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## **Divorce law - a disaster? Transcript**

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## **Divorce Law - A Disaster?**

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My series of lectures on family law this year will have two interlocking themes. One is the connection between morality in public life and in private life. The other is the conflict in ideologies or demands that are placed on us in our private and public capacities. I have found these themes to be apt in divorce, maintenance, attitudes to cohabiting couples, gay marriage, cousin marriage and inter-generational relationships.

We are speaking in the year of financial collapse and of the gravest moral failings in our politicians. This year's Reith Lecturer on Radio 4, Prof. Michael Sandel of Harvard, addressed the moral failings in our public life, whether in the markets, in politics, in genetics or the control of pollution. He ascribed much of the general moral failing to a marketisation of everything. He said we tend to calculate costs and benefits instead of deciding on attitudes to situations. For example, how much do we value the reduction of carbon emissions, or in my case, the preservation of stable families? In the former case, if governments, intending to control carbon emission, decide to tackle it by the imposition of increased tax on big cars, or extra payments from passengers for long haul flights, the consequent attitude to these activities is that the tax is simply the cost of running the car or taking the flight. But it does not stop the pollution by those who can pay, and it tends to reduce the stigma attached to the activity, for the payer says to himself, I have atoned for the pollution that I cause.

According to Prof. Sandel: 'Letting countries buy the right to pollute would be like letting people pay to litter. We should try to strengthen, not weaken the moral stigma attached to despoiling the environment.' 'Norms matter . . . In deciding how best to get global action on climate change, we have to activate a new environmental ethic, a new set of attitudes towards the planet we share.'

The same is true of marriage, children and divorce. Men are permitted, by law, to buy their way out of relationships and fatherhood, regardless of the damage and lasting hurt that they leave behind and which is not thereby lessened. To some extent, women may do the same in family law. One might even say that some of them market themselves!

If paying for something makes it alright, it changes views and habits in society. Markets leave their mark on social norms. Rather than leaving the market to decide, lawmakers should determine the proper value of social practices and, if need be, leave the market behind in fixing the benefit of that practice. So, said Prof. Sandel, efficiency is not the only criterion. There are moral and political benefits to be weighed up in providing for health, education, national defence, criminal justice, environmental protection and marriage and the family. Each case has to be debated to ascertain its moral worth as an investment. This is a habit we lost in the UK during the age in which the markets ruled triumphantly, and everything had a price attached to it.

I want to open a new debate on marriage and the family under the umbrella of moral and civic renewal, although the debate is unlikely to produce any consensus. But these are arguments that need to be put and have not been put for a while; when the topic is broached, voices of religion, ideology and individualism have drowned out the other side. My next few lectures will continue with this theme.

They will also be shot through with the contradictions that most of us grapple with every day, especially women. Following on Sandel's lectures and his topical focus on the lack of morality in public life, it seemed to me to be clear that this is because over the last forty years or so we have abandoned, in terms of approbation/disapprobation, law and categorisation, any pressure to conform to basic, long unchallenged tenets of private morality. At the time I applauded the liberalising laws of the 1960s and still think that on balance they did more good than harm - the legalisation of abortion and homosexuality, the ending of the criminalisation of suicide, the stigmatising of illegitimacy, and the liberalising of contraception and divorce. Yet the effect, when taken all together a few decades on, is to live in a society where there are no constraints on private morality, no judgmentalism, no finger wagging or name calling, only acceptance of anything that anyone does, short of the criminal law, in the name of the pursuit, if not of individual happiness, then at least individual choice. It is not possible, it seems to me, to raise a generation in that permissive framework, and then expect those self same people to go into politics and behave with the utmost scrupulousness and regard for the public purse and approval, to behave in a way that bears public scrutiny and accountability and takes into account the cost to others and in the future of cherished constitutional institutions. So individual happiness is pitted against, and prevails over the good of one's family and others.

