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Rethinking the Grounds for Divorce:
Comparative Perspectives from the UK, the US, Canada and Australia

This Special Issue assesses and contextualises the change in English divorce procedures[1] in April 2022, following the implementation of the Divorce, Dissolution and Separation Act 2020. It does so by drawing comparisons with three closely related jurisdictions – the US, Canada and Australia – all of which had revisited the requirements for marital fault or extended separation several decades prior to the English reform being enacted. This collection of articles arises from the proceedings of an international conference entitled 'Rethinking the Grounds for Divorce: Comparative Perspectives from the UK, the US, Canada and Australia', held in May 2023 at City, University of London with the support of the Society of Legal Scholars.[2]

Originally scheduled for 2020, the conference was sparked by the UK Government's public consultation on divorce in 2018, after the Supreme Court famously ruled in *Owens v Owens* that a woman in her mid-60's had to stay legally married for five years if her estranged husband opposed the divorce and his conduct did not meet the threshold for granting the divorce against his wishes.[3] The outdated attachment to fault and lengthy separation placed English divorce law at odds with US, Canadian and Australian procedures. The comparative law event sought to explore lessons from more permissive jurisdictions at a time when England contemplated reform, focusing on the benefits and risks of the regime proposed under the *Divorce, Dissolution and Separation Bill*. Reconvened after a lengthy postponement due to the Covid-19 pandemic, the conference addressed a markedly different legal landscape: the reform bill had become law, and the amendments had so radically altered the Matrimonial Causes Act 1973 that England morphed spectacularly from the most conservative to the most liberal model in the comparative exercise. With no requirement to demonstrate the breakdown of the marriage, no option to defend a divorce, no mandatory period of separation before filing an application, and no court assessment, English divorce law remained the odd one out, but in quite the opposite way to the situation which had existed just a few years earlier.

Building on the conference, this Special Issue provides expert analysis of divorce laws and routes to reform in Australia, Canada, England and the US. This timely cross-country

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[1] The new reform legislation extends to England and Wales only. Scotland and Northern Ireland each have their own family law.

[2] I am grateful to Ann Cammett (City University of New York), Deanne Sowter (Osgoode Hall Law School, York University, Toronto) and Lisa Young (Murdoch University, Perth) for joining me in this project; to our editor, Daniel Monk, for his patient encouragement; to the anonymous reviewers for their helpful comments; and to Jodi Lazare (Dalhousie University) for contributing to launching the project in 2019 and adding a new Canadian scholar to the team when unforeseen circumstances precluded her participation in 2023.

[3] *Owens v Owens* [2018] UKSC 41.

comparison sheds light on the public interest in the creation and dissolution of private relationships and on the shaping of family law institutions in their social and legal context. It invites reflection on England's isolated position, both in its delayed reform and in its paradoxical leap to the most radically liberal regime. Additionally, by taking stock of experiences of divorce liberalisation elsewhere, this Special Issue enables an evaluation of the recent English law reform, including concerns over increased divorce rates and the gravitas of marriage.

Some of the contributions inevitably address different layers of jurisdiction. As Lisa Young explains, under the Commonwealth of Australia Constitution Act 1900, the States and the federal Parliament have concurrent power in relation to marriage and divorce, but federal authorities refrained from legislating on this matter for over half a century. This resulted in diverse, largely fault-based, State regulation (initially inspired by England's Matrimonial Causes Act 1857), although South Australia and Western Australia introduced five-year separation in 1938 and 1945, respectively. The federal Matrimonial Causes Act 1959 made no-fault divorce available everywhere, incorporating five-year separation among fourteen grounds. Those were subsequently abolished by the Family Law Act 1975 and replaced by the sole ground of irretrievable breakdown of the marriage, established through twelve-months separation. Similarly, Deanne Sowter notes that, despite having legislative authority over divorce and corollary relief under the 1867 Constitution Act, the Canadian federal government did not adopt a comprehensive divorce scheme until 1968. Under the various provincial laws in force until then, also inspired by 1857 English law, in most of Canada divorce could be sought on the ground of adultery. The federal Divorce Act 1968 introduced multiple grounds, including cruelty and separation, which were retained by the Divorce Act 1985, currently in force. By contrast, Ann Cammett observes that family law in the US falls under State jurisdiction and it took over five decades for some version of no-fault divorce to become available in every State. This was due, however, to the inordinate delay of the State of New York, where reform arrived in 2010. By the 1970s, 37 out of 50 States had already added no-fault grounds (starting with California, whose Family Law Act 1969 permitted dissolution based on irreconcilable differences or incurable insanity) or amended the separation ground to reduce waiting periods. Cammett explores the related phenomenon of 'migratory divorce': as population mobility increased, Americans travelled to jurisdictions offering more expansive divorce grounds and short residency requirements (e.g., Indiana). Indeed, after the Supreme Court upheld the obligation to recognise decrees from other US jurisdictions, based on the Full

