DIVORCE FOR A MODERN AGE
THE DIVORCE, DISSOLUTION AND SEPARATION BILL [HL] 2019-21:

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1. When a couple in 2020 concludes that their marriage is over, they are confronted with a divorce regime first enacted in the 1960s[1]. Although it is impressive that the regime has since survived for over 50 years, society has changed radically since then. It is more egalitarian and, arguably, more socially permissive. As Philip Larkin wrote[2]:

> *Sexual intercourse began*
> *In nineteen sixty-three*
> *(which was rather late for me) -*
> *Between the end of the "Chatterley" ban*
> *And the Beatles' first LP.*

2. The current regime requires an allegation of moral culpability on the part of the defending spouse if a divorce is to obtained forthwith. Otherwise parties to a marriage must wait for at least 2 years from separation before they can apply to the Courts. There is a growing view that this is an unacceptable situation in modern life. Divorce is a miserable experience; and it should it not be made the more so by a long wait for resolution or a requirement to point the finger of blame if a more immediate termination is required. For many years, the Courts and the legal profession have tried to paper over the problem by engendering a culture of *turning down the heat* in Petitions based on the other party's behaviour and making do with the current law. This is admirable but legislative change is required if a satisfactory regime is to be created. Parliament has been surprisingly reticent to implement that change. However, finally it may be about to occur in the terms of the current **Divorce, Dissolution and Separation Bill [HL] 2019-21.**

[1] **Divorce Reform Act 1969**; reproduced in **The Matrimonial Causes Act 1973**
[2] 'Annus Mirabilis'

The Current Law

Section 1 of the Matrimonial Causes Act 1973 ('the Act') provides that:

(1) *Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.*

(2) *The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say —*

(a) *That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*

(b) *That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*

(c) *That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*

(d) *That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years' separation") and the respondent consents to a decree being granted;*

(e) *That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as "five years' separation").*

(3) *On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.*

(4) *If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to section 5 below, grant a decree of divorce'.*

3. The section prescribes that:

   3.1. There is only 1 ground for divorce, that is: *irretrievable breakdown of the marriage*;

   3.2. The Court can only find that the marriage has broken down irretrievably if the petitioner establishes 1 of the 5 statutory *facts*, that is*:* adultery, behaviour, desertion, or a relevant period of separation. Counterintuitively, there is no requirement that the relevant *fact* has caused the breakdown of the marriage;

   3.3. The Court has a duty to inquire into the fact relied on. If the fact is proven, then the Court shall grant a decree of divorce unless it is satisfied that the marriage has not irretrievably broken down.

Ancient History

4. Until the mid-19th century, the only way to divorce your spouse was through a private Act of Parliament[3] or by annulment; otherwise it was illegal. In 1670, the first divorce was granted in England, by private Act of Parliament, to a Lord Roos, on the grounds of his wife's adultery. Jane Addison was the first woman granted a divorce, in 1801 and again by private Act of Parliament, on the grounds of her husband's incestuous adultery with her sister. Between 1670 and 1857, 379 Parliamentary divorces were requested and 324 were granted. Of those 379 requests, eight were by wives, and only four of those were granted.

5. Divorce through the courts was first introduced into England and Wales by the **Matrimonial Causes Act 1857**. The Act allowed legal separation by either husband or wife on grounds of adultery, cruelty, or desertion. In the circumstances, fault had to be established: historically known as the *matrimonial offence*. It required a husband to prove his wife's adultery if he wanted a divorce. Conversely, a wife had to prove her husband's adultery and also that he had either treated her with cruelty, had deserted her, or had committed incest or bigamy. The **Matrimonial Causes Act 1923** granted a wife the right to divorce her husband for adultery alone and thus removed the double standard with respect to the grounds for divorce from English statutes.

