Women and Parliamentary Divorce in England. From Wife-Sale to the Divorce Act of 1857

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Abstract:
The essay is a study of divorce in England in the Modern Period, with particular reference to parliamentary divorce, established since the end of the 17th century. If husbands could get rid of undesired wives through wife-selling, private separation deeds, or separation *a mensa et thoro* awarded by the ecclesiastical courts, they were not permitted to remarry unless they got a private bill from Parliament. Parliament acted as a real court of justice and, being the procedure extremely long and expensive, parliamentary divorce was in fact a privilege reserved to members of the aristocracy in search of a heir. Only in 1857 the *Divorce Act* legalized divorce in the country through the establishment of the *Court for Divorce and Matrimonial Causes*.

Keywords: divorce; marriage; parliament; England

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1. Before divorce in England: wife-sale and other "remedies"

"I'll sell her for five guineas to any man that will pay me the money and treat her well; and he shall have her for ever, and never hear aught o' me. But she shan't go for less. Now then – five guineas – and she's yours. Susan, you agree?" She bowed her head with absolute indifference. "Five guineas," said the auctioneer, "or she'll be withdrawn. Do anybody give it? The last time. Yes or no?" "Yes," said a loud voice from the doorway. All eyes were turned. Standing in the triangular opening which formed the door of the tent was a sailor who, unobserved by the rest, had arrived there within the last two or three minutes. A dead silence followed his affirmation. "You say you do?" asked the husband staring at him. "I say so," replied the sailor. "Saying is one thing and paying is another. Where's the money?" The sailor hesitated a moment, looked anew at the woman, came in, unfolded five crisp pieces of paper, and threw them down upon the table-cloth. They were Bank of England notes for five pounds. (…) "Well, I take the money, the sailor takes you.

That's plain enough. It has been done elsewhere – and why not here?" said the husband. He took the sailor's notes and deliberately folded them, and put them in a high remote pocket, with an air of finality. The sailor looked at the woman and smiled. "Come along!" he said kindly. (…) She paused for an instant, with a close glance at him. Then dropping her eyes again, and saying nothing, she took up the child and followed him towards the door. On reaching it, she turned, and pulling off her wedding-ring, flung it across the booth in the hay-trusser's face.*[1]

This scene, drawn from a famous Thomas Hardy novel, refers to the wife-sale by an English trusser in an end of summer evening of the beginning of the 19th century at the fair of the village of Weydon-Priors, Upper Wessex. Although Hardy's character is a half-drunk husband,[2] and although the sale in the novel starts as a joke and a provocation, becoming a real sale after some time (and some more beer) raising uproar among the people present,[3] the wife-sale was quite a popular practice for the popular classes, especially in Southern England and in the Midlands, from the 16th until the 19th century.[4]

It consisted, in practice, in the sale of the wife by the husband at the marketplace or a fair. It took place in public and in compliance with the forms followed in the cattle business. In fact, the sale usually rested on an agreement between husband and wife, and on the existence of a buyer, usually the woman's lover. Once agreed on the money due (usually a symbolic sum), a real auction took place: the husband herd the wife – by a neck rope – to the closest cattle market or fair, then auctioned her in front of the crowd exactly as if she was a heifer or a cow, sometimes even marking her weight. The buyer offered the agreed sum, paid it and took away the woman, always by neck rope, after the restitution of the wedding-ring to the husband. After the bargain the parties often drank beer together at the pub.

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* The essay is a shorter version of the article In Parlamento come in tribunale. Il divorzio per via parlamentare nell'Inghilterra del Settecento. *Historia et ius*, 2016, 10.

1 HARDY, T. *The Mayor of Casterbridge*. London: Ware, 1998, pp. 7–9.

2 "The man finished his basin, and called for another, the rhum being signalled for in yet stronger proportion. The effect of it was soon apparent in his manner (…). At the end of the first basin the man had risen to serenity; at the second, he was jovial; at the third, argumentative; at the fourth, the qualities signified by the shape of his face, the occasional clench of his mouth, and the fiery spark of his dark eye, began to tell in his conduct; he was overbearing, even brilliantly quarrelsome." HARDY, *op. cit.*, pp. 4–5.

3 "The sight of real money in full amount, in answer to a challenge for the same till then deemed slightly hypothetical, had a great effect upon the spectators. Their eyes became riveted upon the faces of the chief actors, and then upon the notes as they lay, wheighted by the shillings, on the table. Up to this moment it could not positively have been asserted that the man, in spite of his tantalizing declaration, was really in earnest. The spectators had indeed taken the proceedings throughout as a piece of mirthful irony carried to extremes; and had assumed that, being out of work, he was, as a consequence, out of temper with the world, and society, and his nearest kin. But with the demand and response of real cash the jovial frivolity of the scene departed. A lurid colour seemed to fill the tent, and change the aspect of all therein. The mirth-wrinkles left the listeners' faces, and they waited with parted lips." HARDY, *op. cit.*, p. 8.