In related spheres, we are told, indeed, we are nagged and cajoled and sometimes even penalised into changing our behaviour to save State medical resources and our own lives by not smoking, taking precautions against AIDS (although this has weakened), protecting our own health by the food we eat and the exercise we take. Simultaneously we are allowed to do

whatever we like in more private fields, and the ability to resist temptation is not easily promoted in communities where criticism is not offered and tax benefits not accounted for.

In the case of women, we give them two messages. One is that the good mother stays at home with her children throughout their infancy if not longer, and is praised for being pushy or being a helicopter mother, or otherwise devoted to her children, safeguarding their physical health at all times. She is rewarded in maintenance awards for staying at home, and being a housewife/mother is regarded as her share of the equal partnership of marriage, as it is described by judges now. But we also expect to find women occupying half of the top jobs, getting equal pay, retiring at the same age as men with similar pensions. We expect women to jeopardise their careers by staying at home with their children and then we make their position precarious by providing for easy divorce, regardless of how well they have behaved as homemakers.

## **The statistics**

According to the ONS, there were only 231,000 marriages in England & Wales in 2007, the lowest total in 112 years. 4 out of 10 are likely to end in divorce. 143,000 were first marriages, the others second or further remarriages. Remarriages are statistically more likely to break down than first marriages. We have the highest divorce rate in Western Europe, at 6.68 per 1000 married people, compared with say Germany at 4.57 and France at 2.01.

Historically the divorce rate has been linked to the ease of divorce and changes in divorce law. After legal divorce was introduced in the Matrimonial Causes Act 1857 there were 24 divorces; at the end of the first world war a few thousand. In 1923 equal divorce rights were given to men and women and the rate climbed again to 60,000 at the end of the second world war. The Divorce Reform Act 1969 pushed the rate up still further to 119,000 in 1972, and 165,000 in 1993. In 2007 the annual rate came down to 128,000 because the numbers choosing to cohabit and not marry had risen and so had the age of marriage. There is a correlation between later age of marriage and less divorce. The rate is highest for those who marry in their early 20s, and the average age at divorce is 41 for women, 43 for men. Other factors predisposing to divorce are premarital births, cohabitation before marriage and a previous divorce. Previous divorcees now tend to cohabit the second time around, with the effect that although the marriage rate may have dropped, there is a higher cohabitation break up.

At various times rising divorce rates have been blamed on a recession, or alternatively rising incomes so that women can afford to be on their own; on housing shortages, the end of a war, women going to work and becoming independent, young age of marriage, remarriage and the availability of legal aid to institute proceedings. In fact it is now proven that it is the law and its administration that push the rate up. It has been shown that the introduction of so-called no fault divorce, which I will explain shortly, has had the effect of increasing divorce by 2 per 1000 married people in the long term. This was based on analysis of 18 European states between 1950 and 2003. Reforms based on no-fault were said to account for 20% of the increased rates across Europe in the late 20<sup>th</sup> century. ('The Effect of Divorce Laws on Divorce Rates in Europe', L. Gonzalez & T. Viitanen, Sheffield University 2006.) Of course changes in the law affect human behaviour - that is why the law was passed or reformed in the first place. (Allen & Gallagher, 'Does Divorce Law Affect the Divorce Rate?' 2007). Easy divorce and the access to financial benefit attached to ending a marriage gives the state-sanctioned message that marriage can be treated lightly. On the other hand if the ending of a marriage is made too legally difficult, it is likely that some will be deterred from marrying in the first place, or will cohabit with another while still married to the spouse from whom they cannot free themselves. These are arguments to be borne in mind when considering whether reform is worthwhile, even if the law is not perfect as it stands.

