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Reform of the Legal Requirements for Divorce Post-Owens: A Welsh Perspective

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Reform of the Legal Requirements for Divorce Post-*Owens*: A Welsh Perspective

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Abstract

The seminal case of *Owens v Owens* attracted an unprecedented level of attention to divorce law by highlighting the practical and theoretical failings of a system predicated on fault. It also spurred the Government to take active steps towards reforming the requirements for divorce in the current jurisdiction of England and Wales. However, the discussion and proposals for reform have remained grounded in a traditional framework that follows a discriminatory rhetoric stemming from an English-focused history. An analysis of the unique understanding of marriage and divorce in Medieval Wales and the current Welsh legal and political climate provides justification for devolving divorce law to Wales as well as a new lens for approaching reform.

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Authors Declaration

Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw'r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o'r blaen ar gyfer unrhyw radd, ac nid yw'n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.

I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.

Chapter 1 – Introduction

Family law has experienced radical changes in recent times[1], but the requirements for divorce have remained untouched for over 50 years. Divorce law therefore constitutes a glaring anomaly in a dynamic field of law that has largely responded to the evolution of the expectations of family life. No other area of family law requires a sharp distinction to be drawn between the legal principles and the practical procedure only to enable a basic understanding of the topic[2]. Taking issue with this is not in any way novel, but the criticism of divorce law in this thesis is particularly pertinent following the 2018 case of *Owens v Owens*[3]. The case merits a reassessment of the issues surrounding divorce law and procedure, to the extent that the formation of an alternative scheme is now compelling and urgent. It is no longer sufficient to contend that the law has become unfit for purpose. Rather, it is reasonable to argue that the law, practically and theoretically speaking, is no longer functioning at all; a law which lacks the ability to command a degree of intellectual respectability cannot be effective. This thesis explores the issues pertaining to the centrality of fault, the hypothesis that liberalising divorce devalues marriage, the level of value which marriage deserves in modern political and legal thought, and the improbability of achieving a satisfactory solution to the current problems through reliance on familiar means[4]. This latter point relates to the Welsh dimension of this thesis. An analysis of Welsh legal history indicates that it is unrealistic to expect Westminster to legislate in way that accommodates the historical account of marriage and divorce in Wales. This thesis therefore goes further than merely arguing for reform, it purports to show that there is a case for revolutionising the current system by devolving divorce law to Wales in light of better prospects for progress.

The Rationale of the Thesis

The inspiration for this thesis was provided, in large part, by the Supreme Court's judgement in the case of *Owens v Owens* in 2018. The case substantiated the claim that the current system

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[1] Duffield, Kempton, Sabine, *Family Law and Practice 2019* (College of Law Publishing, The University of Law 2019), p. 8

[2] Ruth Lamont, *Family Law* (Oxford University Press, 2018) p.67

[3] *Owens v Owens* (2018) UKSC 41

[4] See the discussion on the Government's reform proposals, 'Reducing Family Conflict – Reform of the Legal Requirements for Divorce' Consultation Paper, (September 2018), https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf > accessed 23 November 2018), on page 177

of divorce in England and Wales is predicated on conduct. In brief, Mrs Owens sought a divorce from her husband, but Mr Owens refused to consent so she relied on his behaviour as most divorcing couples do[5], and Mr Owens contested the allegations. The trial judge agreed with Mr Owens that the examples of behaviour provided by Mrs Owens were not sufficient to satisfy the legal test for unreasonable behaviour, and the Court of Appeal and the Supreme Court dismissed Mrs Owens' appeal.

As to the immediate effects of the case, Mrs Owens will have to wait until 2020 to obtain a divorce, and the case may have a bearing on the way practitioners advise their clients in relation to behaviour petitions in future. However its true significance goes beyond this, and lies in the fundamental questions raised about the acceptability of a law that can enable a judge to oblige a woman to stay in a marriage which has broken down. It added effective and powerful momentum to the long-standing campaign for no-fault divorce, undoubtedly constituting a substantial (if not *the* main) catalyst for the Government's consultation on reforming the requirements for divorce[6]. The case was exceptional, not only as a defended divorce but a *successfully* defended divorce. Despite the outcome of the case, it has been common knowledge amongst practitioners and academics that the strength and level of detail required for 'unreasonable behaviour' has consistently and significantly weakened over the years. The practice of the law has responded to modern realities to a greater extent than the substantive law, in recognition of the fact that it would be futile to preserve a marriage when one party wants it to end. This means that there are competing values at play that can make the divorce process operate unfairly, by creating inconsistencies and *Owens*-type situations that satisfy no one. Its exceptionality should not therefore detract from the true magnitude of the case or its troubling nature. On the contrary, an inherently incoherent law that lacks certainty cannot rationally be defended, even by proponents of fault.

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[5] John Haskey conducted research on the ground for divorce and found that 'unreasonable behaviour' was the most common, and fault-based facts were generally preferred, in understanding why, he explained; 'Divorcing couples have become pragmatic in using the provisions of divorce law, learning, or being advised, that petitioning on a 'fault' fact ensures a faster divorce than on a separation fact - with 'unreasonable behaviour' providing the fastest. Divorcing wives may well need to obtain ancillary relief urgently, which may explain their greater use of 'unreasonable behaviour' than husbands'. University of Oxford, News and Events, 'Unreasonable behaviour' most common ground for divorce' (30 July 2018) http://www.ox.ac.uk/news/2018-07-30-%E2%80%98unreasonable-behaviour%E2%80%99-most-common-ground-divorce# > accessed 1 July 2019

[6] Reference is made to the case in only the second sentence of the foreword. Ministry of Justice, 'Reducing Family Conflict – Reform of the Legal Requirements for Divorce' Consultation Paper, (September 2018)

Of course changes in societal views and changes in the law rarely run parallel, and it is understandable that the law will struggle to keep pace. In the context of divorce law however, this justification carries less force. An out-of-date system for divorce law is particularly unacceptable because it deals with a very intimate part of people's personal lives, and a purely common sense perspective would conclude that the law should strive to ease rather than exacerbate what will usually already be a difficult and emotionally painful situation. However, the current system encourages conflict, not least as it incentivises relying on the fault-based grounds because they are quicker[7].

Divorce is a harsh reality of 21st century Britain[8], but negative connotations associated with the term have been unnecessarily sustained by dominant ideologies in law. This fuels the stigmatisation that continues to follow from divorce[9], and ignores the possibility that it is a 'positive process of the reconstruction of identity[10]'. More significantly however, by maintaining these ideologies, including a status-based view of marriage (discussed in Chapter 5), and using them to justify a restrictive divorce law despite the changing nature of the family and social trends indicating that people are increasingly forming different family formation pathways, creates a law that is unacceptably intrusive. This thesis proceeds on the presupposition that an adequate system of divorce law should not grant invasive powers to the state as divorce is predominantly a private matter, instead it should empower autonomous individuals to make their own decisions and enable freedom of choice.

In addition to *Owens*, the Government published their proposals for reform in September 2018[11]. Given the extent of the problems with the current law, it is fair to say that the Government has adopted a modest position. This has prompted an analysis of the possibilities for the future of divorce law through a different, wider lens. There does not appear to be a precise exploration of the justifications for the current law from the sole perspective of Wales.

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[7] Shelley Day Scatler, *Divorce: A Psychological Study* (2017, Routledge), p. 29
[8] Paula Hall, *How to Have a Health Divorce: A Relate Guide* (Ebury Publishing 2018), p.1
[9] See Naomi Gerstel, 'Divorce and Stigma', Social Problems Vol 34, No.2 (April 1987) p.172-186. For a contemporary discussion on the experience of stigmatisation on divorce, see D.A. Woolf, 'The Divorcee Stigma That's Alive and Well' (The Huffington Post, 16 December 2014)
[10] Scatler, *Divorce: A Psychological Study,* p.2
[11] Ministry of Justice, 'Reducing Family Conflict – Reform of the Legal Requirements for Divorce' Consultation Paper, (September 2018), https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf > accessed 1 July 2019

This idea should be considered against the backdrop of testing times facing the Union, fuelled by the political climate and dismay surrounding Brexit[12].

The legitimacy of Westminster legislating for the regions is being questioned more than ever. The relevance of this point being that the continuance of England and Wales as a single jurisdictional entity can no longer be considered a given[13]. This thesis is therefore also inspired by the changing political landscape and the critical challenges facing UK constitutional theory. In the landmark case of *R (Miller) v Secretary of State for Exiting the European Union*[14] in 2017, the Supreme Court adjudicated on 'Westminster's constitutional entanglement with the EU and with the devolved legislatures'. On the devolution question[15], the Court was unanimous in its assertion that there could be no 'parallel legislative competence' in the devolved legislatures for withdrawing from the EU[16]. As Murkens points out, this retreat to textualism[17] 'will be interpreted in the regions as a retreat to constitutional formalism and Westminster intransigence[18]'.

