

## DIVORCE AFTER SEPARATION: THE GERMAN EXPERIENCE

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THE fact that a Bill proposing divorce after seven years' separation has passed its second reading in the House of Commons, and that a Royal Commission is to investigate Divorce Law in general, makes relevant some consideration of the existing German law which provides for divorce after a separation of only three years. As was said during the House of Commons debate, once granted the principle of separation as grounds for divorce, even a shorter time limit might be adopted; and, since the German law provides the evidence of the working of such a law over a period of some thirteen years, it should be possible, from German experience, to consider the similar British proposals and their likely effects.

It is significant that the German law which permitted divorce by the objective fact of separation, in addition to divorce on the grounds of adultery or misconduct, came into force when Hitler had reached the climax of his career in 1938. The Hitler law had for its background theories of race and population: the man who was physically able to produce nordic children must not be hindered by the matrimonial vows which he once gave to a now ageing woman no longer capable of bearing children. One needs just to mention this primitive idea of the sense of matrimony to understand its full bearing. It was very characteristic that the upstarts of the Nazi party—the Kreisleiters and Gauleiters—were the first to make use of this law; their womenfolk who had carried the burden of the past were no longer young and sophisticated enough to fit in with the 'glory' of the new class: they must be divorced in order to make room for 'worthier' girls. And as the wives were not 'guilty' according to the existing divorce law, and would not oblige their husbands by divorcing them for their all too notorious misconduct, the new paragraph had to be added to the German Code. These upstarts were called by a German sobriquet *Bonzen*, and the new divorce law was popularly called the *Bonzen* clause.

When the Allied Control Commission took over Germany and her legislation, many laws tainted by Nazism were abolished. The C.C.G. redrafted the German Law of Matrimony (*Ehegesetz*) and suppressed many manifest Nazi regulations: but divorce after three years' separation was a blessing bestowed to the German people by the Nazis which the C.C.G. did not want them to lose. With some slight alterations it is still in the Statute Book.

The law provides for a divorce after three years' separation. It is not required that the subjective aspect—the shattered moral relationship—should have existed at the beginning of the separation: it suffices if it is manifest when the case is before the Court. The separation itself must be a voluntary one: war service, time as a prisoner-of-war, separation by evacuation or by enforced expulsion up to a possible reunion of the family, is not taken into account. It is irrelevant whether the real separation originated from anybody's guilt. And if it originated from guilt, then even the guilty party may claim divorce after the expiration of three years. There is, however, one exception: if the plaintiff is the only, or the more guilty, party the defendant may protest against the divorce. If he—or she—does not protest, the Court is not entitled to refuse divorce once the required period of separation is proved. Agreements by which one partner promises a kind of pension to the other on the understanding that there shall be no objection to the divorce, are valid and usual. But even if a protest is raised, the Court is not obliged to refuse divorce: this is left to the discretion of the Court, which is bound to pronounce a divorce if 'in its opinion the maintenance of matrimony and the contributory mutual behaviour of the spouses are not morally justifiable'. During the Nazi period this led to a jurisdiction by which practically all protests were regarded as unjustified, and only in very exceptional cases did a defendant succeed in maintaining the matrimonial bond. There is, of course, a changed attitude nowadays. It happens not rarely that a divorce is refused because there seems to be still a slight hope that the loyal spouse may persuade the unfaithful one to resume the marriage. And even if this does not happen, the fact that the deserted wife would be too old to earn her living herself, while losing by the divorce pension rights for the future from her husband (and through a second marriage of the former husband might fail even to recover maintenance from him), is regarded as sufficient reason

to withhold a divorce. But all this is a matter of judicial discretion and there are no hard and fast rules. Many a case remains doubtful till judgment is promulgated or even till the Court of Appeal or the *Bundesgerichtshof* (corresponding to the House of Lords as a Supreme Court) has given judgment.

So the situation is as follows: if the couple agree, the Judge simply has to pronounce divorce after the time limit has elapsed, and after the declaration by the spouses that their intention to remain married is now extinct. If the two spouses have a more or less equal degree of guilt and one claims divorce—even if the guilt is not such as would justify divorce for adultery or misconduct—the other one has no right to object. If the guilt of one partner is greater, he (or she) is permitted to make an agreement with the other one, by money or any other legitimate means—and again the Judge has to pronounce divorce. Only if the innocent party protests against a claim by a guilty partner may the Judge use his discretion in maintaining the marriage, but even here his discretion is severely restricted by the wording of the law, and a high percentage of marriages is ended even after objection by the innocent partner.

