WORKING PAPER 13
DIVORCE

*David Wires**

In the first year of the reign of King Julief, two thousand married couples were separated, by the magistrates, with their own consent. The emperor was so indignant, on hearing these particulars, that he abolished the privilege of divorce. In the course of the following year, the number of marriages in Agra was less than before by three thousand; the number of adulteries was greater by seven thousand; three hundred women were burned alive for poisoning their husbands; seventy-five men were burned for the murder of their wives; and the quantity of furniture broken and destroyed, in the interior of private families, amounted to the value of three million rupees. The emperor re-established the privilege of divorce.[1]

I. INTRODUCTION

The danger inherent in the process of law reform, as the story of King Julief clearly describes, rests in the possibility that misinformed, ad hoc changes may precipitate a remedy which is more intolerable than the mischief it was intended to cure. The Law Reform Commission of Canada was organized to study and review, on a continuing basis, the laws of Canada with a view to making recommendations for reform, including "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society".[2] We in Canada have reason to hope that the mistakes of King Julief will not be visited upon us.

The quality of the Commission's work has been and continues to be excellent, and the Working Paper on Divorce is no exception. The paper reflects a genuine concern for the evolving needs of the Canadian family and its maintenance as the basic social unit in our society. However, divorce reform is a sensitive area. There is a great temptation to regard divorce as a cause of marriage breakdown rather than as an effect, and to confuse amendments to the Divorce Act[3] which attempt to "promote maximum fairness and minimum humiliation and distress on the judicial dissolution of marriage"[4] with liberalization of the grounds of divorce so as to render

---

* Of the Board of Editors.

[1] Quoted in Foster, *Divorce: The Public Concern and the Private Interest*, 7 WESTERN ONT. L. REV. 18, at 36 (1968).

[2] Law Reform Commission Act, R.S.C. 1970 (1ST SUPP.), c. 23, § 11(d).

[3] R.S.C. 1970, c. D-8.

[4] THE LAW REFORM COMMISSION OF CANADA, DIVORCE, WORKING PAPER 13, at 5 (1975).

the sanctity of marriage meaningless. Again, as the simple story of Agra illustrates, the reduction of the divorce rate does not mean the reduction of marriage breakdown. The moral of the story has not been lost on the Commission.

> [W]e conclude that it is not divorce that destroys families but bad marriages. The common assumption that liberal divorce laws breed marital irresponsibility and are a cause of marriage breakdown must be challenged. [5]

The abolition of divorce or the restriction of the right to a divorce in the proper or appropriate circumstances would not foster the preservation of otherwise unworkable marriages. The spouses, when faced with the realization that they could not dissolve their marriage, would continue to live in animosity or abandon each other or embark on adulterous relationships. Although divorce per se may not meet with approval, the public should understand that divorce may provide a constructive solution to marital conflict, at the least providing release from the turmoil of an unworkable marriage and at best providing an opportunity to enter into a successful second marriage.

The Working Paper establishes this perspective, yet it is doubtful whether the point is made strongly enough to convince those who have though otherwise in the past. The point is, however, critical. Should the recommendations of this paper ever be formulated in legislation, the acceptance of such legislation will depend to a large extent on the public's understanding of the cause-effect relationship between marriage and divorce. [6]

II. Presentation

The weight and significance to be attached to any legal writing, whether it be law reform recommendations or an article in a legal journal, depends upon the ability of the author, the manner of the presentation, the originality of thought and the reliability of authorities and sources upon which opinions are based. The Commission's staff working in the area of family law are undoubtedly talented; their presentation reflects superior knowledge and ability, and their recommendations are very convincing. The Working Paper does not, however, contain citations to the authorities upon which opinions and proposals are based. Conclusions are drawn, statistics are quoted and cases are described; yet the paper never cites sources. [7] At one

[5] *Id.* at 4.

[6] The recommendations of the Commission relating to family law were tabled in the House of Commons on May 3, 1976. The Law Reform Commission was required to defend its proposals soon after. The Globe and Mail newspaper reported: "Denying that its specific recommendations are proposals for easy or quick divorces, the commission nonetheless advocates substantial changes to the Divorce Act, last amended in 1968." The Globe and Mail (Toronto), May 5, 1976, at 1, col. 7.

