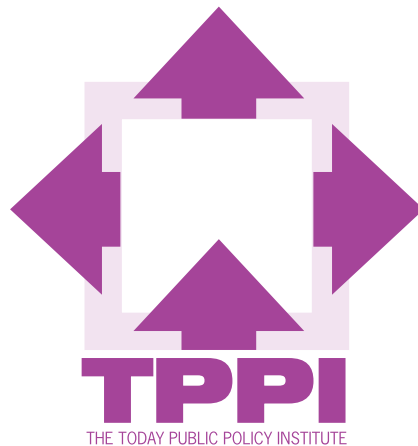


# **FOR WORSE, FOR BETTER: RE-MARRIAGE AFTER LEGAL SEPARATION**

## **EXECUTIVE SUMMARY**



## The Facts

1. Marital break-down is now a fact of Maltese life. In the years between the census of 1995 and 2005, the number of marriages in Malta which were annulled or where foreign divorces were recognised, together with those couples who were granted legal separations, rose by 160%, from just over 5000 to over 13,000. The number of legal separations alone increased by over 7000, from just over 4000 in 1995 to over 11,000 in 2005.
2. Since then, there have been over 1000 ecclesiastical and civil annulments, with over 800 cases currently pending. During the same period, there have been about 3500 sworn separation applications submitted or mediations introduced, with over 1000 separation cases currently pending. It has been estimated that the number of failed marriages will exceed 35,000, or over 17% of all marriages, by 2015.
3. These marriages have collapsed even though divorce cannot be obtained in Malta.

## The Need to Address the Issues

4. A civilized society has to deal with the consequences of broken marriages as prudently, fairly and justly as it can by providing the legal remedies for a well-ordered process when marriages have clearly failed. It must also encourage and sustain the institution of marriage by giving the family unambiguous support.
5. In Malta, legislation allows married people either to get divorced abroad, or to have their marriage declared null and void through annulment and, in both circumstances, to re-marry. Alternatively, the State acknowledges that a couple's marriage has broken down and allows them to separate without being permitted to re-marry.
6. The only missing element in the present legal separation process, therefore – in contrast to foreign divorce or annulment – is that these people cannot re-marry. The aim of this report is to consider whether Malta should introduce legislation to allow people who are legally separated to re-marry after the civil dissolution of their marriage.
7. Society and the State have a vested interest in promoting, encouraging and supporting stable marriages, built on solid foundations. If the rising tide of marriage break-downs in Malta is to be stemmed, there are several steps which the government should take. The recommendations for a six-point programme of marriage support on the lines set out in paragraph 21 of the report are the minimum that the government should seek to implement.
8. But the State also has to cater for the reality that – despite best efforts to avert it – marriages will continue to break down and that, when they do, it must give legal recognition to this fact in such a way as to acknowledge the need to support the institution of marriage as the preferred frame-work for a stable relationship and a family, not further weaken it. This means minimising the damage from earlier failure and avoiding the adverse social consequences from any subsequent relationships that may be formed.

## Roles of Church and State

9. In relation to marriage, the Church and State have different, though not mutually exclusive, sets of concerns. The State, through its legislators, must decide what decision is best for the whole of society, striking the proper balance between the human rights and the natural aspirations of individuals and the interests of the community and society as a whole. Legislators have to consider those who are not Catholic, those who do not accept the Catholic Church's teachings and those who, in all consciousness, take a decision which differs from its teachings.
10. What is of fundamental importance is that the distinction is maintained between the right of individuals to have religiously-based convictions, and the right of others not to have those religiously-based convictions imposed upon them. This distinction, which is crucial to a mature democracy, is the basis for the separation of Church and State – a position which, as the Archbishop has under-lined, is accepted by the Church in Malta.
11. It does not follow that the civil dissolution of marriage would deny freedom of religious practice to those

conscientiously opposed to it. Although a person's religious convictions may not permit divorce, his or her freedom of religious practice and belief are not violated by allowing re-marriage after legal separation.

12. If the State continues to deny the right of civil dissolution after legal separation, it cannot do so simply on the basis of the religious beliefs of one part of society. Legislating for divorce would not force any one to revoke his or her religious or moral stand on marriage.

### **Need to Protect Stable Relationships**

13. Persons legally separated are denied the right to re-marry. Under our laws, if they form a new relationship there is no husband, no wife, merely a co-habiting couple. It is clearly in the interests of the common good of society to seek to rectify this inequity. This is the civic imperative to be considered by the State.
14. The obvious way to rectify this is to regularise second unions by bringing them within the scope of marriage law and other aspects of civil law. The availability of legislation for re-marriage after legal separation and the civil dissolution of marriage would make this possible.
15. In assessing such a law, the determining factors for the State should be the requirements of justice and the common good of society. A secular, democratic State bound to pluralism and committed to the protection of the civil rights of each individual must do justice by and on behalf of all its citizens, thereby strengthening the bonds of society as a whole.