The only improving amendment by C.C.G. in 1946 was a clause that in any case—whether one partner objected or not—the divorce had to be refused if ‘the imperative interests of children who are still minors require such a decision’. But this clause is all but obsolete. There is a very simple reason for this: the spouses, whether desiring or objecting to the divorce, are represented by Counsel. Their opinion and their balance of interest are voiced before the Court. But the children are in practice unrepresented, and the Code of Procedure does not give many possibilities to the Judge to find out for himself where the interests of the children lie. For this reason, even these slender possibilities are not utilised at most Courts though tendencies to the contrary are recognisable just now.

What then are the results of this law which, *mutatis mutandis*, might influence the reform of English Divorce Law? One may look at this question simply from the point of view of the special cases dealt with, or from a wider standpoint of general principle. Now it is obvious that, if one takes divorce and its possibilities as an accepted part of Civil Law, some cases may find a better solution by this law than would otherwise be possible. Spouses

may become divorced by the mere objective fact of separation instead of being asked to present to the Court their mutual or single misbehaviour. But this is a fictitious improvement. In most cases where divorce is asked for on these grounds, this serves only to hide the real reason which is often graver. If the Court has any doubt whether the conditions, say, of time are fulfilled, it is surprising to see how quickly proof is offered either of adultery or other misconduct, until then not mentioned! The only cases where this does not happen are those where the claimant cannot blame in any way a spouse who has until now refused for religious, moral or personal reason to have his hand forced and by his own decision to divorce the guilty one. This advantage, therefore, is not much of a benefit in cases where, as the promoters of the English Bill argued, long-suffering people are tied by a hard and heartless law. Rather does it help the guilty one to get his so-called freedom against the will of a blameless spouse (and it seems rather doubtful whether these are deserving cases!), or it only permits a more tactful untying of two willing and not guiltless partners who wish to avoid having their personal and mutual misconduct considered in open Court. It may be conceded that this seeming benefit would be more valuable in Britain where the facts brought before a Court are dealt with in the popular (and not so popular) press. In Germany, even this seemingly beneficial effect does not exist, as all cases of divorce are dealt with by the Courts *in camera*. This is part of the regulations in the Code of Procedure. It is not regarded as a kind of sinister Star Chamber system, but rather reflects a right to privacy in one's most personal affairs. This fact is mentioned to show that the real and understandable interest of the British parties in matrimonial cases could be served much better by excluding 'strangers' from the Courts in such cases and thus depriving the promoters of the new grounds for divorce of a perhaps valid argument. It may be said that in Germany, at least, it would be possible to use the necessary discretion in dealing with a matrimonial case without invoking the special law for divorce after separation, if counsel and the Court agreed to such a procedure.

It must be admitted, however, that there are indeed a few cases where this law is beneficial. But these cases are not part of the normal life of a nation and, therefore, ought to be regulated by the ordinary law. They concern those marriages where the spouses

have lost touch with each other over a period of years through no fault on their part, and where presumption or proof of the death of one partner is wanting. These cases concern the after-war flotsam and jetsam of Europe and a not inconsiderable proportion of the German population: those people who perhaps for years try to discover whether their spouses are still alive after the mass expulsions, or whether there is indeed any way of finding out what happened to them. But in a country such as Great Britain, which in general has been spared many of the effects of the turmoil of war, there is no need for such an extraordinary law for extraordinary times.

On the other hand, it is now amply manifest in Germany how this law has become a cancer in the moral life of the nation. First of all it helps to discredit the established principle of monogamy as such. If people know that a marriage can—after a comparatively short time and under certain conditions—be ended by mere mutual consent, as is the case now, the idea that matrimony is more than an exclusively private affair is bound to vanish. In Germany people have started to regard it as their personal right to be divorced whenever they agree upon it, just as if they might decide to terminate a lease or tenancy or some similar commercial agreement by mutual consent. If in a German Court a Judge utters a doubt whether an alleged and not denied misconduct has really happened, or is in itself a sufficient legal reason for a divorce, he may hear the astonished and perhaps even indignant objection of the spouses: 'But after all we have agreed between us to be divorced; why should the Court and the Law interfere with our decision?'

