

## THE STABILITY OF THE FAMILY

A report to the Director of UNESCO on the Colloquium on a Comparative Study of the Legal Means to Promote the Stability of the Family, Held in Spain, under the Auspices of the International Association of Legal Science.

by

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In numerous places fears that the stability of the institution of marriage and family might be in danger have been expressed in recent years. Concern about the family has been voiced by organizations so different in outlook as the Roman Catholic church and the government of the Union of Soviets Socialist Republics. Special cabinet ministries charged with the task of designing measures to protect and strengthen the family have been established in France and the Federal Republic of Germany. Studies by governmental commissions have been undertaken in the United Kingdom and other countries. Family associations have sprung up in many places and have united on an international scale in the Union of Family Associations. The problem of divorce has constituted the subject matter of heated discussions, legislative reforms, or political postulates in both hemispheres. In the United States of America in particular a vast amount of writings on the family has been produced by sociologists, legal scholars, educators, psychiatrists, and theologians as well as by authors writing for popular magazines and daily newspapers.

Efforts to protect and to strengthen the stability of marriage and the family have been of many kinds. Religious leaders and

bodies have been engaged in efforts to vitalize the faith, through intensified religious education and exhortation to strengthen Christian responsibility, and to oppose legislation regarded as being incompatible with Christian doctrine. Psychiatrists, educators, social workers, and others interested in public welfare or individual health of body and mind have engaged in the search for ways and means by which marriage stability might be effectively promoted.

Many of the proposals require for their implementation measures which can be applied only by governments. Enforcement by judicial or administrative agencies is necessary not only for such police methods as the criminal prosecution of husbands who neglect to furnish support to their families but also for schemes of family allowances, public housing, or other measures of public welfare which require the use of public funds to be raised through the taxing power of the state. As in our times the state is in all its activities strictly bound by the law ; the making of laws, especially by way of legislation, is indispensable. In the preparation of these laws as well as in their implementation and enforcement, legal experts are needed along with those in the other fields concerned.

In the United States of America, the American Bar Association found itself impelled to pay attention to the problem of the role of the law in the course of the widespread efforts to protect and promote family stability. In 1950 it sponsored the establishment of an Interprofessional Commission on Marriage and Divorce to study the problem involved and to draft a set of model laws. As its first task that commission undertook the drafting of a model law on divorce, which, the commission decided, should be based upon scientific knowledge rather than upon preconceived postulates.

It became apparent to this commission that it would be necessary to find a broader international basis for its work. It was also found that studies of various kinds had been initiated in other countries, and it was felt that all these studies might be benefited if they would be brought into contact with each other. Toward this end, Professor Rheinstein proposed to the International Committee of Comparative Law that it should place a colloquium on marriage

stability upon the agenda of one of the annual meetings of the International Association of Legal Science. This proposal was accepted and a colloquium on family stability was called to convene at Santiago de Compostela, Spain, on September 5, 6, and 7, in connection with the Association's First International Congress of Comparative Law. Professor Max Rheinstein was appointed as the general reporter of this colloquium.

In a memorandum which was sent by the general reporters to the prospective members of the colloquium, the topic for decision was defined as follows :

#### LEGAL DEVICES TO PROMOTE MARRIAGE STABILITY

1. The term marriage stability cannot be defined unequivocally. The opposite of a stable marriage is an unstable one. When is a marriage unstable? In a sense a marriage may be called unstable when the relation between the spouses is disturbed by disharmony, or when its permanency is endangered by dissatisfaction of one party or both, or when its monogamous character is impaired or threatened by a liaison of one of the spouses with a third party. The term "marriage stability" has qualitative implications which range over a full scale of different kinds of marriage from the ideal of a perfect harmonious, permanent, and invariably faithful union to the other extreme of a married couple living separate and apart from each other and inspired by mutual hatred or contempt.

For the purposes of the colloque it appears necessary for the time being to disregard the qualitative element and to define marriage stability in a purely formal sense. Promotion of marriage stability shall thus mean no more than prevention of marriage breakup. **Marriage breakup**, in turn, shall signify the external event of termination of the maintenance of a common home of a married couple. A further limitation is necessary, however, in order to eliminate two groups of situations in which a marriage cannot be regarded as having been broken up in spite of the fact that the parties do not presently live together.

The first of these groups covers those situations in which a common matrimonial home is maintained, although one spouse is temporarily absent from it for such reasons as short travel, vacationing, temporary employment outside the place of the matrimonial home, service in the armed forces, or temporary institutionalization in a hospital, a prison, a detention camp, or some other institution.

