2 Divorce: ... To the Right to a Second Chance

What took place in the area of family law following the defeat of the first divorce referendum appears to be evidence of a radically different strategy. The problem did not disappear as the 1986 census figures and later the 1991 ones, proved, bearing witness, as was pointed out earlier, to the growing anachronism that the ban on divorce was. They showed that the number of separated people was growing alarmingly, with a 48 per cent increase in five years. Irish people, the legislators included, began to accept that the absence of divorce did not protect the institution of marriage and that they resorted to all sorts of solutions to put an end to deadlocked marital situations, as detailed earlier. Seeing both the overt and the underlying opposition to divorce, in all political parties, how would it be possible to introduce major legislative changes in the wake of a resounding defeat? The introduction of divorce in Ireland was not on the agenda as a majority had rejected it in principle, and as it was out of the question to make civil annulment procedures more accessible for fear of hypocrisy, it remained to change the legislation on legal separation. This avenue which, by loosening the bond of marriage, has long been presented as the Catholics’ divorce, because it is compatible with the dogma of the indissolubility of marriage, is a palliative that has developed wherever divorce is not available.

JUDICIAL SEPARATION: A LEGISLATION THAT DARE NOT SPEAK ITS NAME

It was Alan Shatter, a barrister specialising in family law, author of a lengthy volume on family law in Ireland, and a Fine Gael TD, who relaunched the debate. He had been a member of the Joint Committee on Marital Breakdown and in 1987 he tabled a private member’s bill based on its recommendations. The Judicial Separation and Family Law Reform Bill, which would become the first private member’s bill to become law in 30 years, and the second one in the history of the Oireachtas, had the initial support of all parties. Even Fianna Fáil, then in power, admitted in its recent Programme for National Recovery, that its policy on marital breakdown would be to deal with
the problems ‘fairly and with as little acrimony as is possible’. The bill aimed at replacing the 1870 separation law, which rested on the Victorian concept of fault. Its intent was to make judicial separation a more identifiable remedy for people with marital problems, and it should put an end to the use of barring orders and suchlike in lieu of divorce proceedings.

The Law Reform Commission had examined the legislation regarding divorce a mensa et thoro and published a report in 1983 recommending change, particularly as far as the acceptable grounds were concerned. The Joint Committee insisted in 1985 on the same requirement, and suggested replacing the current grounds by just one, irretrievable marital breakdown, in order to minimise conflict between the spouses. The Shatter Bill proposed that a judicial separation would be granted if there was irretrievable marital breakdown (which could be proved in six different ways) and mandatory mediation sessions had not led to reconciliation. Moreover the courts would be empowered to make maintenance orders, lump-sum payment orders, property transfer orders, orders extinguishing or changing inheritance rights, orders relating to the guardianship and custody of children, and orders relative to the sale of property. Concerning the ownership of family property, the court must take into account ‘the contribution made by each of the spouses to the welfare of the family, including any contribution made by looking after the home or caring for the family.’ Separation applications would now be heard in the Circuit Court only, and not in the High Court, certain days of the week being set aside for matrimonial cases; also, in order to make these hearings less distressing, neither the judges nor the barristers would wear wigs and gowns. It was an exhaustive bill, drafted by someone who faced these traumatic situations daily and who had drawn a lot from the Joint Committee.

At first, it seemed that it was widely supported, but it became obvious that the government was trying to empty it of its substance: it did not succeed in having its amendments adopted at committee stage, but it managed to stretch the length of the debates since that stage alone lasted seven months, and it tabled 36 amendments which covered more paper than the bill itself! One of its main difficulties with the bill was that it could not accept the phrase ‘irretrievable marital breakdown’ in the wording, and that it could be invoked to obtain a separation, since a separation is not a dissolution and it is always possible to get back together. The phrase belongs to the terminology of divorce legislation, and it is plausible that the Fianna