

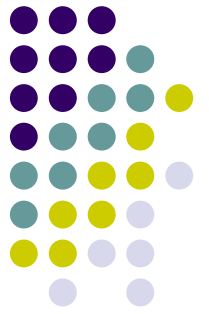
European Family Law

Divorce and separation

Friday, 23rd November 2007

Dr. Ian Curry-Sumner, Universiteit Utrecht

US Divorce Quotes



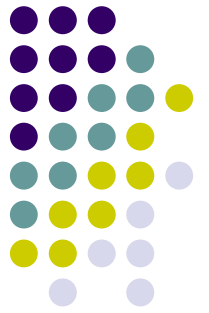
**Get her what she really wants for
Christmas!**

Divorce – only \$95.99



Buy one, get one free

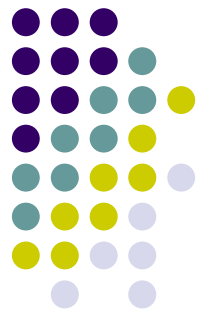
Divorce – only \$125.00



Structure of the lecture

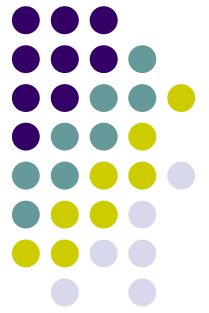
- Divorce in England and Wales
- Divorce in The Netherlands
- Divorce in Europe
 - CEFL Comparative Research
 - CEFL Principles

History of English Divorce Law



- <1857 – Private Act of Parliament
- 1857 – Matrimonial Causes Act
- 1923/37 – Grounds for divorce widened
- 1969 – Divorce Reform Act
- 1973 – Matrimonial Causes Act
- 1990 – Grounds for Divorce Report
- 1996 – Family Law Act 1996

Grounds for Divorce in England



Grounds

One ground: irretrievable breakdown of the marriage: s.1(1), MCA 1973

Proven

Five facts:

s.1(2)(a), MCA 1973: adultery and intolerable

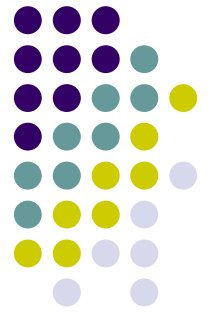
s.1(2)(b), MCA 1973: “unreasonable behaviour”

s.1(2)(c), MCA 1973: desertion for continuous period of 2 years

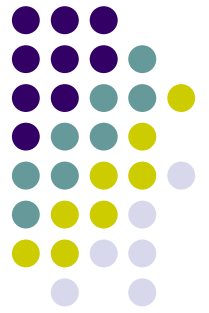
s.1(2)(d), MCA 1973: consent and 2 years separation

s.1(2)(e), MCA 1973: no consent and 5 years separation

Number of Divorces in 2000



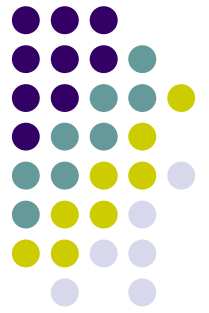
Ground	Number	Percentage	Men	Women
1(2)(a)	33,310	23.5%	12,227	21,083
1(2)(b)	63,152	45%	11,668	51,494
1(2)(c)	680	0.5%	269	411
1(2)(d)	32,820	23.5%	13,261	19,559
1(2)(e)	10,498	7.5%	4,851	5,647
<i>Total</i>	<i>140,470</i>	<i>100%</i>	<i>42,276</i>	<i>98,194</i>



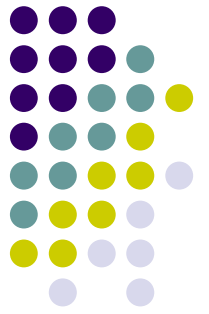
The Netherlands

- Art. 1:150, Dutch Civil Code
 - Either sole or joint petition
- Article 1:151, Dutch Civil Code
 - Sole petition
 - Ground: irretrievable breakdown of the marriage
- Article 1:154, Dutch Civil Code
 - Joint petition
 - Ground: irretrievable breakdown of the marriage

Number of Divorces up to 2001



Year	Number
1995	34,170
1996	34,871
1997	33,740
1998	32,459
1999	33,571
2000	34,650
2001	37,505



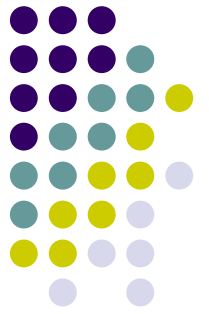
ECHR

- Article 8: Private and family life?
- Article 12: Right to marry

Does these articles include a right to divorce?

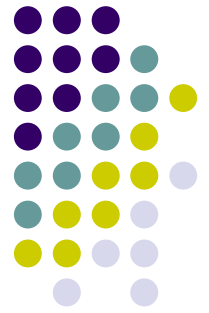
Johnston v. Ireland (1986)

The European Picture



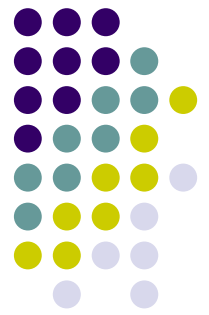
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Different grounds for divorce - 1



- ***fault-based divorce (divorce-sanction):*** the state is a guardian of universal morality, and has to punish the spouse who has committed a matrimonial offence
- ***divorce upon irretrievable breakdown of marriage (divorce-remedy):*** the state has to protect the stability of marriage for the sake of society; and to protect the spouses from their own ill-considered decisions
- ***divorce by mutual consent (divorce as an autonomous decision by the spouses):*** nobody is in a better position to decide on the dissolution of the marriage than the spouses themselves
- ***divorce on demand (divorce as a right):*** a marriage should and cannot be kept intact if even one of the spouses wishes to terminate it