4 On the wife-sale, MENEFEE, S. P. *Wives for Sale*. Oxford: University Press, 1981. STONE, L. *Road to Divorce. England 1530–1987*. Oxford: University Press, 1990; IDEM. *Broken Lives. Separation and Divorce in England 1660–1857*. Oxford: University Press, 1993, s. 19, reported that there were about 300 cases of wife-sale between 1780 and 1850, with a peak of 50 in the decade 1820–1830. See also, for a short summary, KENNY, C. Wife-selling in England. *Law Quarterly Review*, 1929, XLV, pp. 494–497, who highlighted the role of the press in "advertising" such a practice, not common but destined to provoke clamor as reputed scandalous and immoral.

Such a practice, exclusive of the poorest part of the population – more common and standardized after the enactment of the Marriage Act of 1753, which abolished marriage contracts and prohibited clandestine marriages[5] – was, in fact, "a kind of public self-divorce".[6] The will to make the translation of the property binding, together with the intent to transfer effectively both the legal/financial responsibilities and the husband's rights on the wife, explain the search of the maximum publicity and of the solemn forms of selling, in front of the community and in places especially devoted to such a business.[7] For the same reason, since the end of the 18th century, some sales were accompanied by written deeds. Obviously, notwithstanding the parties were generally convinced of the contrary, the wife-sale didn't produce any legal effect, being the sale illegal, so the marriage between the seller and the sold woman remained valid for all intents and purposes.

If possible separation choices for the poorer sections of the population were not many, being desertion by the husband or escape with another man by the wife the easiest ways to get rid of the spouse – both extremely popular "remedies" to marital unhappiness of the poor, often leading to clandestine marriages and bigamy –,[8] more guarantees were offered by the stipulation, since mid-17th century, by the *élite* and the middle class, of private deeds of separation in front of a notary. In practice, the couple agreed on the separation terms, the husband committed himself to provide alimony for his wife for life (an annuity usually corresponding to a third of his income) and the wife committed herself to release him from the responsibility for any future debt on her part (at common law normally charged to the husband). The most important guarantees of a private deed of separation – and the reason why it was popular during the 18th century too – were: contractual freedom recognized to the woman, who could acquire property and act in court (at common law both excluded for married women); husband and wife could live where and with whoever they wanted, being both committed to renounce to act in court to assert marital rights; the agreement on children custody and maintenance (usually fostered to the mother, while at common law subjected to the absolute and exclusive power of the father, who could even forbid the separated wife to see the children or keep touch with them in the future).

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5 The Marriage Act was the last of many statutes, enacted since 1666, to regulate marriage: in fact, notwithstanding the celebration of the wedding had to take place in church, in front of a priest and at least two witnesses, after the achievement of the licence it often took place, within the poorest sections of population, by a simple oral contract. Then there was the popular practice of clandestine marriages, celebrated by a priest secretely and without any licence, opposed both by Church and government as it not only damaged the revenue, but also gave place to complicated legal problems (cases of bigamy, incest, inheritance). On the history of marriage in England, STONE, L. *The Family, Sex and Marriage in England, 1500–1800*. New York: University Press, 1979; IDEM. *Uncertain Unions, Marriage in England, 1660–1753*. Oxford: University Press, 1992; MACFARLANE, A. *Marriage and Love in England, 1300–1840*. Oxford: University Press, 1986.

6 STONE, *Road to Divorce*, p. 144, talked about wife-sale, within a "non-separating and non-divorcing society", as "a kind of public self-divorce".

7 It is not a case that Hardy sets the sale within a kettle fair: "The trusser and his family proceeded on their way, and soon entered the fair-field, which showed standing places and pens where many hundreds of horses and sheeps had been exibited and sold in the forenoon, but were now in great part taken away. At present, but little real business remained on hand, the chief being the sale by auction of a few inferior animals, that could not otherwise be disposed of, and had been absolutely refused by the better class of traders, who came and went early." HARDY, *op. cit.*, p. 3.

8 SHARPE, P. Marital Separation in the Eighteenth and Early Nineteenth Centuries. *Local Population Studies*, 1990, XLV.

Such contracts, containing agreements totally or partially contrary not only to the common law, but also to the canon law, could be enforced only in equity: as a woman could not stipulate any deed after marriage, the husband had to enter into an agreement with a trustee acting in the wife interest. And as the Court of Chancery had jurisdiction over trust, it automatically acquired a specific competence – concurring with either the common law courts and the ecclesiastical tribunals – in matter of private deeds of separation for both financial matters and children custody.[9] In any case, such deeds couldn't get full protection in the law courts (both secular and ecclesiastical) in case the husband, changing his mind, decided to act in court for adultery.[10] The courts, on their part, to strengthen the affirmed indissolubility of marriage, tended – especially between the end of the 18th and the first half of the 19th century – to give a narrow interpretation of private deeds of separation, quite popular for the low costs and the absence of the compulsory adultery requisite.

Such a requisite was indispensable to obtain the only allowed form of judicial separation in England, awarded by the ecclesiastical courts: the Consistory Courts and the London Court of Arches (acting as an appellate court); above the last one was the High Court of Delegates, appointed by the Lord Chancellor and formed by three judges of the common law courts and three civilians. It was finally possible to petition the Commission of Review, but in fact this was an appeal *in extremis* to the king's mercy. Ecclesiastical courts had an exclusive competence over marriage: since the separation between secular and spiritual jurisdiction by William I, all spiritual matters (including marriage and its validity), were in the exclusive competence of the Church and were regulated by medieval canon law.

