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Looking North, Looking South

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INTRODUCTION

Matrimonial breakdown has traditionally been under-researched in Ireland,² North and South, despite the international trend over the past quarter of a century of using socio-legal methods to understand and inform the development of family law.³ Fahey and Lyons' groundbreaking study⁴ of legal responses to matrimonial breakdown in 1995 provided a vital snapshot of the matrimonial law system just before the point at which divorce was introduced. Their study of 510 files in 81 solicitors' offices, and 130 family law cases in the Dublin Metropolitan District Court found a series of "dualisms" operating within the matrimonial law system. Dichotomies existed between cases in which the primary need was for protection from violence and those in which it was resolution of the ancillary (primarily financial) issues surrounding separation; between cases brought in the District Court and those brought in the Circuit Court; and between those clients who were legally represented and those who were not. One might have thought that the subsequent enactment of the Family Law (Divorce) Act 1996 would have considerably altered this picture. Yet in 1997, the first year of operation of that Act, there were only 1,360 applications received for divorce in the Republic of Ireland and only 356 decrees were granted.⁵ Fears of a tidal wave of divorce have proved unfounded, and as the system hits its stride it may be useful to consider whether a distinctive pattern of divorce and other legal responses to matrimonial breakdown will emerge.

DIVORCE IN NORTHERN IRELAND

The authors are part of an interdisciplinary team from both universities in Northern Ireland which has just completed a major empirical research project on divorce in Northern Ireland for the Office of Law Reform.⁶ The team was asked, inter alia, to provide a picture of how the divorce system in Northern Ireland operates and the result is a report entitled "Divorce in Northern Ireland: Unravelling the System" ("the report"). As well as providing a comparison with the English experience of a mixed fault/no-fault divorce system,⁷ and demonstrating that a mixed system need not necessarily revert to a fault ethos, some interesting parallels can also be drawn with the Republic, notwithstanding the differences between the two jurisdictions. Generally, the report shows that divorce in Northern Ireland is usually a lengthy affair, preceded both by recourse to the magistrates' courts or lawyer-led negotiations and by lengthy periods of physical separation. The explanations presented for the phenomenon of slow divorce, even though the statute allows for relatively swift dissolution may be of benefit to family lawyers in the south when they reflect on the slow rate of divorce applications to date.

SIMILARITIES AND DIFFERENCES

Of the many significant differences in family law and practice between the two jurisdictions in Ireland there are two which are more worthy of mention. Most obviously, it was only after the implementation of the Family Law (Divorce) Act 1996 that divorce became available in the South. Judicial divorce has been available in Northern Ireland since 1939.⁸ Equally importantly, the wider availability of legal aid in the North has led to different patterns of legal representation and, for a variety of reasons, Northern Ireland has felt less pressure than the Republic on its family court

system.⁹

Notwithstanding these differences, however, there are several striking similarities between the system in the South described by Fahey and Lyons and that operating in the North described in the report. Superficial similarities abound: matrimonial law in Northern Ireland is, in the words of Fahey and Lyons, “a woman’s resource rather than a man’s resource”¹⁰ in that proceedings are more often initiated by females than males.¹¹ Whilst the differences in the research objectives and methodologies of the two studies mean that it is difficult to say that there are direct parallels with the dualisms identified by Fahey and Lyons, some of their research findings do strike a chord with those in the report. The dominance of lawyer negotiated settlements, the tendency for separation agreements to be brokered, particularly where the clients are better off, and the tendency for poorer clients to be directed towards the lower courts are all features found in Northern Ireland as well as the Republic. Most significant among these similarities, however, are the high rates of domestic violence which seem to lurk below the surface of both systems, and more particularly, the long, non-precipitate matrimonial breakdown process in both jurisdictions, which stands in stark contrast to the precipitate divorce process in England and Wales.¹²

DOMESTIC VIOLENCE

In the survey of petitioners and respondents¹³ in “Unravelling the System”, approximately 40 per cent indicated that they were influenced in choosing the “fact”¹⁴ in their petitions by the abusive attitude of their spouse. ten per cent of petitioners offered as the explanation for their marriage breakdown that their spouse had been abusive towards them. Our examination of court records determined that 15 per cent of those alleging “unreasonable behaviour”¹⁵ in the petition disclosed evidence of physical abuse in the particulars, with a further 13 per cent of divorcees having recourse to the courts for protection from violence before their divorce. These figures reveal a very significant undercurrent of at best, acrimony and at worst, domestic violence between couples who go on to divorce. Whilst Northern Ireland now has a regional forum on domestic violence and legislation improving the available legal remedies is about to be implemented,¹⁶ these figures demonstrate that it will be necessary to account for domestic violence when considering any alteration in the divorce laws in the north.

MORE THAN JUST A DIVORCE SYSTEM

The tendency of clients in Northern Ireland to secure court orders in the magistrates’ courts or to negotiate substantive matters before proceeding to obtain a divorce decree are significant factors in slowing the divorce process. Immediate recourse to the divorce courts after the magistrates’ court had been invoked was not common among those files examined in the court record study. Only one in 10 proceeded to make a divorce petition within a year of that order and two years later only one quarter had done so. The pace of the divorce system might be said to be a reflection of the views of the general public, practitioners and clients about divorce, though it would be accurate to say that our interviews with divorcees show that there is a degree of disenchantment amongst clients regarding the time it takes to arrive at a divorce decree following the initial marriage breakdown.

