When 'Happily Ever After' Goes Wrong:
Divorce law in the UK in light of *Owens v Owens*

Yiota Constantinides

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The ultimate goal of functional divorce law is thought to be the facilitation of separation of the involved parties, as well as the limiting of hostility between them and the prevention of 'collateral damage' to third parties such as children. However, the UK system of divorce, which is founded on the concept of attribution of fault to one of the parties, inhibits the peaceful breaking up of relations by cultivating resentment. Recent cases as well as academic and judicial commentary highlight the need for reform to permit a 'no-fault' divorce system. This system will make parting tolerable and more reflective of contemporary society standards.

Termination of marriage is a very common event today. It is estimated that in England and Wales, 42% of marriages will eventually end in divorce. Comparatively, in 1970, only 22% of marriages had ended by their 15th anniversary.[1] This profound increase in divorce rates could be attributed to an alteration of norms in modern society; the pre-existing stigma that divorce used to carry no longer affects divorcing couples. It is therefore evident that there is a pressing need for effective divorce legislation to be in place.

The current legal provisions that regulate divorce can be found in the Matrimonial Causes Act 1973 (MCA 1973). Section 1 of the Act indicates that for a decree of divorce to be granted, the sole ground needs to be presented by the petitioner, as well as one of the five facts. Three of those five facts are based on the respondent's fault, who is effectively blamed for the marital breakdown. This has proven to be problematicas indicated in various cases, including the case of *Owens v Owens*.[2] This article will examine the current law of divorce, will attempt to demonstrate the implications of the existing fault-based system and will advocate for a 'no-fault' legal framework.

Divorce legislation in the UK: a historical glance

In order to better comprehend how the law has advanced into a fault-based model of divorce, it is essential to look back at its historical development. The first manifestation of a fault-based divorce can be seen after the Reformation and the dichotomy between Catholic and Protestant churches. The Protestant theological lobby presented divorce as a sanction for the guilty spouse who would be punished for their matrimonial crime.[3] However, the Church of England refused to accept this concept, upholding the doctrine of indissolubility, and full divorce was not possible.[4]

The first opportunity to get a divorce was made available in the eighteenth century by procuring the passing of a Private Act of Parliament. Conversely, divorce was nearly impossible since it was extremely expensive and time-consuming, making it available to 'the very few and very rich'.[5] The first divorce law of general application was the Matrimonial Causes Act 1857. The Act established the first Court for Divorce, and the only ground for divorce was the respondent's adultery.[6] The Act reflects the standards of society at the time in regard to the position of women. More specifically, the wife was required to prove that the husband had committed 'aggravated' adultery while mere adultery was sufficient for the husband to establish the

[1] Nuffield Foundation, *Finding Fault? Divorce Law and Practice in England and Wales* (Summary Report, 30 October 2017) <http://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_summary_report_v_FINAL.pdf> accessed 19 December 2017.
[2] *Owens* v *Owens* [2017] EWCA Civ 182.
[3] Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge: Cambridge University Press 1988) 90.
[4] ibid 91.
[5] David Morris, *The End of Marriage* (London: Cassell 1971) 15.
[6] Matrimonial Causes Act 1857, s III; Matrimonial Causes Act 1857, s XXVII.

requisite ground for divorce. This requirement was later abolished by the Matrimonial Causes Act 1923. A partially blameless model of divorce was introduced in the Matrimonial Causes Act 1937, where the grounds of divorce included adultery, cruelty, desertion for a period of three years or longer as well as incurable insanity, which could not be attributed to the respondent's fault.

As a consequence of the shift away from traditional family patterns, stemming from the emergence of feminism, the sexual revolution and other contemporary social concepts, in the 1960s it became apparent that a departure from the long established matrimonial offence approach was needed. In light of this, a report was released by the Law Commission, submitting that the ground of divorce should be altered from matrimonial offence to irreversible breakdown.[7] The report's findings were adopted in the Divorce Reform Act 1969, in which the ground of divorce was changed.

Current law and its effectiveness

Section 1(1) of the Matrimonial Causes Act 1973 provides that the petitioner will need to establish the ground that the marriage has broken down irreversibly by proving one of the five facts from section 1(2). In addition, section 3 imposes a one-year bar to divorce, meaning that the applicant has to be married for at least a year before they can apply for dissolution.

I. Fault-based facts

The first fact is adultery. The petitioner will first need to prove that the respondent has committed adultery and secondly, that he or she finds it intolerable to live with them. Regarding the former element, adultery has been defined in *Dennis v Dennis* as 'voluntary sexual intercourse between the husband or wife and a third party of the opposite sex'.[8] For the latter hurdle, in *Goodrich v Goodrich*, it was held that this is a subjective test.[9] The period of cohabitation is relevant, as the petitioner cannot rely upon this fact if six or more months had passed after the adultery was discovered.[10] It could be argued that this is particularly problematic; in reality, the timeframe is rather narrow as a couple might initially try to save their marriage after the adultery is discovered and subsequently realise that this is not plausible. Additionally, it could be observed that since the person who has committed the adultery cannot rely on this fact to apply for divorce, significant complications could arise if their spouse protests the divorce. Accordingly, this could pose the risk of the 'guilty' spouse remaining in an unhappy marriage or contending with, fallaciously, unreasonable behaviour in order to obtain the divorce. Commenting on adultery, Smart *et al* note that the spouse who has committed the 'matrimonial offence' often feels guilty or wants to get out of the marriage and is therefore, more inclined to agree to a non-favourable financial settlement.[11]