England was, in fact, the only European protestant country to have preserved, notwithstanding some attempts of reform dating back to the 16th and 17th centuries – the *Reformatio Legum Ecclesiasticorum* in the 16th century, the removal from the ecclesiastical courts of marriages celebration and registration during the Commonwealth –, the canon law prohibition to divorce without regulating the matter by statute.[11] And as canon lawyers had opted for an interpretation of the Holy Scriptures in the sense of marriage indissolubility for life, the only possibility accorded by the ecclesiastical courts (at their discretion) was the separation *a mensa et thoro* (the separation from bed and board), possible only in case of adultery, violence, sodomy and heresy.[12] It was admitted that husband and wife, although indissolubly joined, could live apart, but – remaining the marriage valid and, consequently, not voidable – they were forbidden to remarry until the death of the separated spouse.

Canon law procedure was followed (recourse to writing, private hearing of witnesses, absence of jury): the need to recur to canon lawyers (the proctors, the only ones allowed to

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9 Since the end of the 18th century the Court of Chancery started to assign children under age of seven to their mother custody. On equity protection of married women property, see DICEY, A. V. *Diritto e opinione pubblica nell'Inghilterra dell'Ottocento*. Bologna: Il Mulino, 1997.

10 For these reasons STONE, *Road to Divorce,* p. 182, defined private deeds of separation "a form of quasi-legal collusive self-divorce".

11 RHEINSTEIN, M. *Marriage Stability, Divorce and the Law*. Chicago – London: Methuen, 1972, p. 317, talked about a "English late". For a comparative *excursus* on separation and divorce in pre-industrial Europe, see FAUVE-CHAMOUX. Matrimonio, vedovanza e divorzio. In: BARBAGLI, M. – KERTZER, D. I. (eds.). *Storia della famiglia in Europa*. Roma-Bari: Laterza, 2002, pp. 307–351.

12 There were only a few cases of separation *a mensa et thoro* between 1660 and 1830: further details and data in STONE, *Road to Divorce,* pp. 184–185.

act in the ecclesiastical courts), together with the high procedural costs, made the process very expensive and, consequently, only accessible to the *élites* and the gentry. Only a declaration of nullity following to the missing of legal capacity requisites (e.g., the existence of a previous marriage, consanguinity, impotence at the time of the wedding) or the validity of the given consent (e.g., coercion, insanity, error, young age)[13] allowed the parties to remarry as in these cases the marriage was invalidated *ab origine* and, being void, held *tamquam non esset* from its very beginning. But this was a rare case, as nullity was difficult to prove.[14]

Notwithstanding the ecclesiastical courts traditional competence in matter of marriage, secular tribunals tried to remove some moral and material aspects of married life from the Church control: the Court of Chancery, competent in matter of trusts and personal property, intervened in cases concerning married women property, pre-wedding contracts and debts incurred after the celebration of the wedding; while criminal courts intervened in cases of sodomy and bigamy, a felony liable to death penalty.[15] Besides, with time the common law courts acquired a growing competence over the breach-of-promise (the violation of pre-wedding contracts)[16] and above all, starting from the 18th century, over the compensation for damages in case of trespass.

More in detail, in case of wife adultery, the husband could act in the Court of King's Bench or – although more rarely – in the Court of Common Pleas against his wife's seducer to claim the compensation for damages by an action for trespass, assault and criminal conversation (action for seduction), shortly indicated as action for crim. con. At common law, after the wedding the woman became one thing/person with the husband (*feme covert*) loosing, as already said, every legal and patrimonial capacity. As according to the *fictio* such a "one person" derived from the marriage bond was represented by the husband, it was the husband – wife's *dominus* and guardian at the same time – to dispose of her and of her present and future goods, which were in his absolute property.[17] The violation of property including, in this case, not only the woman goods, but also her body (functional to the control of the transmission of property itself), was safeguarded through such a specific action deriving from the action of trespass: it was held that the seducer, "using" the wife body, had trespassed on and damaged the husband property, who could consequently act in court as in any other case of tort. Besides, it was taken for granted that the compensation for damages was due not only in case of material damage, but also

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13 The minimum age for a valid consent was seven years old, but girls under twelve and boys under fourteen could avoid marriage. Such an age was elevated to sixteen years old in 1929.

14 Cases of nullity were one seventh of all separation cases in the last thirty years of the 17th century and none in the 1750s. After the requisite of parental consent for minors under 21 years of age was introduced by the Marriage Act, their number newly increased. See, for further details, STONE, *Road to Divorce*, p. 194.

15 Following to the application of the benefit of clergy, death penalty was usually changed in hand fire brand.

16 More details in FROST, G. S. *Promises Broken. Courtship, Class and Gender in Victorian England*. Charlottesville – London: University Press of Virginia, 1995.