Faith and Credit Clause in the Constitution, States started to compete for divorce business (e.g., Nevada reduced its residency requirement to six weeks).

A number of common themes run through the various contributions. First, the purpose of divorce law has ostensibly shifted from a remedy to matrimonial offence (specifically, adultery) to the acknowledgement of relationship breakdown, and from an opportunity to remarry for the wronged, innocent spouse to a chance for either party to exit an unhappy marriage. Historically, adultery was the first ground on which marriages could be dissolved in all four jurisdictions, and the sole ground for a considerable time. Thus, in seventeenth-century England, parliamentary acts of divorce were designed to allow the betrayed husband to remarry and beget legitimate children, with no equivalent provision for the adulteress. Remarkably, the first New York divorce law, dating back to 1787, explicitly prohibited the guilty spouse from remarrying. Further grounds were added over time in all jurisdictions, with some equivalent of the English notions of 'desertion' and 'behaviour' ('abandonment', 'cruelty'/ 'cruel and inhuman treatment'). However, significantly more numerous grounds were introduced in the other three legal systems, some of them corresponding to annulment grounds in England: impotence, bigamy, habitual drunkenness, felony conviction, confinement in prison for a specified time.

What sets present-day English and Australian regimes apart is that divorce is available solely on a no-fault basis, whereas Canada and many US States maintain alternative fault-based frameworks. Under the Canadian Divorce Act 1985, while all applications must be brought on the ground that there has been a breakdown of the marriage, the ground can be established through one-year separation, adultery or cruelty (not dissimilar from English law pre-reform, save for the shorter length of mandatory separation). Only 17 out of 50 American States offer exclusively no-fault divorce. There are, however, important distinctions between the no-fault regimes. Under the Australian Family Law Act 1975, the irretrievable breakdown of the marriage must be established through a period of twelve-months separation, whereas in England the applicant's statement that the marriage has broken down irretrievably suffices. Unlike Canada and Australia, where no-fault divorce requires one-year separation, some no-fault US States allow petitioners to simply cite irreconcilable differences – the closest equivalent to the new English 'no-reason divorce'.[4] The analysis of English parliamentary debates in the following pages shows that they raised precisely the question of whether fault

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[4] *Hansard*, HC Deb, vol 662, col 589 (25 June 2019) (Jim Shannon).

should continue to coexist alongside no-fault, and whether no-fault should entail shorter separation rather than no explanation.

Despite these distinctions, one common observation across countries and epochs – underlying the very notion of 'grounds' for divorce – is that the State, rather than the parties, decides when the marriage is over. This typically involves a judicial enquiry ensuring that the grounds are met and there is no collusion between spouses to circumvent the law. In Australia, by contrast with pre-reform English divorce, even where the spouses agree that they were living separated under one roof (as permitted by federal legislation for the purposes of twelve-month separation), corroborating evidence is required. As Young argues, the scrutiny of when separation occurred delves into very personal matters, which ironically no-fault divorce sought to avoid. Divorce bars also present interesting parallels. For instance, in nineteenth-century New York, divorce could not be granted, notwithstanding proven adultery, if the petitioner had also committed adultery, condoned the other spouse's adultery or connived in procuring evidence – essentially, the bars governing 1857 English law. Collusion, condonation and connivance are still divorce bars under Canadian law.