Different grounds for divorce - 2



Malta

- no divorce at all

France (2004)

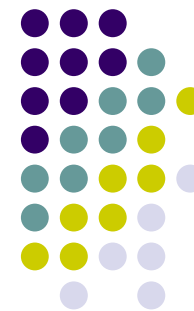
- Mutual consent
- Separation of at least 2 years
- Matrimonial offence

Ireland (1996)

- 4 years separation during the last 5 years
- No prospective for reconciliation
- Agreement on ancillary matters

Sweden (1973)

- divorce can be granted immediately if the spouses agree on divorce and do not have minor children
- if one of those conditions has not been met, divorce can be granted after a reconsideration period of six months

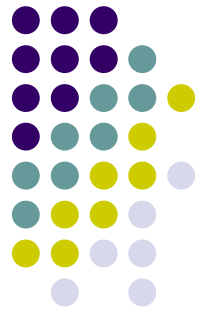


What is irretrievable breakdown of the marriage?

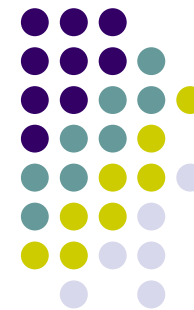
- **Fault-based divorce: upon proof of a matrimonial offence (England and Wales)**
- **Irretrievable breakdown in the narrow sense: upon proof of breakdown of a marriage (Hungary)**
- **Divorce on the ground of separation for a stated period of time without enquiry (Denmark)**
- **Divorce by consent: upon the agreement of the spouses without inquiry (The Netherlands)**

Divorce on demand: upon the unilateral request of each spouse (Russia)

Proof of the irretrievable breakdown of the marriage



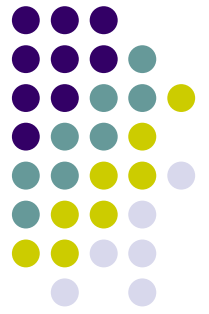
- Enquiry which convinces the court that the marriage cannot be saved (**Bulgaria, Czech Republic, The Netherlands, Poland, Hungary etc.**)
- Enquiry and a certain period of separation (four years in **Ireland**, three years in **Austria**, two years in **Belgium** etc.)



Do differences in divorce law diminish over time?

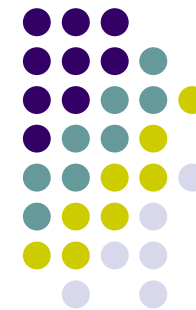
	Middle 19th century	Present day
Most conservative divorce laws	No divorce at all	Restrictive fault or no-fault divorce with long waiting periods and discretion of the court to refuse divorce
Average divorce laws	Restrictive fault-based divorce	Divorce by consent or divorce by unilateral application combined with some restrictions
Most progressive divorce laws	Divorce upon mutual consent or irretrievable breakdown, combined with some restrictions	Unilateral divorce Divorce on demand

Requirements for the divorce by consent



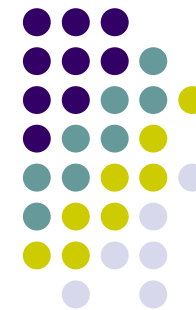
- *Certain duration of the marriage*
(three years in **Bulgaria**, two years in **Belgium**, one year in the **Czech Republic** and **Greece**, six months in **France**)
- *Certain period of separation*
(two years in **England and Wales** and in **Scotland**, one year in **Germany** and six months in **Denmark, the Czech Republic** and **Iceland**)
- *Agreement on ancillary matters*
(**Austria, Belgium, Bulgaria, France** (only for divorce by joint application), **Greece, Germany, Hungary, Denmark, Portugal**)

CEFL Principles

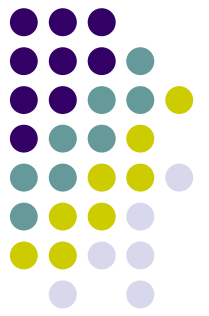


- **Principle 1:1 – Permission of divorce**
 - The law should permit divorce
 - No duration of the marriage should be required
- **Principle 1:2 – Procedure by law**
 - The divorce procedure should be determined by the law
 - Divorce should be granted by a competent authority which can either be a judicial or administrative body
- **Principle 1:3 – Types of divorce**
 - The law should permit both divorce by mutual consent and divorce without the consent of one of the parties.

CEFL Principles

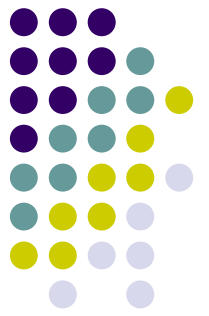


- **Principle 1:4 – Mutual consent**
 - **Divorce should be permitted upon the basis of the spouses' mutual consent. No period of factual separation should be required.**
 - **Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved.**
 - **This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouses.**



European Divorce Jurisdiction

- Brussels IIbis (Regulation 2201/2003)
 - Rules on jurisdiction (Article 3)
 - Both parties citizens, or
 - Habitual residence of the defendant; or
 - Habitual residence of the claimant and:
 - If last marital HR there, or
 - If lived there 1 year prior to petition, or
 - If lived there 6 months prior to petition and national.
 - No choice!



European Divorce Recognition

- Brussels Ibis (Regulation 2201/2003)
 - Rules on recognition (Article 21)
 - Recognition without any procedure
 - Very limited refusal grounds (Article 22)
 - Public policy
 - Untimely summons and other Article 6, ECHR protection
 - Incompatibility with previous decision
 - No jurisdictional test