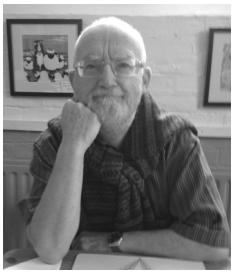
Articles

Heartbreak Hotel . . . er *Hansard*: Parliamentary Divorce Debates 1854 – 2020

Professor Chris Barton, *A Vice-President of the Family Mediators Association, Academic Door Tenant, Regent Chambers*



Chris Barton is Emeritus Professor (Staffordshire University) of Family Law, an Emeritus Member of the Society of Legal Scholars and an Academic Door Tenant at Regent Chambers (Hanley, Stoke-on-Trent). He assists with the provision of continuing professional development for family lawyers and family mediators.

This article examines Parliamentary protests at the incremental lowering of the barriers to divorce over the last 150 years or so. It attempts to distinguish the transient from the durable and considers which objections, if any, were subsequently justified. The Bills selected for these purposes are the Divorce and Matrimonial Causes Bills ('DMCB') of 1854, 1857 1923, 1937, 1951 1967, the Divorce Reform Bill ('DRB') 1969 and, of course, the Divorce, Dissolution and Separation ('D,D&S') Bill 2000. Whilst Parliament impliedly dismissed most proffered misgivings, and further liberalisation followed, there were some temporary hold-ups, viz the defeats of (among others ignored here) the 1854 and 1951 efforts. The reforms, like those of other family matters, the Civil Partnership Act 2004 and the Marriage (Same-Sex) Marriage Act 2013, plus the breathalyser, seatbelt and public smoking legislation all passed the acid test of controversial legislation: never any likelihood of repeal. Perhaps, likewise, there will be no stepping back from the 2020 Act, although no doubt subsequent Parliaments will revisit divorce law. Whilst these Bills were also criticised elsewhere, we are concerned here with objections raised at Westminster.

Famously, the journey started with the 1857 Act allowing curial divorce on the sole ground of adultery (wives needed exacerbating circumstances) and ended – so far – with the 'no-fault only' 2020 Act. Key stages were the 1923 removal of the 'extras' required of wives and the 1937 additions of cruelty, desertion and – the first inroad into the 'matrimonial offence' principle – supervening incurable insanity, before the 1969 Act bowed to the existing de facto reality by allowing a consensual petition and an extension to the 'no-fault' possibility. Other Acts opportuned Parliamentarians to declaim generally on divorce. A memorable example is the second reading of the 1967 Bill in the Commons in which all 13 contributors were lawyers: nine barristers in Sir Elwyn Jones, Sir John Hobson, Alexander Lyon, Mark Carlisle, David Weitzman, Richard Body, Ian Percival, Emlyn Hooson and Anthony Buck; plus four solicitors in Anthony Grant, Leo Abse, Gordon Oakes and Daniel Awdry. There was much 'declaring of interest' in that debate as The Bill extended divorce jurisdiction from the old Probate Divorce and Admiralty Division of the High Court, – 'Wills, Wives and Wrecks' – to the County Courts (whose judges had previously heard such cases on commission). So, hats off, in these digital divorce days, to Mr Warren MP and his prescient announcement that 'the result of the 1857 Bill will but too probably be, that these delicate and important questions will be brought *before inferior tribunals*' (HC Deb 04 August 1857 vol 147 Col 1023; his emphasis).

Many protests, such as an alleged lack of demand, are omitted here for reasons of space. The objections included are the

deleterious effect of divorce on marriage both individually and as an institution (with particular reference to casual commitment, ease/speed of exit, the threat to reconciliation), the 'need' for reasons to be given and for parties to be heard. Rehearsed less often recently are matters of religion/morality with gender and class even less. Some of these concerns are interlinked of course.