In the situations of the second group it is no longer possible to

speak of a matrimonial home of the couple, but its absence is due to facts other than dissension or dissatisfaction with the marital union. Situations of this kind exist where one of the spouses is institutionalized for life or where a couple is prevented from living together by laws restricting immigration or emigration, but and there the spouses, in full agreement and harmony, maintain separate professions or careers which require their long-time presence in different places.

For the purposes of the colloque, "marriage breakup" shall thus mean the termination of the maintenance of a common home by a married couple which is due to dissension or dissatisfaction with the marital union.

Such breakup can be brought about unilaterally by the **desertion** of one spouse by the other or by a **separation** more or less agreed upon by both.

**Devices to promote marriage stability** shall thus be devices designed to prevent marriage breakup in the sense just defined.

**Legal devices to promote marriage stability** are those which make use of that compulsory element which is characteristic of the law, that is, enforcement by an agency of the state. The colloque will thus be concerned with those laws — written, customary, or judge-made — which can be used to induce a person who contemplates to break up his marriage to forego the carrying-out of his plan and rather go on with the maintenance of his marital home.

In no country does this motivation seem to be brought about by the threat of punishment for the mere fact of simply discontinuing the maintenance of a marital home. Desertion or abandonment are treated as criminal acts where they are combined with a failure to provide support for a wife or children, but no legal system seems to try, by means of a threat of punishment, to compel a person against his will to live together with his spouse.

The legal devices to deter individuals from terminating the maintenance of a marital home are thus of an indirect character. In the countries of monogamy, among the most important appears to be the legal impossibility to enter upon a new marital relationship as long as a prior one has not been terminated by the death of one spouse or by divorce. Attention must thus be paid to laws excluding the possibility of divorce altogether or rendering divorce difficult to obtain. In those extensive discussions of the "problem of divorce" which have been carried on in recent years, especially in the United States and England, a tendency has shown itself to regard the divorce law as **the** device to prevent family breakup and even to equate divorce and marriage breakup. Such identification is not justified. Important, however, is it to know, to what

extent, if any, the comparative ease or difficulty of obtaining a divorce constitutes an element of motivation in rendering marriages more or less stable. There have been many apodictical statements that "divorce breeds divorce" or that "the absence or excessive difficulty of divorce breeds desertion, adultery, and concubinage," but no one has so far been able to furnish exact proof of either one of these propositions. The difficulties of such proof are, indeed, formidable. The task is that of isolating out of the seamless web of interconnecting motivating factors the one factor "state of the divorce law." The task does not seem to be altogether impossible, however. Efforts to elaborate appropriate methods are currently made in the United States. Comparison of, on the one side, the divorce laws of several countries and, on the other, the state of marital stability in these countries constitutes one of these methods. This fact as well as the recognition of the necessity of cooperation on a supranational scale have resulted in the desire to have the problem treated by the International Association of Legal Science.

The number of factors by which the degree of marriage stability is influenced in a given society appears to be almost infinite. Among the more obviously recognized ones are the state of the particular society's industrialization and urbanization, the status of women, the religious and moral climate, the state of education, the housing situation, or the attitudes toward and the extent of prostitution. In connection with many of these phenomena, a certain role is played by legal rules such as those concerning the status of women with respect to political rights or rights of property, or laws on housing, family allowances, or rights of succession to property on death. In some ways family stability also seems to be influenced by law on income and estate taxes, pensions, social security, or public morals. Systematic investigation of these connections seems to be totally lacking. Yet, in order effectively to protect and promote marriage stability, it is necessary to know what kind of measures are promising, which are likely to be futile, and which may do more harm than good. Co-operation and an exchange of ideas are necessary not only between nations but also between the representatives of different branches of learning. Legal scholars must work together with experts in sociology and, perhaps, also in other fields of social science.

To the Bureau of the International Association of Legal Science, it has appeared advisable not to attack the whole complex at once. The colloque scheduled for 1956 is to be of an exploratory character. Its main task is that of formulating the problems. In 1957 the discussion shall be continued by a larger group consisting of representatives of the law as well as of social science.

This memorandum was accompanied by a questionnaire which the recipients were requested to answer in advance of the meeting

so that the factual information sought to be obtained would be available. Fourteen countries responded.

