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world: a socio-legal overview**

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Divorce Trends and Patterns in the Western World: A socio-legal overview

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Introduction

This paper provides a general overview of trends and patterns in divorce in the present-day western world, focusing especially on the interaction between legal and behavioural aspects of union dissolution. The account is written from a sociological rather than a legal perspective. Its purpose is to provide sociological background and context for an assessment of trends in the legal regulation of couple breakup. It first provides a brief outline of trends in divorce rates in industrialised countries over the past half century, highlighting both the overall upward shift which occurred and the varied timing, pace and extent of that shift between countries. It then turns to a number of aspects of the interaction between law and behaviour that are associated with these trends. The first aspect is the import of the law itself as a possible influence on union stability, particularly the question whether the wave of liberalisation of divorce law that occurred in most western countries between the 1960s and 1980s might have contributed to the rise in marital breakdown that emerged at the same time. A related issue is the role of various forms of *de facto* and legal separation as alternatives to divorce for those exiting marriage, a question which is relevant to both the methodology of measuring marital breakdown and substantive concerns about the range of possible legal responses to union dissolution. A further topic the paper takes up also bears on what the law on union dissolution entails, as it concerns the de-institutionalisation of marriage represented by the growth of non-marital childbearing and cohabitation and corresponding change in what can be counted as fragile unions, which in turn raises challenges for the state's role in regulating the process and consequences of union instability. This topic also points to the prominence of social policy as an element in state regulation of family life since welfare entitlements and maintenance arrangements arising from union fragility have regulatory impact and contribute to blurring the boundary between marital and non-marital family forms. The social gradient in union instability – how it varies by the socio-economic standing of couples – is also relevant to this issue since the balance between family law and welfare entitlements as points of reference for separating couples is likely to vary as we go from the top to the bottom of the social scale.

Trends in divorce

The advent of 'easy' divorce and a surge in divorce rates are now widely pointed to as more or less universal developments in the industrialised world in the final third of the twentieth century. While this perception is generally valid, countries differed in how soon, how fast and how far their divorce rates rose. The extent of variation is evident from looking at crude divorce rates (divorces per 1,000 population) across countries since the 1960s (Figures 1a-d). Much of Northern and Central Europe, the Baltic region and the non-European Anglophone states most closely conform to what we now often think of as the standard evolution: divorce rates were low until the mid-1960s but then, over a

period of one to two decades, they increased by two- to three-fold. That was followed by a period of two decades or so up to the present when they either fluctuated around an overall flat trend or showed some signs of decline. Latvia (in Figure 1c) and the United States (in Figure 1d) make an unexpected pairing in this regard in that their upsurge in divorce started early (that is, in the mid to late 1960s), quickly reached great heights (they both peaked in the early to mid-1980s at above 5 divorces per 1,000 population) but then subsided over a long period up to the present. The decline in divorce in the United States since the 1980s has been confirmed by measurement which utilises more precise indicators than the crude divorce rate (such as the divorce rate per 1,000 married couples). This decline has given rise to a new American literature which seeks to explain increasing marital stability rather than increasing divorce – or at least tries to locate recent developments within a long-term sequence of rise and decline in marital stability.¹

Other countries which took part in the post-1960s surge in divorce either moved ahead more slowly or peaked at lower levels (usually below 3 per 1,000) and showed less steep (or no) subsequent declines. Denmark is a case in point. It made an early and rapid upward transition but plateaued in the 1970s and 1980s at a level well below 3 divorces per 1,000 population. Belgium, on the other hand, rose more slowly but following an easing of divorce law in 1995, experienced a surge at the close of the century and then fluctuated at a level close to the 3 per 1,000 threshold.² Ireland is a clear outlier in Northern Europe: it had no provision for divorce until 1997 but even after divorce was introduced take-up was limited and by the early 2000s the divorce rate flattened out at an exceptionally low level (below 0.9 per 1,000). Part of the explanation for the unusual Irish trend is the late and restrictive nature of the divorce law that was introduced and the effect that had in diverting Irish couples into other exit routes from marriage. This is an issue I will return to below in considering the general question of how divorce law and marital breakdown rates interact.

The southern European region of Portugal, Spain, Italy and Greece was somewhat slow to introduce divorce and initially went for more restrictive legislation. This meant that for a time this region seemed to be set on a trajectory of low divorce (well below 1 per 1,000) that set it off from countries further north. In Portugal, however, legislation to allow divorce by consent with only limited restrictions was introduced in 1975. This was followed by a long steady climb in divorce rates which by the early 2000s brought Portugal into the same range as central and northern Europe. Divorce laws adopted in Italy in 1970 and Spain in 1981 were less liberal in that they required a period of legal separation (usually two to three years) prior to divorce.³ The result was a two-step process of exit from marriage where many of those taking the first step into legal separation were deterred from taking the second step into divorce by the cost and slowness of the procedures involved and possibly also by the limited interest in the right to re-marry which is the main focus of the second step. The picture changed suddenly in Spain in 2005 when the new socialist government introduced

¹ T.B. Heaton, 'Factors contributing to the increase in marital instability in the United States' *Journal of Family Issues* 2002, 23, 3: 392-409; B. Stevenson and J. Wolfers, 'Marriage and divorce: changes and their driving forces' *Journal of Economic Perspectives* (2007), 21, 2: 27-52.

² T. Vanhove & K. Matthijs, 'The socio-demographic evolution of divorce and remarriage in Belgium' Working Paper, Centre of Population and Family Research, Department of Sociology, University of Leuven, 2002.

³ G.E. Glos 'The Spanish Divorce Law 1981' *The International and Comparative Law Quarterly* (1983) 32.

a one-step 'express' divorce law.⁴ The incidence of divorce leaped in response, going from 51,000 divorces in 2004 to 127,000 in 2007, with the numbers settling back to around 100,000 per year by the end of the decade. This too is a case worth looking at more closely in the section below on the impact of divorce law on marital breakdown rates.