17 Marriage consequences on women property were described by KENNY, C. S. *History of the Law of England as to the Effects of Marriage on Property*. London: Yorke Prize, 1879; KAHN-FREUND, O. Matrimonial Property in England. In: FRIEDMANN, W. (ed.). *Matrimonial Property Law*. London: Stevens, 1955; BONFIELD, L. Marriage, Property and the "Affective Family". *Law & History*, 1983, I; HOLCOMBE, L. *Wives and Property*. Toronto: University Press, 1983.

in case of mental suffering, clearly recognizable in a case of seduction.[18] Of course, the action, being the wife incapable to stand in court, had to be exclusively promoted against the seducer: hence the impossibility for the woman to defend herself or to bring forth witnesses in her favor.

The action for crim. con., accessible only to members of the wealthy classes (given the procedural high costs) allowed the husband not only to obtain the money necessary to cover both the procedural charges and the judicial separation costs in the ecclesiastical courts but also, in case of high compensation for damages by the jury – a special jury, made of "gentlemen of fortune", reputed more sensitive to matters concerning honour compared to ordinary jurors –, to see the seducer in jail for debts for the rest of his life. Furthermore, getting compensation for damages through the action for crim. con., increasingly recurred to during the second half of the 18th century and sometimes cause of fraudulent deals between the parties, was one of the requisites – made compulsory at the end of the century – to obtain parliamentary divorce.

2. In Parliament as in court: the birth of parliamentary divorce

It is well known that the first Parliament intervention in matter of marriage dates back to the time of Henry VIII. The king had married Catherine of Aragon in 1509 but, after eighteen years of marriage and a child, wanted his marriage to be annulled to be able to marry Anne Boleyn. The affair, submitted to Cardinal Wolsey, remained unsolved until Henry VIII, in 1533, decided to break with the Church of Rome, to hold his marriage void and secretly marry Ann Boleyn. Thomas Cranmer, appointed Archbishop of Canterbury, held that the king's previous marriage was contrary to divine right as Catherine was his brother's widow. The Parliament, on its part, abolished appeals to the Pope. Besides, it was enacted that whoever criticized these statements, would be accused of treason. Three years later Cranmer himself would declare the annulment of the new marriage (because of the king's relationship with Mary Boleyn, sister of his wife) and Anne Boleyn would be beheaded for treason.[19]

If Parliament intervention was limited, in the case of the annulment of the first marriage of Henry VIII, to obligingly ratify and strengthen the interpretation – or, better, the manipulation – of canon law norms more favorable to the king, nevertheless Parliament's decisions showed canon law weakness and permeability, in matter of marriage, to the interference by temporal power: for the first time, marriage had been removed from the Church control, making possible what was impossible in the ecclesiastical courts. Such an important precedent was followed, in correspondence to the growing leadership of Parliament since the end of the 18th century,[20] by other *causes célèbres*, all implying parliamentary acts *ad personam*.

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18 It was noted that the action for crim. con. represented, in the shift from a "honour-and-shame society", patriarchal and hierarchical, to a "commercial society", more individualistic, the substitute of the gentlemen challenge to a duel for the honour outrage: STONE, *Broken Lives,* p. 23, who also talked about a "commercialization of honour".

19 A complete account of Henry VIII marriage affair is offered by KELLY, H. A. *The Matrimonial Trials of Henry VIII*. Stanford: University Press, 1976.

20 On Parliament activity between the end of the 18th and the beginning of 19th century, and on the increasing relevance of legislation in the English legal system, LIEBERMAN, D. Codification, Consolidation,

The first Parliament decision in matter of divorce, dating back to 1552, was the case of the marquis of Northampton, who had already got the separation *a mensa et thoro* for his wife's adultery. The marquis applied to Parliament to remarry – excluded at canon law –: although he decided to remarry without waiting for the answer, the marriage was ratified by a private parliamentary act (withdrawn after Catholics came back to power).[21] More important, and continuously quoted in the future, the case of Lord Roos, earl of Rutland, the first to obtain, in 1670, the dissolution of his marriage and the possibility to remarry by a parliamentary private act. He had married Anne Pierrepont, the daughter of the marquis of Dorchester, in 1658, but the marriage had failed, so he wanted to get rid of his wife, pregnant, accusing her of adultery. After the birth of the child, christened as "Ignotus" and taken away from his mother, and after a failed tentative to reach a private agreement of separation, Lord Roos acted in the Court of Arches to obtain the separation *a mensa et thoro* for adultery. But as at canon law the children got from the wife – moreover, pregnant again – were to be considered legitimate and, consequently, the heirs of the Rutland title and property, the earl applied to the Parliament. He obtained a private act, which declared illegitimate the children borne by his wife since 1659 and accorded him permission to remarry to get legitimate descent: he did it twice and got the coveted heir.[22]

Then there was the case of Lord Howard, the duke of Norfolk, dating back to the 1690s and reputed the first real case of parliamentary divorce: in 1692, being both Lord Howard and his wife, Lady Mary Mordaunt, the daughter of the earl of Peterborough, notoriously adulterous, the duke – differently from Lord Roos – directly applied to the House of Lords to get the dissolution of the marriage and have the possibility to remarry to get an heir. The House of Lords, also thanks to the votes of the Catholics, at first rejected the request, notwithstanding Lord Howard tried to strengthen his petition by a victorious action for crim. con. in the Court of King's Bench. Then, but only in 1700, issued the private divorce act notwithstanding no previous separation in the ecclesiastical courts had taken place and notwithstanding the assessed reciprocal adultery. But the duke died soon after, and without issue.[23]