## **The law**

The most recent reform is 40 years ago (I was there when it was being devised at the Law Commission and it shaped my career.) The Divorce Reform Act 1969 (otherwise known as the 'Casanova's Charter', and now consolidated in the Matrimonial Causes Act 1973) introduced the concept of irretrievable breakdown as the ground for divorce. It removed the old concepts of guilt and innocence in divorce, the stuff of so many novels and stage dramas where the hotel chambermaid is summoned to give evidence that she saw the spouse and the co-respondent in bed together. (See the 1934 novel *Holy Deadlock* by A.P. Herbert.) Of course in practice 'irretrievable breakdown' is hard to define, let alone to prove, and in order to facilitate the passage of thousands of cases through the courts, the concept was reduced to the proof or allegation of one of the five facts, still popularly known as the 'grounds' for divorce, namely adultery, unreasonable behaviour, 2 years' desertion, two years living

apart with consent or five years without consent. Children and financial proceedings are separate and may continue to drag through the courts years after the marriage has been ended by a divorce decree. 75% petitioners choose to divorce on the so called fault grounds, (so called because they resemble the pre-1969 grounds) the first three listed, that is adultery, 'cruelty' and desertion. They are chosen in preference to the more civilised and less provocative separation grounds because they are quicker. No petition may be brought within the first year of marriage.

One of the most significant reforms came about through a change in procedure. Instead of the parties appearing in court and giving evidence on oath about their behaviour before a judge in public, in order to deal with the streams of cases, in 1977 'Special Procedure' was introduced, although it is now the norm and not special. No appearance in court, but the judge looks at the papers in his room and if satisfied with the arrangements and statements in them, progresses them to the pronouncement of a decree nisi followed a few weeks later by a decree absolute. This is all on paper, so there is no opportunity to challenge the statements made that allegedly go to prove the ground, for example, unreasonable behaviour. It is very rare indeed to have a defended divorce. It is said that it is very easy, almost collusive and artificial to allege unreasonable behaviour, because almost anything will amount to that, and it is a quick way out. Indeed, conceptually and procedurally, it is far more difficult to terminate those other pillars of a stable life, employment and a tenancy, than marriage.

Fault makes no difference to the arrangements for children and finance, unless quite exceptionally extreme, although technically we still have grounds that seem to embody fault. Many a divorcing spouse cannot understand why he or she is denied the chance to allege or disprove fault; they feel that it is a charade. Women form the majority of petitioners - not because they are the ones anxious to divorce their husbands, but because it is usually his behaviour that provides the grounds, and to petition is the only way she can access the financial assistance from him that will enable her to live alone. Lawyers are said to discourage couples from using the two-year separation ground for reasons of financial diligence. During those two years the financial situation of, say, the wife who said at the outset that she needed only a certain amount, may worsen, and the law might change in detrimental ways.

There were mistakes in the 1969 law, even though it was the result of the most protracted analysis, preparation, debate and amendment. It was promoted as a law that would promote the stability of marriage by focusing on the irretrievability of the breakdown, that it would encourage reconciliation through solicitors, fairness, the protection of children and the economically weaker spouse. It was thought that the reform would lead to the reduction of the numbers of illegitimate children and cohabiting couples, because people would be free to divorce and remarry and legitimate their offspring, where previously they might have been prevented by the need to prove fault on the part of the unwanted, but well behaved spouse. In fact, the increased freedom to divorce which was granted by the 1969 Act had the opposite effect. Births out of wedlock have risen by one percent a year ever since: 8% in 1971 and 44% now. The legal concept of illegitimacy was abolished by the Family Law Reform Act 1987. People are just not as interested in the formalities of their relationships as had been thought. They seek the quickest way out of a bad relationship and carry on regardless.