Moving directly eastwards from these southern European states, we find a further large belt of relatively low divorce in some southerly ex-communist states, particularly Bulgaria, Romania and Slovenia, as well as the more northerly Poland. Waves of high divorce along the lines of Latvia referred to earlier may have come and gone elsewhere in eastern Europe in the early years of communist rule but, as William Goode long ago pointed out, the true picture is obscured by the poor data and ideological posturing of that era.⁵ However, in Russia from the 1960s onwards, the data series compiled by Avdeev and Monnier suggests a fairly typical western pattern: divorce was moderately low in the early 1960s (well below 2 per 1,000 – Figure 1c) but then doubled within fifteen years and remained at quite a high level up to the present.⁶ The low level of divorce in Turkey until 2000 and its upward movement since then reflect the tension between modernisers and traditionalists that still feature in Turkish politics and social debate, not least in regard to family life.⁷

The crude divorce rates just looked at are the most widely used measure of the instability of marriage but they have the limitation that they express divorce rates with reference to the entire population, including children and single adults, rather than concentrating on the population at risk, namely the currently married. When we use a better-focused measure that quantifies divorce per 1,000 married people (which is possible only for countries where up-to-date data on the marital status of the population are available), the picture of cross-national differences in divorce rates alters but not dramatically. This is shown in Figure 2 which presents the two indicators side by side for 27 countries in or around 2009. The similarity of the patterns revealed by these two indicators is indicated by the strong statistical correlation between them (with a Pearson correlation of 0.93). But there are some differences, especially for the Nordic countries where non-marital cohabitation is distinctively high and the population of married people is correspondingly small. The divorce rate calculated per 1,000 married people in these countries is considerably higher than what is suggested by the crude divorce rate. This is particularly so for Sweden, which moves from eighth highest to third highest place in the divorce table when we shift from the latter to the former measure. To look at it another way, Sweden's divorce rate seems to be two-thirds of the US rate when measured on a crude basis, but it rises to almost 85 per cent of the US rate when it is measured per 1,000 married people.

⁴ F. Bernardi & J-I Martínez-Pastor, 'Divorce risk factors and their variation over time in Spain' *Demographic Research* (2001), 24, art. 31: 771-800.

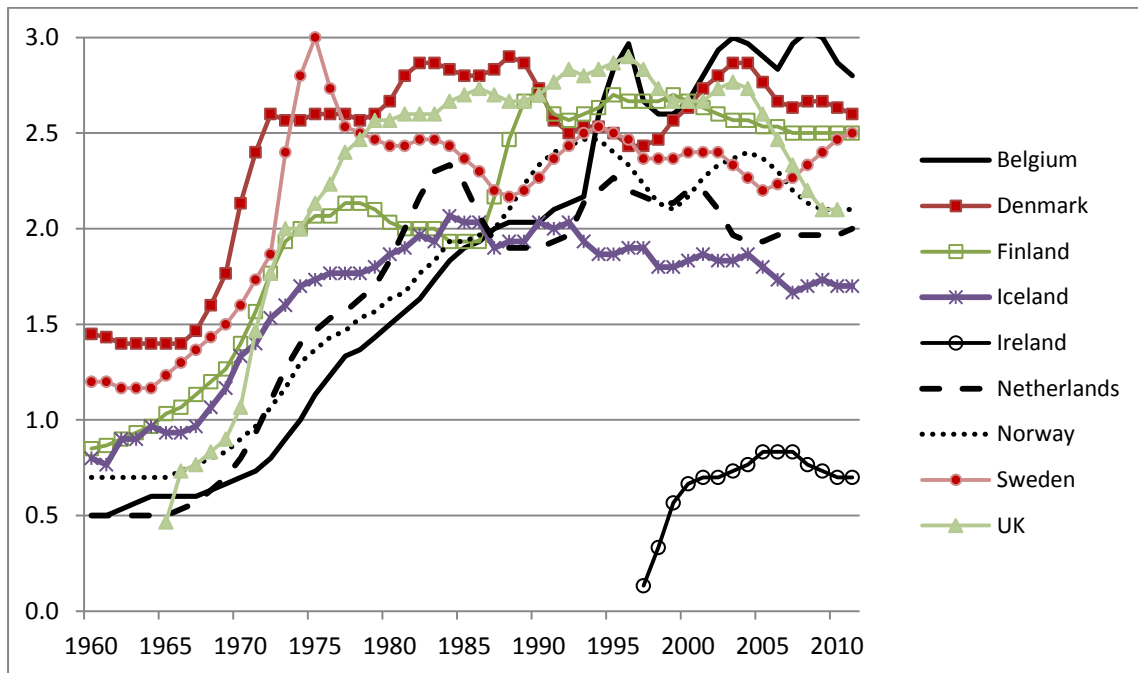
⁵ W.J. Goode *World Changes in Divorce Patterns*. New Haven and London: Yale University Press (1993), pp. 110-35

⁶ A. Adveev & A. Monnier, 'Marriage in Russia. A complex phenomenon poorly understood' *Population: An English Selection* 12 (2000), pp. 7-50.

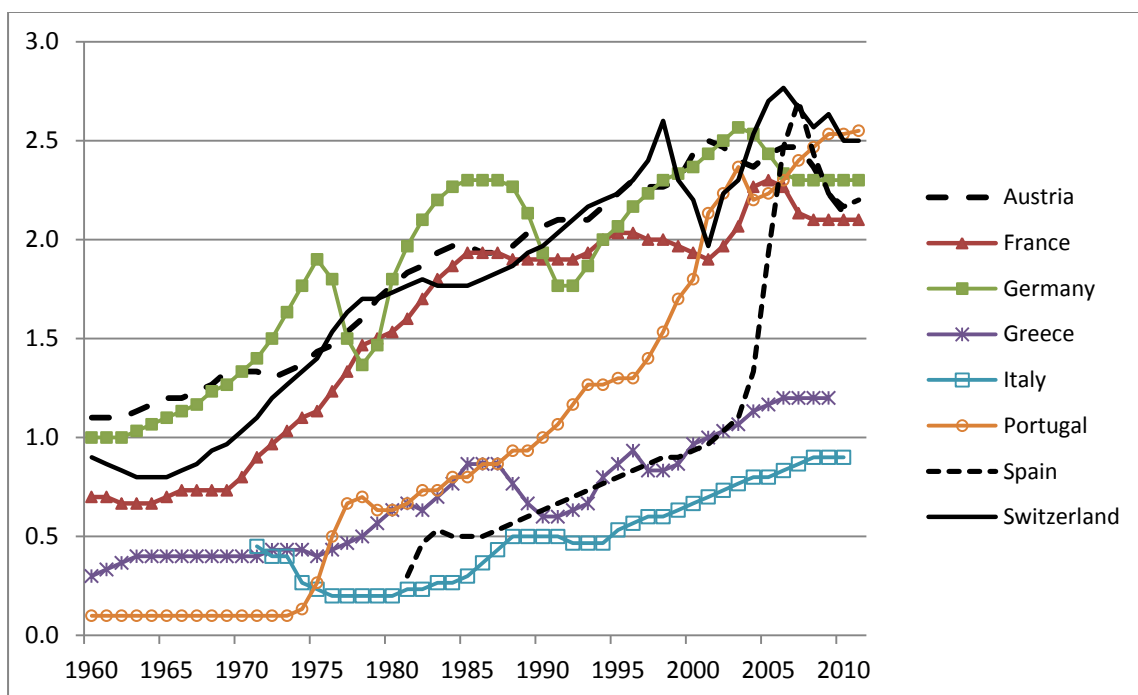
⁷ G. Therborn, *Between Sex and Power. Family in the World, 1900-2000*. London, Routledge (2004), pp. 87-9.