The Scottish Government reiterated in its 2019-20 programme that it intends to hold a second independence referendum[19], and the Welsh call for independence has reached a historic high. A poll by YouGov indicated that a third of Welsh citizens said they would support

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[12] See Martin Kettle, 'Boris Johnson's full English Brexit could rip the union apart' (The Guardian, 26 June 2019), https://www.theguardian.com/commentisfree/2019/jun/26/boris-johnson-english-brexit-union-scotland-northern-ireland > accessed 1 July 2019

[13] See 'Top 10 reasons why support for Welsh Independence is surging' (Nation.Cymru.com, 25 June 2019) https://nation.cymru/opinion/top-10-reasons-why-support-for-welsh-independence-is-surging/ > accessed 2 July 2019

[14] (2017) UKSC 5

[15] This related to the terms of the Northern Ireland Act 1998, and whether the agreement of the devolved legislature was required before notice could be given under Article 50. As the Supreme Court had already determined that an Act of Parliament, rather than reliance on prerogative powers, was necessary to authorise such notification, the Court held that the terms of the Northern Ireland Act were not constructive to the case, nor did the Sewel Convention (which provides that the UK Parliament will not normally legislate for devolved matters without the consent of the devolved institutions) give rise to a legally enforceable obligation. Jo Eric Khushal Murkens, 'Mixed Messages in Bottles: the European Union, Devolution, and the Future of the Constitution' The Modern Law Review (July, 2017) Volume 80, Issue 4, p. 690. Gordon Anthony, 'Devolution, Brexit and the Sewel Convention' Report, The Constitution Society, p.1

[16] *Miller*, para 130

[17] The Supreme Court's interpretation of the Sewel Convention and the devolution settlement 'reads like a reassertion of the English principle of absolute legislative supremacy that traces back to Blackstone and Dicey'. *Ibid*, p.690

[18] *Ibid*, p.694

[19] The Scottish Government, 'Protecting Scotland's Future - The Government's Programme for Scotland 2019-20' (September 2019), p. 27

independence if it meant staying in the EU[20]. A series of independence rallies have taken place throughout Wales in the preceding months, and the term 'indy-curious' has recently emerged in light of the changing attitudes[21]. Though this may appear to be political hyperbole, it is fair to contend that the legitimacy of legislating for the regions is being questioned more than ever before. Thus, being required to follow a law which is widely thought to be out of touch, not only with the modern values of the United Kingdom as a whole, but also with the Welsh historical and current legal landscape, is open to serious challenge. The long-established debate on where marriage falls on the status v contract continuum[22] with an added Welsh dimension, facilitates a compelling case for why divorce should be devolved sooner rather than later.

Literature Review

In ascertaining the ideologies and values contained in the current law on divorce, this thesis examined the historical development of the law as well as the centrality of marriage. The very essence of a discussion on divorce reform necessitates an analysis of marriage, but in the existing literature, marriage is often analysed against the backdrop of a multitude of different perspectives. Marriage can be approached from a purely religious point of view and be regarded as a spiritual discipline. Here, the focus was on the traditional Biblical teachings within Christian theology, for the simple fact that it is this religious doctrine which has influenced the development of the law and shaped what this thesis identifies as the traditional, legal concept of marriage. One of the purposes of this research has been to establish the extent of this influence.

The core of the Christian literature on marriage emphasises the sacredness of the institution, but it is the ethical norms derived from this core belief that have seeped into notions underpinning the law[23] and thus are the focus of this thesis. In other words, altruistic notions

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[20] YouGov, 'Plaid Cymru – Welsh Independence', Survey Reports (13 September 2019) https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/4lav01m6zl/PlaidCymruResults_190910_Independence_W.pdf > accessed 16 September 2019

[21] Adrian Browne, BBC News, 'Welsh Independence: Is Wales becoming indy-curious' (18 July 2019), https://www.bbc.co.uk/news/uk-wales-politics-49018127 > accessed 16 September 2019

[22] Marie Louise Parker, 'Marital Property Agreements, The Family and The Law: Status *and* Contract?' (DPhil Thesis, Bangor University, November 2012

[23] One of the most clearly defined links between the law and the Christian doctrine is the influence of the 1966 Report by the Archbishop of Canterbury, 'Putting Asunder', explored in greater detail on page 62. This served as the primary motivation for the introduction of the Divorce Reform Act 1969. Despite its role in the liberalisation of divorce law, its suggestion of requiring an inquisitorial approach akin to a 'coroner's investigation' into the breakdown of the marriage would suggest that protecting the traditional concept of

such as responsibility, obligation, complete devotion, permanence, mutuality and exclusiveness are characteristic of Christian theology and bear a direct link to the presence of fault[24] and restrictive divorce law[25]. It is this way of thinking which the State has adopted in its approach to divorce legislation and its promotion of marriage. However, the literature exploring the justifications for this restrictive legislative approach is not always grounded in theology and Biblical teachings. In the transition from religion to contemporary politics, such ideals are often mixed within a more general moral argument about the value of marriage as a status, deriving from the limitations it places on individual autonomy, for the service of societal good.

When researching the basis of the State's promotion of marriage and the firm belief in its inherent value, political philosophy's contribution is sparse. There is a lack of a sound philosophical understanding to legitimise the level of State's intrusion, and the question of how and why marriage is morally transformative and significant, beyond elevating the relationship to a political and legal status, is undertheorised[26]. Perhaps this is a direct consequence of the private nature of the relationship; though we all encounter marriage in some way or another, the research looks at marriage from the outside in. We know little of marriage from the inside. As Mount writes, 'It is the essence of marriage that it is private and apart from the rest of society. Its 'selfishness' or 'exclusiveness' is not its undertone but its heart and soul[27]'. Subsequently, there may be some inherent limitations hindering a fully comprehensive research on marriage.

When attempting to justify the significance attached to marriage, the focus has therefore been necessarily geared towards socio-economic arguments, and when encompassing marriage within public policy, policy-makers often speak of how marriage makes society wealthier,

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marriage was its primary aim. Church of England, 'Putting Asunder – A Divorce Law for Contemporary Society - The Report of a Group appointed by the Archbishop of Canterbury' (Society for Promoting Christian Knowledge, January 1964) (London, S.P.C.K., 1966), p.67.

[24] Baroness Young was of the view that no-fault divorce '…undermines individual responsibility. It is an attack upon decent behaviour and fidelity. It violates common sense and creates injustice for anyone who believes in guilt and innocence'. Baroness Young, HL Deb 29 February 1996, vol 569, col 1638

[25] And also restrictions on marriage itself, such as through the refusal to allow same-sex marriage until 2013. See page 47 for a discussion on same sex marriage

[26] 'For the political philosopher, the question of how – or whether – society and the state should organize sex, love and intimacy is urgent, but recent attention has focused mainly on a set of narrow questions surrounding marriage law: same-sex marriage, or not; polygamy, or not, abolitions, or not.' Elizabeth Brake, *Minimizing Marriage, Morality and the Law* (Oxford University Press, 2012), p.1

[27] Ferdinand Mount, *The Subversive Family: An Alternative History of Love and Marriage* (J.Cape, 1982) p.188

healthier, more developed and more stable[28]. The empirical data which substantiate such claims by identifying a correlation between marriage, social stability and economic prosperity[29]are however, vulnerable to fundamental challenge. It is not that such benefits derive from marriage itself as a legal concept, rather the stability arises from other characteristics often reflected by marriage rather than caused by it[30]. That is, marriage tends to signal stability, not create it. Similarly, marriage has traditionally and repeatedly been associated with child-bearing. However, just as marriage and child-rearing have diverged within society itself, a recent trend in the family law literature has been to separate marriage and parenthood. Some even contend that children might be better protected by legally separating marriage and parenting, enabling parenting frameworks that are more durable and more accommodating of new family forms[31].

Both the traditional Biblical teachings on marriage and the political arguments have been seriously challenged by the feminist critique of marriage. Though the research undertaken in this thesis makes it clear that marriage has played a central role in the economic, political and social oppression of women, the feminist perspectives on how to proceed with marriage as a modern concept today differ significantly. One school of thought stresses that freedom for women and true equality 'cannot be won without the abolition of marriage[32]'. However, others are of the view that the modern idea of marriage may not be essentially inimical to women[33], and it is possible to reform the institution in such a way so that it is no longer a tool for disempowerment. One possible way is by tilting our understanding of marriage away from a status-based conception and towards contractual principles, as explored in Chapter 6. The difficulty is that it is not clear whether it is at all possible to reform marriage to this extent,

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[28] For example, the former Prime Minister David Cameron deemed married couples the 'bedrock' of society and repeatedly expressed his desire to promote marriage through the tax system. Peter Dominiczak, 'David Cameron: Married couples are the 'bedrock' of society', (The Telegraph, 19 February 2015) https://www.telegraph.co.uk/news/11423799/David-Cameron-Married-couples-are-the-bedrock-of-society.html > accessed 18 September 2019

[29] For example, a study by the American Enterprise Institute and the Institute of Family Studies found that a state's high levels of marriage 'are strongly associated with more economic growth, more economic mobility, less child poverty and higher median family income'. W. Bradford Wilcox, Joseph Price, and Robert Lerman 'Strong Families, Prosperous States – Do Healthy Families Affect the Wealth of States?' (2015), p. 3

[30] See, for example, Claire Crawford, Alissa Goodman, Ellen Greaves, Robert Joyce 'Cohabitation, marriage and child outcomes: an empirical analysis of the relationship between marital status and child outcomes in the UK using the millennium cohort study' Child and Family Law Quarterly, Issue 2 (July 2012)

[31] Brennan, Samantha, and Bill Cameron, 2016, Is Marriage Bad for Children? Rethinking the Connection between Having Children, Romantic Love, and Marriage, in *After Marriage: Rethinking Marital Relationships*, Elizabeth Brake (Oxford University Press, 2015), p. 84–99.