The second fact is unreasonable behaviour of the respondent with the effect 'that the petitioner could not reasonably be expected to live with' them.[12] As decided in *Livingstone-Stallard v Livingstone-Stallard*, the test for this fact is comprised of both objective and subjective aspects.[13] More specifically, the question is whether any right-thinking person would have come to the conclusion that the husband had behaved in such a way that his wife could not reasonably be expected to live with him, while taking into account all the circumstances and the characteristics of the parties. Considering any periods of cohabitation, if the parties have lived together for more than six months, this will be taken into account by the court, but it does not generate an absolute bar to the divorce.[14]

Criticising unreasonable behaviour, Lottie Tyler, a specialist in European and International Family law, observes that this specific fact is 'cited by family lawyers as a cause of heightened tension between divorcing couples and counter-productive to a swift and cost-effective settlement'.[15] Moreover, one could suggest that unreasonable behaviour is used as a de facto choice where there has been no adultery, as this is the only fact that could grant divorce 'instantly'. Justifiably, the question arises whether it is the position of an effective divorce law to force individuals to fabricate events in order to simply be allowed to end their marriage quicker.

The last fact-based fact is desertion. In the event that the petitioner had been deserted by the respondent for a continuous period of at least two years then this fact can be relied upon.[16] There are three elements that need to be satisfied. Firstly, the desertion has to be physical, as established in *Hopes v Hopes.*[17] In this case, the couple was residing under the same roof and although they were effectively operating as two different households, it was held that there was no actual desertion because they were still living together in the eyes of the law. The next element is an intention from the respondent to desert the petitioner. Lastly, the third element requires for the petitioner to prove that they did not agree or consent to the desertion. Any periods of cohabitation up to six months are permitted and will not repudiate this fact.[18]

A 'Wretchedly Unhappy Marriage': the case of *Owens v Owens*[19]

Tini and Hugh Owens have been married since 1978. In May 2015, Mrs Owens filed for divorce, stating unreasonable behaviour of her husband, citing twenty-seven examples of misconduct, including insensitive manner and tone, being constantly mistrusted and

[7] Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Law Com No 6, 1966).
[8] [1995] 2 All ER 51.
[9] [1971] 2 All ER 1340.
[10] Matrimonial Causes Act 1973 (MCA 1973), s 2(1).
[11] Carol Smart and Bren Neale, *Family Fragments?* (Cambridge: Polity Press 1999) 125.
[12] MCA 1973, s 1(2)(b).
[13] [1974] Fam 47.
[14] MCA 1973, s 2(3).
[15] Lottie Tyler, 'Owens v Owens: Supreme Court to decide on 'unreasonable behaviour' in divorce case' (*Weightmans*, 14 August 2017) < https://www.weightmans.com/insights/owens-v-owens-supreme-court-to-decide-on-unreasonable-behaviour-in-divorce-case/> accessed 19 December 2017.
[16] MCA 1973, s 1(2)(c).
[17] [1949] P 227.
[18] MCA 1973, s 2(5).
[19] *Owens* (n 2).

generally, feeling unloved. Mr Owens contested the petition and in January 2016, Judge Tolson QC heard the case. He held that Mrs Owens had not passed the legal test and that her allegations were 'minor altercations of the kind to be expected in marriage'.[20] She appealed to the Court of Appeal where the lower court's decision was upheld. However, Sir James Munby, President of the Family Division, recognised that the law is based 'on hypocrisy and lack of intellectual honesty' due to the need to prove 'bad enough behaviour'.[21] Mrs Owens was granted permission to appeal to the Supreme Court and the impending response of the Law Lords holds great interest.

The case is an audacious example of the unsatisfactory nature of the current law. In effect, the decision has forced Mrs Owens and various other individuals to remain in loveless marriages, with their sole option being to wait until the timeframe of the five-year separation without consent has lapsed. Ezra Hasson maintains that it is troublesome for the State to have the power to intervene so significantly into an individual's life. Likewise, the idea that divorce law must save the marriage is regarded as 'social engineering'.[22] Evidently, society has evolved to the point where people have the right to be the masters of their choices. Therefore, the decision does not only fail to recognise the importance of deciding autonomously but also, a 'forced morality' in the form of support to the institution of marriage is imposed upon individuals.