A connected theme regards policy concerns about the stability of marriage, which transcend religious dogma, resulting in legislators' deliberate refusal to make divorce 'easy' procedurally. The articles evidence several features of divorce laws designed to support the institution of marriage. First, embedding prolonged reflection in the law to avoid precipitous decisions, which usually translates into a requirement for spouses to live apart for a prescribed period of time (the Canadian and Australian models, England pre-reform). Second, facilitating trial reconciliation, which is permitted under separation rules: in Australia and Canada, resumed cohabitation for up to three months does not preclude the aggregation of the periods of separation before and after (similar to the pre-2022 English divorce regime, which allowed reconciliation attempts for a cumulative period of up to six months without resetting the clock for two-year separation). Third, compulsory counselling: this is a requirement for the parties to a short marriage in Australia, and compulsory information meetings including counselling options were thought to save marriages under the 1996 aborted English reform.[5] Significantly, since the enactment of the Divorce Act 1968, Canadian law has established a statutory duty for the court to satisfy itself that there is no possibility of reconciliation between spouses. An interesting procedural distinction can be observed between the English and Australian models, both of which involve a two-step process: in Australia, the interim divorce order becomes final

[5] Family Law Act 1996, Part II (repealed).

automatically after a month; in England, only a further deliberate application for the final order dissolves the marriage.

Post-divorce economic concerns emerge as another common thread. Sowter notes that Canadian courts can refuse a divorce if reasonable arrangements for child support have not been made. Conversely, in parliamentary debates leading up to the 1985 reform, proposals by women's rights advocates to treat inadequate spousal support as a bar were rejected, on the basis that divorces should not be granted or refused on economic grounds. Sowter further suggests that, despite the introduction of guidelines for spousal support in 2008 (notably later than the 1997 standardisation of child support), underpayment remains an issue. Concerns over the pauperisation of women through easier divorce, albeit also voiced in English parliamentary debates, are mitigated by courts' wide statutory powers to reallocate present and future matrimonial assets, the 'yardstick of equality' doctrine,[6] and financial safeguards under section 10 Matrimonial Causes Act 1973 (which pre-existed the 2022 reform), permitting courts to deny the divorce if adequate provision for a spouse is in question. In examining the New York case, Cammett explains that opposition to no-fault reform was mounted not only by Catholic and conservative traditional family groups but also by feminist groups fearing that it would deprive indigent women of bargaining power in negotiating spousal and child support. Although the 1980 Equitable Distribution of Property laws introduced flexible division of marital property based on non-financial contributions to the marriage, the gender pay gap results in lower income for divorced women. By contrast with the 'silos approach' to ancillary relief and child matters in England,[7] under the 2010 New York divorce law a judgment may not be rendered until economic issues of equitable distribution of property, spousal and child support, legal fees and custody and visitation have been resolved.

Relatedly, the articles reveal different ways of organising the economic consequences of marriage breakdown. In Canada, 'corollary relief' is available immediately upon separation; the divorce dissolves the marriage formally and entitles the parties to remarry but is not a pathway to post-separation financial and property remedies. The relationship between divorce and ancillary proceedings is similar in Australia: orders for spousal maintenance, child support, property settlement or parenting arrangements can be granted before the parties divorce. Conversely, in England a conditional divorce order is necessary to activate the courts' powers

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[6] See *White v White* [2000] UKHL 54.

[7] See Centre for Child and Family Law Reform, *Children and Money Cases – Should They Always Be Heard in Isolation from Each Other? A Proposal for Flexibility*, https://researchcentres.city.ac.uk/__data/assets/pdf_file/0003/763851/Children-and-Money-Cases-CCFLR-Report-2023.pdf, last accessed 24 November 2023.

to redistribute matrimonial assets and order spousal support, making access to divorce rather more pressing.

Against the background of the shared objective of divorce laws to secure the stability of marriage, the subsequent pages cast doubt on the ability of fault-based divorce to achieve it. Cammett indicates that, shortly before the enactment of the first no-fault divorce laws in the US, there was a chasm between statutory requirements for marital fault for granting a divorce to the innocent spouse and the practice of feigning marital misconduct, which led to the toleration of divorce by mutual agreement. According to Cammett, this threatened the legitimacy of the courts but also showed that the law did not serve the public interest and was misaligned with people's needs. The analysis of pre-2022 English divorce law discloses a similar variance between law and practice, calling into question the 'intellectual honesty'[8] of the legal procedure and its rational connection to its aims. This criticism appears compounded by the discriminatory effects of restrictive divorce regimes. Cammett recalls that low-income New Yorkers who could not afford a migratory divorce or lawyers capable of bending nullity law had to cope with involuntary desertion or informal separations keeping them in a limbo. Parliamentary debates leading to reform in England in 2022 equally reveal that the only no-fault procedure available then, requiring two years' separation, was inaccessible to lower-income couples, who depended on property and financial orders to live independently. Interestingly, while in English debates the easier divorce process under the Divorce Reform Act 1969 was described as a 'Casanova's Charter' for men wishing to abandon middle-aged wives for younger partners,[9] in the US access to divorce emerged as a feminist issue, in that it benefitted women needing redress against desertion, abuse and financial aspects of 'coverture' (whereby the wife's property was transferred to the husband).