[32] Sheila Cronan 'Marriage' in Anne Koedt, Ellen Levine and Anita Rapone, *Radical Feminism* (The New York Times Book Company, 1973), p. 219

[33] Elizabeth Brake, *Minimizing Marriage, Morality and the Law*, p. 288

given the State's reluctance to liberate marriage as is evident through the enduring presence of fault within divorce law. What is clear, is that the very existence of such a discussion illustrates how far society has developed with regards to the expectation and the social compulsion[34] to marry.

Building on the challenge to the centrality of marriage presented by feminist theory, is the literature on same-sex marriage. Again, opinion significantly differs on whether same-sex marriage should be fought for or rejected altogether. Some authors point to marriage as a socially significant institution conferring legitimacy and legal benefits to argue for equal rights to enter the institution. That is, regardless of whether marriage should be the bedrock of society, the fact of the matter is that it continues hold such a position in modern culture, and thus the argument rests on fundamental notions of equality[35]. Others, particularly critics of heteronormativity, do not advocate extending marriage to same-sex couples. This view centres on the concern that 'pursing marriage rights is assimilationist, because it rests on the view that it would be better for gay and lesbian relationships to be as much like traditional heterosexual intimate relationships as possible[36]'.

Though significant, providing answers to these internal disputes is not an objective of this thesis. Rather, in drawing on such literature the aim is to show how these discussions challenge the centrality of the traditional, legal conception of marriage. Similarly, the literature on civil partnerships, both in terms of same-sex and opposite sex couples, has stimulated the idea that marriage may not be the only game in town. In other words, the possibility of another form of domestic partnership that does not carry the sexist and homophobic baggage that is tied to marriage, is worth serious consideration.

The upshot of this analysis on the literature on marriage is to show that when trying to unpack the model of marriage which has and should shape divorce law, a number of different perspectives must be considered. Furthermore, compartmentalising these different lenses and

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[34] See page 40

[35] 'The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples. But many same-sex couples have the same interest, which marriage would serve in essentially the same way. So restricting marriage to opposite-sex couples is a denial of equality. There is no way of justifying this denial of equality without appealing to controversial conceptions of the good (such as the moral superiority of heterosexuality or the procreative family)…'. Ralph Wedgewood, 'The Fundamental Argument for Same-Sex Marriage', The Journal of Political Philosophy, Volume 7, Number 3 (1999), p.225

[36] Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement*, (Oxford University Press, 2000) p.113

assessing their effect on the law is an oversimplification. The concept of marriage which has shaped divorce law is more nuanced. It is only by grasping this point it becomes possible to turn to divorce reform with credibility and authenticity.

In contrast to the prevailing account (or lack thereof) of the legal and political existence of marriage, there is a vast body of philosophical analysis surrounding the presence of fault in divorce law. These are similar to the religious arguments in support of marriage as it is often the case that both share the goal of defending and protecting the traditional concept of marriage. Therefore, attention is drawn to the promise-making inherent in the marriage vows, which can be seen as an 'undertaking of a public status and social role'[37] which would make no-fault divorce morally problematic because a party cannot then unilaterally release themselves from promissory obligations[38]. Naturally, a great deal of the discourse in support of fault within divorce law relies on notions of morality in some sense; fault directs a divorce a petition to be scrutinised in moral terms. It would be futile to argue that morality has no place whatsoever when discussing divorce, such is the nature of a law which deals with dynamic human behaviour. However, this thesis proceeds on the basis of the liberal position that the moral decision of whether to divorce should be placed on the individual spouses[39] rather than the State.

Such a position begs the question of why the presence of fault is particularly unsuited to the divorce process and family law more generally. This thesis therefore analyses the philosophical roots of fault within the criminal law in order to discover whether some of justifications could be extended to divorce law. It was found that there is a gap in the literature exploring the relationship between these two areas of law, fault has traditionally been analysed in isolation. However, such a discussion is illuminating; the robustness of the theoretical groundwork accounting for fault in the criminal law exposes the fragility of the same with regards to fault in divorce law.

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[37] Elizabeth Brake, *Minimizing Marriage, Morality and the Law*. However, as Brake then points out the difficulty with this promise-making, 'given diverse understandings of what the spousal role entails, its content can only be specified by the intentions of the people getting married . . . In a multicultural, multireligious society, not all spouses will understand their roles in the same way', (p.40) therefore 'there is no single essential marriage promise that all spouses make', p.41

[38] Jennifer Morse, 'Why Unilateral Divorce Has No Place in a Free Society' in Robert P. George and Jean Bethke Elshtain *The Meaning of Marriage* (Spence Publishing Co, 2006) p. 74–99.

[39] Carl Schneider, 'Marriage, Morals and the Law: No-Fault Divorce and the Moral Discourse', Utah Law Review, Number 2 (1994), p. 506

Furthermore, arguments against no-fault often draw on the general consensus in the empirical data that the divorce rate increases in line with the emergence of no-fault divorce[40]. Again, though this may true, the mere presence of this correlation does not reveal the full picture; a vast and immeasurable range of factors deriving from the wider legal, social and cultural landscape influence the rate of divorce, only one of which is the effect of the law[41]. Drawing on such statistics ties to the institutional view of marriage as it implies that an increased divorce rate is somehow a social ill. On an individual level however, it may be viewed in positive terms; perhaps people respect themselves enough to be able to walk away from a toxic situation.

The research conducted on the above points benefitted from an established body of literature. The case of *Owens* is integral to this thesis, but given the contemporary nature of the case, research was necessarily focused on the judgement of the Court of Appeal and the Supreme Court. In terms of external secondary literature, it is still very much early days, and most of the commentary that has taken place since the Supreme Court's judgement has been media-based. The aim is therefore that this thesis can contribute to the discussion, particularly by placing the case firmly in the context of reform.

The same could be said for the thrust of this thesis' approach to divorce reform; through the lens of devolution. Though the literature on divorce reform is vast, the focus has exclusively been on how to amend the divorce process in the jurisdiction as whole. This thesis dismantles this basic proposition and fundamentally challenges the basis of the central approach. There seems to be a general consensus that devolution was and continues to be a positive development[42] in light of the fact that there remains strong cultural differences between the nations of the United Kingdom[43]. As O'Neill writes, 'It has always been acknowledged that the historical peculiarities of the United Kingdom's constituent nationalities require special consideration for their effective political management[44]'. The precise extent of the legal differentiation is a more politicised and disputed question.

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[40] For a more detailed analysis of the relationship between the law and the empirical data see J M Eekelaar and Mavis Maclean, 'Divorce Law and Empirical Studies - A Reply' (1990) 106 Law Quarterly Review 621.
[41] Douglas Allen, 'Do No-Fault Divorce Laws Matter? A Survey, 1995-2006' (2006) Simon Fraser University Working Paper, p.10
[42] See, for example, Mick Antoniw, 'Opinion: Transforming Wales: Not a Bad Start: 20 years of devolution', Law Society Gazette (20 May 2019)
[43] For a thorough analysis of the history of devolution see Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 2001)
[44] Michael O'Neill, *Devolution and British Politics* (Routledge, 2004) p.4

Welsh legal history has a rich and full body of literature[45], but the current relationship between England and Wales is difficult to research in such a way that enables definitive conclusions. From one perspective, the relationship between England and Wales is characterised by the economic, cultural and political power England has exercised over Wales for the majority of modern history. There are however, marked differences in language and tradition too vast to list here, and the historical English tendency to refuse to afford these differences the appropriate level of respect[46] has led to an animosity between the two countries, in the form of what Parker refers to as 'Cymrophobia' and 'Anglophobia'[47]. Welsh identity is also incredibly difficult to research because 'Wales as a country and a nation has been by deep internal, social and geographical divisions which still shape much of the discourse surrounding competing conceptions of Welsh identity'. That is, there is a tradition of dividing the country into 'more Welsh' and 'less Welsh' regions[48], and the Welsh awareness[49] of this regional distinctiveness makes it particularly difficult to point to a consensus on identity.

Nevertheless, Brexit may viewed as a signal for change in this regard. Much has been said about the implications for the future of the United Kingdom. Scotland has received much coverage given its formal and informal powers over the Brexit negotiations, bolstered by the strong presence and leadership of the SNP. Similarly, given the deadlock caused by the controversial 'backstop'[50], Northern Ireland has also received significant attention. Wales has been largely overlooked in this discussion. This thesis therefore aims to contribute to the more general gap in the discourse on the future of Wales as a nation, within the specific context of divorce and matrimonial matters. With Brexit possibly the very crisis that leads to the break up

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[45] When looking at significant contributions to Welsh scholarship, Thomas Glyn Watkin's volume, *The Legal History of Wales* (University of Wales Press, 2nd edition, 2012) is worth mentioning, as it bottles the nation's legal history in one volume. Also significant is Richard Ireland's *Land of White Gloves? A History of Crime and Punishment in Wales* (Routledge, 2015).

[46] For example, the Welsh Not was used in schools in the 18th, 19th and 20th century to punish the use of the Welsh language. See John Evans, *Welsh History Stories: O.M Edwards and the Welsh Not* (Gwasg y Dref Wen, 2003). For a more contemporary exploration see Rhiannon Lucy Cosslett, 'Anti-Welsh bigotry is rife. It's just as well we're tough people' (The Guardian, 15 March 2018), https://www.theguardian.com/commentisfree/2018/mar/15/anti-welsh-bigotry-eddie-jones-england-brexit > accessed 15 September 2019

[47] Mike Parker, *Neighbours from Hell? English Attitudes to the Welsh* (Y Lolfa, 2007)

[48] Pyrs Gruffudd, 'Remaking Wales: nation building and the geographical imagination, 1925-50', Political Geography Volume 14, Issue 3, p.219-239

[49] Daniel John Evans, 'Welshness in 'British Wales': negotiating national identity at the margins', Nations and Nationalism, Volume 25, Issue 1 (February 2018), p. 170

[50] See Michael Zander, 'Brexit: the endgame (Pt 2)', New Law Journal, Volume 169, Issue 7852 (August 2019)

the UK[51], and current divorce law and practice reaching a crisis of its own, such a discussion is necessary and timely.