II. Non fault-based facts

A petitioner can also rely on two blame-free facts of divorce listed in the 1973 Act. Section 1(2)(d) lists the fact of a two-year separation with consent. More precisely, if 'the parties of the marriage had lived apart for a continuous period of at least two years and the respondent consented to a decree being granted' then the court will be satisfied. The parties can still live in the same house and nevertheless be considered separated, as long as the petitioner can demonstrate that they were functioning as two separate households. This was demonstrated in the case of *Hollens v Hollens,* where the two parties were living under the same roof but had no communication with each other.[23] However, the decision was not analogous in *Mouncer v Mouncer*, where the court refused to grant divorce to a couple that occasionally had meals together and spoke to each other.[24] One could claim that this was a harsh decision as it is rather unrealistic to expect two people living in the same house not to have any form of communication. A period of cohabitation up to six months is permitted and will not negate this fact.[25]

As a last resort, a petitioner could use the fifth fact which is a five-year separation without their spouse's consent. This is a qualified fact since the respondent could contradict it by arguing that the divorce would cause them grave financial or other hardship and that it would be wrong, in all the circumstances, for the marriage to be dissolved. An example of that is the case of *K v K*, where the court did not grant a divorce, as the wife would lose substantial pension entitlement.[26] Regarding periods of cohabitation, living together for up to six months is permitted and does not affect the outcome of the case.[27]

Blood, sweat, tears and no outcome: Family Law Act 1996

As the turn of the millennium approached, no-fault divorce was brought back on the legal agenda. The enactment of the Family Law Act 1996 provided two fundamental changes to divorce law: the removal of matrimonial fault and the introduction of mediation into the divorce process. Part II of the Act, which dealt with divorce and separation, provided that there was no need to prove reasons for the breakdown of marriage, effectively removing once and for all the notion of fault. A couple could obtain a divorce after a 'statement of marital breakdown' was created and a nine-month reflection period had taken place, which would be extended by six months if they had children. Although the Act seemed promising, before its implementation, the part of the Act which dealt with divorce was abandoned in practice in 1999 and repealed by Parliament in 2014. One of the reasons given by the Lord Chancellor's Department for that was a failure of the pilot initiatives of the Act to save marriage.[28]

Time to end the blame game?

It is evident that a no-fault model of divorce is an essential requirement for the contemporary British society since the current fault-based model obstructs fairness and impedes a clean, retaliation-free break. In a national survey, 62% of petitioners and 78% of respondents said that 'using fault had made the process more bitter'. Furthermore, 21% of fault-respondents said that 'fault had made it harder to sort out arrangements for children' and 31% of them believed that 'fault made sorting out finances harder'.[29] In addition, Antokolskaia remarks that a fault-based divorce is attractive as it is the only available option that could provide a quick outcome. Hence, a 'fact shopping' approach is indicated even when facts are not necessarily genuine.[30] Concurrently, only 29% of respondents to a fault divorce said that the fact used had very closely matched the reason for the separation.[31] Unsurprisingly, even if the respondent does not agree with the allegations of their spouse, it might be impossible for them to defend the divorce, as they are

[20] ibid [46].
[21] ibid [94].
[22] Ezra Hasson, 'Setting a Standard or Reflecting Reality? The 'Role' of Divorce Law, and the Case of the Family Law Act 1996' (2003) Int J Law Policy Family 17(3) 357.
[23] (1971) 115 SJ 327.
[24] [1972] 1 WLR 321.
[25] MCA 1973, s 2(5).
[26] [1996] 3 FCR 158.
[27] MCA 1973, s 2(5).
[28] Lord Chancellor's Department, *Information Meetings and Associated Provisions within the Family Law Act 1996. Final Evaluation Report Vols. 1–3* (2000).
[29] Nuffield Foundation, *Finding Fault? Divorce Law and Practice in England and Wales* (Summary Report, 30 October 2017) <http://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_summary_report_v_FINAL.pdf> accessed 19 December 2017.
[30] Masha Antokolskaia, 'Convergence and divergence laws in Europe' [2006] CFLQ 307, 319.
[31] Nuffield Foundation (n 30) 5.

required to pay an initial fee of £245, along with a barrister's fees and other costs of a normal court hearing. Therefore, access to justice is prejudiced. Lastly, returning to the historical development of the law, one must admit that effectively, since the matrimonial offence times, there has merely been a change in terminology, as the outdated model of fault is still in force.

Make no fault the default

One proposal that has been put forward by Resolution is for one or both partners to give notice that the marriage has broken down irretrievably. After a period of six months, if either or both partners still think they are making the right decision, the divorce is finalised.[32] Lady Hale has also called for the introduction of a new system where a couple could simply declare that the relationship has failed and acquire divorce a year later.[33] Such a no-fault system or divorce on demand is also used in Sweden and Finland.[34] This procedure could be extremely beneficial as it is swift, comprehensive and it allows for a civil, blame-free separation. Furthermore, it fully respects the autonomous decisions of the spouses and acknowledges that the State cannot keep their marriage intact against their will.

Conclusion

Divorce can arguably be a painful and difficult time in anyone's life. The present legal position, which provides for a partially fault-based system of divorce, is anachronistic and unsatisfactory. It is of utmost importance that the law exists to support the spouses in such time of need and refrain from producing further tension. It is now time for Parliament to revisit the issue and make substantial reforms in order to adopt a fault-free model of divorce.

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[34] Antokolskaia (n 31) 321.