Figure 1. Crude divorce rates in industrialised countries, 1960-2011 (3-year moving averages)

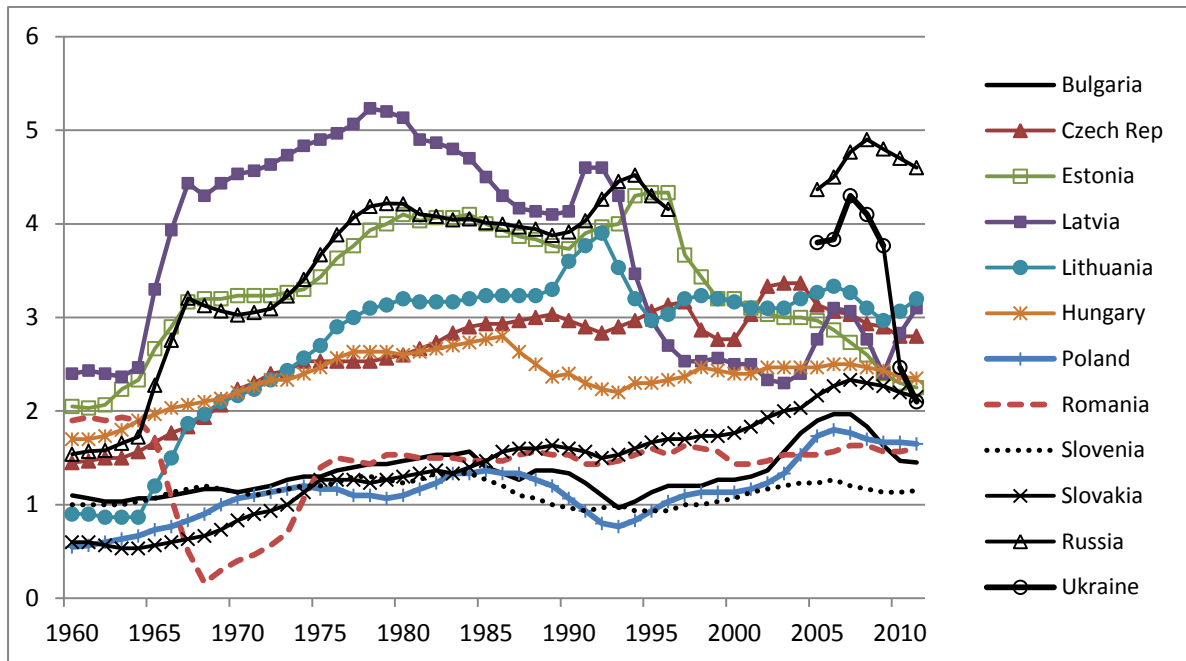
1a. Northern Europe



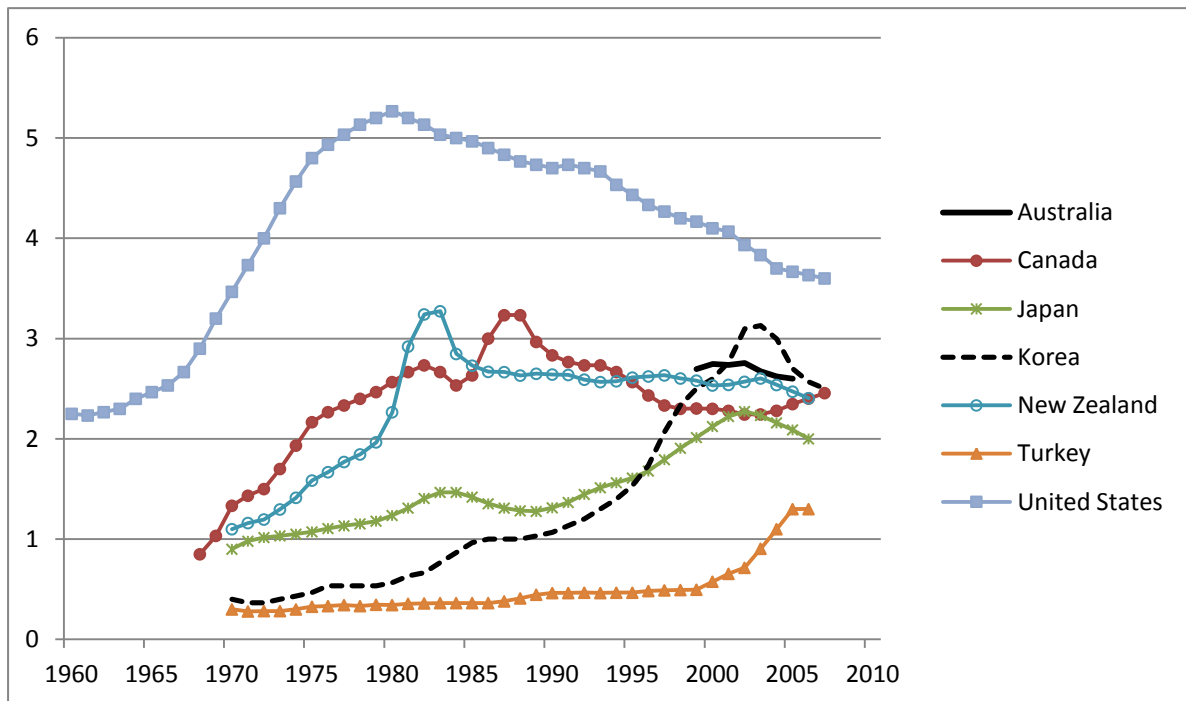
1b. Central and southern Europe



1c. Eastern Europe



1d. Other industrialised countries

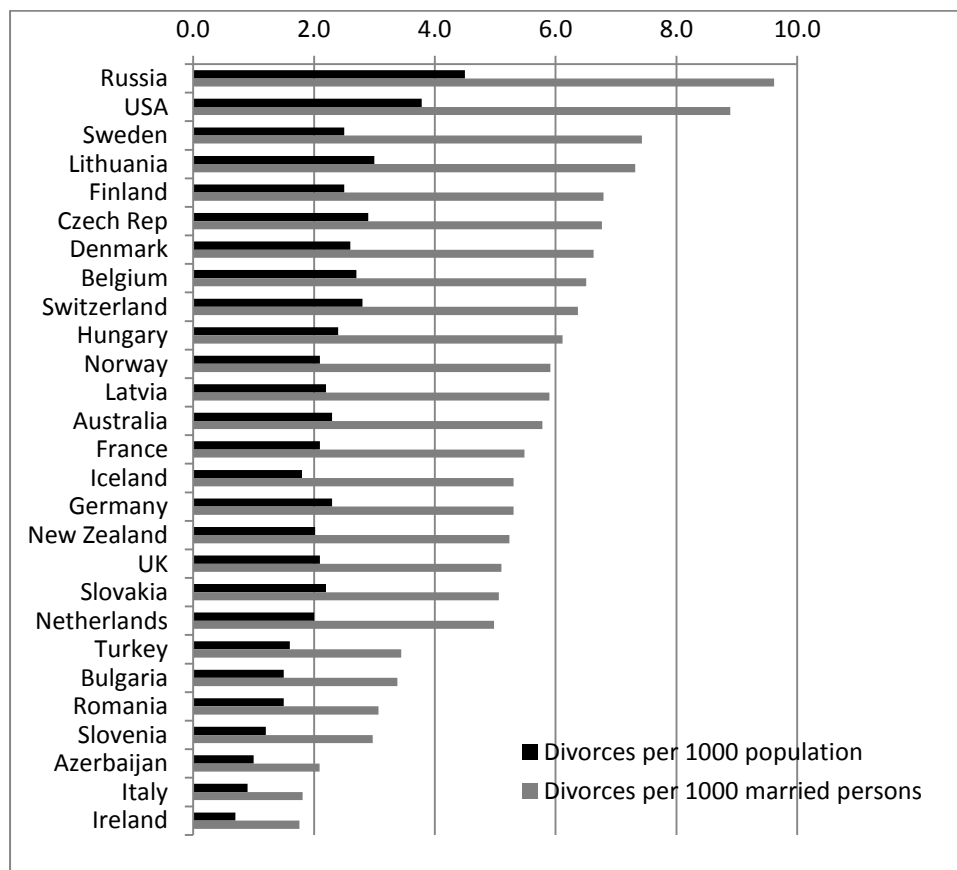


Sources: European countries – Eurostat database Divorce indicators [demo_ndivind], accessed 14.04.13; except Russia 1960-1997 –Adveev & A. Monnier in note 15. Other countries – OECD *Society at a Glance 2009*, Table GE4.2; except United States 1960-69 – Statistical Abstract of the United States, 1970; Canada 1968-9 – Statistics Canada.

Explaining divorce trends: the impact of change in the law

Looking at the three countries at the top of the divorce table in Figure 2 (Russia, the United States and Sweden) reveals how difficult it is to identify common features of high-divorce societies and the same lack of discernible pattern is present throughout the whole range of variation across countries. Russia, which has the highest divorce rate, is among the least developed of industrialised societies (it was almost one-third of the way down in the global rankings on the UNDP's Human Development Index in 2012) whereas Sweden and the United State, which come next in the divorce table, are among the most developed. Culturally, Sweden and Russia are among the most secular societies in the world, according to the scale developed by Ronald Inglehart, but the United States, while relatively secular by historical and global standards, is among the most religious of western countries today.⁸ Russia and the United States have traditionally had a high incidence of early marriage, which is conducive to marital instability, but Sweden's exceptionally late average of marriage does not seem to offer it any protection in this regard. At the other end of the range, the low level of divorce in Ireland and Italy could be thought of as a reflection of their Catholic heritage but the Catholic explanation for low divorce has lost much of its force since Portugal and Spain have departed the camp of low divorce societies, as Austria did from the outset of the divorce revolution.

Figure 2. Two measures of divorce in 27 countries in 2009 or nearest available year.



Sources: Crude divorce rates – as Figure 1. Divorce rates per 1000 married population – author's calculations using marital status data from Eurostat Database, UN Economic Commission for Europe Statistical Database and Statistics New Zealand.