Methodology

Naturally, this thesis utilises the traditional genre of research in the legal academic field with doctrinal research as its main methodological framework. Such an approach was necessary in order to conduct a thorough and systematic enquiry into the problems with the law on divorce and deal with all its aspects; its underlying principles, historical development and theoretical basis. Dobinson and Johns define such an approach simply:

> '…as a research which asks what the law is in a particular area. It is concerned with analysis of the legal doctrine and how it has been developed and applied. This type of research is also known as pure theoretical research. It consists of either a simple research directed at finding a specific statement of the law or a more complex and in depth analysis of legal reasoning[52]'.

In line with traditional legal research, an integral part of this thesis is the study of the recent *Owens* case. The detailed analysis undertaken on *Owens* in Chapter 4 provides a formal and authoritative source of information for a clear understanding of the current law on divorce. The case provides the most up-to-date authority for interpreting the legislation, bolstered by the fact that the highest court in the jurisdiction adjudicated on it. It is therefore utilised as an effective jurisprudential tool to research the current state of divorce law. This subsequently provides a solid framework to tie the legislation to the ideologies and values observed from the research conducted on the historical development of the law, and pinpoint the specific problems in need of correction.

The doctrinal approach was therefore necessary to consider reform and support the argument for the devolution of divorce. A precondition for a discussion on legal reform is a sound knowledge of the traditional elements of the law, so as to provide an alternative framework which is internally consistent in its delivery. Through this, it was found that

[51] Daniel Evans, 'Wales, already impoverished, is set to get even poorer', LSE BrexitVote blog (August 2016), https://blogs.lse.ac.uk/brexit/2016/08/02/wales-already-impoverished-is-set-to-get-even-poorer/ > accessed 12 September 2019

[52] Ian Dobinson and Francis Johns, Qualitative Legal Research, *Research Methods For Law*, (Edinburgh University Press, Michael McConville & Wing Hong Chui edition, 2007), p.18-19

devolution of divorce law is necessary so as to enable a no-fault model to align with both modern and historical Welsh values.

In the same vein, undertaking comparative analysis was also critical for reaching this conclusion. This methodological method is broadly-defined, as can be used as a way of undertaking 'the essential task of furthering the universal knowledge and understanding of the phenomenon of the law'. Divorce is almost universally regulated, and thus comparative analysis provided valuable tool for the purposes of this thesis. Arguing for reform is of little use without properly justified alternative models, and thus comparative analysis was used as a means of drawing inspiration where appropriate.

The level of comparative analysis, however, has been properly and necessarily focused. Legal norms are, of course, intrinsically related to social values and are either a direct expression of such values or a way of serving them indirectly[53]. Consequently, this thesis focused on two countries in particular, in recognition of their appropriateness. Naturally, of particular importance was Scotland, with a jurisdictional model closely aligned with that of England and Wales and a system of divorce illustrating a pragmatic approach which, if emulated, would constitute a progressive way forward without complete disregard for the reasonable concerns of those traditionally in favour of fault. From a Welsh perspective, an analysis of Scotland was vital; both countries bear a similar political relationship with Westminster. This thesis is however, more ambitious in touching upon a comparative analysis with Sweden when discussing possible models of a devolved divorce law. It was found that the model used in Sweden served as an appropriate point of reference given the similar ideological framework found in Welsh political and legal thought. The comparative approach was therefore particularly useful when answering the research question of how divorce law would likely look should it be devolved.

Divorce is, of course, a social phenomenon as well as legal concept. This thesis did not therefore shy away from acknowledging and engaging with evidence from other disciplines to bolster the case for reform. An element of a broader social scientific analysis from various perspective was necessary for a deeper understanding of the

[53] Yehezkel Dror, 'Values and the Law', The Antioch Review, Vol 14, No.4 (1957), p.440

problems facing the current system how these issues could be alleviated. Consideration was also given to existing empirical research, in particular when looking at the practice of the current law. In future, empirical research could be particularly useful in the context of devolution. For example, research could be undertaken by contacting Welsh family law practitioners to ascertain the desirability of a model of divorce law which reflects Welsh national identity.

	RESEARCH QUESTIONS	
PART 1 The Historical Background – Marriage, Divorce and the Underlying Principles	**Chapter 2** Challenging the Centrality of Marriage	What are the consequence of the centrality of the traditional, legal concept of marriage in the context of divorce law? To what extent has this centrality diminished in modern legal and political thought?
	Chapter 3 Divorce Law in England and Wales: History, Evolution and Current Form	To what extent has current divorce law and practice been influenced by the historical development of the law?
	Chapter 4 Challenging the Preservation of Fault in Divorce Law	What are the negative consequences of the centrality of fault within divorce law? Do the justifications for the retention of fault

PART 2 **Current Divorce Law – The Failings of a Fault-Based System**		adequately stand up to theoretical scrutiny?
	Chapter 5 *Owens v Owens*	What does *Owens v Owens* demonstrate about the state of the current law? What are the implications of *Owens v Owens* in terms of the future of divorce law?
PART 3 **The Way Forward – A Welsh Perspective**	**Chapter 6** The Tradition of a Status-Based View of Marriage and the Case for Devolving Divorce Law	In the context of the theoretical debate of whether marriage should be framed as a status or contract, what conception of marriage and divorce aligns with Welsh history and identity? To what extent does the historical Welsh perception of marriage differ from the ideologies enshrined in the current law on divorce in England and Wales?
	Chapter 7 An Alterative, Welsh Model of Divorce Law	What model of divorce would be appropriate for Wales if divorce law was devolved? Are Government proposals for reform satisfactory so as

		to lessen the argument for devolution?

Thesis Structure

This thesis will proceed in three main parts, broadly grouped as divorce law's past, present and future. Chapters 2 and 3 should be read in conjunction as providing background and context for the study, with an exploration of the concepts and ideologies that have informed legal developments so as to enable full appreciation of their bearing on the problematic nature of the current law. More broadly, the interaction between the historical, social and legal elements of divorce are explored. Chapter 3 will give a historical account, beginning with pre-legislative control up to and including the current legislation as contained in the Matrimonial Causes Act 1973. The Christian interpretation of divorce and canon law's influence on the various legal developments will be analysed and the Chapter will show how these historical and legal events have shaped divorce law. An explanation of the current requirements for divorce will be provided, with a detailed analysis of the 5 facts and an unpacking the philosophical premise of each. The failure of the Family Law Act 1996 will be looked at, with particular focus dedicated to *why* the attempt failed despite proposing a scheme of no-fault divorce.

Chapter 2 will centre on marriage. It will discuss the traditional, legal concept of marriage, in terms of its prominence as a state-sanctioned institution and in terms how it has been shaped by what Biblical teachings deem to be the features and purposes of marriage. The Chapter seeks to explore the causal link between this traditional model of marriage and both the substantive law on divorce and the privilege accorded to it by means other than a restrictive divorce law. It will scrutinise the appropriateness of this privilege in light of the use of marriage as a tool in perpetuating the disadvantage of women and the decline in its centrality in culture and society. The law's approach to the regulation of cohabitating couples and same-sex relationships will be explored in the interest of discovering to how the State views marriage and other family forms.

Chapters 4 and 5 should be understood as forming the second part of this thesis, which forms a comprehensive critique of the unsatisfactory state of the current law. Chapter 4 provides a

detailed criticism of current law and practice, and begins by seeking an adequate justification for the existence of fault in the divorce system, concluding that none stand up to logical scrutiny. The Chapter will seek to answer what specific negative consequence flow from the existence of fault. The relationship between the divorce rate and the centrality of fault will also be explored, with a view of emphasising that there is a distinction between the divorce rate and marital breakdown. In the same vein, the value of making statistical links and identifying the determinants of divorce will be questioned. The divorce procedure and the rise in the administrative nature of the divorce process will be explained, and the problems that the discrepancy between the law in the books and the law in action will be outlined.

Chapter 5 focuses solely on *Owens v Owens*. First the facts of the case will be outlined, following with a critique of the trial judge's treatment of the case, in terms of the sexist undertones of the language used and the illogical consequences of his determinations. The judgements in the Court of Appeal and the Supreme Court will be analysed, with a view of determining whether they had no option but to dismiss the appeal based on the substantive law, and their comments about the state of divorce law generally. The behaviour ground for divorce will necessarily be explored in detail, with a discussion on the subjective and objective elements required. The Chapter will seek to show precisely how the case highlights the problems of the current law, the significance of *Owens* in the context of reform and whether it will have an effect on future petitions.

Based the above framework, Chapters 6 and 7 constitute the final part, which considers how to proceed. Chapter 6 begins by analysing the status-based conception of marriage and the contractual-based conception of marriage, with a discussion on how the historically favoured status-based view has informed the law on divorce, and an argument for a more contractually based view as a means of providing a more equal framework. It will then be shown that marriage and divorce in medieval Wales under *Cyfraith Hywel* was indisputably contractually-based, and the ideologies behind the regulation of the family were more progressive, in contrast with the position in England. Focus then moves on to present day, where the Welsh approach to gender discrimination and strides already made in the devolution settlement bolsters the argument that current law is particularly ill-suited to Wales, on the uncontroversial assumption that the laws that apply to a particular country should be a reflection of the values of that country's society. Based on the research into Welsh history and contemporary post-devolution

events, no-fault divorce is the logical conclusion, rather than the current fault-based system that applies.