Objections to divorce per se

Unsurprisingly, such fundamental disapproval has become much less common (if not vanishingly so, see the 2020 Bill below). In the debate on the DMCB 1854 Baron Cranforth LC addressed the argument that if the lock is known to be legally unopenable the social relationship must improve:

> '. . . Lord Stowell, in his judgment in Evans v. Evans said 'When people understand that they must live together . . . they learn to soften by mutual accommodation that yoke which they know they cannot shake off, and they become good husbands and good wives – from the necessity of remaining husbands and wives over the years' (HL Deb 13 June 1854, Vol 134, Col 6)

This seems an unrealistic aspiration by modern – perhaps any – standards. Indeed, Cranforth himself was unconvinced, being prepared to commit personnel resources for divorce somewhat in excess of today's electronic route by way of a court consisting of:

> '. . . five members, of which the Lord Chancellor and the Lord Chief Justice of the Court of Queen's Bench shall always be members, and the other members shall be the Master of the Rolls and two other persons, probably two learned civilians, to be named by the Queen . . . the appeal from the divorce court should be to your Lordships' House'(Cols 9, 10)

At the Committee stage of that Bill the Bishop of Oxford was nonetheless concerned that husbandly reliance on a breach of the Seventh Commandment – the only proposed ground – could redound to the wrongdoer's advantage:

> 'If the sin of the wife were to be allowed to set her free, the sanctity of marriage, which had hitherto been one of the special blessings of this country, would be threatened and destroyed.' (HL Deb 30 June 1854,Vol 134, Col 946–47)

A more durable, and more fundamental line of attack is the marriage-as-contract argument, advanced, eg, by Sir P Hannan during the 1937 Bill:

> '. . . we have always regarded ourselves in this country and in this House as the guardians of the righteousness and sanctity of all contracts, and of all contracts the supreme contract is the contract of marriage' (HC Deb 23 July 1937, Vol 326, Col 2615).

Yet during the 1951 debate Mr Maudling MP noted, by implication, that contracts can be discharged. Perhaps he had frustration in mind in saying:

> 'The basis of the contract under which the two parties to a marriage undertook to share their lives was the mutual affection which they felt for one another' (HC Deb 09 March 1951, Vol 485, Col 1010)

As currently as the 2020 debate on the second Commons reading, Sir John Hayes went a step further in the suggestion that marriage is, or should be, innately indissoluble:

> '. . . a marriage is not a contract but a vow . . . Roger Scruton put it this way: "That we can make vows is one part of the great miracle of human freedom; and when we cease to make them, we impoverish our lives by stripping them of lasting commitment"" (HC Deb 8 June, Vol 677, Col 119).

One of the proffered advantages of the contract/vow line is that it discourages casual – and therefore likely to be regretted – commitment, illustrated here by Mr Wood MP's 1951 advancing of the

commonly-heard point that extending the (then) ground for divorce would:

> '. . . very seriously weaken the contract, and will very seriously encourage people possibly to enter on marriage lightly and inadvisedly' (HC Deb 09 March 1951Vol 485 Col 945).

Some may think that, in the same debate, Mr Houghton MP provided a convincing, and certainly withering and far from unique, riposte:

> 'It is fantastic to suggest that . . . men or women . . . who are contemplating marriage, enter that solemn undertaking, that act of faith, that pledge of mutual support and affection, while meditating upon the intricacies of the divorce law . . . to enable them to escape from what they surely hope will be a happy and lasting union . . . ' (Col 972)

The, sometimes combined, implications of religion and the wording of some marriage services are often pressed into action, though perhaps less often over the years, to support the indissolubility claim. At its bluntest, here is Lord Russell in 1937:

> '. . . we Catholics, at all events, have no doubt . . . We believe divorce to be an evil thing . . . contrary to the teachings of Christ . . . the holy bond of matrimony . . . can, and should, only be dissolved by death' (HL Deb 19 July 1937, Vol 106, Col 581)

(Russell exempted adultery from his bar. The position today is that although the Catholic Church recognises that divorce procedure is necessary to solve civil matters such as arrangements for children, remarriage is only permissible after a catholic annulment or the other's death: 'Whoever divorces his wife and marries another, commits adultery against her and if she divorces her husband and marries another, she commits adultery' (Mark 10:11–12). It appears to be the only major faith that adopts this attitude, although some others discriminate against wives.)

