THE "LENIENCY" OF THE SCANDINAVIAN DIVORCE LAWS

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1. ACCORDING to the Swedish Code of Marriage, Chapter 11, sec. 1,[1] two spouses who because of a profound and lasting disruption consider themselves unable to continue their cohabitation may apply for a decree of separation if they agree upon such measure. Before the court acts upon their application, they must have their case submitted to a mediator, in most cases a clergyman.[1a] Sec. 3 of the same chapter of the Code prescribes that, after a year of separation, each spouse has a right to petition for a divorce, provided the spouses have not in the meantime resumed cohabitation.

It would seem that these provisions are lenient, as giving access to divorce at will. The spouses, if they can agree upon the filing of a petition, themselves judge the character of the rupture between them. The mediator has no disciplinary sanctions at his disposal. At most he can request the parties to meet before him again in the near future in order to make certain that they are aware of the seriousness of their action. It should be emphasized that the court has no right to look behind the statement of the spouses that there exists a profound and lasting disruption, but has to issue its decree of separation on the basis of the application alone. Nor is there any room for discretion when the court, after the year of separation, deals with the petition for a divorce. The decree has to be issued solely on the evidence of actual separation during the period from the date of the previous decree of separation; generally it is sufficient to produce a written statement made by two persons who know the spouses.

Basically a similar procedure—a decree of separation followed after a year by a final decree of divorce—applies when one of the spouses is opposed to the divorce petition. In this case, however,

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[1] A translation of the Swedish Code of Marriage is found in Johan Thorsten Sellin, *Marriage and Divorce Legislation in Sweden* (a doctoral thesis presented to the University of Pennsylvania), 1922. In his thesis, Dr. Sellin gives a survey of the legislative history and the general background.

[1a] The alternative of submission to a civil mediator is less often resorted to.

the decree of separation will not be based solely upon the statement of a party. The plaintiff has to prove that profound and lasting disruption has been caused by disparity with respect to temperament and outlook. Generally speaking, the burden of proof carried by the plaintiff is not heavy. The mere facts that one of the spouses has filed an action for a decree of separation and that the spouses actually have lived apart from one another may satisfy the court. It is true that under a special clause the court has the power to refuse the granting of a decree of divorce in a case where "having regard to the plaintiff's own conduct or other particular circumstances it is proper to request that he shall continue to cohabit with the defendant". As clearly indicated by the legislative history, however, this clause does not imply that the question of guilt shall be considered a main issue. The clause mentioned is not comparable to the corresponding rule in the *Bürgerliches Gesetzbuch* of the German Federal Republic, as amended in 1961, which virtually excludes the guilty spouse from a divorce against the objection of the innocent spouse. Generally speaking, separation has to be granted in each case of genuine basic disruption. Only in quite special circumstances, such as when the plaintiff has not been able to judge the consequences of his act, has the Swedish Supreme Court used its discretion to refuse an application for a decree of separation.

The Swedish statutory provisions on separation and divorce date from 1915, when the first part of the present Code of Marriage was enacted. The other Nordic countries have similar rules. The Norwegian rules are derived from a Statute on the Dissolution of Marriage of 1909. The Danish, Icelandic and Finnish laws on the matter are somewhat later, dating from the 1920's.

2. In this article I shall try to describe how these rules of liberal access to divorce came into being and how they actually operate. Further I intend to discuss whether they may be considered beneficial to the community. What I say will refer to my own country Sweden alone. As far as I know the experiences of the other Nordic countries are essentially the same.

The Swedish Lutheran State Church acknowledged adultery and desertion as grounds for divorce. In both cases the early Reformers considered that in the New Testament there were statements which legitimated divorce, among others Matthew XIX and the Pauline privilege (*Privilegium Paulinum*) in Paul's First Epistle to the Corinthians VII. The Swedish Code of 1734 followed the same

line. Except for these, the two classic grounds, there was ordinarily no possibility of divorce. Other situations were dealt with through a special procedure designed to bring the parties together. In its procedure for dealing with wrangling and disruption in marriages the Swedish Church Ordinance of 1686 prescribed harsh disciplinary measures, such as warnings, penalties and, as the final resort, excommunication. In accordance with traditions surviving from the Roman Catholic period, the decree of separation *(separatio quoad thorum et mensam)* was one step in this procedure.