### **What is the harm?**

Are we simply in a new society where personal happiness is our guide and children adapt to variable new household structures? Have I turned into Mary Whitehouse? We can start with the easily quantifiable, the material cost. The material costs comprise *inter alia* legal aid for proceedings, welfare for one-parent families, extra housing because one unit is now two, the running of the family courts (about 100 in London alone) and judges, lawyers, accountants, conciliators, additional illness arising from the divorce stress, which is documented, absence from work and children's extra needs because more of them are taken into care, and in general divorced households receive more in benefits than they pay out in tax. Fathers are notoriously reluctant to pay for the children they no longer live with. The failure of the Child Support Agency which was established to calculate maintenance for children in a fixed fashion and avoid the expense of going to court, was spectacular and repeated even when reformed - not so much a failure of the system but the resistance of the men who would not pay regardless of the arrangements. The overall cost of family breakdown has been variously estimated at either £20 billion pa (Family Law Review group of the Centre for Social Justice 2006, vol. 2 *Breakdown Britain* p.68 n.12) or up to £40 billion (Kirby J., 'The Price of Parenthood', Centre for Policy Studies, 2005; Relationships Foundation, 2009, 'When Relationships Go Wrong: Counting the Cost of Family Failure'). The conclusion must be that as a society we cannot afford serial marriage and cohabitation on this scale. The poverty of the children is as inevitable as the damage to their emotional and educational future and that of their parents, to which I turn next.

Courts take little real concern in the future of the children of divorce, because it was decided in the last round of legislation that what used to be called custody disputes should be left to parents to sort out unless there was something intractable or very wrong on the surface. The court approves the divorce unless *dissatisfied* with the arrangements for children. Yet for years it has been shown by studies that divorce is associated with harm to children, including educational attainment, more drinking and drug use, psychological harm, poorer employment chances and greater likelihood of relationship breakdown themselves later on. Even apparently amicable divorces result in more stress to children (Marquardt E., 'Between two worlds: the inner lives of children of divorce', NY 2005). There is risk of physical harm too from future living arrangements of the parents. Children are at far greater risk of abuse from stepfathers and their mother's boyfriends than from their natural parents. Canadian research stretching over 20 years put the risk of a child being killed by a step parent at between 50 and 100 times greater than by a parent. The NSPCC in Britain found that children living with their biological parents are between 20 and 33 times safer than those living in any other type of household. It is often said that the difficulties for children of divorce arise solely from poverty, but again research has shown that poverty is less of a risk than the presence of a step parent. Putting more resources into the support of one parent families will not necessarily be the answer to what children may feel. It is marriage that makes the difference, for only 8% of married parents split up before the child is 5 compared with 43% of the unmarried.

According to the Telegraph, December 2008, a survey of children under 10 revealed that if they could make a new rule it would be that they ban divorce; marital splits were named the second worst thing in the world - after being fat!

The children instinctively recognised the benefits of marriage, set out by research (amongst many, McLanahan, S., 'Family, State and Child Wellbeing', 2000 Annual Review of Sociology vol. 26 p. 703), namely better health, longer life, better finances, less risk of domestic violence and isolation in old age, the support of a family network, greater likelihood of being involved in the local community and more law abiding citizens.

Despite all this, and I have only scratched the surface of the depth of research, it seems to be an unspoken political decision that attempts to make divorce more difficult are totally unacceptable. Any other situation that is known to harm children, sometimes not nearly as much, for example school food or paedophilia, attracts legislation and extensive public campaigns without dissent. But even when public debate focuses on the plight of single parents and their children, the fact that over half of them are created by divorce and separation is overlooked. It is astonishing that no government seriously considers divorce as an issue while expressing anxiety about single parents, their children and society's health. How silent is this issue compared with environmental protection, smoking, drugs, obesity, exercise, driving, supermarket plastic bags and so on.

Policy makers will not acknowledge the difference between marriage, cohabitation and one-parent families, and refuse to confront a major factor harming society, even while issuing studies and warnings about gang warfare and the carrying of knives, drop out rates from school and failure to find employment amongst youth. If anything, the debate is couched in terms of having to adjust to new family structure, and legal academics writing in this field hasten to make the case for adjustment of law and practice to the new situation rather than examining what has gone wrong. Any opposing voice is drowned out. Mr. Justice Coleridge of the Family Division gave a speech on this issue earlier this year, where he described family breakdown as a greater threat to our society than global warming. He pointed out that fathers and mothers who have failed to commit and engaged in a game of 'pass the partner' have left millions of children scarred for life. He called for marriage to be recognised as the gold standard for relationships. For this, he was castigated on air as an old man (albeit only 6 years older than the critic, Prof Mary Beard) and a judge out of touch with society, even though he has presided over hundreds of family cases as a barrister and judge over 30 years. I can only conclude that there is an unwillingness to address the issue because of the fall out of previous 'back to basics' calls, and because our political leaders and opinion formers are themselves involved in divorce or breakups. The last attempt to reform divorce law, not necessarily along lines that would improve the situation, had a very rocky passage - the Family Law Reform Act 1996 - introduced by a Conservative Government and abandoned for the greater part by the incoming Labour Government, with the result that virtually none of it is in force, notably not the divorce law sections.

