the Common Law* (1953) at pp.138-9.

123. (1932) 32 *Columbia L.R.* 1281 at pp.1288-1296.

124. *Ibid.* at pp. 1288-1289.

125. *Ibid.* at p.1288.

126. In Llewellyn's *ipsissima verba*, 'The wife who is used up is not simply to be fired – so, even under most ruthless individualistic capitalism' (*Ibid.* at p.1290).

127. *Ibid.* at p.1291.

128. *Ibid.* at pp.1293-1295.

129. *Ibid.* at p.1293.

130. *Ibid.* at p.1294.

person you can bully; . . . ' and so on. Finally, says Llewellyn,¹³¹ marriage serves the development of individual personality.

It is suggested that Llewellyn is here spelling out rather more than the functions of marriage *per se*, but has also assumed the traditional functions of the family, which are appreciably broader than those of marriage. Eekelaar, on the other hand, sees the status of marriage as having two functions. 'On the one hand', he states,¹³² 'it has institutionalised the care and protection a mother needs during child-bearing and maternal care. On the other hand it has provided a method of creating alliances by which human groups have been reconciled, united and expanded'. Of the essence in both Llewellyn's and Eekelaar's conceptions of the status of marriage is the aspect of institutionalisation, or as the present writer prefers to describe it, *formalisation*.

The importance of the formal nature of the marriage relationship can easily be under-emphasised, yet it is inherent in Murdock's definition of the familial institution known best to us. The nuclear family, he defines as,¹³³ ' . . . a married man and woman with their offspring, although in individual cases one or more additional persons may reside with them'. Despite claims to the contrary,¹³⁴ there can be no doubt that marriage is enjoying increasing popularity as an institution as more people are marrying¹³⁵ and more people are marrying earlier.¹³⁶ In addition, new groups of people are seeking to have their relationship formalised. Thus, in the case of *Baker v. Nelson*¹³⁷ the petitioners, who were both males, applied to the respondent, who was a court clerk, for the issue of a marriage licence, which he refused on the sole ground that the petitioners were of the same sex. Although Peterson J. of the Supreme Court of Minnesota refused to hold either that the marriage of two persons of the same sex was authorised by the relevant Minnesota statute or, alternatively, that state authorisation was constitutionally compelled, the significance of *Baker v. Nelson* lies in the fact that the application was made. The reason is not far to seek: as Kennedy has put it,¹³⁸ 'By going through a particular formality a qualitatively different posture is presented by the parties. They represent to the world that theirs is

131. *Ibid.*

132. 'The Place of Divorce in Family Law's New Role' (1975) 38 M.L.R. 241 at p.242.

133. *Social Structure* (1949) at p.1.

134. Perhaps one of the more extreme (and entertaining) instances of this kind of assertion is Garner Ted Armstrong, *Your Marriage Can Be Happy* (1968).

135. For Australian statistics see Krupinski, 'Demographic Data on Marriage and Family' in *The Family in Australia* (1974, ed. Krupinski and Stoller) 5 at p.8.

136. *Ibid.* at p.9. See also Nye and Berardo, *The Family* (1973) at pp.225-244 for a commentary on the position in the United States.

137. 191 N.W. 2d 185 (1971). See also *Re North and Matheson* (1974) 52 D.L.R. (3d) 280.

138. 'Transsexualism and Single Sex Marriage' (1973) 2 *Anglo-Am L.R.* 112 at p.129. Cf. Finlay and Bissett-Johnson, *Family Law in Australia* (1972) at 72.

a relationship based on strong human emotions, exclusive commitment to each other and permanence. Put another way, they wish to say and indeed advertise that there is nothing transient, superficial or casual in the way they view each other *and wish to be viewed*'. So long as marriage as it has traditionally been known continues to enjoy its present popularity and if people or groups who do not conform with its traditional pattern wish to involve themselves in it, it cannot be true to suggest that marriage is in decline as a status or social institution.

However, changes have taken place in society, since Llewellyn wrote in 1932, which have, in turn, effected changes in the nature of the marriage relationship and created in it new stresses of which account must be taken by both the sociologist and the lawyer. The most obvious and far reaching cause of familial change has been the increasing momentum of the process of industrialisation. There can be no question but that the nuclear family is particularly equipped to fulfil the requirements of the industrialised society. It is more mobile than the larger extended family, a fact which is of particular importance as the emphasis placed by such a society on performance requires, in the words of Goode,¹³⁹ '... that a person be permitted to rise and fall, and to move about wherever the job market is best'. Similarly, the family, in a society where work is often boring and repetitive and job satisfaction consequently low,¹⁴⁰ can provide a necessary source of emotional satisfaction. The industrial enterprise, Goode comments,¹⁴¹ '... has no responsibility for the emotional input-output balance of the individual; this is solely the responsibility of the family, in the sense that there is nowhere else to go for it'. Conversely, society has taken over certain of the roles which were traditionally the sole province of the family, particularly those connected with education and care of aged relatives — although it is, at least, open to doubt as to how effectively it has done so. Quite apart from the complex network of functions performed by the institutions of marriage and family which were enumerated by Llewellyn,¹⁴² the anthropologist Linton¹⁴³ and the sociologist Parsons,¹⁴⁴ like Eekelaar, see the family now serving only two functions: the socialisation of children and the provision of psychological and emotional security for adults — though neither are particularly concerned by

139. *The Family* (1964) at p.108.