This moral abasement of matrimony, which is not merely intolerable for religious people but touches the very roots of society in a monogamistic state, is not only to be seen in the Courts, but shows its influence, too, when people are married, whether before the registrar or by a religious ceremony. Matrimony is regarded as a contract which can easily be dissolved and its solemnisation has lost any meaning. The consequence is that young people who have grown up in the last few years regard it as a matter of fact that marriage is just an experiment, a matter of not too much consequence. One must have seen these youngsters who crowd the Divorce Courts now when it is only too often obvious that there is not much legitimate reason for

divorce, and indeed that there was still less reason for marrying at all if marriage is regarded as anything more than another name for a permitted sexual intercourse of the most important character. One need only see this deluge of divorce cases to be forced to ask: would these people ever have married? would they, on the other hand, have not decided to overcome the initial difficulties which may occur in every marriage if they had not started married life under the impression that the law permits divorce by a more or less manifest agreement?

This cancer is bound even to influence the Courts: whether the Court divorces after misconduct or for so-called mental cruelty and similar reasons, is largely a matter for the Judge's discretion. But it is only natural and human that a Judge is much more inclined to grant a divorce for misconduct, even if normally he might consider the proved facts as not fulfilling the meaning of misconduct when he knows perfectly well that in cases where he refuses a divorce he will have to deal with the same cases later on when the parties will claim a divorce on the grounds of separation. It may even happen that when a Judge has refused to recognise misconduct in the legal sense and an appeal is pending, the spouses declare: Now it is out of the hands of the Judge, the three years limit is reached, the Judge of Appeal will now simply have to pronounce a divorce for the asking! This situation, of course, is bound to quicken the steps of an otherwise hesitant Judge and, in the end, to modify the meaning of misconduct in a still more dangerous way.

Moreover there is a very sinister reaction from the law of marriage into the general field of law and the obedience it demands. If it is legally possible for the guilty partner to secure the revocation of the most sacred and solemn agreement, even against the will of the innocent party, how shall the sanctity of contracts be maintained in the eyes of the man in the street? If a contract—whatever its religious meaning may be for the partners—which anyhow was concluded for better or worse, can be simply scrapped by the one partner because he or she prefers to have it scrapped, how can trust and decency and loyalty and the keeping of one's word be maintained in the ordinary affairs of life? If a man has found that he can do away with a contract after a time simply by refusing to recognise its validity,

will he be likely to understand that this is permissible for the most important vows but not for everyday affairs? And still worse, how can one explain to the innocent partner who has been dealt with in such a way by the guilty one, aided by a law which puts a premium on infidelity, that he is bound to stick to his daily duties in life? The moral abyss to which this law may lead, and to which it is indeed already leading, cannot be exaggerated.

In conclusion it may be useful to look at the statistics: Cologne is a predominantly Catholic city of about 600,000 inhabitants. Figures for divorce in the urban district during 1950 show that 1,754 divorces have been pronounced during this one year—a terrible figure. It should perhaps be borne in mind that this high proportion is still an aftermath of the war: it includes marriages ended after the return of husbands from Russian prison-camps in 1949. Still, the figure is frightening; 226 out of these 1,754 cases were divorces in consequence of a separation of more than three years' standing; 106 of these cases concerned children. 195 children, of whom 124 were still minors, were involved. There was one case with eight children, two with six, three with five. 226 cases of divorce, 195 children: that means that 647 people in this one year saw their families dissolved by this one regulation. Altogether the 1,754 cases of divorce concerned 1,872 children, so that a total of 5,380 people (practically one per cent) saw their families destroyed in one year by divorce! One need not even invoke the religious aspect of matrimony: the social community as such can never stand such a calamitous undermining of the family and its importance for the stability, decency, honesty and the very future of the nation.

The German lawyers who administer the law sometimes feel like people who stand on a dam defending the country against a deluge. They do not know how long they can defend the influx of anti-western and anti-Christian materialism of the vilest kind, and they even feel sometimes that regulations like the one mentioned are the crack in the seawall against a threatening tide. May England heed the warning!