⁸ R. Inglehart and C. Welzel, *Modernization, Cultural Change and Democracy* New York: Cambridge University Press (2005)

In looking at explanations for cross-national divorce patterns, our particular concern here is with one possible causal influence – divorce law itself. The rise in divorce rates in recent decades and the liberalisation of divorce law have generally gone hand in hand in most countries. This coincidence has given rise to a large body of social scientific research on the possible causal connections between the two. Did ‘easy’ divorce help cause the rise in divorce rates or was the change in the law itself merely a consequence of wider forces that impelled both law and behaviour to move in the same direction? Research on this question has for the most part consisted of comparative studies of multiple jurisdictions using econometric methods. There are technical challenges to deducing causal relationships from statistical associations in research of this kind but the existence of numerous before-and-after instances of divorce liberalization has enabled this challenge to be dealt with.⁹ Studies initially focused on comparisons of states within the United States, taking advantage of the different dates at which divorce was liberalised across states and the different trajectories of accompanying divorce rates. More recently, research has extended to comparisons of European states and has also included some single-country studies.¹⁰ The conclusions reached from this research were for long inconclusive. However, as data and analytical methods improved and more jurisdictions were included in comparative studies, a tentative consensus emerged that easier divorce law did tend to raise divorce rates by a modest amount, though probably only for a limited time.¹¹ One review of research in this field concluded that the typical effect of the easing of divorce law was to raise the divorce rate by about 10 per cent for about 10 years – an almost trivial impact in light of the doubling and trebling of divorce rates which were common in western countries during the era of reform.¹²

Varieties of legal response to marital breakdown

Some additional insight on this question can be gained by looking at countries which deviated from trend by delaying their liberalisation of divorce and by developing non-standard legal responses to marital instability. Do we see a different trajectory of marital breakdown in these countries that might have at least partly been caused by their distinctive legal regimes? Does their experience teach us anything about the impact of the law on the stability of marriage? Spain is a good case in which to begin to answer these questions since the huge surge in divorce that occurred hard on the heels of the ‘express divorce’ legislation introduced in 2005, as we saw earlier, seems at first sight to confirm the transformative effect of easier divorce law. This aspect of the Spanish experience is of

⁹ See especially J. Wolfers, ‘Did unilateral divorce laws raise divorce rates? A reconciliation and new results’, *American Economic Review* (2006), 96, pp. 1802–1820..

¹⁰ Contributions to this literature include L. Friedberg ‘Did unilateral divorce raise divorce rates? Evidence from panel data’, *American Economic Review* (1998), 88, pp. 608–627; J.M. Binner and A. W. Dnes ‘Marriage, Divorce, and Legal Change: New Evidence from England and Wales’, *Economic Inquiry* (2001) 39, 2, pp. 298-306; C. Coelho and N. Garoupa ‘Do Divorce Law Reforms Matter for Divorce Rates? Evidence from Portugal’, *Journal of Empirical Legal Studies* (2006) 3, 3, pp. 25-542; T. Kneip and G. Bauer ‘Did unilateral divorce laws raise divorce rates in Western Europe?’ *Journal of Marriage and the Family* (2009) 71, pp. 592-607.

¹¹ See esp. Wolfers 2006, *op. cit.*; Kneip and Bauer 2009, *op. cit.*

¹² D.W. Allen and M. Gallagher ‘Does Divorce Law Affect the Divorce Rate? A review of empirical research’, 1995-2006. *iMAPP Research Brief* 1, 1, July 2007. Available at: www.marriedebate.com/pdf/imapp.nofault.divrate.pdf (accessed May 2013)

particular interest as it echoes the more extreme cases of soaring divorce rates which occurred in a number of countries that had their divorce revolutions in the 1960s and 1970s, as noted above. Yet a closer look at underlying trends suggests that the pattern of change in marital breakdown in Spain was less abrupt and less affected by the law than the divorce data suggest – and its experience in this regard is unlikely to have been unique and may have wider lessons about how sudden increases in divorce rates in other countries might be interpreted.

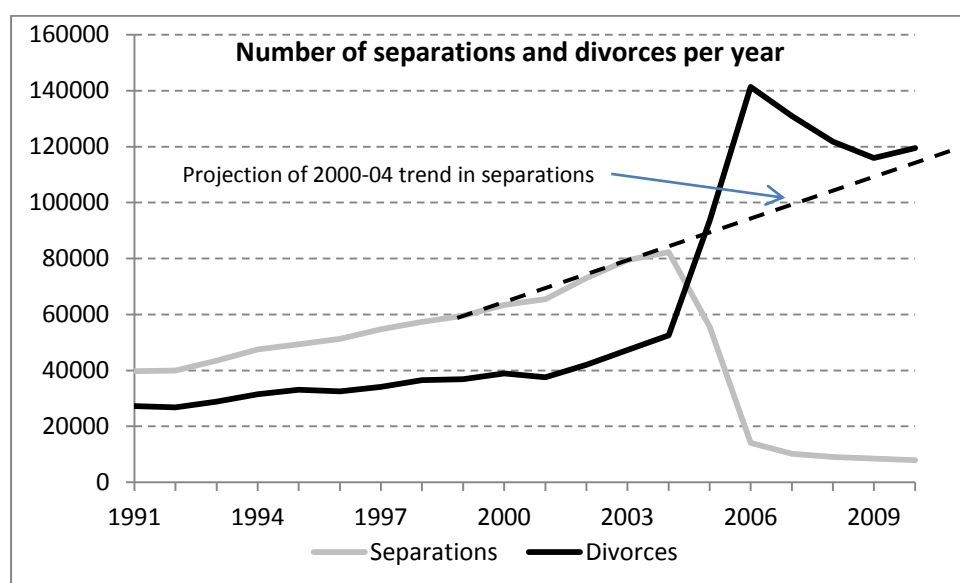
The lesson of the Spanish case has much to do with the diversity of possible legal responses to marital breakdown and what that means for how we measure marital instability. The standard practice is to treat divorce and marital instability as synonymous, as if the immediate response to the break-up of a marriage (as occurs when spouses set up separate households) is always to seek and obtain a divorce. In Spain, under divorce legislation introduced in 1981, as mentioned earlier, this identity did not hold, even in narrow legal terms: legal exit from marriage first required a judicial separation, following which a period of years had to elapse before a divorce could be granted.¹³ Official data for the 1990s and early 2000s reveal the gap between the numbers taking these two steps. Within a generally rising trend of both separation and divorce, separations consistently exceeded divorces by about 50 per cent (see Figure 3). These patterns mean that in any given year divorce data captured only about two-thirds of those marital breakdowns that resulted in legal separation, on top of which there may have been more marriages which split up through *de facto* separations or divorces obtained abroad. Even then, divorce was a time-lagged measure in that it related to breakdowns that occurred at least two to three years before the divorce was granted. By 2004, looking only at the period since 1991, this two-step process had created a pool of some 400,000 couples who had separated but not divorced, over and above the 800,000 or so who had separated *and* divorced.¹⁴