6. The current framework of the 5 facts underpinning the single ground of *irretrievable breakdown* was introduced by the **Divorce Reform Act 1969**. In allowing for divorce

[3] ('Well-Behaved Women Don't Make History": *Rethinking English Family, Law, and History*. Prof. Danaya Wright (19 Wis. Women's L.J. 211 2004))

based on a period of separation, it removed the need to prove a *matrimonial offence.* This was carried over into the Matrimonial Causes Act 1973, which remains the legislation on which we currently rely.

Modern History

7. Law is generally understood to be a mirror of society; which had undergone radical change since the 1960s.

8. By the time the appellate Courts were tasked with deciding the fate of Mrs Owen's *behaviour* petition in **Owens v Owens**[4]**,** the legal profession was ready for change. When the case came before the Court of Appeal in 2017 Sir James Munby P reflected on the enormous social change that had occurred since the Divorce Reform Act 1969[5]. The case law had moved (albeit slowly) to respond to those changes with, by example: the death of the doctrines of unity between husband and wife[6]; a husband's immunity from prosecution for rape[7]; and the principal of marital equality[8].

9. The majority of society would consider it wrong that a married couple seeking to terminate an unhappy relationship should have to prolong or aggravate their misery: either by waiting for 2 years to obtain a divorce or having to rely one of the 3 fault grounds of behaviour, desertion or adultery. Munby P put it slightly differently when he began his judgement in ***Owens*** with a reflection on the current unacceptable state of the law: *'… Parliament has decreed that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage, though some people may say it should be'.*

10. Modern Courts have tried get around the problem with a consensual and collusive manipulation of the procedure for divorce under **section 1(2)(b)** (the *behaviour* ground). The current Acknowledgement of Service of the Petition Form poses the question: 'DO YOU INTEND TO DEFEND THE CASE?' If the Respondent answers: 'NO', then

[4] **([2017] EWCA Civ 182)** and subsequently **([2018] UKSC 41).** The Central Family Court had refused to grant Mrs Owens a divorce even though it found that her marriage had irretrievably broken down. In 2016 HHJ Tolson QC concluded that she had failed to satisfy the court her husband had behaved in such a way that she could not reasonably be expected to live with him. Both the Court of Appeal in 2017, and the Supreme Court in 2018, upheld the first instance decision.

[5] §§86 to 89 of the Judgment in the Court of Appeal.
[6] Midland bank Trust Co Ltd v Green (no.3) ([1982] Ch 529).
[7] R v R ((Rape: Marital Exemption) ([1992] 1 AC 599).
[8] White v White ([2001] 1 AC 596).

pursuant to **FPR 7.20(2),** the Court has to decide whether the applicant is entitled to a decree. Under the special procedure thereby engaged, the Court has simply to ask the question: '*assuming the facts alleged are true, does what is pleaded amount to unreasonable behaviour within the meaning of section 1(2)(b)?* Munby P recorded that many successful Petitions are anodyne in the extreme[9]. Indeed such an approach is encouraged the Law Society's Family Law Protocol and Resolution's 2016 Guide to Good Practice on Correspondence. He cited recent data so as to highlight how few divorce petitions were now defended. In the year to January 2017, there were 113,996 Petitions for Divorce. Of those, only 760 (0.67%) were defended by Answer. Although there is no empirical data, he assessed the number that went to a contested hearing at 0.015% (being 'a mere handful')[10] [§98].

11. The President concluded his judgment in ***Owens*** by returning to the legal historian Stephen Cretney. In his work, **Family Law in the Twentieth Century: A History 2003** he posed the question in these terms: '*behind this debate about a no fault divorce there lurks, at a conceptual level, a profoundly important point of principle and public policy:* ***ought the decision whether or not a marriage should be dissolved to be one for the parties which the State is not in a position to question****?'*

The Pressure for Reform

12. The majority of the Supreme Court Justices in ***Owens*** expressly invited parliament to "*consider replacing a law which denies Mrs Owens a divorce in the present circumstances*".