The sanction of excommunication was seldom practised and was possibly considered out of date as early as the time of the enactment of the Church Ordinance. For various reasons the King was empowered to deviate from the strict application of the laws, and now and then this prerogative was used for the purpose of permitting remarriage even in cases where there was no ground for divorce expressly mentioned in the statute book. During the 18th century such dispensations became more common than before in cases where the disciplinary procedure for dealing with wrangling and ruptures had been applied to the point of issuing a decree of separation but without positive result. In an Ordinance on Divorces, enacted in 1810, the royal prerogative of granting a divorce that enabled both spouses to remarry in case of previous separation undertaken as part of the disciplinary procedure was explicitly recognized.

At the beginning of this century the state of law was as follows. For practical purposes there were two routes for reaching a decree of divorce: (1) the innocent spouse could sue in court for divorce on the ground of adultery or of malicious desertion; (2) the spouses could jointly submit to the King a petition for a dispensation.

The first route was the more expeditious of the two. Desertion as a ground for divorce was far more popular than was adultery; in the years 1901–10 the number of divorces on the ground of desertion was roughly five times the number of divorces because of adultery. The situation is described by the Law Committee of Parliament in 1879 in a report on a private bill. "The matter is arranged thus, that one of the spouses, e.g. the husband, travels to the nearest foreign city, usually Copenhagen. Then the wife sues him in court for divorce on the ground that he maliciously and wilfully deserted her, and went abroad with the intention not to be and cohabit with her any more. Having been served the writ, the defendant admits the circumstances of the case by attorney, whereupon the court grants its decree of divorce

without more ado." The Committee adds the comment: "With the rapid communications of today, all this can be managed within the period of a few weeks."

To the poor man who was not able to afford such trips there remained only the way of submitting a petition to the King. However, this road was both thorny and slow: thorny because, in accordance with the provisions of the Code of 1734, the spouses had to sustain warnings of two ecclesiastical instances, and slow because the spouses had to pass the intermediate stage of a decree of separation.

To educated men this state of affairs seemed utterly unsatisfactory. The reports of the Ombudsman to Parliament in 1907 and 1909 give the views prevailing in Liberal quarters. The citizen had a claim for divorce and the clergy should not apply the warning procedure arbitrarily, thus causing unnecessary delays and making difficult the use of the only way to a divorce which was open to those who were not well off.

In 1909 the Standing Law Revision Committee was instructed to work in cooperation with Danish and Norwegian experts on the revision of the law of domestic relations. Its first report, containing a Bill on the Entrance into and Dissolution of Marriage, was published in 1913. The Bill was introduced in Parliament 1915 and passed in the same year. It was a compromise, on the one hand putting an end to easy divorces, on the other hand sanctioning the liberal view that there should be a regular procedure for divorce. Thus the Copenhagen trips were deprived of their usefulness. This was accomplished because the bill required in case of desertion that the neglective spouse had refused cohabitation for a period of two years. At the same time, it made the breakdown of the marriage after a previous period of separation the principal ground for divorce. All divorce suits were to be handled by the ordinary courts; thus the old practice of application to the King was abolished. At the opening of the debates in Parliament the Minister of Justice, Mr. Hasselrot, expressed this view with regard to the Copenhagen trips in almost Dickensian language: "Here we have an abuse that should be countered, but also a need which should be recognized." The Bill received support from nearly all quarters. Even those members of Parliament who belonged to the clergy were mild in their criticism. In part this can be explained by the fact that there were other provisions which might be considered concessions to the Church. From early times so-called incomplete marriages, an institution similar to the

common law marriage by agreement and copulation, had played an important role in Sweden. The betrothed woman was entitled to sue in court for a declaration of her married status. Adopting an old policy of the Swedish National Church, the Act made the marriage ceremony the exclusive form for the conclusion of marriage. Also, unlike what had happened shortly before in Germany and earlier in France, civil marriage was not made compulsory. As in England, it is only an alternative to religious marriage.