[7] *See, e.g., supra* note 4, at 17-18.

point the paper states: "These statistics do not support any assumption that liberalized divorce laws foster a divorce-minded public that rushes into divorce on the slightest provocation and at the first sign of marital conflict." [8] It is entirely probable that the available statistics do support this conclusion; however, when conclusions are drawn before statistics are consulted, the statistics can be flexible enough to support a number of different conclusions, depending on the approach taken and the material excluded. Those who are not convinced by the conclusion drawn might have been convinced by the statistics themselves.

The publication of Working Papers invites public response and constructive criticism from academics and practitioners in the legal profession and from interested persons in the lay public. An overly technical report may discourage the general public from reading and commenting on the proposals presented in the Law Reform Commission's publications. The Commission, to remain responsive to the changing needs of the Canadian public, requires contact with and exposure to the opinions of the general public, especially if its recommendations are to iniate realistic reforms. Contact with the general public must, however, be balanced with the requirements of substantive legal research.

The response of the legal profession to the Working Papers in general, and this paper in particular, and the value of the profession's constructive comments would increase if academics and practitioners were permitted to respond not only to the conclusions reached by the Commission but also to the authorities used in reaching a specific conclusion. A compromise between the need for citation of authorities and a straightforward presentation could be reached if footnotes were listed at the end of Commission publications.

III. CONTENT

The then Minister of Justice, Pierre Trudeau, rationalized the 1968 amendments to the Criminal Code in relation to private morality offences by the statement: "There is no place for the state in the bedrooms of the nation." Simplistic as the statement appeared, it nevertheless established a wide fundamental rationale on which the amendments were based. Certainly there has never been an analogous statement in relation to divorce law in Canada, and the recent reports and Working Papers on family law clearly reflect the state's very deep interest in the regulation of legal rights and obligations both in marriage and upon the dissolution of marriage. Indeed, one reason for the Commission's proposals for reform of the existing law centres on the exclusion of the legal process in present divorce procedure.

---

[8] *Id.* at 30.

> In fact, as we have pointed out, the overwhelming majority of Canadians resolve the issues [arising on the dissolution of a marriage] by agreement before they apply for a divorce. All that remains in most cases is a rubber stamping by the courts. [9]

The Commission assumes quite properly that the law has a vested interest in the preservation of marriage and a responsibility to maintain it as a viable institution. If this were not so, divorce would be available simply by de facto separation coupled with an intent to live separate and apart. The Working Paper maintains that "[t]he judicial process should be retained as a means of avoiding premature or unnecessary divorce" [10] and that it should protect the best interests of the children and provide for the equitable distribution of the property and equitable determination of maintenance obligations.

Although the Working Paper outlines many excellent recommendations for reform of the divorce process, it fails to explain why the state has a vested interest in the preservation of marriages, why the judicial process should prevent the premature termination of marriages, and why the law should investigate the personal relationship of divorcing spouses. To King Julief (with the wisdom of hindsight) and to social scientists and practising lawyers, the answers may be apparent; however, to the general public the rationale for divorce law and its reform may not be so obvious. Ironically, the Working Paper in its introduction acknowledges the traditional definition of marriage as "the voluntary union *for life* of one man and one woman to the exclusion of all others". [11] If this definition is to be taken literally, a law which provides for the dissolution of marriage before death should be based on a fundamental principle of public policy. This policy should be enunciated as the starting point in any presentation of recommendations for divorce reform.

The Working Paper seems to exist without a context; recommendations do not appear to be aimed at the furtherance of a general policy objective. The reforms suggested would seem more logical if they were prefaced with precise statements describing the purpose of the amendments, the rationale upon which they are based, and the effect they are intended to have. This would have a double benefit. It would assist the public and the profession in understanding the need for reform and the shortcomings of existing legislation intended to be remedied, and it would provide a standard by which to measure the effectiveness of the statute in operation. The Working Paper meets these requirements in some instances but ignores them in others.

To unify the proposals, the paper requires a general statement of policy outlining the purpose of divorce in relation to the purpose of marriage and the family in contemporary Canadian society. For example, the Commission might have prefaced its paper with a statement such as the following:

---

[9] *Id.* at 31.
[10] *Id.* at 34.
[11] *Id.* at 3.