The introduction of one-step divorce in Spain in 2005 had the effect, first, of offering a quick route to completing the dissolution of marriage among the large pool of those who were already separated, and second, of doing away with the need for legal separation among couples newly exiting marriage (the latter is evidenced by the collapse in the number of legal separations as the number of divorces rose after 2005 – see Figure 3). The sharp spike in divorces after the law was reformed reflects these temporary effects and is only weakly connected with the underlying trend in marital breakdown. A more accurate picture of marital breakdown *per se* can be obtained by focusing on legal separations in the pre-reform era and on divorce in the post-reform era while taking account of the temporary spike in divorces caused by the back-log clearing effect in the first two to three years after the reform. As Figure 3 shows, if we project forward the trend line for legal separations in the late 1990s and early 2000s and carry it on to connect to the divorce trend for 2009-10, we find a more-or-less straight upward slope that extends over the whole two decades covered in the graph.

¹³ The complexities of what was permitted are outlined in Gros, *op. cit.* pp. 681-683.

¹⁴ Instituto Nacional de Estadística *Social Statistics* (2011 Edition)

Figure 3. Trends in legal separation and divorce in Spain, 1991-2010



Source: Instituto Nacional de Estadística *Social Statistics* (2011 edition).

A comparison of this trend-line for marital breakdown with that based on Spanish crude divorce rates included in Figure 1b above would suggest that the crude rate understates the rate of marital breakdown prior to 2005 and overstates it afterwards. Indeed, a corrected trend-line for Spain which sought to capture marital breakdown proper would suggest a longer, smoother upward trajectory on a higher plane (probably close to that recorded for Portugal in Figure 1b). It is likely that the same holds for Italy, where the divorce law of 1970 created a similar two-step process of legal exit from marriage and yielded a similar numerical dominance of legal separation over divorce. Through the 1990s and early 2000s, annual separations in Italy exceeded annual divorces by 80-95 per cent, an even wider margin than in Spain, though by 2009 the excess had narrowed to 53 per cent.¹⁵ Taking account of a possible element of *de facto* separation on top of legal separation and some 'divorce tourism',¹⁶ it is probably safe to say that the rate of marital breakdown in Italy has long been close to double the divorce rate, which would leave it today with a marital breakdown rate close to 2 per 1,000 population per year rather than circa 1 per 1,000 as shown in Figure 1b above. This would still leave Italy with a low level of marital instability by international standards but would locate it as less of an outlier than divorce data on their own would suggest.

The cases of Spain and Italy, then, suggest that restrictive divorce legislation tended to create a gulf between what is measured by divorce data and actual patterns of marriage breakdown and also to obscure the role of legal remedies for marital breakdown other than divorce. Conversely, easing of divorce law may have the effect of placing divorce closer to the centre of the legal response to marital instability (as happened in Spain), thereby making it more likely that the divorce data and the underlying reality of marital breakdown would converge. The import of these patterns is that they may have been replicated in other jurisdictions before and after they liberalised their divorce law in

¹⁵ ISTAT *Separations and Divorces in Italy 2010*, typescript pdf, 2 July 2012

¹⁶ According to a report in the *New York Times* (August 14, 2011), Romania's flexible residency requirements and simple divorce procedures has made it a favourite destination for Italian divorce tourism.

previous decades. This is what is suggested by Cyrek's historical study of marital disruption in the US, which suggests that in the first half of the twentieth century, only about half of broken marriages proceeded to a divorce and these were largely confined to better off couples who could afford the costs involved. 'Desertion' was the more common form of marital disruption among the less well off in the US in this period.¹⁷ This would suggest that what we saw earlier as a sharp upsurge in divorce in many countries between the 1960s and 1980s may at least in part have been due to closer congruence between actual marital breakdown and what was processed through the divorce courts as well as to real increase in marital instability.

The outlier case represented by Ireland adds further to this picture by highlighting an even more complex and diverse response of family law to marital instability.¹⁸ Divorce became available in Ireland only in 1997, as mentioned earlier. While the legislation provided for no-fault divorce, it echoed the Italian and Spanish divorce laws of the 1970s and 1980s in requiring a period of separation (in the Irish case, a minimum of four years of either *de facto* or legal separation) before divorce could be granted. It also gave rise to similarly slow and costly proceedings. In light of these constraints, it is scarcely surprising that no rush to the divorce courts emerged in the years after 1997 but nevertheless it was something of a surprise quite how low the uptake was. By 2007, ten years after divorce became available, the crude divorce rate had not broken through the 1 per 1,000 threshold and thereafter it turned downwards – by 2011 there were 25 per cent fewer divorces than there had been in 2007.¹⁹ As in Italy, it is likely that taking separation as well as divorce into account the total rate of marital breakdown was of the order of double the divorce rate, but even that modest upper rate also seemed to have levelled off, if not declined, since the early 2000s. Ireland's divorce reform thus proved to be something of a damp squib and arrived at a time when, it would appear, marriages were about to become more rather than less stable. While the full ramifications of this evolution are difficult to identify, much less explain, one factor which contributed to the lack of enthusiasm for divorce itself was the plethora of piecemeal legal measures to deal with exit from marriage which had grown up in Ireland since the 1960s. These consisted of provisions on custody and access for married and non-married parents and the parental rights of non-married fathers (introduced in 1963), maintenance claims between married and non-married partners (1976) and domestic violence (1981).²⁰ An attraction of these measures was their simplicity and accessibility as a result of which even today they are more widely used by couples in conflict than the formidable legal proceedings required for either judicial separation or divorce. The late arrival of divorce in Ireland thus had the effect of stimulating the growth of an alternative patch-work system of exit from marriage and of resolution to disputes among non-marital couples. This system proved effective enough for it to persist as the mainstay of the legal response to family instability even after divorce became available. Here too we have a reminder that divorce in the strict sense need not always be the centrepiece of the state's legal remedies for union fragility but might better be

¹⁷ T. Cyrek, 'U.S. Marital Disruptions and their Economic and Social Correlates, 1860-1948', *Journal of Family History* (2011) 32, 2: 142-58.