Many cases of parliamentary divorce for wife adultery followed in the last decade of the 17th century, all accompanied by the grant to the husband of the permission to remarry. These cases concerned only aristocrats, the only ones interested in the transmission of titles and wealth. Wealth that allowed them to start the long and expensive procedure to

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and Parliamentary Statute. In: BREWER, J. – HELLMUTH, E. (eds.). *Rethinking Leviathan. The Eighteenth-Century State in Britain and Germany*. Oxford: University Press, 1999, p. 361; IDEM. *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain*. Cambridge: University Press, 1989, pp. 24–28; HOPPIT, J. Patterns of Parliamentary Legislation 1660–1800. *Historical Journal*, 1996, XXXIX/I; HOPPIT, J. – INNES, J. – STYLES, J. Towards a History of Parliamentary Legislation, 1660–1800. *Parliamentary History*, 1994, XX.

21 COBBETT, W. *The Parliamentary History of England. From the Norman Conquest in 1066, to the Year 1803*, XXXV. London: Bagshaw, 1800–1801, p. 265–266. Further details about famous parliamentary divorce cases in MACQUEEN, J. F. *A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice on Parliamentary Divorce*. London: Maxwell & Son., 1842, pp. 551–576; CLIFFORD, F. *A History of Private Bill Legislation*. I. London: Routledge, 1885, pp. 387–417.

22 COBBETT, W. *Complete Collection of State Trials and Proceedings for High Treason*. XIII. London: Bagshaw, 1820, pp. 1332–1338.

23 COBBETT, *Complete Collection*, XII, p. 886.

get parliamentary divorce, generally precluded to members of the other classes. So road to divorce in England was levelled, missing any statutory norm and in presence of a clear hostility towards separation on the part of the ecclesiastical courts, by the desires and needs of the *élite*. Parliamentary divorce was not the result of progressive or reformist demands, but of a conservative spur coming from the privileged class: history of divorce paradoxically was, in its origins, history of the rich divorce.

Historiography has mostly concentrated on the historical-social aspects of parliamentary divorce, missing to fully highlight the judiciary character assumed by Parliament in the issue of private divorce acts.[24] The new role assumed by the legislative body is apparent if we consider the characters of the procedure followed, more defined and standardized following to the consolidating of many precedents, during the 18th and in the first half of the 19th century. The same arbitrariness and contradictoriness of Parliament decisions, especially in the first years, deriving from the absence of strict procedural rules, witnesses the role of court of equity assumed by Parliament.

The procedure followed showed a strong judiciary character: after the application by the party the House of Lords, presided by the Lord Chancellor, carried out a long and accurate inquest, with the cross-examination of parties and witnesses to assess the existence of the adultery and the absence of any legal obstacle; then The Select Committee on Divorce Bills of the House of Commons (formed by nine members, lawyers and laymen) examined the application in order to decide the patrimonial and children fostering matters. After the granting by the House of Commons, it went back to the House of Lords, where the decision – in fact, a real judgment – was promulgated as law after obtaining the approval by the king.

Parliamentary divorce could be applied for, from the beginning of the 18th century, only by noblemen, without issue, who had already got separation *a mensa et thoro* – which shows the mingling of temporal and spiritual power, of political and religious instances and, at the same time, the importance still played by the ecclesiastical courts –, whose inheritance transmission was threatened by the existence of illegitimate children. In practice, it was possible to remarry only to get a heir. By the end of the century other compulsory requisites were added: first of all, wife adultery proved by two witnesses; besides, the existence of good relationships between the couple before the adultery itself; furthermore, the absence of adultery or violence on the husband part; finally, the proof by the husband of both the existence of the separation *a mensa et thoro* in the ecclesiastical courts and of a successful action for crim. con. in the common law courts. Standing these requisites, made compulsory by the enactment of two House of Lords Standing Orders of 1798 and 1809, the grant of divorce, after about three years of trials in three different courts of justice, was almost certain. Secret and fraudulent agreements between the spouses, if found out, would obviously put an end to the procedure.

The need of a previous decision by two further courts of justice, the central role of precedent, the judicial character of the decision of Parliament, together with the already mentioned procedural elements (oral hearing of witnesses, central role of evidence, cross-examination), clearly show parliamentary divorce judicial character. Its effects were: freedom

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[24] Apart from a brief mention in CORNISH, W. R. – CLARK, G. de N. *Law and Society in England, 1750–1950*. London: Sweet & Maxwell, 1989, p. 380; only STONE, *Road to Divorce,* p. 319, has summarily highlighted the equitable character of Parliament decisions in matter of divorce.

for the husband to remarry, the declaration of illegitimity of the children borne by the wife one year after separation or during long absences of the spouse, the provision of an annuity in favor of the separated woman.

From the second half of the 18th century there was an increase of the applications for parliamentary divorce[25] not only from the aristocracy and gentry, but also from the wealthy members of the middle class: parliamentary divorce, born as an exceptional mean to preserve lineage and, most of all, the considerable fortune of the noblest families of the reign, become a privilege of the rich, regardless of social status.[26] The reasons of hereditary transmission – so far the only possible exception to marriage indissolubility – were slowly superseded by the reasons of marital happiness. Parliament interventions in matter of marriage – which through *ad personam* laws had made possible what law itself forbade! – and the increase of favorable decisions of the legislative body (determined by the increased opening of the House of Lords members with time), gave place to a wide public debate, and voices favorable to the reform of the law of marriage and the institutionalization of divorce started to rise.