> The family remains the basic unit of society, the primary source of psychological security and personality development and the fundamental social and economic unit for the orderly administration of the country. When a marriage fails to fulfill the physical and psychological needs of the spouses and the children of the marriage and degenerates to a level where the parties cannot be reconciled by counselling, and when a marriage fails to fulfill the purposes for which the relationship was sanctioned, it should be dissolved in a manner which results in the equitable distribution of the property of the marriage and the proper maintenance of dependants of the marriage.

This statement is of course my own; however, such a general policy statement by the Commission would serve to tie together particular reforms by relating each to the furtherance of a stated policy objective. The public and the government could then examine both the objective and the means by which that objective is to be attained.

IV. Obiter Dicta

The Commission has stated that the divorce process must be "reformulated to promote maximum fairness and minimum humiliation and distress on the judicial dissolution of marriage".[12] In furtherance of this particular goal the Commission proposed that the adversary system be replaced by investigatory procedures and that pre-trial procedures be changed.[13] The changes will purportedly minimize conflict and acrimony and promote consensual agreements between the parties. These are to be facilitated by a system of neutral pleadings (dispensing with accusatory allegations of misconduct) and by standard forms which could sometimes be filled in by the parties themselves. Divorce hearings will be held in the privacy of the judge's chambers, closed to the general public and open only to members of the news media, who would be entitled to report on the proceedings so long as their reports did not contain particulars from which the parties could be identified.

These changes are truly momentous. In these six short pages of the Working Paper the Commission recommends the abolition of the legal procedure originating in the common law and developed over a period of eight hundred years. Without reference to social studies or legal writers, the paper suggests that the adversary system, polarized pleadings, and the right of public access to the courts be given up for an "investigation of the facts by qualified support staff attached to the court or available in the community".[14]

The Commission states that "the adversary character of the divorce process has remained substantially unchanged, notwithstanding trenchant criticisms by judges, lawyers, social workers, psychologists, psychiatrists and the

[12] *Id.* at 5.
[13] *Id.* at 33-38.
[14] *Id.* at 37.

general public". [15] This widesweeping, unqualified statement surely deserves some form of empirical substantiation before it can be used as the basis for fundamental reform.

Though the adversary system is discounted, the Commission states that "the overwhelming majority of Canadians resolve the issues by agreement before they apply for a divorce". [16] The adversary system cannot be wholly without merit if it fosters consensual agreement, for the proposed reforms themselves are intended to "reduce the contested issues to a minimum". [17] It is unrealistic to assume that spouses who have failed to reconcile their differences and who embark on proceedings for divorce will not naturally adopt polarized positions. What merit that does exist in the adversary system should be closely examined before it is discarded; for polarization is likely to occur in any event, regardless of revised procedures. Although there may be great merit in the investigatory format, the need to dispose of the adversary system and the beneficial value of the investigatory procedure should be substantiated to assure the public that the proposed remedy cures the mischief and does not create new problems.

The Commission recommends that access to divorce courts be restricted to the press. It is a fundamental postulate of the common law that justice must not only be done but must be seen to be done. Though divorce proceedings may be embarrassing to the parties, so too are rape trials, paternity suits, gross indecency trials and many other types of legal proceedings. All these sensitive cases could be tried behind closed doors; however, with secrecy comes the possibility of abuse of the legal process. The legal profession should be cautious in accepting this particular amendment to the divorce laws of Canada.

The recommendations in relation to children and maintenance are timely and reflect an appropriate response to the requirements of a changing society. The effectiveness of these provisions will be especially enhanced within the framework of the proposed Family Court.

V. Conclusions

The work of the Law Reform Commission is a focal point for public discussion of amendments and alterations of the existing law. With this responsibility comes the obligation to monitor the changing requirements of a society in a constant state of flux. The task is made easier by informed comment from those who will be affected by amendments to the existing law; however, criticism can only be constructive if it is directed not simply at the Commission's conclusions but also at the sources and reasoning used to reach those conclusions.

---

[15] *Id.* at 4.
[16] *Id.* at 31.
[17] *Id.* at 37.

Where a viable solution is found to a legal problem, the successful operation of the resultant legislative provisions must be based on public understanding and acceptance of the purpose and rationale of the reformulated law. To this end the rationale, purpose, and intended effect of proposed new laws should be made clear in the Working Paper. Sweeping changes which alter fundamental concepts of the common law and established statutes should be confined to situations where the effect of the changes is clearly understood. Better the devil we know than the devil we don't know.