Another recurring theme is the public interest in divorce as a major trigger for reform. According to Cammett, one explanation for the delay in effecting reform in New York was its citizens' ability to evade the law, either through migratory divorces (with one third of divorces being obtained out-of-state by 1922, as nearby Pennsylvania and Vermont offered a quicker route), through the creative use of annulment as an exit strategy (leading to the highest annulment rates in the US, approximately one-third of all annulments), or by perpetrating fraud on the courts. She argues that the resistance of religious groups to reform is insufficient to explain the stagnation: while New York has historically had a large Catholic population, so did

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[8] *Owens v Owens* [2017] EWCA Civ 182, [94] (*per* Munby P).

[9] See S Thompson, 'Behind Casanova's Charter: Edith Summerskill, Divorce and the Deserted Wife', in J Miles, D Monk and R Probert (eds), *Fifty Years of the Divorce Reform Act 1969* (Hart, 2022) 117.

other States who modernised the law much earlier. This case study presents interesting parallels with the phenomenon of collusive divorce petitions in England, particularly well-documented after the introduction of the special procedure for undefended divorces. Social demand for modernisation was relatively low in both jurisdictions because of the discrepancy between the law and the reality of access to divorce. Remarkably, Sowter notes that in the period leading up to the Divorce Act 1968, in Canada there was public concern over the difficulty of obtaining a divorce and in the 1960's in Ontario professional co-respondents could be hired to fabricate evidence of adultery.

Additionally, the aftermath of reforms fails to substantiate concerns over escalating divorce rates. Young notes that Australia witnessed an increase in divorces after the introduction of the Family Law Act 1975, but over time the rate stabilised and trended downwards since the 1990s. Cammett points out that the national divorce rate across US States has also fallen, although polls show that divorce is widely seen as morally acceptable. According to Sowter, after the 1968 reform, and once again after the introduction of the Divorce Act 1985, the divorce rate in Canada experienced an initial surge before decreasing. In England, although the data shows an increase in divorce applications in the second quarter of 2022 to levels not seen since 2007, the trends reverted to pre-pandemic levels shortly thereafter, suggesting a temporary spike attributable to spouses deferring proceedings so as to apply under the new law.

The articles consider divorce liberalisation in the broader context of evolving social institutions. Young discusses the applicability of judicial principles on 'separation' to property relief disputes following the breakdown of cohabitation – an area England has yet to regulate. For Cammett, in the US the freedom to dissolve intimate relations without State intervention is a corollary of the expansion of freedom to marry. She highlights the persistence of anti-miscegenation laws in 16 States until 1967 and the late recognition of same-sex marriage in 2015, after the last sodomy laws were declared unconstitutional in 2003; she stresses the significance of marriage as a primary source of social benefits in the US, given the lack of universal health care and other family supports. Sowter links divorce reform in Canada to the development of equality rights under the Charter of Rights and Freedoms 1982.

Finally, the papers touch upon the future prospects of divorce law reform. Young observes that fathers' rights pressure groups continue to advocate for the return to fault-based divorce in Australia, albeit without gaining serious traction. For Cammett, the liberalisation of divorce is not immune from revision, considering the 2022 US Supreme Court decision striking

down the right to abortion[10] and the revisionist agenda of members of the judiciary as regards contraception, same-sex marriage and sodomy statutes. Readers will ponder whether the move to no-fault divorce is an irreversible process and whether the new English model can prove as influential as its 1857 predecessor.

[10] *Dobbs v Jackson Women's Health Organization*, 597 US__, 142 S Ct 2228 (2022).