

A Study Paper on Divorce and Remarriage

Report Issued by the Continuing Committee on Social Issues and Concerns
Lutheran Church in America-Canada Section.

It is not an official statement but is being distributed to stimulate thought and discussion.
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Foreword

The Special Joint Committee of the Senate and House of Commons on Divorce made public its report and recommendations on June 22, 1967. Prime Minister Pearson has announced that the government is studying the report and will introduce new divorce legislation. When making this statement, he expressed hope that public interest and participation in proposed divorce law changes would not fade away.

The Committee was given power to "report upon divorce in Canada and the social and legal problems relating thereto..." It has not done this, except to extend grounds for divorce and to tidy up matters relating to domicile and the interests of women and children. It has not come to grips with court reform and social services to strengthen or save marriages. Suggestions made by the churches have in the main been by-passed.

There are responsible persons who say that the suggested new divorce law in its details is at least as debatable as the present system. Is it nothing more than setting up machinery for a quick divorce? Is it true that Canadians are not prepared to pay the cost of a better divorce law, as implied by the committee?

The material in this document consists of a report of the Continuing Committee on Social Issues and Concerns to the Lutheran Church in America--Canada Section Convention, Ottawa, Canada, June 20-21, 1967, together with a capsulated statement presented by a Convention committee. Neither statement was adopted. Comments are encouraged.

Our nation through the Special Joint Committee of the Senate and House of Commons on Divorce has taken a much needed look at its divorce laws. The Federal Government is to be commended for its steps to revise the divorce legislation of Canada.

At a time when the church is faulted for not being modern, it is refreshing to note that, with regard to divorce laws, it is the state which has been reactionary and not the church. It is the hypothesis of this statement that under the divorce laws of Canada the church has not been able to carry out fully her ministry to persons experiencing marriage failure. The church has been more free than the state in meeting the needs of troubled people.

The Incongruities

The church has other compelling concerns arising from Canada's unrevised divorce laws. By upholding the state in matters where societal and human values are being eroded the church by default has been condoning what it otherwise would condemn as being destructive of human personality and social order.

It is a Christian value to enhance respect for law and order. Yet our divorce laws can be easily circumvented. Such a situation has led to lack of respect for the law and court procedures. It is an anomaly that persons have had to find relief from an intolerable situation by complicity, perjury, compromise of religious convictions, and adultery."¹ It is ironic that under present law, most of the persons who break the mores of our society and commit adultery are quickly divorced, yet those who commit neither adultery nor perjury are permanently denied relief." Instead of enhancing the institution of marriage, the law has contributed to another institution, common-law marriages, estimated at more than 200,000 in Canada.

It is considered that "quickie" divorces and "divorce by consent" weaken the institution of marriage. There is the mistaken notion that divorces take a long time to obtain. Most are granted quickly. Usually there is a large element of consent for "... where there is no consent, adultery can seldom be proven and no relief is available to the injured party."²

In connection with hasty divorce proceedings, it should be noted that "our present law actually encourages people to ask for a divorce before they may be certain that is what they really need and want..."³

It is also contended that the consent factor prevents proper litigation with regard to alimony and disposal of common property. To quote Mr. Fitch again, he states:

*If one were to sit through an average sitting of an Alberta divorce court, one would wonder at the number of women who want no alimony from their "guilty husband," if it did not become apparent that the voluntary admission of the "guilty husband" is the only proof of adultery the woman has obtained.*⁴

The church's concern is for what contributes to the wholeness of personality. It speaks of forgiveness and reconciliation in the development of personhood. Yet condonation becomes a hindrance to achieving divorce. Divorce proceedings pit two people against each other as adversaries, having to destroy the other person in order to resolve a problem. Bitterness, anger, and hurt follow in the wake of a divorce case. Because we are in an area dealing with powerful feelings, vindictiveness is always a distinct possibility. Vengeance can mean the control for life of one person over another. It should be remembered that in a two-person group there is the greatest potential for enrichment but also the greatest potential for emotional stress.