### **Marriage is the Preferred Frame-work**

16. Marriage is a vital pillar of society. As such, the State has the right and the duty to regulate it. It must consider the interests of the individuals involved: the spouses, their children (if any) and the persons who would be second spouses.
17. The State must also, quite properly, examine the economic, social, psychological and other consequences of re-marriage after legal separation. At the same time, it must consider how the introduction of civil dissolution might affect the institution of marriage.
18. The individuals' right, in all consciousness, to choose their own domestic and family relationships and to expect due respect and acknowledgement of those choices from the State, together with the wider benefits to society from the stability provided by re-marriage, are fundamental. Respect for such rights does not run counter to the general interests of the State in supporting marriage. It reinforces them.

### **The Need for Change**

19. To fail to recognise second relationships, as is the case in Malta today, is actually to undermine the institution of marriage and the family by denying them the equal respect and recognition which come from being married if they wish. State legislators have a duty to try to give citizens all freedom that is consistent with the rights of others, as well as arbitrating in the name of the common good of society between various interests.
20. The position our legislators adopt on the issue of re-marriage after legal separation, therefore, should be to weigh up the issues on the basis of the interests of the community as a whole, and not simply on the basis of private moral and religious convictions about marriage. They should seek the best answer which will benefit the whole of Maltese society.
21. Marriage is a legal contract created by the exercise of a free and rational will by a man and a woman. However, even with the best will in the world, marriages may sometimes fail. So long as humans are fallible marriage break-downs will happen. The State has a duty to protect the family even when marriages collapse.

22. The case in Malta for civil dissolution is ultimately the case for allowing people whose marriages have broken down and are legally separated to re-marry since this would in the long run provide greater stability to our society, not less.

### Options Open

23. The fundamental question which we as citizens and the State must ask ourselves is: should we, as a society, prevent separated people from beginning a new relationship based on marriage, if they wish to do so?
24. In responding to this question, the State faces three options. The first is to leave things as they are. The second is to focus simply on tidying up the current arrangements for co-habitation between a man and a woman, while leaving other legal provisions for the break-down of marriages unchanged. The third course is to introduce legislation allowing for re-marriage after legal separation and the civil dissolution of marriage.
25. To leave matters as they are is no longer an option. The current situation is intolerable and seems only likely to grow worse. The legal provisions in place are insufficient, the growing number of marital break-downs is alarming and the effects on society are becoming unsustainable.
26. Steps to buttress Maltese marriages on the lines proposed in paragraph 21 of this report need to be taken urgently and determinedly by government. But it would be wishful thinking to suppose that the trends of marriage break-down in Maltese society can be reversed. They can at best only be slowed down.
27. As to co-habitation, it would be tempting to suppose that introducing legal safeguards on such matters as the position of children born of such couples and their property rights would provide the solution. Although legal regulation of those men and women who co-habit is desirable on grounds of good order, it would represent only a partial and inadequate solution to Malta's current social ills.
28. On the contrary, to make a necessity of co-habitation would be incompatible with encouraging the stability which comes from marriage. A well-ordered legal process should ensure that, even when marital break-down occurs, it is fairly regulated in such a way as to reduce, not exacerbate, its wider impact on society. Permitting re-marriage would achieve this.

### Meeting the Objections to Re-marriage After Legal Separation

29. Recourse to legal separation or divorce is not the cause of marital break-down, but ways of minimizing the inevitably negative consequences on society of marriages which have failed and to allow people who wish to re-build their lives to do so.
30. To give legal recognition to second relationships, which are today marriages in everything but name, can only advance the cause of the institution of marriage, not weaken it.
31. Civil dissolution after marriage break-down would end a marriage and allow the parties to re-marry, while legal separation after marriage break-down only ends a marriage but does not permit re-marriage. Society currently pays a very heavy price for sustaining the concept of the indissolubility of marriage and the hope that separated couples may one day be reconciled. It is irrational to marginalise legally separated couples and prevent their further participation in a stable, orthodox and healthy family environment which re-marriage would provide.
32. It is alleged that divorce transforms marriage into a temporary contractual arrangement. This is a grossly unjust and wrong-headed view of why couples enter into marriage and, more pertinently, how painful the process of broken marriage is. Marriage is, indeed, a contract. But to argue that because a contract can be dissolved inevitably leads to many - or any - not committing themselves in the first place to its success is both unacceptable and wrong.
33. Nobody in a successful marriage wants to divorce. Nobody enters into a marriage intending to divorce. The civil dissolution of marriage after legal separation simply enables the parties to an irretrievably broken and finished marriage to acknowledge legally that it is finished, and to be free to marry again.