¹⁸ The account of the Irish case here is based on T. Fahey 'Small bang? The impact of divorce legislation on marital breakdown in Ireland' *International Journal of Law, Policy and the Family* 26, 2 (2012).

¹⁹ Central Statistics Office, *Statistical Abstract of Ireland 2008 & 2012*. Cork: Central Statistics Office.

²⁰ For a description of these and how they functioned in the pre-divorce era, see T. Fahey and M. Lyons *Marital Breakdown and Family Law in Ireland: A sociological Study*. Oak Tree Press, Dublin (1995).

regarded as a metonymic label (which names the whole by reference to a part) for a cluster of provisions dealing with the complex range of issues that union break-up can entail.

Cohabitation and the deinstitutionalisation of marriage

The patchwork approach to regulating union breakup which emerged in the pre-divorce era in Ireland may have reflected its late modernisation of family law, but it could also presage the future for many countries where a new diversity of coupledness is now part of the landscape of family life. If marriage is the standard method of union formation, divorce can be the standard method of exit, but if routes of entry to unions expand and types of union become more varied, the law on break-up of unions is likely to have to diversify in response. The theory of the Second Demographic Transition has pointed to a package of changes in patterns of human coupling as a major aspect of social transformation in western countries in the post-1960s period.²¹ Along with the rise in divorce, the elements of this package include the decline in the marriage rate, the growth of cohabitation outside of marriage, the growth of non-marital childbearing and the increase in solo living.²² Here our concern is with those aspects of these new family forms that have most significance for the legal regulation of union break-up.

One such aspect is the possible role of cohabitation in reducing the incidence and relevance of divorce by shifting the site of partnership instability away from marriage towards informal unions. The mechanism most likely to produce this effect is a possible self-selection of couples with less secure or promising relationships away from marriage and towards cohabitation or unpartnered childbearing. One in-depth qualitative study in the United States has pointed to just such a process. It suggests that poor American women who are keen to have children often opt for unmarried motherhood not because they have no regard for marriage but because they view it as an ideal which is beyond their reach or which they could not hope to sustain even if they did manage to enter it in the first place: 'In a surprise reversal of middle-class norms, [poor women] believe it is better to have children outside marriage than to marry unwisely only to get divorced later'.²³ In what is now a strikingly class-differentiated family system in the US, middle and professional class women, by contrast, are more likely to delay motherhood until they complete their education, establish careers and find a partner who is likely to stay the course and offer real companionship and participation as both husband and father. The result is that higher status couples preserve much of the structure and stability of traditional marriage (though with more egalitarian gender roles) and are more successful in avoiding both divorce and unstable cohabitation. Lower status couples and

²¹ D.J. van de Kaa 'Europe's Second Demographic Transition,' *Population Bulletin* 42, 1 (1987) ; Lesthaeghe, R. and J. Surkyn. 2006. 'When history moves on: Foundations and diffusion of a second demographic transition,' in R. Jayakody, A. Thornton, and W. Axinn (eds.), *International Family Change: Ideational Perspectives*. Mahwah, NJ: Lawrence Erlbaum and Associates.

²² For an empirical overview of these trends in Europe, see T. Sobotka & L. Toulemon 'Changing family and partnership behaviour: Common trends and persistent diversity across Europe' *Demographic Research* 19, 6, pp. 85-138 (July 2008)

²³ K. Edin & M. Kefalas, *Promises I can Keep: Why Poor Women Put Motherhood Before Marriage*. University of California Press, Berkeley (2005), p. 9. See also C.M Gibson-Davis, K. Edin and S. McLanahan, 'High hopes but even higher expectations: the retreat from marriage among low-income couples', *Journal of Marriage and the Family* 67, pp. 1301-12 (2005).

their children are more likely to experience the disruption and insecurity that Sarah McLanahan has captured in the concept of the 'fragile family' and the 'diverging destinies' between children in poorer and better-off families.²⁴

Class differences in these patterns are usually thought to be less extreme in Europe, and, in northern Europe at least, cohabitation is more widespread and perhaps less different from marriage than it is in America.²⁵ Nevertheless, in Europe in general and even in Nordic countries where cohabitation enjoys wide social acceptance, detailed analysis shows, first, that cohabitation is differentiated by social status in the same manner (though perhaps not to the same degree) as in the US, and second, that those who commence their childbearing as cohabiting couples have on average poorer relationship quality and are more likely to split up than their married counterparts.²⁶ Here too, then, we have evidence of divergence between the married and cohabiting route to family formation such that manifestations of instability tend to concentrate on the cohabiting side of the divide.

This is not to say that we can easily establish correlations between rising rates of cohabitation and falling rates of divorce, as might be expected if the former were to attract a growing share of the union instability that might otherwise attach to marriage. Later ages at marriage and rising educational levels of spouses have been pointed to as most likely causes of the decline in divorce in the United States since the 1980s.²⁷ It may be the case that the trialling of relationships through periods of cohabitation in early adulthood may help to produce more stable marriages, yet there is no strong indication that changing patterns of cohabitation is contributing to the increase marital stability observed in the US since the 1980s. Likewise, high rates of cohabitation in the Nordic countries seems to do little to reduce their divorce rates, unless one were to argue that divorce levels would be even higher were it not for the role of cohabitation as a magnet for less stable relationships.

Whatever its effect on marital stability, the growth of cohabitation as a family form has implications for family law in that it requires state regulation of union dissolution to extend beyond the break-up of marriage and encompass exits from a wide range of non-marital unions. This in turn gives rise to challenges in defining when such unions make the transition from transient arrangements that have no legal significance to ongoing unions with family-like features. Having children is one transition that is often regarded as crucial in this respect, and indeed the regulatory challenges posed by children of informal unions are nothing new.²⁸ In particular, family law in western countries has long

²⁴ S. McLanahan, 'Diverging Destinies. How Children Are Faring Under the Second Demographic Transition' *Demography* 41, 4 (2004): 607-627; S. McLanahan. and C. Percheski 'Family Structure and the Reproduction of Inequalities', *Annual Review of Sociology* 34 (2008): 257-276; Stevenson and Wolfers, *op. cit.*

²⁵ K. Kiernan, S. McLanahan, J. Holmes & M. Wright, 'Fragile Families in the US and the UK'. Working Paper WP 11-04-FF, Princeton University: Centre for Research on Child Well-Being (2011); S. Kennedy and E. Thomson 'Children's experiences of family disruption in Sweden: Differentials by parent education over three decades' *Demographic Research* 23, 17(2010): 479-508

²⁶ B. Perelli-Harris, W. Sigle-Rushton, M. Kreyenfeld, T. Lappegård, R. Keizer, and C. Berghammer 'The Educational Gradient of Childbearing within Cohabitation in Europe'. *Population and Development Review* 36, 4 (2010): 775-801; A.C. Liefbroer and E. Dourleijn 'Unmarried Cohabitation and Union Stability: Testing the role of diffusion using data from 16 European countries' *Demography* 43 (2006): 203-22.