3. Let us turn to the question how the Swedish divorce law actually operates. In Chapter 11 of the Code of Marriage there is set out a catalogue of grounds for divorce, starting in sec. 3 with divorce upon previous legal separation. As mentioned before, the minimum period of separation is one year from the decree of separation. Closely connected with this is the provision in sec. 4 that actual separation for three years because of breakdown of the marriage is a ground for divorce. The other items on the list are malicious desertion, presumption of death, bigamy, adultery, contagious venereal disease, threatening the life of the other spouse, a sentence of hard labour for more than three years, addiction to excessive use of alcohol, and incurable insanity.

One may ask the question whether the legislators have been successful in their policy of "countering the abuse but recognizing the need". The answer is Yes in so far as the great majority of divorce suits are channelled through the sections dealing with divorce after previous separation. According to the official statistics for the year 1960, out of 8,958 divorces 7,242 were based upon a decree of divorce after previous legal separation and another 412 on the related ground of actual separation. The figure 7,242 includes previous separation on joint application and on the request of one of the spouses alone. There were 1,117 divorces on the ground of adultery. All the other grounds are represented by infinitesimal numbers. Thus, malicious desertion—the ground most frequently applied before 1915—was found in only five cases in 1960. The figures indicate that in most cases a divorce on the basis of a period of legal separation because of disruption is preferred to other possible arrangements. Lawyers practising in the domestic relations field affirm that this is often so even when one of the spouses lives on intimate terms with a third person whom she or he wants to marry in the future, regardless of the fact that a divorce on the ground of adultery would have been more expeditious. An agreement by the spouses that the husband shall

arrange a scene of adultery, as described by A. P. Herbert in his novel *Holy Deadlock* (1934), never occurs. The only Swedish case of this type that I know of concerned an English couple domiciled in Sweden who wanted to make certain that their divorce in Sweden would be recognized in Great Britain.

It should be mentioned that mediation and the subsequent period of separation as measures of procedure are far from mere formalities. The mediator is not supposed to bring pressure upon the parties, but he should be capable of screening hasty decisions. Mediation is a prerequisite for the decree of separation. During the period of separation the mediator has no power to intervene. However, it is not uncommon that spouses are reconciled after the decree of separation. Available statistical data indicate that spouses resume cohabitation in about one fifth of all cases. If the spouses should then find this to be a mistake, they have to start the procedure of mediation, a decree of separation and a period of separation, all over again.

In a divorce case the custody of the children and the questions of alimony and support are the truly important matters. Unlike England, there are no special rules providing for custody or care in divorce cases. The same rules apply to all situations when the parents have ceased to cohabit. In Sweden, as almost everywhere, the welfare of the child is the decisive point. In respect to the question of guilt, however, Swedish law departs from the ordinary view in other countries. It is prescribed in the Children and Parents Code, 1949, that regard may be paid to guilt only in cases where both spouses have equal qualifications for the care of the child. In practice the mother is generally considered more fit to take care of the child. When the child has reached the age of 10–12, its own opinion will be given much weight. The English rule that the custody may be granted the father while the mother has the care and control, is unknown to us in Sweden. Usually, the custody will be given to the mother if nothing particularly unfavourable comes to the knowledge of the social welfare officer who investigates the case. This is so even in the case of a divorce on the ground of the wife's adultery. About two years ago, on Swedish television, there was a moot case with the husband suing his wife whom he had caught *in flagranti* with her lover in the marital bed. In accordance with established practice the court decided that the mother should have custody of the daughter, who was about six years of age. This moot case aroused public opinion and many angrily expressed the view that the court should have

decided the other way. One may reflect that it is fortunate that matters of this kind are decided in the impartial atmosphere of the courtroom.