A first reaction – deriving from the conservative worries of an increase of adultery cases and, consequently, of the corruption of morals in the reign – brought to an improvement of parliamentary procedure. In fact, after the enactment of the Lord Loughborough's Rules in 1798, it was not only necessary to bring to the House of Lords an official copy of the files concerning the previous separation in the ecclesiastical courts (in addition to the ones concerning the action for crim. con. in the common law courts), but a previous examination of the applicant was also required to exclude every possible fraud. The conservative also unsuccessfully tried to punish female adultery, forbidding the separated woman to marry her lover after the husband got divorce. Anyway, at the beginning of the 19th century times were ready, in presence of new needs and values, of a new sensitivity towards female condition and of a different perception of marriage within society – despite the increasingly weak conservative instances – for the first reform proposals.

3. The long and rocky road to the Divorce Act of 1857

Parliamentary divorce was unsatisfactory: it was an exceptional procedure, with long times deriving from the need to recur to three different courts, and high costs (for the documents, the hearing of the witnesses, the lawyers' fees),[27] which made it accessible

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25 During the 1780s and 1790s the number of applications increased from 20 to 41 per decade, while in 1799 they were 12: HORSTMAN, A. *Victorian Divorce*. New York: University Press, 1985, p. 13. The increase is apparent if we consider that, while between 1700 and 1749 they were 14 only, between 1750 and 1799 they became 117 and between 1800 and 1857 193: WOLFRAM, S. Divorce in England, 1700-1857. *Oxford Journal of Legal Studies*, 1985, V/II, p. 157.

26 ANDERSON, S. Legislative Divorce. Law for the Aristocracy? In: RUBIN, G. R. – SUGARMAN, D. (eds.). *Law, Economy and Society, 1750–1914: Essays in the History of English Law*. Worcester: Abingdon, 1984, p. 412, particularly insisted on applicants social background: through a careful exam of parliamentary divorce applications, the author recorded the increase, year after year, of people coming from the richest part of the middle class. STONE, *Road to Divorce,* p. 325, has similarly highlighted that, since 1760, about two thirds of the applicants were bankers, merchants, landowners.

27 Of different opinion WOLFRAM, *op. cit.*, pp. 166–172, according to whom parliamentary divorce costs, although elevated, were not exaggerated if compared to the separation *a mensa et thoro* ones: if the last one costed about 120–140£, an act *ad personam* by Parliament costed, on average, about 200£.

only to privileged people, while the poor had necessarily recur to private separation deeds or, worse, to illegal practices as wife-sale. More than that, parliamentary divorce admitted a different treatment of men and women, as it was reserved only to husbands in case of wife adultery. In fact, women weren't allowed any action against adulterous husband, being the same action for crim. con. exclusively reserved to men. So divorced women paid the highest price: disgraced and dishonored, not only they lost every respectability and judicial protection of their patrimonial rights but, unless different agreement existed, they were also often forced to live in financial straits and, more than that, without their children.

Besides, within a wider secularization process of society, the same *dogma* of the indissolubility of marriage, held from the Church and defended by the conservative but, in fact, infringed by Parliament, was now criticized. Since the 1830s, in the same years of the institution of civil marriage (1836) – a contract which permitted to bypass the ecclesiastical prohibition to remarry after divorce[28] – and of the increasing decadence of the ecclesiastical courts power, the slow and opposed (but irreversible) process that, after almost thirty years, would lead to the Divorce Act, had started. Fundamental was the role played by Bentham reformism: within a more general reformation program of society, which included the rationalization and reorganization of the inefficient English judiciary system, accused to slow down and even prevent the administration of justice in the country – it's not a case that, to get parliamentary divorce, it was necessary the intervention, with long times and high costs, of three different courts of justice! –, Utilitarianism enhanced favorable opinions towards the reformation of the law of marriage.[29] It kept the discussion on the matter alive and promoted the reform proposing the unification of the competence in matter of separation and divorce by a sole secular court and, at the same time, a simplification of the procedure.

Reformers supported female reasons, enhanced also by the socio-economical changes following to the country industrialization and women work in the new factories, which would give place to their slow emancipation (they now were the owner of their goods and income, at common law in their husbands property[30]) and to a wider access to divorce on their part. If already since the second half of the 18th century pamphlets, articles and conferences had discussed the different legal treatment reserved to women, the first suc-

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28 Nevertheless, until 1904 only 18% of marriages was celebrated in the form of civil marriage. Since 1960s civil marriage would reach 30%, until the dramatic contemporary increase. See, for further details, ANDERSON, O. The Incidence of Civil Marriage in Victorian England and Wales. *Past & Present,* 1975, LXIX.