The church professes that all persons are under sin. The present divorce proceedings which make one party innocent and the other guilty are at variance with the insights of Christian ethics. In addition, it is contrary to the known factors about interpersonal relationships. The brief submitted by The Pastoral Institute of The United Church of Canada, Calgary, to the Special Joint Parliamentary Committee on Divorce states:

The research in the complex motives of human life has yet to be taken seriously in drafting divorce legislation. The legally "innocent party" many times may be more psychologically guilty than the legally "guilty party."

¹ Douglas F. Fitch, "Let's Abolish Matrimonial Offences," *Canadian Bar Journal*, April 1966, p. 86

² Brief of the Pastoral Institute of The United Church of Canada, Calgary, submitted to the Special Joint Parliamentary Committee on Divorce, November 22, 1966

³ Douglas F. Fitch, "Let's Abolish Matrimonial Offences," op. cit., p. 87.

⁴ *Ibid.* p. 86.

While the church underscores the "one flesh" concept, this does not suggest that the physical side is the essence of marriage. The grounds of adultery seem to make the sexual act the essential component of marriage. It deals with a symptom rather than recognizing that a marriage is spiritually and emotionally dead.

Marriage failure "arises from self-centredness or other obstacles the couple cannot or will not overcome."⁵ There are many pressures leading to marriage failure. Making adultery the main grounds for divorce does less than justice to the institution of marriage.

Concern for the poor is another reason for the church's concern about the inconsistency of our divorce legislation. As noted above, divorce is easy--but only if you have the money. Coupled with this is the fact that the poor are more vulnerable to crisis because of their limited resources.

Last, but not least, is what happens to the children of broken homes. One factor is that most legal jurisdictions when dealing with divorce do not take into account what happens to the children. Another observation is that child welfare specialists generally agree that a one-parent home is better than a two-parent emotionally-charged home. Emotional problems in parents are a major cause of children being in need of care. Research enquiries have found "...three things to be the greatest importance for married happiness; the married happiness of the couples' parents; happiness of childhood; no conflict with the mother." The conclusion was that "unhappy children grow up to make bad parents."⁶

The Core of the Matter

In the examination of our divorce laws we have really been talking about remarriage and not divorce. Married couples do separate through desertion. Married couples do separate by mutual consent and this is recognized by judicial separation. It is the "divorce from bed and board." Canon law and civil law in most western countries grant this "divorce." It is said that "no country, under any religious persuasion denies the right of the spouse to be freed from an intolerable situation."⁷

The Response of Our Church

The sinful human condition in a fallen world precludes dealing legalistically with divorce and remarriage. Divorce is not listed in Scripture as an unforgivable sin. On the question of remarriage, the Lutheran Church in America in a statement on Marriage and the Family adopted at its Second Biennial Convention, July 1964, said:

While it is the Christian teaching that marriage is a lifelong indissoluble union and that divorce and remarriage do violate God's order, nevertheless, God in His love does accept the sinner and deals with him according to his need. The church has recognized that marriage may be a remedy for sin and has seen in such Bible passages as Matthew 5:32, 19:9, and I Corinthians 7:15 the possibility of remarriage, but it also knows that the final basis of decision is loving concern for man in his actual situation.

⁵ From Statement on Teachings and Practice on Marriage and Divorce. Adopted by the Second General Convention of The American Lutheran Church, October 21-27, 1964.

⁶ John Bowlby, *Child Care and the Growth of Love* (a Pelican Book, 1953), p. 93.

⁷ Douglas F. Fitch, "Let's Abolish Matrimonial Offences." op. cit. p. 80-81.

Repressive legislation or a punitively legalistic approach is not in accord with the evangelical or the gospel-centered approach to the problems of divorce and remarriage. Upholding the sanctity of marriage must not be at the expense of helping people to rebuild meaningful lives.