In 1951 Martin Lindsay suggested that a refusal to divorce to permit re-marriage is likely to have other motives:

> 'I have no sympathy at all for the man or woman who refuses to divorce his or her matrimonial partner, at any rate when he or she steadfastly wants to remarry. This attitude can, of course, be defended upon religious grounds, but in my opinion it can be defended on those grounds only if one takes a very narrow view of Christianity. I believe that the refusal to divorce is more often due to malice, to vindictiveness and to spite' (HC Deb 09 March 1951 vol 485 Col 940)

In 2020 Lord Farmer referred, like others before him, to the 'better or worse' phrase in an Anglican wedding ceremony:

> 'What good will it accomplish that comes even close to remedying the harm it will inflict by further emptying marriage vows of meaningful promise?' (HL Deb 05 February 2020, Vol 801, Col 1824)

(In fact there is a choice of what is spoken and s 43(3A)) of the Marriage Act 1849 as amended by s1(1) of the Marriage Ceremony (Prescribed Words) Act 1996 allows such as 'I declare that I know of no legal reason why I [name] may not be joined in marriage to [name]' 'in registered buildings. One might add that civil partnership merely requires registration. On the other hand, some American States, such as Arizona, offer a choice of 'covenant marriage' whereby the parties agree to accept pre-marital counselling and limited grounds for divorce.)

Too fast, too easy, too many

This has been perhaps the most durable of objections, not to dissolution per se but as a warning that any relaxing of the ground(s) would lead to divorces that might have been saved by reconciliation. During the 1854 debate Lord Clancarty flatly asserted that it 'would be injurious to the morality of the country by increasing the number of divorces' (HL Deb 30 June 1854, Vol 134, Col 845). In 1857 Mr Warren MP imagined the position that was brought about 112 years later 'that if divorces were allowed to depend upon a matter within the power of

either of the parties, they would probably be extremely frequent' (HC Deb 04 August 1857, Vol 147, Col 125).

Sir Alex Cunningham countered that argument during the Committee Stage of the 2020 Bill 'when people embark on divorce proceedings, it is not because they have just changed their mind overnight – relationships break down over a long period' (HC Deb,17 June 2020, Vol 677, Col 856). In 1951 Mrs Eirene White had argued '.it is entirely misleading to infer from [an increase in divorce] that that one is increasing the number of broken marriages' (HC Deb 09 March 1951, Vol 485, Col 957). (A rare exception might be the discovery of infidelity.) The argument that has repeatedly won the day, by implication at least, is that whilst greater accessibility may well increase numbers, it takes more dead marriages off legal life support more quickly and painlessly than hitherto – as indicated by 'spikes' in the ensuing numbers. In fact, Robert Buckland LC averred that the 2020 Bill will actually lengthen the final, legal, part of the process:

> '. . . under the new law, the legal process of divorce will take longer for about four fifths – 80% – of couples, after taking account of the projected impact of the take-up of the streamlined, digitised divorce service. That means that the question of quickie divorce is one that is wholly refuted' (June 8, Vol 677, Cols 103/4)

During the debate on the 1996 Family Law Bill Earl Russell summarised the matter thus:

> 'The noble Baroness, Lady Young . . . has always argued that one preserves marriage by making divorce more difficult. However, on the other hand, I have argued that by making divorce more difficult all one achieves is making break-up more painful' (HL Deb June 27, Vol 573, Col 1094)

At the Committee Stage of the 2020 Bill, Alex Chalk MP provided evidence that once the legal process starts, regret is vanishingly rare: 'the 2017 Nuffield study noted that for people who have come to the hard decision to divorce and have begun the legal process of divorce, only one of 300 cases was known to have ended in attempted reconciliation' (HC Deb 17 June Vol 677, Col 895).

The need for blame

From AP Herbert's 1937 Bill to the 2020 Westminster debates – to which his great-grandson, Toby Perkins MP contributed – some Parliamentarians have disapproved of fault-free divorce, acknowledging the desire of affronted parties to 'have their day in court' in order to air their grievances in the public eye or, alternatively, for the other to deny guilt and perhaps 'cross petition'. In the Committee Stage of that last Bill Fiona Bruce MP said 'The removal of fault sends out the signal that marriage can be unilaterally exited with no available recourse for the party who has been left' (HC Deb 17 June Vol 677 Col 849). Yet during the 2020 Bill Lord Mackay was unequivocal:

> 'I took part in quite a number of defended divorce cases. The idea that these were conducive to saving marriage, elevating its status or anything of that kind is absolute nonsense' (05 February, Vol 801, Col 1815).