29 BENTHAM, J. A Comment on the Commentaries and A Fragment on Government. In: BURNS, J. H. – HART, H. L. A. (eds.). *The Collected Works of Jeremy Bentham*. I. Oxford: University Press, 1977, p. 189. For further details on Bentham influence on the 19th century reforms see in particular, between the many existing works, DILLON, J. F. Bentham's Influence in the Reforms of the Nineeteenth Century. In: *Select Essays in Anglo-American Legal History*, I. Boston: University Press, 1992; DINWIDDY, J. R. Early-Nineteenth-Century Reactions to Benthamism. *Transactions of the Royal Historical Society.* 1984, XXXIV; FINER, S. E. The Transmission of Benthamite Ideas, 1820–50. In: SUTHERLAND, G. (ed.). *Studies in the Growth of Nieneteenth-Century Government*. London: Routledge, 1972, p. 13.

30 Only in 1870 the Married Women's Property Act gave married women full control over their own income. It was extented to all women's property by the new Married Women's Property Act of 1882.

cessful parliamentary divorce application from a woman for husband incestuous adultery (committed with her sister) dates back to 1801, and others six applications were submitted in the following four decades, although they were all rejected. Only three further divorces were granted by Parliament to women in the thirty years preceding the enactment of the Divorce Act (of a total of four in 176 years), all in cases of husband adultery aggravated by special circumstances as incest or bigamy.[31] Nevertheless, a series of precedents now existed.

Notwithstanding the mentioned renewal issues, reform would take place not before the 1850s as reformers had to face many obstacles, which gave place to slowdowns and delays. First of all, the opposition of the Church of England and its bishops, well rooted in the House of Lords, according to whom marriage was holy and indissoluble. Besides, the conservative reputed marriage only aimed to procreation, the creation of a family and the achievement of economic stability, more than to the search of individual happiness. Worried for the increase of parliamentary divorce cases between the end of the 18th and the beginning of the 19th century, they believed that making divorce more accessible would increase the spread of adultery, corruption of morals and consequent decay of the English society.[32] Just the identification between divorce and adultery would make the road towards its legalization long and rocky. Divorce was reputed an *extrema ratio*, to recur to when no other solution was possible, especially for the scandal it normally caused. Last but not least, the civilians working in the ecclesiastical courts, economically and professionally interested to keep their monopoly, were contrary to any reform in matter of divorce.

A first commission to investigate on the ecclesiastical courts was set up in 1824: their inefficiency and the need to exclude their jurisdiction in matter of marriage were highlighted. But no practical effects followed. The first real step towards reform was the set up, in 1850, of a Royal Commission on Divorce, presided over by Lord Campbell, whose report in 1853 recommended the abolition of the ecclesiastical courts jurisdiction over marriage and, at the same time, of parliamentary divorce, together with the transfer of the matter to the Court of Chancery, leaving to the King's Bench the competence over the action for crim. con.[33] But divorce discipline remained unchanged in its substance (married women's property protection, their access to divorce, etc.), producing discontent

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31 CORNISH – CLARK, *op. cit.*, p. 379, highlighted that, while before 1857 only four women got parliamentary divorce, since 1750 about 15 divorces per decade were obtained by men, 53 in the decade 1841–1850 only, for a total of 318 before the enactment of the Divorce Act. For a more detailed exam of women divorce applications, see STONE, *Road to Divorce*, p. 360; and HORSTMAN, *op. cit.*, p. 20, who affirmed that the "aggravated" adultery requisite determined, in fact, an almost complete denial of parliamentary divorce to women (p. 24).

32 About Victorian England values, CROW, D. *The Victorian Woman*. London: Allen & Unwin, 1971; COMINOS, P. Late Victorian Sexual Respectability and the Social System. *International Review of Social History*, 1963, VIII; ROBERTS, D. The Pater Familias of the Victorian Governing Classes. In: WOHL, A. (ed.). *The Victorian Family*. London: Routledge, 1978.

33 First Report of the Commissioners appointed by her Majesty to enquire into the Law of Divorce and more particularly into the Mode of obtaining Divorces a vinculo. In: *British Parliamentary Papers*. Shannon: Irish University Press, 1969.

among the reformers (Lord Brougham[34] and his Law Amendment Society on one hand, the committee of the feminist Barbara Leigh-Smith[35] and the writer Caroline Norton[36] on the other).

Thanks to their pressure, in 1856 a Select Committee in the House of Lords was set up and its report for the first time recommended that separated wife's goods, savings and income after divorce were to be preserved from the husband claims; that divorced women were to be allowed the same freedom of contract as men; and that women could apply for divorce not only in case of husband adultery aggravated by incest or bigamy, but also in case of violence or desertion. Such proposals were strongly opposed: the opposers of sex equality criticized women patrimonial autonomy and denied the legitimacy of new marriages; its supporters, on the contrary, claimed full equality in accessing divorce from women and criticised the survival of the action for crim. con. Uncertainties finally remained about the procedure to follow to get divorce.[37]

A compromise was reached in 1857, when the Divorce Act (or An Act to amend the Law relating to Divorce and Matrimonial Causes in England) legalized divorce in the country: the ecclesiastical courts competence in matter of marriage was abolished and a new and more efficient secular court, the Court for Divorce and Matrimonial Causes,[38] was established in London, removing divorce control from the Church courts on one hand, from the Parliament on the other (it would be replaced by the Probate, Divorce and Admiralty Division of the High Court of Justice following to the general reform and reorganization of the English judiciary by the Judicature Acts in 1873-75[39]).