The Purpose of Law

One might describe the law as having several purposes - punishment, therapy, and upholding a value."⁸ Punishment apparently fails because people prefer penalties rather than live in an intolerable situation. Besides, punishment is always uneven. Furthermore, it cannot change the basic values of an individual. If a person has the values of love, companionship, and freedom of choice, the law will not succeed in upholding a marriage where such values are absent. Particularly is this true in an industrial society, where it is generally held that psychological security or emotional sharing is the major bond holding the marriage and family together. Also, it is felt that a spouse holding the aforementioned values will not want to take advantage of the law as punishment. In addition, punishment does not take into account personality problems or that the social system itself may contribute to marriage failure.

The law as therapy commends itself in that the sources of conflict are clarified and conciliation is attempted with the help of a professional counsellor. It can help the partners to grow in order to share emotionally with each other. But law as therapy has several shortcomings. It usually goes into operation only at the point of crisis. It is not enforceable because conciliation and compulsion do not mix. The law as therapy is expensive. It is ineffectual where there are deep-seated emotional problems.

Notwithstanding, there is need to use law as therapy. There should be services using specially trained professional staff. While this statement has not explored the function of marriage courts, it would seem there is necessity for some procedure that incorporates study, diagnosis, and conciliation proceedings.

Another concept of the law is to uphold a societal value. It should be acknowledged immediately that we can place too much faith in demands for education for family life and pre-marital counselling. It is not until the life situation is experienced that counselling can be related effectively. The lack of counselling after the first couple of years is a common complaint by young couples.

The marriage union as a lifelong bond is an order of creation given by God. It is considered, as well, a highly desirable social goal. Therefore, the law should be constituted to strengthen the institution of marriage.

Extending the grounds for divorce does not seem to be the answer. Nor does making remarriage easy seem to be the solution. There has to be a recognition of personal responsibility and that a mistake has been made. Society should not prevent relief from an intolerable situation but this does not justify immediate remarriage.

It is our position, then, that there should be required a period of separation determined in length by the situation, in which society through proper procedures would insist upon study, diagnosis and therapy to determine whether residual strengths in the family suggest further treatment or whether in fact the marriage has broken down. If the latter, then judicial machinery should recognize in law what is in reality, make arrangements for the protection of children, make

⁸ Ideas concerning the purpose of law are contained in an article by Eugene Litwak, "Divorce Law as Social Control." *A Modern Introduction to The Family*. eds Norman W Bell and Ezra F Vogel (Routledge & Kegan Paul, London, 1961), p.208-217.

proper provisions for the settlement of property and for maintenance enforcement. In this manner society would not be liberalizing divorce laws but, instead, would be acting conservatively and constructively. It would thereby, while permitting remarriage, uphold by law the sanctity of marriage and family life. Under constructive divorce and remarriage legislation the church will be more free to apply the gospel of reconciliation and love to people in the tragic situation of marriage failure.

Brief Statement on Divorce and Remarriage

By upholding the state in situations where societal and human values are being eroded, the church has not been able under the divorce laws of Canada fully to carry out her ministry to persons experiencing marriage failure.

It is a Christian value to enhance respect for law and order. Yet our divorce laws can be easily circumvented. It is an anomaly that persons have felt they have had to find relief from an intolerable situation by complicity, perjury, compromise of religious convictions, and adultery. Instead of enhancing the institution of marriage, the law has led at a shocking rate to "common-law marriages."

Divorce proceedings pit two people against each other as adversaries, each having to destroy the other person in order to resolve a problem. The present divorce proceedings which make one party innocent and the other guilty are at variance with the insights of Christian ethics.

Marriage failure arises from self-centredness or other obstacles the couple cannot and will not overcome. Making adultery the sole grounds for divorce does less than justice to the institution of marriage.

While it is the Christian teaching that marriage is a lifelong indissoluble union and that divorce and remarriage do violate God's order, nevertheless, God in His love does accept the sinner and deals with him according to his need. The marriage union is an order of creation given by God. Therefore, the law should be constituted to strengthen the institution of marriage.

Simply to extend the grounds for divorce will not provide the answer. There has to be a recognition of personal responsibility and that a mistake has been made. Society should not prevent relief from an intolerable situation but this does not justify immediate remarriage.

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