At the very outset of their discussions all members of the colloquium were of the conviction that the problem of investigating all those legal devices by which the stability of marriages might possibly be influenced would be too vast to be adequately covered in one single meeting of three days' duration and that it would therefore be desirable to provide for continued and extensive study in the future. The colloquium thus regarded it as its principal task to obtain a survey of the problems involved and to consider possible ways in which their study could be profitably undertaken along lines of supranational scholarly co-operation. In order to obtain a firm basis for the study of those legal devices by which marriage stability might be sought to be protected or promoted indirectly, it was decided first to deal with that legal device by which marriage stability is sought to be protected in the most direct way, that is, those laws by which the termination of a marriage by the parties, or one of them, is rendered difficult or impossible. The first part of the meeting at Santiago was thus devoted to a survey of the divorce laws, especially of the countries represented at the meeting and, in connection therewith, to the designing of methods by which it might be possible to determine for a given society the effect of its divorce laws upon its actual state of marriage stability. In the second part of the meeting the colloquium tried to obtain a survey of legal devices other than the divorce laws which might be used for protecting marriage stability. Finally, the colloquium undertook to make plans for future work, especially for a second colloquium to be held in 1957.

As a result of this agreement, two resolutions were placed before the Comparative Law Congress of the International Association of Legal Science and were passed unanimously. Pursuant to these resolutions the International Committee of Comparative Law decided to place upon the agenda of the 1957 meeting of the international Association of Legal Science a colloquium on marriage stability and to appoint Professor Rheinstejn as general reporter for the topic.

The two resolutions which were adopted read, in part, as follows :

### I

A. The various reports and the discussions at the colloque gave valuable information about the different legal systems, especially in respect of grounds of separation and divorce, and, furthermore, about the frequency of separations and divorces and about the existence of the *facto* separations and informal unions. Various types of legal systems could be distinguished. In some countries no legal divorce exists at all (Spain, Italy, Brazil). The legal attitudes toward the idea of divorce by mutual consent are very different. Also the frequency of informal unions differs widely. In some countries (e.g., Belgium) the divorce rate shows considerable regional variations according to different religions and traditional factors. In Japan a survival of ideas of pre-Western civilization can be observed in the rural districts, where the divorce rate is higher than in the cities.

In spite of all these many differences, it may be concluded that there are certain common trends. A steady rise of the divorce rate is to be found in a great number of countries. The divorce rate of the United States seems to be the highest, even though it has decreased during the last few years. Consent divorces represent in great parts of the world the regular solution of marital breakup, although the legal procedure is different in different countries. But we do not know whether the divorce figures allow the conclusion that there has also occurred a corresponding, or even any, increase in the number of cases of marriage breakup. In the discussions at the colloque there was underlined that, excepting some countries, we do not have such full statistical information about the divorce situation as would be desirable and that it is still more difficult to say anything about the rate of factual marriage disruption situations which obviously exist also in countries where the legal divorce rate is zero because the law does not recognize divorce *quoad vinculum*. It was also pointed out that some world-wide trends seem to make a rise in the number of factual disruptions inevitable;

the emancipation of women, the shrinking of the family, industrialization, urbanization, etc.

B. The discussions at the colloque led to the general conclusion that a new conference, already tentatively decided by the CIDC, should be held in 1957, in order to bring together legal and sociological scholars interested in the problem of family stability. The basic task of this conference should be to take further steps toward a scholar study of the problems concerned under all necessary points of view, insofar as they are of interest for the evaluation of existing legislation or possible legislation reform.

## II

At the colloquium held in Santiago in September, 1956, it was apparent that there exists a general agreement as to the desirability of the greatest possible stability of marriages and family relations in general. This conviction was shared equally by the representatives of the Western countries, of the people's democracies, and of the oriental countries. There also exists a widespread feeling that at the present time the stability of the institution of marriage is being endangered by a number of recent trends and developments. Everybody agreed that all possible measures should be taken to preserve and, in so far as necessary, to strengthen the stability of the institutions of marriage and the family. It also became apparent from the discussion that there exists a need for knowledge and information with respect to both the actually existing state of facts and the possible cause-effect relationships between the various devices advocated and the actual state and trend of marriage stability.

The present dearth of factual knowledge and information was felt to be serious and to be potentially productive of dangerous effects; widely divergent opinions have been held and professed with great strength and conviction. On the one side, for instance, it is said that "divorce breeds divorce," while on the other side it is held with equal conviction that "the lack of divorce breeds immorality." The advocates of neither opinion have so far been able to adduce proof for their respective positions.