34. Those who oppose re-marriage while at the same time condoning legal separation in Malta point to other western societies where they see a wide-spread collapse of marriage when measured by the incidence of divorce. But when we look around us today we also find this collapse to be prevalent in Malta as well. The only difference is that the break-down here has to be measured in broken marriages after legal separation, not in divorce applications.
35. The absence of the ability to re-marry after legal separation has plainly spared Malta none of the pain and tensions and the dislocation of the modern age. All that it has done is made life more difficult than it need be for many people caught up in this situation.
36. To then argue that civil dissolution of marriage after legal separation causes marriage break-downs, rather than remedies it, is like saying that heart operation is a disease, not remedial surgery. The argument that introducing laws to permit re-marriage increases the possibility of marriage break-ups or creates a 'divorce mentality' is disingenuous and null in a context where co-habitation is both possible and prevalent.
37. If those who opposed re-marriage after legal separation really believed the assertion that divorce is the direct cause of marriage break-down they would, in logic, oppose legal separation as well. Yet, they do not conclude that legal separation, which has been a part of Maltese law for over a century, ought to be prohibited. What they really oppose is the right to remarry. People who seek civil dissolution are looking for a civilized remedy, under the law, for a finished marriage.

### Consequences of Re-marriage After Legal Separation

38. There are conflicting opinions about the effects of divorce on children. Research in this area poses difficulties because it is not possible to generalise with any validity about marriage, or about problems within marriage and the solutions to those problems. The research picture suggests that the subject is extremely complex.
39. Despite the extent of marital break-down in Malta, there is very little, if any, comprehensive research into the topic. Conflicting results emerge from the various studies and research which have been carried out in other countries. This is not surprising given the complex and variable nature of the subject and the fact that each and every case is determined by the particular context and background of the break-down.
40. In general, however, no research study denies that the process of marital break-down – whether resulting in legal separation or divorce – may damage children. There is very little research which focuses specifically on the different effects of divorce, legal separation or, indeed, the root problem, which is marital discord and break-down itself. Research of this nature would labour under the obvious difficulty that the conflict arising out of marital break-down is inextricably bound up with the legal separation or divorce that follows.
41. The over-riding point, however, is that it is marital discord, conflict and break-down which cause the primary emotional damage to children and it is wrong to state categorically that it is the experience of divorce which harms children. Civil dissolution after legal separation is a way of responding to that problem by trying to ensure that parents and children can carry on with their lives after marital break-down in an environment where there is less conflict and where, in due course, the stability of a new marriage is possible.
42. There are inevitable financial consequences following the break-down of any marriage, be it as a result of the existing legal separation arrangements or divorce. But spouses and children need not be worse off than they are under the current legislative regime of legal separation.
43. Civil dissolution and re-marriage neither add to nor subtract from the legislators' duty to regulate the financial affairs of a separating couple, whether in a legal separation or divorce. The financial consequences are common to both legal separation and divorce and there is no *prima facie* case for thinking that civil dissolution of marriage after legal separation would pose an additional burden on the tax-payer. The economic costs to the tax-payer which arise today in marital break-downs in terms of social security, housing and other benefits are caused by legal separation. We face these costs at present, whether re-marriage after legal separation is introduced or not.

## Conclusions

44. It is concluded that:

- The arguments in favour of the introduction of legislation to allow people who are legally separated to re-marry after the civil dissolution of their marriage far out-weigh the disadvantages;
- The individuals' right to choose their own domestic and family relationships and to expect due respect and acknowledgement from the State is fundamental;
- The case for civil dissolution after legal separation is ultimately the case for allowing people whose marriages have broken down and are legally separated to re-marry;
- It is manifestly in the interests of the common good of society and a work of justice and fairness to seek to rectify this inequity;
- The absence of divorce has plainly spared Malta none of the pain and tensions and the de-stabilisation of modern society. All that it has done is made life more difficult than it need be for many people caught up in this situation;
- To give legal recognition to second relationships, which are marriages in all but name, by permitting re-marriage after civil dissolution can only advance the cause of the institution of marriage, not weaken it.
- It is vital, however, that a legislative remedy for the civil dissolution of marriage, when it is introduced, be just, civilized, responsive to the interests of any children of the marriage and sensitive to the needs for the protection and security of the parties to the civil dissolution.

## Recommendations

45. It is, therefore, recommended that the government should introduce legislation for people who are legally separated to re-marry if they so wish after the civil dissolution of their marriage.
46. Moreover, it is recommended that the legislative frame-work should comprise the main characteristics in paragraph 93 of the report, under-pinned by a social support infrastructure as proposed in paragraph 95.