140. See, for example, Parker, Brown, Child and Smith, *The Sociology of Industry* (1967) at pp.155-7.

141. *Op.cit.* p.109.

142. *Supra* text at n.49.

143. 'The Natural History of the Family' in *The Family: Its Function and Destiny* (1959, ed Ashen).

144. Parsons and Bales, *Family, Socialization and Interaction Process* (1955).

this development.¹⁴⁵ However, it must be emphasised that the importance of, particularly, the latter function as envisaged by Linton and Parsons may well, in itself, be productive of problems. If the number of functions are reduced, the importance of those remaining may well be increased and, in addition, product advertising and certain types of fictional literature aim to heighten, particularly young people's, expectations of marriage.¹⁴⁶ 'Disappointment in marital expectations', Angela Reed suggests,¹⁴⁷ may not be quoted as a cause of divorce but it lies at the root of many which are more commonly described and accepted'. Furthermore, there is evidence to suggest that people today are not prepared to tolerate the level of marital disharmony which once they were. 'People took for granted', Goode states,¹⁴⁸ 'that spouses who no longer loved one another and who found life together distasteful should at least live together in public amity for the sake of the children and of their standing in the community'.¹⁴⁹

Another matter which might have surprised Llewellyn is the extent to which marriage and the family are criticised today as institutions, particularly by women. In a well known and seminal work,¹⁵⁰ the socialist writer Engels wrote that, '... the modern monogamous family is founded upon the open or disguised domestic slavery of women'. Germaine Greer in *The Female Eunuch*,¹⁵¹ Shulamith Firestone in *The Dialectic of Sex*¹⁵² and Kate Millett in *Sexual Politics*¹⁵³ have all used Engels as a basis for their attack on the relationship between the institutions of marriage and family and the status of women. Firestone, in particular, has looked towards Engels' ideal of, '... the old communistic family, which comprised many couples and their children' as a paradigm for an alternative structure. That many other women, who have less opportunity to voice their opinions than these writers, agree with their views is illustrated by the findings of Blood and Wolfe,¹⁵⁴ who studied some 900 families in the Detroit area. They discovered that 21% of women who had been married for twenty years or more were 'notably dissatisfied' with their marriages, whilst only 6% remained fully satisfied. Hence, Llewellyn's expressed view that the institution of marriage was aimed

145. Parsons and Bales *op.cit.* at p.9 see it as a transitional stage.

146. See, Reed, *The Woman on the Verge of Divorce* (1970) at p.6.

147. *Ibid.* at p.8.

148. 'Family Disorganisation' in *Contemporary Social Problems* (1966, ed Merton and Nisbet) at p.493.

149. Living together for the sake of the children would seem to be an entirely specious reason. See Nye 'Child Adjustment in Broken and in Unhappy Unbroken Homes' (1957) 19 *Marriage and Family Living* 7. *Infra* text at n.132 ff.

150. *The Origins of the Family, Private Property and the State* (1844).

151. (1970).

152. (1972).

153. (1969).

154. *Husband and Wives: The Dynamics of Married Living* (1960) at pp.263-273.

at protecting the ageing wife is not shared by many women today.¹⁵⁵

5. CONCLUSIONS

Western society has seen many changes since Llewellyn wrote in 1932. Not least of these changes is that relationships with residence, employment and, indeed, between people have become less likely to be continuous and it would be unrealistic to regard the institutions of family and marriage as being impervious to the effects of the wider context in which they operate.¹⁵⁶ More empirical information, too is available to lawyers and social scientists than in the past and this new material has led commentators to question assumptions hitherto regarded as axiomatic. There can be no area of legal intervention where the correlation of law, social theory, investigation and policy is so necessary as in Family Law. The recognition of the relationship of law and the social sciences was, in fact, one of the major contributions made by Karl Llewellyn to modern jurisprudence.¹⁵⁷

Furthermore, we must always look, as Llewellyn directed us,¹⁵⁸ *behind* the law of divorce. If a divorce law does not fulfill the requirements, aspirations and needs of the people affected by it then, however well drafted and inherently logical it may be, it cannot be claimed as satisfactory. Accordingly, divorce law must always be tested against the proven needs of individuals and the more research which is done in the area of family relations the better the law will cope with the complex problems posed by the institutions of family and marriage.

Finally, although many social problems remain – spouses are deserted and maltreated, family poverty still exists – it is suggested that the Australian legislature and its advisers have devised a workable, humane and realistic divorce law, and one which makes a considerable advance on those of its English and Canadian counterparts.

155. (1932) 32 Columbia L.R. 1281 at p.1306.

156. See Bates, *A New Family Law for Australia* (1975) at p.3.

157. For a complete assessment of Llewellyn's Contribution see Twining, *Karl Llewellyn and the Realist Movement* (1973).

158. *Supra* n.1.