The devices which are potentially apt to influence the stability of marriage are many and of great variety. Many potentially useful devices do not belong to the sphere of law but rather to those of religion, education, psychiatry, city planning, and similar non-legal spheres.

The characteristic of the sphere of law is compulsion through the might of the government. No government however can bring about durability of a marriage by direct compulsion. If two married people do not wish to live together, or if one is determined to abandon the other, no government can forcibly keep them together. All legal devices available are therefore of an indirect character only.

Indirect is even the effect of the rules of law which either render the tie of marriage completely indissoluble or permit the dissolution of the marriage tie only under certain limited conditions. A legal system which excludes divorce or under which a divorce is obtainable only with difficulty cannot prevent the occurrence of factual separation and abandonment or the creation of new adulterous unions. All it can do is to prevent the creation of a legally recognized new union. The effectiveness of the law concerning divorce is therefore not so obvious as it may appear at a first glance.

Even more difficult to ascertain is the casual effectiveness on marriage stability of laws concerning such topics as marital property rights, social security, taxation, pensions, family allowances or housing, or of laws providing for the use of public funds for marriage counseling or education for family living.

In view of this striking lack of indispensable knowledge and information, the members of the colloquium unanimously reached the conclusion that the 1957 Colloquium should be charged with the task of preparing the collection of such factual knowledge.

It was also unanimously held that it would be impossible for a colloquium of short duration by itself to find all the information which is presently lacking. The task of collecting the data will require years. The colloquium will have achieved a task of great im-

portance, however, if it succeeds in finding and defining the questions to be answered, in indicating methods for their solution, and in establishing a well-structured systematic survey of all the problems.

Perhaps the colloquium may even go a step further and try to promote the establishment of a formalized international organization through which the answers to the various questions may be sought. It will be one of the tasks of the colloque to investigate whether or not the establishment of such an organization appears to be practicable and, if so, what funds will be needed, how they might be obtained, and along what lines the organization should be established.

If the colloquium is to achieve its aim, it must be participated in not only by legal scholars but also by experts in empirical sociology and perhaps also by representatives of such other fields as social welfare, psychology, or education. The legal experts are to be chosen so that they represent the principal legal systems. The participants from the field of social science should be scholars of special experience in family research.

### III

A. When the colloquium assembled in Santiago de Compostela, it had before it the rich material of the reports that had been prepared for it. This material made it clear that efforts to protect and promote marriage stability have to a considerable extent been determined by tenets of religious faith or basic philosophy, which are held with deep conviction, but which it would be pointless to make the subject matter of discussion. The colloquium thus decided to accept as a working premise the proposition that stability of marriage is desirable and to limit its discussion to the problem of finding out by what legal devices, if any, this end might be achieved. In this way it was possible in discussions which were participated in by representatives of Catholic Spain, Communist Yugoslavia, Protestant or secularist Scandinavia, modern Japan, and other nations, not only to eliminate all friction, but also to carry on all conversation in the calm spirit

of scientific inquiry. It was also possible to reach agreement on a considerable number of propositions, the most important of which can be summarized as follows :

1. Legal devices to prevent family breakup can operate only by indirection. Governmental power cannot be effectively used to compel a married man or woman to live with his or her spouse against his or her own wishes. No such attempts are made anywhere in modern society. All the state can do is, by threatening punishment or by direct action, provide for the enforcement of those duties of support which are incumbent upon a husband or father or, in some countries, upon a married woman or a mother. The law can also prevent the factual breakup of a marriage being followed by the conclusion of new legitimate marriages by the parties.

Divorce laws, that is, laws which exclude or limit the possibility of dissolving the legal tie of an existing marriage, cannot prevent the factual breakup of a marriage by unilateral abandonment or mutual separation or by the creation of new irregular unions.

2. While it is likely that a society's state of marriage stability is to some extent influenced by the comparative ease or difficulty with which the formal dissolution of a marriage and, consequently, the conclusion of a new legitimate marriage can be obtained, few efforts have so far been made to obtain more precise information about this causal relationship, and hardly any reliable information is presently available.

3. Among the present laws dealing with the dissolution of an existing marriage, the following groups can be distinguished :

a) Marriage is completely indissoluble in any way other than by the death of one of the spouses—Canon Law of the Roman Catholic church; Spain, Italy, Peru, Brazil, Columbia.

b) A marriage can be dissolved upon the petition of one party if the other has been guilty of a grave violation of his marital duties—system of *divorce sanction*; *Verschuldensprinzip*; England,

Scotland, most states of the United States of America, France, and many others.