A divorce implies a radical change in the economic relations of the parties concerned. In case the wife is to have custody of the children, naturally the husband has to pay her for their support. On this point the Swedish rules are hardly of particular interest. On the other hand, the law of the relations of husband and wife reveals features that are more special. In England, women's emancipation and their claim for equal status was one of the reasons why the old rules of the common law were replaced by statutory provisions based upon the principle of separation of property. In the Scandinavian countries the old community of property survives in a new shape. As long as the spouses live as husband and wife, each of them administers his own property, but at the dissolution of the marriage because of death, separation, or divorce, each has a claim for equal distribution of the assets of both spouses unless there is some other provision laid down in a marriage settlement. Because of special statutory prescriptions the right of occupying the apartment and of entering as a party to the agreement with the landlord—a matter of great concern in a country with strict rent control—will be disposed of separately and the apartment given to the spouse who has the greater need. Ordinarily, therefore, the wife does not start from scratch.

During the period of separation the wife has a claim—enforceable at her option—to live under the same economic conditions as she enjoyed during the marriage. As expressed by the Standing Law Revision Committee in its Report on the Bill on Entrance into and Dissolution of Marriage in 1913, with regard to the purpose of the period of separation, it is proper that the separation should not lead to a greater reduction in the standard of living of each spouse than is required by the increase in costs resulting from the fact that the spouses will no longer have a joint household.

When incident to a decree of divorce, the duty of support takes another form. According to the Code, the wife's claim for alimony will depend upon her need as compared to the husband's capacity to pay. The court is free also to take into account other circumstances of the case.

It might seem an easy task to describe the courts' practices in matters of alimony, as there are thousands of examples to hand. Nevertheless, it is hard to present any set of fixed rules. Generally

speaking, a claim for alimony must have some justification. If the divorced wife is in good health and quite capable of earning her living, she will, as a rule, get no alimony except during a period of transition. In the *travaux préparatoires* of the Code it is hinted that a woman of higher social status cannot be requested to do ordinary simple work, but today such a demand will scarcely be considered proper. It is another matter that a woman who, for twenty years or more, has lived at home as a housewife will be treated more generously. If she has reached the age of fifty and has been accustomed to a high standard of living, the husband will be ordered to pay her a decent alimony regardless of her possible earning capacity.

As mentioned before, the question of guilt plays a rather insignificant role when the court decides whether the mother or the father shall have the care of the children. Where alimony is concerned the matter is more relevant. Chapter 11, sec. 26, where the substantive rules on alimony in divorce cases are laid down, contains the following provision: "However, alimony shall not be granted to the spouse who bears the principal guilt for the divorce." The language is broad, as guilt includes every breach of the duty of fidelity and mutual help incumbent upon each spouse. Thus, it is not limited to a flagrant act like adultery, but it is sufficient that the husband has neglected to give his wife the money she needs for the children, for the housekeeping or for her own personal expenses, or that the wife is quarrelsome or unwilling to take proper care of the home. Certainly, Swedish courts consider themselves bound by the directives of the legislators. However, on this point the Code is applied in a spirit different from the ideas which originally gave rise to the provision. Beyond denying alimony when the divorce is granted on the ground of the wife's adultery, the Swedish courts are, for several reasons, not inclined to let the question of guilt influence their decisions. First, according to the basic philosophy of the Swedish judge, in a divorce suit both spouses are to blame. Therefore, the presumption is against the claim that as required by the language of the Code the other spouse bears "the *principal* guilt". Second, regard should not be paid to the physical acts alone and it is hard to come to a judgment on any other ground. Third, one should not encourage people to wash their dirty linen before the court. The assessment of a lower amount than would otherwise be justifiable does not often occur. Forfeiture is considered something extraordinary.