## **Reform?**

Would there be merit in changing the law? The past pattern has been that as rates of divorce rise, a gap is seen between the black letter law, which is fairly strict, and the actual practice, which has been to get around it in the interests of speed, cheapness and sometimes on a consensual basis. So the law has been reformed to recognise the reality; but promptly the divorcing partners start to get around it again, the rate rises and the same dilemma follows. It has to be acknowledged first that changes in the law, especially simplification, do push up the rate and that a little hypocrisy in this field is not necessarily a bad

thing. Although the failure to recognise any fault on behalf of one party or the other does rankle; in some marriages, but by no means all, there is clearly fault, as popularly understood, on one side or the other, and it is odd that this cannot be referred to. There is no other area of law where such attempts are made to ignore causation and blame, and failure to do so may make for more resentment in the separate but parallel proceedings for maintenance and property, and maybe in making arrangements for the children. The reintroduction of fault, at least in maintenance proceedings, might send a message that behaviour in marriage is a serious issue. Its removal as a concept has taken away some leverage from spouses seeking to block the divorce proceedings and induced an inability to understand why one is paying for someone who, in general parlance, was 'guilty'.

On balance I would not advocate any wholesale reform of the divorce grounds themselves. All those whose marriages have broken down can easily obtain divorces under the existing law, so there is no need to 'liberalise' it - on the contrary. Indeed, any reform is dangerous. Each successive attempt in the 20<sup>th</sup> century to bring the statute law into line with 'reality' has resulted in an increase in the divorce rate. Every increase results in greater familiarity with divorce as a solution to marital problems, more willingness to use it and to make legislative provision for its aftermath. The pressure on the divorce system leads to a relaxation of practice and procedure in divorce, then to a call for a change in the law to bring it into line with reality, and then to yet another increase in divorce. This is the spiralling process which Parliament should not encourage, for the sake of the children if nothing else.

My own remedy would be an introduction of a waiting period to stop divorce being so quickly granted, even where the ground is one of the speedy ones. I would add to the present grounds of divorce a provision that no decree shall be granted until at least 12 months have elapsed from the service of the petition (the start of the formalities). This would ensure that no petitioner would be free to remarry for at least one year after the beginning of the process, regardless of the reasons for the divorce. Others have called strongly for a 3 month cooling off period before proceedings can start (Social Justice Policy Group, July 2009) in which finances and the impact of the divorce can be explored. During this period no financial proceedings could be launched, for they inflame the situation and the purpose of waiting would be to discover what was practicable and what could not be afforded. The waiting period could also be used to explore alternative dispute resolution procedures as an alternative to court. Most importantly they could be used to provide information to the parties about their future and the way the legal proceedings work. Having said that, some pilot trials of providing information to divorce petitioners has not worked well, because it has been done to groups, and has led to more insistence on seeing a lawyer, rather than less.

Mediation has not worked as well as might be hoped either, even though the conciliation and mediation professions have grown greatly. They are not to be confused with reconciliation, which latter is an attempt to bring the parties together again. Mediation and conciliation are designed to help a single person or couple reach the appropriate decisions concerning the breakdown of the marriage. They are not designed to promote or assist reconciliation. As such, mediation is useful but is unlikely to hold down the rate of divorce. Women are reported to feel disadvantaged by mediation. This is because mediation seeks a compromise or agreement, and favours the articulate and determined over the cowed and quiet, apparently, and it is said female mediators are more persuaded by husbands' arguments than wives'. For forty years there has been a provision in the divorce law that solicitors filing petitions should indicate whether they have, or have not, given information to the petitioner concerning reconciliation services. This is known to have little if any effect. Successive governments have promoted mediation, possibly in order to save on legal aid.