Should the opportunity to regulate divorce occur, Chapter 7 considers the kind of divorce law that could be implemented in Wales. Four overarching themes of divorce law identified by Antokolskaia will be explored and assessed in relation to the conclusions made from research on the problematic nature of the current law, to find a better alternative framework for legislation. The Chapter addresses the likely form of divorce most appropriate for Wales given the research conducted in the preceding Chapter, and which jurisdictions could serve as a basis when framing Welsh divorce. In particular, the Swedish and the Scottish divorce systems are discussed, with the former providing aspirational objectives and the latter providing a very realistic starting point. Finally, current proposals for reform in England and Wales in the government paper; 'Reducing Family Conflict – Reform of the Legal Requirements for Divorce', will be evaluated in detail, to see whether the changes proposed fully address the problems outlined.

Chapter 8 forms the conclusion, which will bring together the different facets of the thesis so as to emphasise the main points that should be taken away from the research conducted. The conclusion will shed light on the rationale behind separating this thesis into three different parts, and establish links between all three to support the suggested future proposals.

Part 1: The Historical Background – Marriage, Divorce and the Underlying Principles

Chapter 2 – Challenging the Centrality of Marriage

The Historical and Legal Definition of Marriage

In order to fully grasp the problems with the current law on divorce and consider the most appropriate reforms that could be implemented, it is necessary to explore the concept of marriage in detail. Marriage and divorce are closely linked, but understanding what marriage means in and of itself is important as different understandings will form different underlying principles and produce different outcomes in divorce law. On a basic level marriage and divorce are two sides of the same coin; insofar as there is a formal procedure for entry into a marriage, the State needs to provide a formal mechanism for its exit. Just how formal will depend, to a significant extent, on the values and ideologies attached to marriage. The research questions considered in this Chapter are, what are the consequence of the centrality of the traditional, legal concept of marriage in the context of divorce law? And to what extent has this centrality diminished in modern legal and political thought? In answering these questions, 5 different examples of contemporary social concepts and developments will be identified, and all may be viewed as a direct challenge to the centrality of the State's view of marriage outlined at the beginning of this Chapter.

Though some would argue that the term 'marriage' has a well-established invariable meaning, attempting to provide an accurate legal explanation of the concept in a modern, culturally diverse society on which there is a general consensus is a useless endeavour. It is now incredibly difficult to assert with any degree of certainty what the nature of marriage is, and it is equally difficult to make generalisations about individuals' reasons for entering a marriage and what that commitment means to them personally. However, it is clear that the institution has undergone significant change in recent times. As the nature of the family has evolved, so too has the institution that was once thought to be the foundation of family life.

When comparing the traditional, legal concept of marriage with modern ideas, it will become apparent that the inclusion of fault in divorce law clashes with changes in suppositions in and around marriage. Another element that emerges is the existence of an increasing divide between how the law, the Church and the general population understand marriage. What makes marriage difficult to analyse as a legal concept, is the complex and conflicting interplay between these legal, emotional and religious interpretations. Again, the historical account in this Chapter is English-focused as this is what has shaped the law on divorce which applies to

England and Wales as a jurisdiction. As mentioned in the previous Chapter, the Welsh have a unique understanding of marriage within its history, which is explored in Chapter 6. A satisfactory analysis of marriage requires an examination into the debate over whether it should be understood as a status or contract. However, to be able to understand the concept of status and contract fully a more general exploration of the background and history of marriage is needed. The status-contract debate is therefore discussed in detail separately, again in Chapter 6.

Marriage originated with early tribal groups, and was used exclusively as a strategic tool in establishing networks of cooperation and reciprocal obligations. With the development of differentiation of wealth, and in particular the rise of capitalism, marriage became one of the central institutions for managing economic and political affairs and securing an advantage within these spheres. From when marriage first emerged through to the Middle Ages[54], the desires and consent of the participating couple were of little importance[55]. Many would incorrectly assume that it was the Church[56] who originally advanced the concept of marriage[57], however the emergence of Christianity in Rome had a limited impact on marriage, and early Christians favoured the spiritual union in celibacy with Christ over the marital bond[58].

The traditional Christian perception of marriage which remains highly influential on the law's interpretation of marriage emerged with the rise of the Catholic Church and its focus on matrimony, which referenced the institution of marriage as a sacrament tied to experiencing God's presence. It was during the Council of Trent in 1563 that marriage was officially promulgated as one of the seven sacraments[59]. Catholicism regards marriage as a divinely

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[54] Michael Sheehan, 'Choice of Marriage Partner in the Middle Ages: Development and Mode of Application of a Theory of Marriage' in *Medieval Families: Perspectives on Marriage, Household and Children (*edited by Carol Neel) (University of Toronto Press, 2004)

[55] Brendan Brown, 'The Canon Law of Marriage' Virginia Law Review, Vol 26, No. 1 (1939) p. 70-85

[56] A detailed discussion on the influence of the Christian faith on the *law* on marriage divorce take place in Chapter 3

[57] Some are still of the view that marriage remains within the Church's exclusive domain and is a wholly biblical tradition

[58] Johanna Brenner, 'Like a Horse and Carriage?: *Marriage, A History: How Love Conquered Marriage* by Stephanie Coontz book review (2006) Sage Journals

[59] Jutta Sperling, 'Marriage at the Time of the Council of Trent (1560-70): Clandestine Marriages, Kinship Prohibitions, and Dowry Exchange in European Comparison' Journal of Early Modern History (2004). Though it should be borne in mind that the English Reformation (1534) had already taken place at this time and England had broken away from Rome.

instituted covenant, a contract between two parties before God, and it is God who defines the features and parameters of this commitment.

One such feature is permanence[60]. Marriage is viewed as a serious commitment, with divorce only allowed in a very limited number of biblically prescribed circumstances prior to the 1969 legislation. Divorce is considered to be a sin because it disrupts this permanence, and the Bible refers to God's aversion to divorce specifically[61]. Divorce is also used as an analogy for spiritual apostasy[62]. This alludes to an important point to bear in mind when seeking to understand the Christian teachings on divorce and the assertion that God would disapprove; marriage is viewed as a covenant rather than a contract. The difference is subtle but significant. A covenant entails the parties holding up their end of the deal and adhering to the promises originally made regardless of whether the other party does so[63]. As discussed in the next Chapter, divorce in England and Wales is available only insofar as the parties can demonstrate one of the five 'facts', and so the law severely limits the accessibility of divorce as if it were in the nature of a covenant. The Catholic condemnation of divorce and the belief that it compromises God's idea for marriage must bear a causal connection to the law's position[64].

Another feature of marriage as understood by Catholicism is its exclusiveness[65]. This means that no other relationship must interfere with the marital bond. It follows that adultery is deemed a significant shortcoming as it entails the breaking of the marriage vows. As will become apparent in the next Chapter, adultery is conceptualised in very unfavourable terms in law, and it has been a ground for divorce since the concept of divorce first emerged. This echoes the Biblical belief that Jesus spoke of allowing divorce only when there was sexual martial unfaithfulness[66]. Even under such circumstances divorce was to be regarded as permissible rather than preferable, bearing in mind the significance of Jesus' conclusion that 'what therefore God has joined together, let not man separate[67]'. Perhaps this goes some way to

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[60] Matthew 19:6; Mark 10:9
[61] Malachi 2:16
[62] Andreas J. Köstenberger, 'The Bible's Teaching on Marriage and the Family' (2011) Family Research Council. Isaiah 50:1; Jeremiah 3:8.
[63] Gordon Paul Hugenberger, 'Marriage as a Covenant: A study of biblical law and ethics governing marriage developed from the perspective of Malachi' (1991) Thesis for The College of St. Paul & St. Mary
[64] Page 37 considers the other reasons the law strives to uphold marriage
[65] Genesis 2:22–25; 1 Corinthians 7:2–5
[66] Matthew 19:9; Matthew 5:32
[67] Matthew 19:6

explain why the law, despite allowing divorce when adultery is proved, has applied the concession strictly through its jurisprudence and its consistent encouragement of reconciliation, most notably through the policy in the Family Law Act 1996[68].

The legal definition of marriage cited by Lord Penzance in *Hyde v Hyde and Woodmansee*[69] is presented in the case law and the academic commentary as the 'common law definition'[70], and it is worth noting how its features mirror the Biblical position; 'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'. The fact that this is considered to be a *legal* definition when it explicitly refers to Christianity shows the strength of the intrinsic link between both conceptions. The so-called definition is clearly inaccurate today, but as Poulter points out, the statement was inaccurate even at the time it was made[71]. Divorce was available before *Hyde* in 1866 and so marriage was not 'for life', civil marriage was introduced with the Marriage Act in 1836, and not all marriages were entered into voluntarily.