There are two further, famous, objections to the need for blame, firstly that such culpablity, if any, is rarely unilateral. In 1968 Lena Jeger MP said:

> 'I take issue with the hon. and learned Member for Oldham, West (Mr. Bruce Campbell). He kept referring to the totally innocent, and the totally guilty party. The whole difficulty about legislating in this sphere of sensitive and intimate human relationships is that it is not a question of total guilt or total innocence. Marriage is not like that' (December 6, Vol 774, Col 2050)

Secondly, that fault is often reluctantly chosen by couples to achieve consensual divorce. Startlingly, perhaps, to modern eyes, the latter was advanced even prior to the 1857 Act as a challenge to divorce per se; Baron Cranworth LC said that 'the real

difficulty in such cases will be not to prove the adultery but that there is no collusion' (HL Deb 13 June 1854 vol 134 Col 9). Later, long after the 'hotel divorces' exposed in fiction by Toby Perkins' (above) great-grandfather (Holy Deadlock) and Evelyn Waugh (A Handful of Dust) came the unforeseen consequence of the 1969 Act. Unhappy marrieds in a hurry notoriously used 'adultery' and 'behaviour' to obtain –sometimes mendaciously – consensual divorce without waiting to live apart for two years, potentially endangering the goodwill needed to reach agreement regarding the children (if any) house and money. As the 2020 Bill, historically unusual in this area in being a Government Bill, finally won the day, Sir Robert Neill said 'Maintaining a fault system, which . . . entrenches conflict, does us no credit' (HC Deb17 June Vol 677 Col 864).

So, we have reached the point feared and foretold by Parliamentarians at previous stages of reform – divorce by notification. This example comes from Robert Bell MP in the 1951 Bill: 'Where are we going to stop beyond this point? . . . the next Bill cutting down this period to some shorter time will be only a natural extension of this Bill' (HC Deb 9 March 9 Vol 485 Col 994). Of course, not everyone will agree with Mr Bell's next words, 'This is the end of marriage'.

Rag, tag and bobtail

The above headings are not an exclusive list of attitudes struck during Westminster divorce debates. Recently, such as concerns for the children involved, have appeared more frequently whilst snobbery and sexism have retreated. In 1854 Lord Redesdale sniffed that that year's Bill would 'make divorce, for the first time, a common remedy which anyone could seek and obtain' (HL Deb 30 June 1854, Vol 134, Col 936). Even in 1967 the then 'Mr' Percival could remark that, as divorce counsel, he 'often had a typist, or the newest office boy' (HC Deb 04 April 1967, Vol 744, Col 103) sat behind him. In 1854 the Lord Chancellor could say that 'while the wife who commits adultery loses her station in society, the same punishment is not awarded to the husband who is guilty of the same crime' (HL Deb 13 June 1854 vol 134 col 6). Even in – or perhaps particularly in – the 'Swinging Sixties', Leo Abse, regarded as ahead of his time, could say of Mrs Lena Jeger MP 'that the whole House regards her as one of the most beautiful and attractive women in the land' (6 December 1968, Vol 774, Col 2052).

What next?

Will a subsequent Parliament be the first to reverse the 1857–2020 trend and put the clock back? One predicts not. Or will the divorce process be made even leaner? For a long time the sub 2-hour marathon was thought impossible but Eliud Kipchoge beat it by twenty seconds in 2019. In fact the 2020 Act permits a shortening of its current minimum 24-week period, thus further justifying the fears (above) of many past and previous Parliamentarians about divorce by unilateral notification; in 1967 Anthony Grant said that 'It would be a retrograde step if we moved towards the ' "dog licence theory" of marriage, or the idea that one can get a divorce from the post office' (HC Deb 04 April 1967, Vol 744, Cols 91–92). Nonetheless one hopes and suspects that, having made the exit process less likely to damage arrangements for the children, the house and the money, attention will turn – as many Parliamentarian and others have said – to a better regime for those last three matters. Reconciling predictability and justice in financial remedies would be a good start, ideally along the lines I suggested in 'Financial remedies today: "tools", "rules", "guidelines", "benchmarks", "yardsticks" "ordinary consequence" and "departure points" ' [2018] Fam Law 558 at pp 566–568.

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