Kinds of misconduct enumerated in the divorce statutes as "grounds for divorce" are such acts as adultery (only ground for divorce in New York), physical cruelty (England, most American states), mental cruelty of various kinds (France, some American states), or malicious desertion for a certain minimum period, such as two years (Germany) or one year (Illinois).

c) A marriage can be dissolved where it is so thoroughly broken in fact that its factual revival cannot be reasonably expected—system of divorce *faillite*, *Zerrüttungsprinzip*.

The agency by which a party's application for the dissolution of his marriage is to be acted upon may be ordered by the appropriate statute to grant the application if the factual breakdown of the marriage has been ascertained through (1) the investigation of all pertinent circumstances of the individual case (Switzerland, U.S.S.R., Yugoslavia, Poland); or (2) the fact that the parties have factually lived separate and apart from each other for a certain period such as ten years (Rhode Island), three years (Germany), or two years (Louisiana); and (3) the fact that the parties have jointly applied for a decree of separation and have thereupon factually lived separate and apart from each other for a certain period, such as two years (Sweden, Finland) eighteen months (Denmark), or one year (Norway).

d) The system of *divorce sanction* and *sanction faillite* are in many countries so combined with each other that a divorce "for cause," especially on the grounds of adultery or cruelty, can be obtained quickly, while a divorce on the ground of factual marriage breakup cannot be obtained unless such breakup is specifically proved (Switzerland) or has lasted for a period of statutorily specified duration (Scandinavian countries).

e) A marriage will be dissolved upon the joint application of both parties based upon the parties' mutual agreement.

A system freely allowing the parties by their simple agree-

ment to bring about the dissolution of their marriage does not presently exist in any European country. In Belgium, where divorce by mutual agreement is provided for in the civil code, it is so hedged in by restrictive formalities that it is practically equivalent to the system of *divorce faillite*.

In Asia the system of divorce by mutual agreement is recognized by the civil code of Japan, where it largely seems however, to be equivalent to divorce by the husband's unilateral repudiation of his wife.

f) Free power of a husband to terminate a marriage by the repudiation of his wife is still the official law of Islam and Judaism. However, in most Islamic countries as well as in Israel efforts are under way both to limit the husband's freedom of repudiation and to provide possibilities for wives to bring about the dissolution of a marriage for cause or in the case of factual breakdown.

4. In many countries the provisions of the official law do not fully correspond with the law as it is actually applied by the courts or other competent agencies. Observations of actual practice even seems to justify the proposition that, in all places in which a divorce is obtainable only with considerable difficulty, there have been developed practices of collusive or migratory divorce which have resulted in sharp divergencies between the "law of the books" and "the law in action".

In judging the actual significance of a country's provision of substantive law of divorce, it is also necessary to pay attention to the procedural rules, especially those on jurisdiction, conciliation services, availability of *ex parte* proceedings, or the participation in the proceedings of some representation of the public interest as the queen's proctor (England), friend of the court (Wisconsin) or *defensor vinculi* (Roman Catholic church).

5. The state of a country's marriage stability is dependent on numerous factors which are intimately interwoven with each other. A decisive role appears to be played by the general structure of the family and its functions. The rise of the divorce rate which has occurred in many countries of Europe and America

seems to a large extent to have been caused by those changes in the structure and functions of the family which have been brought about by industrialization and urbanization, especially by the emancipation of the female half of the population from male domination inside and outside marriage. The effectiveness of restrictive divorce laws appears to be limited as against these developments. Promising results may possibly be achieved, however, by laws which provide for the effective organization and financing of services for marriage counseling and for education for family living.

6. Extensive research is needed to clarify the complex relationships of social causality involved and of the possible effectiveness of divorce-law reform and other legal devices thought to be of possible value for the protection and promotion of family stability. In that research it is necessary that the experts in the law co-operate with experts in sociology and other fields.

B. A program of fact-finding is extensive but indispensable. Only upon the basis of such facts as those indicated will it be possible to reach conclusions as to the effectiveness in relation to marriage stability of such legal measures as reform of the laws on marriage and divorce, marriage counseling, education for family living, family allowances, tax relief, etc. Even then certainty in the ascertainment of causal relationship will, of course, not be possible. But the degree of predictability can be expected to be higher than it is at our present state of ignorance. (\*)

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