This supports Probert's proposition that it is misleading to refer to Lord Penzance's statement as a definition of marriage. Rather, when considered in its proper context it should be understood as a *defence* to the traditional concept of marriage. In any case, Probert explains how Lord Penzance's depiction of marriage fails as a purported definition, as the characteristics set out do not distinguish marriage from cohabitation[72]. Considering the question presented to Lord Penzance that led to this statement, that is whether the court could exercise its jurisdiction to grant a divorce to a polygamous marriage, it becomes clear that his primary motivation was to articulate the traditional understanding of marriage when threats to that ideal began to

[68] Discussed on page 73
[69] (1866) 1 P. & D. 130
[70] Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same sex Marriage,* (Palgrave Macmillan 2012)
[71] Sebastian Poulter, 'Hyde v Hyde: A Reappraisal', International and Family Law Quarterly (1976)
[72] Rebecca Probert, 'Hyde v Hyde: Defining or Defending Marriage?' Child and Family Law Quarterly vol.19, no.3 (2007), p.336

emerge[73] and divorce had become a viable option for a wider group of people[74]. Furthermore, Lord Penzance himself had by this time presided over the divorce court, and so when he expressed marriage as being 'for life', his words clearly articulated an aspiration. The 'rule' established in *Hyde* is no longer good law, so it seems that the prevalence of Lord Penzance's words have survived 'through their very familiarity and constant repetition[75]' in pursuit of reinforcing a particular conservative policy regarding marriage.

Whether marriage was viewed as a religious association or non-secularly as a form of business arrangement, the idea of marrying for love was scarcely touched upon. It was deemed as too important an institution to be based on a fragile emotion, to the extent that marriage and love were almost incompatible; it was a threat to social stability. The aristocracy in the 12th and 13th century even deemed relationships outside of marriage to be the true form of romance[76]. However it was during this period that Enlightenment thinkers proposed that marriage could be for love, as life was about the pursuit of happiness. This ran parallel with the advent of divorce, as people increasingly turned to divorce as a means to end unhappy unions. This, along with the Industrial Revolution and the growth of the middle class, meant that by the 21st century '…society's ability to pressure people into marrying or keep them married against their wishes was drastically curtailed. People no longer needed to marry in order to construct successful lives or long-lasting sexual relationships. With that, thousands of years of tradition came to an end[77]'. The centrality of marriage as an aspect of legal and political life has remained vulnerable to challenge since then, and these developments are significant in that they cannot be ignored when discussing divorce reform.

Challenging the Centrality of Marriage: Society's Modern Conception of Marriage

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[73] As Probert States, 'The desirability of the idea of marriage set out in Hyde was more important than its accuracy… Lord Penzance was articulating the 'traditional' understanding of marriage at a time when a number of threats to that ideal existed', for example, 'Lord Penzance did not need to define marriage as 'Christian' for the purposes of his decision: the same result could have been reached by stating that English law did not recognise a marriage celebrated under a polygamous system. The insistence that his description of marriage was 'Christian' should be read in the light of the fact that Mormonism posed a particular threat to the Victorian worldview'. *Ibid*, pages 325 and 327

[74] For one, the MCA 1857, 9 years before *Hyde*, made the process of divorce more accessible. Frances Burton, *Family Law* (Routledge, 2012) p.49

[75] Poulter, page 508

[76] Montesquieu in the 18th century wrote that a man who was in love with his wife was probably too dull to be loved by another woman - The Week Feature, 'How Marriage has Changed Over the Centuries' (1 June 2012), https://theweek.com/articles/475141/how-marriage-changed-over-centuries > accessed 7 December 2018

[77] Stephanie Coontz, *Marriage, A History: How Love Conquered Marriage* (Penguin, 2006), p. 71

Today there is an unprecedented number of people living as singles or cohabitating, and generally people are seeking to establish themselves economically *before* marriage and are therefore marrying at an older age. The most recent publication from the Office for National Statistics indicates that 42% of marriages end in divorce, around half of these are expected occur within the first 10 years of marriage[78]. This severely tarnishes the traditional understanding that marriage is a lifelong union. People are also more likely to reject marriage altogether, with statistics showing the lowest marriage rates on record for 2015[79]. The proportion of religious ceremonies has also substantially declined[80]. As will be apparent from the next Chapter, the close link between Christianity development of the law governing marriage and divorce's therefore becomes inappropriate.

It would be inappropriate to draw definitive conclusions from the statistics, but one thing that can be said with a reasonable degree of certainty is that the nature of marriage has changed. Though people clearly still value marriage, it seems that the fluidity with which people enter and exit the institution may suggest that it is no longer seen as a necessity, in terms of obtaining both economic and emotional stability. It is now better characterised as a lifestyle choice; a conscious decision rather than a natural progression. This is certainly influenced by the force of the feminist movement discussed in greater detail on page 40. For now it is sufficient to note that for the majority of the preceding century, marriage was in effect, socially mandatory for both men and women. The latter had no realistic avenues for economic stability without it, and men encountered job discrimination if they were unmarried[81]. In contrast, it now appears that people want to be economically stable and educationally established *before* they marry[82],

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[78] 'Divorce in England and Wales: 2017', (Office for National Statistics, 28 September 2018) https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017#what-percentage-of-marriages-end-in-divorce > accessed 7 December 2018

[79] (Figures being available from 1862) 'Marriage in England and Wales: 2015' (Office for National Statistics, 28 February 2018) https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2015#marriages-between-opposite-sex-couples-decreased-and-resultant-marriage-rates-were-the-lowest-on-record > accessed 7 December 2018

[80] Only 26% of heterosexual marriages in 2015 were conducted through religious ceremonies, in 1990 the figure was 85%. *Ibid*

[81] Rose Hackman 'Is marriage really on the decline because of men's cheap access to sex?' The Guardian (London, 11 Jun 2018)

[82] *Ibid*

demonstrated by the fact that the average age of marriage has increased, being 37.5 years for men and 35.1 for women in 2015[83].

Perhaps one of the reasons why people delay marriage until they are economically stable, or refrain altogether, is the anticipated cost of a wedding ceremony. The cost of getting married in the registry office varies from council to council, by way of example, in Gwynedd a couple can be legally married from as little as £46[84]. However, the average amount spent on a ceremony reached an all-time high of £30,355 in 2018[85]. This is perhaps a sign of the times, with the rise of social media and the high expectations that follow, societal pressure has shifted from the expectation to get married to the lavishness of the ceremony. It is also notable that 25% of couples in the same survey had their own marriage website, and 24% had a personal 'hashtag' for the day[86].

This alludes to an important psychological observation as to why people still value marriage. Marriage is seen as a public display of a fundamental commitment to another, based on devotion, satisfaction and love[87]. It may also be seen as marking the 'completion' of a mature relationship. An interesting theory is proposed by Doyle, who contends that there is a sustained perception of marriage as marking a transition point from immaturity to adulthood. She writes that when she received her engagement ring it '...became a prop. I wore it to job interviews, other people's weddings, when speaking to the neighbours about our barking dog or loud music. It was a little bit of shiny proof I was a legit adult, a person of serious intents[88]'.

The appeal of marriage in linked to sentiments such as partnership, mutual care, common goals, and perhaps rather cynically, a universal desire to feel wanted[89]. Marriage represents an unparalleled optimism, which may carry significant weight for a generation considered to be

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[83] Marriage in England and Wales (ONS)
[84] 'Marriage and Civil Partnership Fees – November 2018' https://www.gwynedd.llyw.cymru/en/Residents/Documents-Residents/Births-marriages-deaths-documents/Weddingcivil-partnership-costs.pdf > accessed 9 December 2018
[85] According to the National Wedding Survey - Rachel Hosie, 'Average UK Wedding Cost Reaches All-Time High' (The Independent, 23 July 2018) https://www.independent.co.uk/life-style/love-sex/wedding-cost-uk-average-how-much-marriage-ceremony-bridebook-a8460451.html > accessed 9 December 2018
[86] *Ibid*
[87] Jane Lewis, 'Marriage and Cohabitation and the Nature of Commitment' Child and Family Law Quarterly, Vol II, No 4, (1999)
[88] Brihony Doyle, *Adult Fantasy: Searching for True Maturity in an Age of Mortgages, Marriages, and Other Adult Milestones* (Scribe Publications, 2017), p.128
[89] Tanya Gold, 'In is for the long haul: why divorce rates are falling fast' The Observer, (London, 9 December 2018)

the most anxious to date[90]. Describing the desire to marry (and remaining married) as a form optimism is appropriate; it is clear from the divorce statistics that the institution remains somewhat fragile with 90, 871 divorces of opposite-sex couples taking place in 2018[91]. Commentators have often correlated this change with a general trend amongst the population – a rise in selfish individualism. The consequence of such pursuit of self-fulfilment is that relationships appear less stable because people are less likely to put the welfare of others ahead of their own[92].

A cultural shift in the formation and nature of intimate relationships may have had a bearing on this phenomenon. For example, access to technology such as dating websites and apps enable people to satisfy their particular needs and be more selective when searching for a partner. This, in turn, may have added fuel to the rise of individualism, because 'ready access to a large pool of potential partners can elicit an evaluative, assessment-oriented mind-set that…might even undermine their willingness to commit to one of them[93]'.

However, this rise in individualism should not automatically be regarded as a negative development. Perpetuating a sense of duty and inciting conformity played an operative part in a system of oppression for women[94]. Others are also critical of the commentary alleging that the change in the nature of intimate relationships is a product of individualism. Lewis argues that it is an inaccurate analysis of the social change. People are not more focused on themselves; rather they have a desire to find a balance between the self and engagement with the family[95]. Similarly, Giddens frames this shift in a more positive light, he contends that a relationship is now likely to be 'entered into for its own sake', in the sense that people live and stay together solely for what can be derived from each person and insofar as this is satisfactory to the other.