In the Code there are also provisions for punitive damages. According to Chapter 11, sec. 24, a spouse may be ordered to pay such damages when the judgment of divorce is grounded on conduct whereby he has inflicted a grave injury upon the marriage or when a previous decree of separation was grounded on a serious breach of his obligations towards the other spouse. In their application of this provision the courts have not shown the same distaste for the idea that guilt should be considered relevant. Partly this can be explained by the fact that punitive damages may be used as an equitable remedy for the deserted wife against the effect of the statutory rules of community property. The wife's claim for damages is then set off against the husband's claim for equal division of the assets.

4. A reader of the Report of the Standing Law Revision Committee of 1913 will come to the conclusion that disruption or breakdown of marriage (*Zerrüttung*) gives the true justification for the general provisions on divorce after an initial period of separation. The arguments of the Committee are similar to those of the commentators on the somewhat earlier Swiss Civil Code of 1907 which recognized *tiefe Zerrüttung* as a ground for divorce. The Law Revision Committee exposed its views as follows. Irrespective of the guilt of either spouse, there may arise a rupture so deep and far-reaching that the continuation of cohabitation, as it ought to exist in a marriage, cannot reasonably be expected. "Ordinarily, it is not desirable, either from the point of view of the community or with regard to the spouses, that in such situations a marriage be held together by force. The State can enforce the external bond alone; but a community of life which carries into effect the moral content of a marriage cannot be enforced by external pressure."

However, these statements in the *travaux préparatoires* explain only in part why the reform was carried. In the introduction I have mentioned a further reason, namely dissatisfaction with the actual state of the law permitting easy access to divorce by means of Copenhagen trips. I quoted the words of the Minister: "Here we have an abuse to be countered, but also a need which should be recognized."

One ought not forget that the Scandinavian divorce laws were products of the general ideas on the emancipation of women. The modern emancipated woman refuses to recognize the old Biblical principles that hardship must be borne and that the husband is

her head whom she must obey. Carried to the extreme, it is within her interest to have the freedom to give notice at will that the marriage be dissolved, the custody of the children granted to her, the apartment placed at her disposal, and the husband ordered to pay support for the children and alimony to herself. Indeed, in the discussion which followed the television moot case mentioned before, a female lawyer familiar with divorce cases frankly stated that the husband who caught his wife *in flagranti* with her lover might have been worse off. Now, at least, he was released from the duty of paying alimony. If the wife had been clever enough to conceal that she had had intimate relations with another man, and if she had been the plaintiff in a trial for divorce the defendant husband would then have been ordered to pay.

It is interesting to compare the divorce rates of different countries. In Catholic countries like Italy, Spain and Ireland the divorce rates are zero, for the simple reason that divorce in the sense of a licence to remarry is not legally recognized. However, as soon as divorce is an accepted institution the figures seem to vary considerably. The Swedish rate of 1960 was 1.2 per 1,000 population, which is higher than the figure for England and Wales (0.51) or that for France (0.61) or Western Germany (0.83), but considerably lower than that for the United States. There, according to the figures for the year 1959, which are the latest ones available, the divorce rate per 1,000 population was 2.24.

Further, one should take into account that these figures do not tell the actual number of broken marriages. In my country, in case of separation, it is considered proper to settle the legal relations by a divorce procedure even when both spouses intend to live alone for the future. In England, on the other hand, it seems never to occur to anyone that a divorce suit can have another purpose than that of enabling a spouse to remarry. Certainly, there are in England many spouses who live apart without being divorced. This was, incidentally, clearly indicated by the Royal Commission on Marriage and Divorce in its report published in March 1956,[2] where the Commission deals with the proposal that with certain safeguards seven years' separation should be made a ground for divorce.[3]

A study of the catalogue of divorce grounds in the Swedish Code

[2] Cmd 9678.