Information and education may be ways ahead. There are three points at which information about divorce and its impact may be delivered. The first is premaritally, the second is at school, where lessons could be given on family relationships and the impact of parental splits on children, and a start has recently been announced on this, controversial though it is. The third is mandatory referral to information centres before formal divorce proceedings start.

It seems unlikely that small tax breaks or incentives would have much effect although they certainly did in the past. The benefits and housing system is now so flexible and varied that there will be other incentives that might be borne in mind which would pull in another direction. I would like to see government and public attitudes change, difficult though that is. Divorce is not a private matter, it is of real public concern and cost, with a ripple effect on the family, the community and the whole country. So public attitudes have to be changed, just as they have been in relation to environmental issues and smoking, with greater or lesser success. Every government initiative now has to have a impact assessment attached to it, weighing its impact in issues such as race, gender equality and the environment; support for marriage and the best interests of the child should be added. Then legal aid should be considered. The government's Legal Services Commission has recently cut the family legal aid budget by £6m (in a scheme of legal aid that costs £100 m. to administer) and has been heavily criticised for doing this. It puts vulnerable women and children at risk by making it difficult for them to get advice and representation. The budget should be ringfenced,

while the costs should be publicised, and more imaginative ways of funding the costs should be found. In my lecture on marital assets you will see that sometimes the cost of fighting to keep them outweigh the value of the property itself.

### **The way forward**

If family break up is inevitable, then we should face up to it. The effects could be ameliorated by providing more affordable day care for children, to enable lone mothers to work, better career guidance for girls, as well as a fresh look at men's preparation for parenthood. Girls still vaguely expect to be kept if they live with a man and believe that there will be support if the union breaks up - unlikely, as we will see. If divorce is, indeed, inevitable in society, then women should be educated to face it, and it is no solution to the material and psychological problems to expect them all to rely on ex-husbands. Historically, the poverty of divorced and separated women is an established feature. It is surprising that feminists have remained silent on the issue of divorce, where one might expect a clear and demanding female voice. There has not been one since Baroness Summerskill opposed the 1969 divorce reform. (It was she who coined the phrase 'Casanova's Charter' and spoke in defence of the legions of women that she claimed would be deserted when the new law came into force.) Presumably it is because women have diametrically opposed personal interests in ease of divorce. For every woman abandoned by her husband, there is another who is glad to have the opportunity to marry or live with a divorced man. Yet it is clear that if women ought to be protesting as a sex against anything, it is against easy divorce and a high divorce rate. The law claims to 'protect' them through maintenance, but it is not that sometimes illusory financial protection that is needed, but the presence of the complete family.

In conclusion, if we are serious about the need to hold or reverse the rise in divorce, then there are two ways forward. One is by education of young persons still at school. The advantages and disadvantages of educating young people about smoking and food have been explored. They certainly hear the messages even if they do not heed them, and some may say that it has done some good. There is no reason not to try the same approach in relation to divorce. Marriage education could be coupled with the existing sex education programmes, each reinforcing the other. A marriage education programme could focus on the factors that are known to make for a happy or unhappy marriage, the financial costs of splitting up, the dangers to children of broken marriages, the paternal role, and the career prospects and post-divorce situation of women. It is not necessary to antagonise teachers or public opinion by attaching any particular political or religious agenda: one need only let the facts speak for themselves. Sadly, these changes will take a long time to prepare and to take effect. The other remedy is to tighten divorce procedures by insisting on a delay before freedom to remarry in divorces based on the adultery or unreasonable behaviour grounds, which can be processed so quickly at the moment.