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[90] Jody Scott, 'Why Millennials are the Most Anxious Generation in History' (Vogue Australia, 5 January 2018) https://www.vogue.com.au/beauty/wellbeing/why-millennials-are-the-most-anxious-generation-in-history/news-story/755e7b197bdb20c42b1c11d7f48525cd > accessed 9 December 2018

[91] Despite the fact that the rate of divorce and the number of divorces have fallen since the mid-1990s. Office for National Statistics, 'Divorce in England and Wales: 2018', https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2018

[92] Baroness Young commented during the passage of the FLA 1996, that 'for one party simply to decide to go off with another person...reflects the growing self-first disease which is debasing our society' - Hansard, HL Deb, Vol 569, col 1638, 29 February 1996

[93] Eli Finkel et al, 'Online Dating: A Critical Analysis From the Perspective of Psychological Science' (2012) Association For Psychological Science Research Article, p. 3

[94] See page 40

[95] Jane Lewis. 'Marriage and Cohabitation and the Nature of Commitment'

The value of the relationship derives from the relationship itself, rather than the form it takes, and thus the relationship is more 'pure'[96].

It cannot be said that the changes in societal perceptions of marriage, nor the continued prevalence of the institution, is a direct effect of any one external societal factor or internal characteristic, such as the advent of a social phenomenon like individualism. It is more likely to be a result of a combination of factors. However, it is doubtful that the legal benefits and the pragmatic reasons for entering a marriage have a significant influence on the decision to marry. Marriage and love are now interlinked in such a way that was absent for the most part of the history of marriage, and love is seldom pragmatic. As always where there is a change in the nature of the family, there is a vast and complex range of considerations and the law is not usually considered to be one. The failure of the FLA 1996 is a palpable illustration that the law cannot govern family behaviour[97].

Challenging the Centrality of Marriage: Cohabitation and The Law's Disparate Treatment of Spouses and Cohabitees

Cohabitation must be considered, as the negative consequences that flow from centrality of marriage and the inability of the institution to accommodate the changing social reality is demonstrated by the problems with cohabitation law. Thus, cohabitation provides an example of how the centrality of marriage impacts on other areas of Family Law. It also raises broader socio-legal questions about using law as an instrument for directing behavioural change[98] and more generally about the State's legitimacy in regulating intimate relationships and whether family function should be regulated over family form. Here however the discussion is focused on how the modern prevalence[99] of expressing commitment in a less institutionalised way has impacted the theoretical and political significance attached to marriage[100] and subsequently, how divorce law should be reformed to reflect this social norm's effect on formal marriage as the epicentre of Family Law.

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[96] Anthony Giddens, 'Modernity and Self-Identity: Self and Society in the Late Modern Age' Cambridge Jaw Journal (1991)
[97] See page 73
[98] See the discussion on the State's promotion of marriage on page 31 and 37
[99] See page 29 below
[100] Anne Barlow, Simon Duncan, Grace James and Alison Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart Publishing, 2005), Foreword

Both divorce and cohabitation present a threat to the centrality of the institution of marriage. Both the increase in the divorce rate[101] and the rise of cohabitation have been regarded as indicative of the breakdown of the traditional nuclear family, and both represent behavioural changes that have had a significant impact on family life[102] in recent years[103]. Though there are several reasons a couple might choose to cohabit instead of formalising their relationship through marriage, the difficulties involved in leaving due to the State's control of the divorce process and perhaps a psychological tendency to choose familiarity over the risk of walking away from an unhappy marriage[104], as well as the costs associated with divorce[105], may be contributing factors[106].

Conversely, there are also studies that indicate that premarital cohabitation may lead to an increased likelihood of divorce should the couple decide to marry[107]. However, it is now commonplace to use cohabitation as prelude to marriage, and this statistical link is rather timeworn and vulnerable to challenge. It may not be cohabitation itself which makes the marriage more likely to end in divorce, but rather a broad-minded acceptance of divorce prevalent in younger generations[108]. Most who intend to marry cohabit first as a form of 'trial marriage[109]', but the apparent increase in the likelihood of their subsequent marriage ending in divorce is likely attributable to their perception of marriage as a 'more negotiated and conditional commitment between partners, which is open to termination[110]'.

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[101] See page 24

[102] Though evidently not via legal regulation

[103] Perelli-Harris et al, 'The Rise in Divorce and Cohabitation: Is There a Link?', Population and Development Review 43 (2) (June 2017) p.303

[104] 'It is probable that many people consider leaving a bad marriage to seek greater happiness in what Freud would call the 'positive' aim but end up staying because of the 'negative' aim, or avoidance of pain. In other words, when they consciously or subconsciously do the calculus, they decide that the possible benefits of finding greater happiness outside of a dysfunctional marriage is worth suffering the pain associated with leaving a familiar situation'. Danielle Teller and Astro Teller, *Sacred Cows: The Truth about Divorce and Marriage* (Diversion Books, 2014), p. 60

[105] At the time or writing the fee for a divorce application is £550, this is separate to the costs involved in engaging a solicitor. GOV.UK, 'Get a divorce: step by step', https://www.gov.uk/divorce/file-for-divorce > accessed 2 August 2019

[106] *Ibid*, p.322

[107] William G. Axinn and Arland Thronton, 'The Relationship between Cohabitation and Divorce: Selectivity or Causal Influence?' Demography Vol 25, No. 3 (August 1992) p. 357

[108] Barlow, Duncan, James and Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century*, p.64

[109] *Ibid*, p.20

[110] *Ibid*, p.2. This idea is linked to a more contractual understanding of marriage explored in Chapter 6, and perhaps the growth of selfish individualism explored on page 26.

It is fair to say that social acceptance of cohabitation is now widespread, with phrases such as 'living out of wedlock' and 'living in sin' no longer forming part of common language[111]. In 2017 the percentage of births outside of marriage was 48.1%[112]. This seems to align with a decrease in social pressure to acquire marital status before childbearing[113]. Cohabitating couple families are also the fastest growing type of family, with 3.3 million in 2017[114]. Many of these couples will go on to marry, but many will not[115].

There has been a strong tendency to omit the social fact of cohabitation from the law, and even express disproval of it. Asquith LJ stated in *Gammans v Ekins*[116] that an unmarried couple 'masquerading...as husband and wife', were not entitled to the protection of the Rent Restriction Acts, and to include a cohabitating couple within the term 'family' for the purposes of the Act, 'seems to be an abuse of the English language[117]'. This alludes to an important point; there are a number of legal benefits that attach to the marital status, whilst in contrast, cohabitation is largely unregulated[118]. However, it could be argued, rather cynically perhaps,

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[111] Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family 1600 – 2010* (Cambridge University Press, 2012), p.137 and 196

[112] 'Births in England and Wales: 2017' (Office for National Statistics, 18 July 2018) https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthsummarytablesenglandandwales/2017 > accessed 14 December 2018

[113] Barlow, Duncan, James and Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century*, p.85

[114] 'Families and Households: 2017' (Office for National Statistics, 8 November 2017) https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017#number-of-families-in-the-uk-continues-to-grow-with-cohabiting-couple-families-growing-the-fastest > accessed 14 December 2018

[115] Research by Barlow and Smithson identifies four categories of cohabitants which 'drove and explained behaviours' observed from their study. By way of brief outline, there were 'ideologues', where one or both of the parties had an ideological objection to marriage though they were in a committed relationship. 'Romantics' expect to marry in future, and saw cohabitation as a prelude to marriage as discussed above. There were also 'pragmatists' who approached their choices on marriage and cohabitation with legal or financial considerations in mind. Finally, the 'uneven couples', where one party wanted to marry and the other did not - Anne Barlow and Jane Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' Child and Family Law Quarterly (2010), p. 346. For an example of a couple who exhibit the features of the 'ideologues', see the discussion on the *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* (2018) UKSC 32 on page 53, where a couple who had ideological objections to marriage based on its patriarchal history successfully argued that their inability of obtain a civil partnerships as an opposite-sex couple violated their human rights under A.14 in conjunction with A.8 of the ECHR

[116] 2 KB 328 (1950)

[117] Page 331

[118] 'It is not that cohabitants do not have any legal rights, rather these rights are complex, confusing and nearly always inferior. They are hardly ever automatic', Anne Barlow, Simon Duncan, Grace James and Alison Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart Publishing, 2005), p.2

that the only real difference between the two in terms of substance is the existence of a marriage certificate, which becomes a gateway to an array of legal protections.

Barlow and James argue that the law fails to address and approach cohabitation comprehensively, instead it issues ad hoc reforms that lead to unnecessary complexity. This is because in some (limited) situations the law treats cohabitants if they were married, in others it recognizes its familial nature but sees it as inferior to marriage and so less deserving of certain rights, and in others it ignores cohabitation in its entirety, with cohabitants dealt with as strangers regardless of the durability of the relationship[119]. It should be noted that it is in the areas of law that are most crucial and distressing to people's lives, that the law ignores cohabitation, namely what is to happen on relationship breakdown and on death.