“Unravelling the System” endorses the view advanced by Fahey and Lyons that divorce and judicial separation are not the only remedies sought by those whose marriages are at breaking point, and that in both jurisdictions, North and South, the importance of the lower courts as part of the wider matrimonial system should not be underestimated. Indeed distinctions between different levels of courts and types of statutory remedies, so obvious to lawyers, are not obvious to clients. In Northern Ireland, misunderstanding about the law has crystallised into an urban myth among the general public. As mentioned above, the research discloses that the clear majority of divorcees obtained a magistrates’ court order in the initial stages of marital breakdown to regulate periodical payments and/or child care arrangements. Although it makes no order regarding the right to consortium, this form of order is commonly referred to as a “separation order”. Even its title is mythical as no statutory order bearing this title exists. The “separation order” is widely believed to be a legal remedy open to couples in marital difficulty who wish to have their separation recognised by the courts but who do not wish to divorce. Indeed, there are those who believe that it is a necessary pre-condition to a divorce petition.

CONCLUSIONS

Factors beyond the textbook law can be responsible for shaping and constructing a divorce law system, with the result that the manner in which remedies are utilised may bear little resemblance to the intention of the legislature which passed the original statute. Empirical research has now begun to map the system in both jurisdictions in Ireland, and it is hoped that it will continue to do so in the future.¹⁷

Both “Unravelling the System” and the work of Fahey and Lyons illustrate that family law practice cannot be separated into component parts with divorce (or legal separation) as its main focus. Rather it is an interlocking mesh of remedies and procedures utilised by practitioners to provide immediate and, eventually, long-term relief to clients. The jurisdiction of the lower tier of justice administered by the courts of summary jurisdiction is as important as that exercised by the superior courts. Intriguingly, in 1974, the Finer Committee¹⁸ reporting on the use of the magistrates’ court in England and Wales warned against such a system, believing that it would ghettoise the poor in second-rate, lower tier courts. The experience of the two Irish jurisdictions may disprove those fears and demonstrate that in principle that there is nothing wrong with a “two-tier” or multi-level matrimonial law system. Rather, the challenge for them is to ensure that the lower tier courts are not second rate, and to ensure that courts at all levels provide remedies appropriate to the distinctive way in which the residents of both jurisdictions use their matrimonial courts.

The Report, “Divorce in Northern Ireland: Unravelling the System”, by Claire Archbold, Ciaran White, Pat McKee, Lynda Spence, Brendan Murtagh, and Monica McWilliams is due to be published by the Stationery Office, Belfast, by the end of 1998. Further details may be obtained from the Office of Law Reform, 5 Linenhall Street, Belfast, tel (08) (01232) 542900.

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2. The most influential works in the South have perhaps been Ward, *Financial Consequences of Marital Breakdown* (Dublin, 1990), Browne and Connolly, *Domestic Violence the Response of the Legal System*, (Dublin, 1995), Fahey and Lyons (discussed in text), while in the North, work by McWilliams and McKiernan, *Bringing it out in the open*, (HMSO, 1993), and McWilliams and Spence, *Taking Domestic Violence Seriously* (HMSO, 1996) have been influential with regard to domestic violence.

3. For a general discussion of the school of socio-legal studies, see Thomas (ed.), *Socio-Legal Studies* (Dartmouth, 1997). For an overview of some of the themes of socio-legal family law scholarship, see Eekelaar and Maclean, *A Reader in Family Law* (Clarendon Press, 1994) which also provides an introduction to some of the main works in the field.

4. *Marital Breakdown in Family Law in Ireland: a sociological study* (Oak Tree Press/ESRI, 1995).

5. See Martin, *Cork Examiner*, April 14, 1998. The Department of Justice has not yet publicly published the divorce statistics for 1997 or the first half of 1998.

6. Responsibility for law reform in Northern Ireland is vested in a range of different bodies, depending on the subject matter. Family law matters are the responsibility of the OLR, which plays a role similar to that of the policy section of the Lord Chancellor’s Department.

7. see Archbold, McKee and White, *Divorce Law and Divorce Culture: the case of Northern Ireland* (CFLQ, 1998), forthcoming.

8. Before the *Matrimonial Causes Act* (Northern Ireland) 1939 introduced judicial divorce, parliamentary divorce was available from the Stormont Parliament on the same terms as it had been available to Irish citizens at Westminster before partition. See Bromley, Passingham and Malcolm, *Divorce Law Reform in Northern Ireland* (1978) *Northern Ireland Legal Quarterly* Inc pp. (v)–(vi).

9. Law Reform Commission, *Report on the Family Courts* (Law Reform Commission, 1996).

10. above, n. 4, p. 136.
11. Approximately two-thirds of divorce petitions are made by women.
12. See Law Commission (Law Com No. 192), *The Ground for Divorce* (HMSO, 1990), paras. 3.26–3.48 in which the Commission discusses the merits of divorce after a period for consideration and reflection or divorce after a “cooling-off period” as it sometimes called.
13. A census of all petitioners and respondents acknowledging service of the petition between July 1996 and July 1997 was conducted. The response rate from a population of 4,086 was 41 per cent.
14. Whilst there is only one ground for divorce in Northern Ireland, namely “irretrievable marital breakdown”, this may be proved by adducing evidence to establish any one of the following five “facts”: adultery, desertion, “unreasonable behaviour”, two years separation plus consent of respondent spouse, five years’ separation (*Matrimonial Causes (N.I.) Order 1978, Article 3*).
15. This is a common shorthand for the statutory formulation that the respondent must have acted in such a way that the petitioner cannot be reasonably expected to live with the respondent (*Matrimonial Causes (N.I.) Order 1978, Article 3(2)(b)*).
16. *Family Homes and Domestic Violence (N.I.) Order 1998*.
17. Murch and Hooper, *The Family Justice System* (Jordans, 1992), in Chapter 9, “The Development of Information Support Services”, and at p. 141, argue for a more comprehensive research strategy to support the “family justice system” espoused in that book.
18. Finer et al, *Report of the Committee on One Parent Families*, (Cmnd 5629, 1974).

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