Nevertheless, the Divorce Act was not revolutionary: procedure was rationalized and strongly simplified, costs were reduced, but adultery was the only admissible requisite to apply (until the Matrimonial Causes Act of 1937, which would include, for the first time, violence and desertion as "autonomous" divorce causes[40]): "simple" adultery in case of

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34 Lord Chancellor from 1830 to 1834, founder of the Law Amendment Society in 1844 and of the National Association for the Promotion of Social Science in 1857.

35 She published *A Brief Summary, in Plain Language, of the Most Important Laws Concerning Women, together with a Few Observations Thereon*. London: Chapman, 1854.

36 The writer had published *A Plain Letter on the Law and Custody of Infants* already in 1838; then she wrote the *English Laws for Women in the Nineteenth Century* and the *Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill*, printed, respectively, in 1854 and 1855.

37 For a report of the debate, *The Annual Register, or a View of the History and Politics of the Year 1857*. London: J. G. & F. Rivington, 1858.

38 It was formed by a Judge Ordinary, the Lord Chancellor, the Chief Justices of the Court of Common Pleas and of the Court of Queen's Bench, the Chief Baron of the Court of Exchequer and their senior judges. Further details on the Divorce Act contents in WOODHOUSE, M. K. The Marriage and Divorce Bill of 1857. *The American Journal of Legal History*, 1959, III.

39 On the Judicature Acts see the classic HOLDSWORTH, W. S. *A History of English Law*. I. London: Methuen, 1927, pp. 634–650, XV, pp. 128–138; MANCHESTER, A. H. Law Reform in England and Wales 1840–80. *Acta Juridica*, 1977; and, more recently, with particular reference to the many attempts to reform the courts' structure, the judges' selection rules and their duties, POLDEN, P. Mingling the Waters: Personalities, Politics and the Making of the Supreme Court of Judicature. *Cambridge Law Journal*, 2002, LI; IDEM. The Judicature Acts. In: CORNISH, W. – ANDERSON, J. S. – COCKS, R. – LOBBAN, M. – POLDEN, P. – SMITH, K. (eds.). *The Oxford History of the Laws of England. 1820–1914.* Oxford: University Press, 2010, p. 757.

40 Only in 1969 the Divorce Reform Act would admit divorce for reciprocal consent of the parties regardless of the existence of any other requisite.

husband application, "aggravated" by incest, bigamy, violence, sodomy and desertion for more than two years in case of wife application.[41] The action for crim. con. was finally abolished, but the husband could still act against the seducer to claim compensation for damages and payment of legal charges.[42] It was finally enacted that the court could exclude divorce claims from adulterous parties.[43]

Notwithstanding the limits of the Divorce Act, legalization of divorce produced many positive effects: first of all, more certainty in obtaining it and, more than that, the increase of wives applications: during the year after the enactment of the law there were 253 applications, 97 of which – more than one third – coming from women.[44] Most of all the law, imperfect but necessary, represented the first real break with the past in improving women condition: although equality in matter of divorce would be reached – after many unfruitful tentatives since the 1880s – in 1923 only (when the distinction between "simple" or "aggravated" adultery was eliminated), more guarantees to divorced women rights and property were offered, this way allowing a better balance of the two sexes positions. The law finally remedied to the different treatment reserved to the rich and the poor, removing once and for ever divorce from the control of the Church on one hand, of Parliament on the other.

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41 "The husband had been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards." *Matrimonial Causes Act 1857*, § 27. Only in 1923 such aggravating circumstances were abolished. Female discrimination in matter of divorce has been studied by PROBERT, R. The Double Standard of Morality in the Divorce and Matrimonial Causes Act 1857. *Anglo-American Law Review*, 1999, XXVIII. See also SHANLEY, M. L. "One Must Ride Behind": Married Women's Rights and the Divorce Act of 1857. *Victorian Studies*, 1982, XXV.

42 "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner (…). The claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided." *Matrimonial Causes Act 1857*, § 33.

43 Other cases of inadmissibility: unjustified late in applying, desertion or voluntary and unjustified separation before adultery denunciation, negligence or misconduct: ivi, § 30 and § 31. CRETNEY, S. *Family Law in the Twentieth Century. A History*. Oxford: University Press, 2003, p. 178, affirmed that the "Court for Divorce and Matrimonial Cases believed itself to be a court of morals" (p. 189).

44 Between 1876 and 1880 the average per year was 277, between 1881 and 1886 335, between 1895 and 1900 500: RHEINSTEIN, *op. cit.*, p. 319. The number of applications, remarkable compared to parliamentary divorce one, was reasonable if compared to the new 170.000 new marriages per year. In any case, in the fifty years following the enactment of the Divorce Act, women applied ten times more than men. In the 1870s about 20% of the applications came from the working class and 40% from the gentry and members of the professions: HORSTMAN, *op. cit.*, p. 85. On the increase of divorce applications after 1857, ROWNTREE, G. – CARRIER, N. H. The Resort to Divorce in England and Wales, 1858–1957. *Popular Studies*, 1958, XI.