[3] Cf. Otto Kahn-Freund, "Divorce law reform?" in *The Modern Law Review* 1956, pp. 573 ff.

of Marriage is like a study of the walls of an excavation. On the surface there are the portal provisions on divorce because of breakdown of marriage (*Zerrüttung*). Then follow the classic grounds of the Church Reformers, namely adultery and malicious desertion. Interwoven with these are a couple of provisions based upon the ideas of the 18th and 19th centuries that an innocent spouse may ask for relief from the marital bonds when the other spouse is guilty of having inflicted a grave injury on the marriage. Underlying all these provisions is the general idea of Christianity that in principle marriage should not be dissolved except through the death of one of the spouses. That this is the case will easily be discerned by studying the other parts of the Code. Divorce is considered the exceptional situation and is so treated. The rules concerning marriage settlements may provide an example. In a marriage settlement the spouses may exclude the community of assets by a provision that the property of each spouse shall be his separate property. It is taken for granted that the marriage settlement deals with dissolution through death and divorce alike. Thus, the spouses are not permitted to include in their agreement special provisions for the case of a divorce, having their property in community provided the marriage lasts until the death of one of the spouses.[4]

Compared to England, where an ordinary divorce procedure was introduced as late as in the middle of the 19th century and where the principal grounds still are those (adultery and desertion) recognized by the Church Reformers of the 16th century, Sweden and the other Scandinavian countries have advanced one step further and added the breakdown of marriage as a further ground for divorce. This should not be taken as a statement that the Scandinavian countries were among the first to introduce liberal and individualistic divorce laws. The *Allgemeines Landrecht für die Preussischen Staaten* of 1794 recognized divorce by consent in childless marriages. However, the divorce laws of today have little in common with the products of the rationalism of the Enlightenment.

I have mentioned before the reason for the doctrine of the breakdown of marriage which was given by the Swedish Law Revision Committee in 1913, namely that the community of life which carries into effect the moral content of a marriage has ceased to exist. Further, I have indicated that the true reasons for the

[4] In Norway such conditions were made permissible by an amendment of 1937.

Swedish law reform were to be looked for elsewhere. In spite of the great disparities, the argument that a marriage which does not represent a community of life has lost its moral content and therefore can be dissolved has one element in common with the argument upon which the English law on divorce is nowadays based. The current English view is not, as in the days of the Church Reformers, to ask what specific grounds are allowed according to the language of the New Testament, but rather to promote a general idea that redress should be given to the innocent when a serious wrong has been committed. The advocates of the principle of breakdown of marriage and of the principle of the matrimonial offence have basically the same approach, namely that divorce is a special remedy which has to be legitimated by some principle regarded as fundamental to social life, and independent of the wishes, the welfare or the need of the individuals concerned. Thus the law on divorce matters is judged upon its merits as a means of supporting the sanctity of marriage.

It is difficult to define the influence of the law upon the divorce rates. The subject has been touched upon recently by Professor Kahn-Freund in a very interesting article published in the last "Festschrift" in honour of Roscoe Pound.[5] It seems indisputable that the differences as to divorce rates between different countries and in different periods of time can in part only be explained in terms of the existing legal rules.

Let us leave aside my assertion that there is a common ground in the two principles of breakdown and matrimonial offences, and the question to what extent legislators can influence people's behaviour. It seems proper to demand that in a society based upon freedom of creed and mutual tolerance, the divorce laws of a country should not be judged upon such merits as now mentioned. For one or more of the persons concerned, the breakdown of a marriage may involve a catastrophe. The social group in which the individual found security and relief and, perhaps, satisfaction of basic needs, has been dissolved. In this situation it is the task of the legislator and of the courts to prescribe to the parties how they shall act in order to adjust themselves to future demands, with regard paid particularly to the interests of the weaker. Such are, in my opinion, the standards according to which one should judge the true leniency of Scandinavian divorce. It is

[5] Otto Kahn-Freund, "English Law and American Law—Some Comparative Reflections", *Essays in Jurisprudence in Honor of Roscoe Pound*, 1962, pp. 368 ff.

true that at the time of the enactment of the present Swedish Code of Marriage, in 1915 and 1920, the legislators had other reasons partly in their minds. However, to the Swedish courts, to the attorneys, and to the social welfare officers it has become increasingly evident that in divorce matters one should look rather to the future than to the past, or rather to the interests of the children and to economic long-term relations than to the question whether there was a proper ground for divorce.