13. Academics joined the call for reform. The Exeter-based academic, Prof. Liz Trinder, chaired a project to report on how the current fault-based divorce ground operates in practice and explore reform. Her 2018 paper, '*No Contest: Defended Divorce in England and Wales*'[11] was based on a comprehensive review of 550 divorce files. It made a number of specific findings in relation to the current system. In particular:

    13.1. Most defences in divorce cases are not attempts to save the marriage, but quarrels about who should be blamed, mostly triggered by allegations about behaviour.

[9] §93 of the judgment.
[10] §98 of his judgment.
[11] Co-authored with Mark Sefton and Sponsored by the Nuffield Foundation. The paper was referred to with approval by Lord Wilson [§16]
www.nuffieldfoundation.org/sites/default/files/files/No%20contest%20final_Nuffield_Foundation.pdf.

13.2. Few of those who might wish to defend allegations are able to do so because of the financial and emotional costs of defending and discouragement from the family justice system. The inaccessibility of the only remedy available is procedurally unfair.

13.3. Most defended cases that do reach the courts are settled, rather than decided by a judge. The outcomes therefore reflect the relative bargaining capacity of the parties, not an inquiry into the truth of allegations. The court's willingness to accept the results of some deals appeared intellectually dishonest, even if it did bring an end to a damaging dispute.

13.4. The pressure to settle reflects a realistic appraisal by family lawyers and judges that defence is costly, unhelpful and ultimately futile for the parties and burdensome for the courts.

13.5. The defence process does increase acrimony, contrary to family justice policy. It can be misused by controlling spouses to make the divorce unnecessarily difficult.

13.6. The authors of the study therefore proposed a simple notification system instead. Divorce would be granted where one or both parties register that the marriage has broken down irretrievably, and that intention is confirmed by one or both parties, following a minimum period of at least six months.

14. For a number of months prior to the Supreme Court ruling in ***Owens***, the Daily Telegraph began running a campaign to reform *no fault divorce.* The Supreme Court judgment made most headlines on 25th July 2018:

14.1. The Sun recorded: *'BANNED FROM DIVORCE Wife trapped in 40-year 'loveless marriage' with millionaire is REFUSED right to divorce him by Supreme Court';*

14.2. The Daily Mail lead with: *'Unfaithful wife, 68, who wants to divorce her mushroom farmer husband of 40 years is forced to stay 'unhappily' married to him after losing Supreme Court fight.*

15. This level of media coverage, largely advocating an unequivocal call for a new divorce regime has probably substantially contributed to a recent reinvigoration of Parliament's interest in reform.

The Birth of the Cohabitation Bill

16. In July 2018, Baroness Butler-Sloss introduced a Lords' Private Member's Bill, which required the Lord Chancellor to review the law relating to divorce and judicial separation and to the dissolution of civil partnerships and the separation of civil partners.

17. On 15 September 2018, the Justice Secretary, David Gauke, published a consultation paper, **Reform of the Legal Requirements for Divorce**[12]; following which the government announced its intention to proceed with planned changes to divorce legislation.

18. On 12 June 2019, the **Divorce, Dissolution and Separation Bill [HL] 2019-21** was introduced into the House of Lords; it passed the Upper House stages on 24th March 2020. It has been introduced into the Commons and awaits a 2nd reading (date to be fixed).

The New Statutory Framework

19. *For section 1 of the Matrimonial Causes Act 1973 (divorce on breakdown of marriage) substitute—*

> ***1 Divorce on breakdown of marriage***
>
> *(1) Subject to section 3, either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably.*
>
> *(2) An application under subsection (1) must be accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably.*
>
> *(3) The court dealing with an application under subsection (1) must—*
>
> *(a) Take the statement to be conclusive evidence that the marriage has broken down irretrievably, and*
>
> *(b) Make a divorce order.*

[12] https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/

20. The Bill thereby retains the single ground for divorce: being *irretrievable breakdown*. Conversely, with a single sweep of the drafting pen, the *5 facts* are abolished; replaced with the simple requirement that the Applicant(s) make a statement that the marriage has broken down irretrievably.