²⁷ Heaton (2007), *op. cit.*, n. 1.

²⁸ R. Nygren, 'Interpreting legitimacy' *Journal of Family History* 28, 1 (2003): 149-60.

grappled with the question of whether and how the obligation to support non-marital children should be imposed on their fathers. Historically, that desire was constrained by a countervailing interest in protecting the institution of marriage, which required that non-marital children and their mothers be denied the same rights as married mothers and their children and even that they suffer social disgrace in order to avoid the moral hazard that might arise from equal treatment of extra-marital partnership and parenthood. Today, the legal challenge presented by the diversification of family forms and growth of partnership and parenthood outside marriage takes an entirely different form and represents an about-face from the past. The core objective now is to avoid discrimination between children based on the marital status of their parents and to avoid disadvantage for women because they are mothers, irrespective of the circumstances of their motherhood. Responding to that challenge not only requires a downgrade to the legal status of marriage but also a shift away from divorce as the centrepiece of the legal response to union instability. It could, in fact, be said to entail a reversion to the concerns which previously dominated the law on legal separation – namely, the issues of maintenance, access and custody of children, division of family property, inheritance and succession rights – with a lesser emphasis on the right of separated spouses to enter a new marriage, which is the distinctive focus of divorce.

This brings us to the second implication of this development which has to do with the role of social policy – the public provision of income supports and services for families – as the other major dimension of the state's response to union instability. Socialising the caring functions of the family through state provision of child and elder care and individualising the welfare entitlements of adults irrespective of spousal or partnership relations have been powerful currents in western welfare states in recent decades, especially in Europe.²⁹ These currents have sought to protect individuals from the insecurities of both market and family, that is, to guarantee their basic living standards and access to necessary services when either the job market or their partners fail to deliver. States differ in how far they have gone in these directions and much comparative analysis now seeks to categorise state welfare systems according to how extensively they have either de-marketised or de-familised economic support systems for individuals and family units.³⁰ Legal scholars now recognize the regulatory aspects of such systems for family behaviour and accept in consequence that family law is now less distinct and separate as a regulatory system than it used to be but has to be viewed as a part of much larger welfare regimes.³¹ Here too, however, social class differences within states matter, since outside of the universalistic welfare states of the Nordic countries, social policy is a greater concern for those lower down the social scale than it is for the middle and upper classes, while conversely family law may continue to be the dominant regulatory framework for better-off couples.

²⁹ J. Lewis, 'Gender and the Development of Welfare Regimes' *Journal of European Social Policy*, 2, 3: 159–73 (1992); M. Daly, 'Changing Conceptions of Family and Gender Relations in European Welfare States and the Third Way' pp. 135–54 in J. Lewis and R. Surender (eds.) *Welfare State Change Towards a Third Way*. Oxford: Oxford University Press (2004).

³⁰ See esp. G. Esping-Andersen (1999) *Social Foundations of Postindustrial Economies*. Oxford University Press, Oxford.

³¹ J. Eekelaar, 'The end of an era' *Journal of Family History* 28, 3 (2003): 108–22; K. Schwie, 'Caring and Paying for Children and Gender Inequalities: Institutional Configurations in Comparative Perspective' *Journal of Family History* 28, 3 (2003): 182–98.

Conclusion

The period immediately after the Second World War is sometimes called the 'golden age of marriage' in the western world – what Therborn calls the era of the 'western honeymoon'.³² This was the era when the love-based union of working husband and stay-at-home wife became more widespread and more revered than ever before – more people married, they did so at younger ages, they were somewhat more likely than their parents to have children and to do so within marriage, and they expected just as their parents had that only death would them part. Yet by the time those who rushed into youthful and hopeful marriage in the late 1940s and 1950s had reached middle age, the ideal of love for life was fraying at the edges, the cracks in the male breadwinner model of the family were beginning to appear, and the gender and sexual revolutions were on the horizon. The children born to couples of that era turned against much of the family model that had produced them as they entered adulthood in the 1960s and 1970s and instead espoused sexual liberation, the release of women from the home, much lower fertility and much less stability in couple relationships.

The divorce revolution of the latter period was a part of that development. The outline of that revolution presented in this chapter has indicated some of its variations across countries not only in regard to pace and timing but also in regard to what divorce meant and how it related to underlying trends in marital breakdown. In addition, it has suggested that the rise of divorce was itself surrounded by wider currents which in some ways reduced its significance. When life-long marriage was the dominant model of union, divorce was the dominant legal response to union instability but as models of union became more varied, methods and forms of exit also had to multiply. Divorce itself adapted and became more flexible as the flood of failures mounted. In those countries where the law tried to stand against the flood, behaviour flowed around it and found other legal channels to facilitate exit from marriage. In any event, what often mattered more for families in this era was not the rules of family formation and dissolution prescribed by family law but the rules of entitlement and obligation embedded in welfare provisions and the manner in which these facilitated – perhaps even dictated – new kinds of family behaviour. Part of the diversity in the practical meaning of family law across western countries arises from differences in how far and how fast their welfare regimes transformed the material bases of family life. Diversity also arises within countries since marital instability and new kinds of family formation are socially stratified, which means that the precise mix of family law and social provision that impinges on families differs as we move up and down the social scale.

³² G. Therborn, *op. cit.*, pp. 162-70; S. Coontz, *Marriage, A History: How Love Conquered Marriage*. Penguin, London (2005), pp. 228-44.

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