21. The language has changed: Petitions are out; replaced by applications for a Divorce Order.

22. Crucially, the Bill recognises joint applications for divorce; a revolution in principle. Now both parties can collectively end their marriage; just as they collectively entered into it. The Court has no right to adjudicate on their entitlement to do so, save to the extent that they must follow the procedure.

23. The procedure is prescribed by **the rest of clause (section) 1.**

> *(4) A divorce order—*
>
> *(a) is, in the first instance, a conditional order, and*
>
> *(b) may not be made final before the end of the period of 6 weeks from the making of the conditional order.*
>
> *(5) The court may not make a conditional order unless—*
>
> *(a) In the case of an application that is to proceed as an application by one party to the marriage only, that party has confirmed to the court that they wish the application to continue, or*
>
> *(b) In the case of an application that is to proceed as an application by both parties to the marriage, those parties have confirmed to the court that they wish the application to continue;*
>
> *and a party may not give confirmation for the purposes of this subsection before the end of the period of 20 weeks from the start of proceedings.*

24. The process is thereby designed to take no less than 26 weeks in total from the application for a Divorce Order in that:

24.1. From 20 weeks after the start of the proceedings, the Court is entitled to grant a *conditional order of divorce;* and

24.2. No less than 6 weeks after the *conditional order*, the Court may make a *final order of divorce.*

25. The regime replaces decree nisi and decree absolute of divorce. The Bill allows the Lord Chancellor to shorten or lengthen either stage in the process by statutory instrument but any change cannot take the overall period beyond 26 weeks[13].

26. The Bill provides flexibility in the process.

    26.1. In *a particular case* the Court dealing with an application for a divorce order may shorten the statutory timeframe[14]; although no further statutory guidance is given as to what such a *particular case* might involve; and

    26.2. Clause 1(10) of the Bill allows for a potential mechanism whereby 2 parties initially apply for a divorce order but ultimately only 1 party choses to progress it. The provision would be introduced by changes to the FPR. This subtle provision illustrates the purpose of the new law; namely, making divorce as painless and easy as possible.

27. There are similar changes to the proceedings for Judicial Separation and dissolution of Civil Partnerships.

Prospects of a New Act

28. Parliament has a shocking record of commitment to modern divorce reform. Well-informed practitioners will recall that the law on divorce was completely changed by the Family Law Act 1996. However, the provisions of the Act were never implemented and it was subsequently repealed in 2014[15]. Furthermore, Richard Bacon MP's 'No Fault Divorce Bill' introduced into the House of Commons in 2015 failed to get a second reading in 2016.

29. The current prospects look rosier; even despite the current lockdown. The last government recorded that it expected the Bill to receive a smooth passage through

[13] Clauses 1(6) and 1(7).
[14] Clause 1(8).
[15] See the House of Commons Briefing Paper (published on 2nd October 2018): Part 2 of the Family Law Act 1996 would have introduced "no-fault divorce" and required the parties to a divorce to attend "information meetings" with a view to encouraging reconciliation where possible. In 2001, following a series of information meeting pilot schemes, the then Government concluded that the provisions were "unworkable". The relevant provisions in Part 2 have now been repealed (https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409).

parliament, with cross-party support. There certainly seems to be a persisting political will to see it make the statute books. It came to a standstill twice last year: as a result of September's prorogation of parliament and December's general elections; but it has survived these interruptions into the new parliament. Importantly, the Justice Secretary, Robert Buckland, has publicly recorded his support in terms that:

> *'The institution of marriage will always be vitally important, but we must never allow a situation where our laws exacerbate conflict and harm a child's upbringing. By sparing individuals the need to play the blame game, we are stripping out the needless antagonism this creates so families can better move on with their lives.'*

30. Whether that is enough remains to be seen

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