There is no equivalent mechanism for divorce in the context of cohabitation. Therefore there exists no duty for a spouse to maintain the other and no power within the court to redistribute property[120]. However, the theoretical justification for the division of assets on divorce is equally applicable on the breakdown of cohabitation. That is, people build their lives together and become accustomed to a specific standard of living and often one party, usually the woman, will sacrifice a career for the benefit of the family. It is no less of an injustice to allow the parties endure an enormous difference in their economic position without taking into account the intertwining of their lives, the sharing of resources, and a vast range of non-financial contributions[121], when a long cohabitating relationship comes to an end. Whether or not a couple has formalised their relationship through marriage should not alter this essential aspect of fairness when there is no discernible substantive difference between these forms of partnership. A marriage can come to an end after a year, but it will still be encompassed within

[119] Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain', The Modern Law Review Vol.67, No.2 (2004), p.143-176

[120] A party may have some limited protection if they are the main carer for a child shared between the couple under s.15 and Sch1 of the Children Act 1989 or the Child Support Act 1991. However, any order will be for the benefit of the child, and the benefit to the resident parent will be indirect and minimal (unless there are significant assets – see *Re P (A Child) (Financial Provision)* 2 FLR 856– in considering what the mother reasonably required, the 'sacrifice of the unmarried parent' who is to be the primary carer is to be taken into account, and this can be based on a generous approach so as to limit the disparity between the standard of living between the parents.)

[121] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (Palgrave MacMillan, 2012) p.43

this legal framework of financial provisions, whilst a cohabitant who has been in a relationship spanning decades will not be entitled to such legal protection[122].

Upon divorce, if the matrimonial home is in the name of one of the spouses, the other spouse will usually receive at least half of the assets by virtue of marriage legislation. In the context of cohabitants where property is held by one party, the other party must demonstrate a prior agreement or contract, or show an interest under a constructive trust to gain any share of the home[123]. Case law has dictated that this requires the existence of a common intention to share, which can be shown either by the holder of the legal title making some sort of statement to this effect, or the other party must make a direct financial contribution towards the purchase price. Both are problematic; often when a property is first bought, one of the parties will take the legal title as a matter of convenience, or one of the parties will by a property and the other moves in at a later date further on in the relationship. In both situations, usually no thought is given to beneficial entitlement or the unimaginable - what will happen should the relationship breakdown.

In addition, the type of expenditure from which common intention can be inferred is limited to the acquisition of the house, so non-financial contributions and 'indirect' contributions, such as paying the bills, the school fees or the council tax (which might be the very reason why the other party can finance the direct cost of the house individually) will not be sufficient[124]. The inherent unfairness of this situation was illustrated in *Burns v Burns*[125], Valerie Burns cohabitated with her partner (who was the sole legal title holder of the family home) for 19 years and raised two children with him, she worked part-time but mostly cared for the children and paid some of the household bills, but was unable to establish a 'common intention'

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[122] However, it should be borne in mind that not all cohabitating couples want legal protection. There exists a fine line between legal protection and what may be viewed as the State interfering in personal relationships, and some may choose not to marry precisely for the avoidance of the latter. The Law Commission's consultation paper on financial relief (discussed in more detail below, see page 36) for cohabitants recognised this, and when proposing a scheme of financial relief on separation, suggested an opt-out scheme to protect individual autonomy - Law Commission Report, 'Cohabitation: The Financial Consequences of Relationship Breakdown', (Law Com 307, 2007), para 1.29

[123] *Lloyds Bank v Rosset* (1990) UKHL 14

[124] Charlie Webb and Tim Akkouh, *Trusts Law*, (3rd edition, Palgrave Macmillan 2013). Though see Lady in *Stack v Dowden* (2007) UK HL 17 for criticism of this approach, stating that there are a number of factors that are relevant to this question of common intention

[125] (1984) 1 All ER 244

sufficient for a constructive trust under which she shared ownership, so she left the relationship with nothing.

Therefore, it seems that contributions of a domestic nature, that is, those *usually* undertaken in cohabitating relationships, will not give rise to a presumption of a common intention to share beneficial ownership of the home. The discretionary jurisdiction available to the court to take account of contributions to the welfare of the family exists in relation to divorce[126], and the now well-enshrined principle established in *White v White*[127] was that different *types* of contributions should not prejudice parties on divorce settlement[128]. Given the challenge cohabitation presents to the centrality of marriage discussed in this section, the argument for allowing the status of marriage to give rise to a right or expectation to share ownership of the property[129] and have *all* types of contributions taken into account, presents an unjustified distinction.

On death, the situation is similarly arbitrary. When a married person dies intestate, their spouse will receive all personal chattels absolutely, the first £250,000 of the residuary estate[130], as well as half of the remainder on statutory trust. In contrast, if a cohabitant fails to make a will, the surviving cohabitant will receive nothing as cohabitants do not feature in the order of priority within intestacy rules[131]. A cohabitant is in a significantly vulnerable position on the death of his or her partner, especially if the deceased has children from a previous relationship. The law assumes that people are legally rational and will make a will, but an estimated two thirds of the

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[126] The Law Commission's Report, 'Cohabitation: The Financial Consequences of Relationship Breakdown', advocated for such a jurisdiction to be available for cohabitants where an eligible applicant (such as those which children or have lived together for a specified time) is able to establish that they suffered economic disadvantage or the other party retained a benefit as a result of qualifying contributions (including non-financial). See paras 3.31, 3.45, 4.26 and 4.40.

[127] (2000) UKHL 54

[128] Lord Nicholls Stated, 'If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer'. *Ibid*, para 605. See further discussion on *White v White* on page 130

[129] Gillian Douglas, Julia Pearce, Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice', The Modern Law Review, Vol. 72, No.1 (2009), p.28

[130] Free from tax and costs and with interest from death until payment

[131] The only recourse is an application under the Inheritance (Provision for Family and Defendants) Act 1975, but again applications from spouses are given special treatment The surviving spouse may make an application for such financial provision that would be 'reasonable in all the circumstances....whether or not that provision is required for his or her maintenance'. Cohabitants on the other hand are subject to the higher standard, they have to demonstrate the existence of a need for such maintenance. Bamford, Browne, Embley, King, Morgan, Rawcliffe, *Legal Foundations*, (College of Law Publishing, 2018)

population have not done so[132], and couples find it difficult to discuss what would be suitable on death[133].

It is often in these situations people learn that the 'common law marriage' is a myth. There is an astounding lack of awareness about the difference in legal consequences attached to different relationships, and the deeply-rooted 'common law' marriage myth may operate as a form of subconscious reassurance for many cohabitants[134]. A survey of cohabitating couples conducted by Resolution showed that two-thirds of their respondents were unaware there was no such concept[135]. The idea of a common law marriage emerged in the 1960s in the context of debates on 'common law wives' of West Indian men regarding immigration. Misunderstandings were further fostered in the 1970s as the legislature and the courts began to confer some rights on cohabitants and the media presented these entitlements in terms of the 'common law wife[136]'.

Further, there is a tendency for the man on the street, and even legal professionals, to use this language to describe an extra-marital relationship to give the relationship an extra dimension of respectability[137]. Probert expands on this confusion, stating that 'lawyers and historians regularly claim that common-law marriage did once exist. Is there, therefore, at least some truth behind the myth? The problem in answering this question is the fact that the phrase 'common-law marriage' is used in different ways to mean different things[138]'. The expression is misleading, English and Welsh law has never recognised the idea, but the ignorance of the high number of cohabitants participating in this legal lottery is worrying[139]. The prevalence of this

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[132] Ben Chapman 'Nearly Two Thirds of UK Adults Don't Have a Will, Research Finds' The Independent (London, 9 January 2018)
[133] The law also overlooks the possibility that people who have formed new relationships after divorcing previously may make a deliberate and conscious decision not to marry again, especially where there are children from the previous marriage. This may be because of the perceived difficulties with formally joining two families or a loss of confidence in the institution of marriage
[134] Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain', (2004) The Modern Law Review (Vol. 67, No.2), p.156
[135] Resolution News Release, 'Millions of Couples at Severe Financial Risk due to 'Common Law Marriage' Myth' (27 November 2017)
[136] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (Palgrave MacMillan, 2012), p.45
[137] J.C Hall, 'Common Law Marriage' The Cambridge Law Journal Vol. 46, Issue 1 (1987)
[138] Rebecca Probert, 'Common-law marriage: myths and misunderstandings' Child and Family Law Quarterly (2008) p.1
[139] Anne Barlow and Grace James 'Regulating Marriage and Cohabitation in 21st Century Britain', p. 156

myth is a sufficient reason in and of itself for reforming the law to reflect the underlying assumptions of the belief.

Legislating in this area is far from straightforward. The most commonly cited difficulty relates to *defining* cohabitation. Probert encapsulates the problem in by postulating the question; when does 'staying over' become cohabitation?[140] Some form of criteria would be needed before discussing the appropriate legal treatment. That being said, this does not constitute a justification for inaction. It could be argued that pointing to the difficulty in creating a definition simply shows is that we lack the terminology for a non-marital sexual relationship because we are so accustomed to the 'husband and wife' rhetoric[141]. Some have suggested that the extension of civil partnerships to heterosexual couples[142] would be an appropriate solution as it would encourage the partners to agree the terms of their relationship whilst avoiding the assumptions regarding the rights and responsibilities tied to marriage[143].

However, this does not give protection to those individuals who do not feel the need to formalise their relationship in the first place, or want to reject State approval of what they perceive is a private relationship, or those who are simply not informed at all about the need for legal protection, or too optimistic to contemplate relationship breakdown or death. An increasing number of people are entering 'cohabitation agreements', which can, amongst other things, govern ownership of property and chattels. It seems that such agreements are binding to the extent that they are consistent with general contractual principles[144]. However, similar to the discussion on the 'coldness' of pre-nuptial agreements[145] and marriage optimism[146], the number of people who actually take the initiative to enter this kind of agreement is marginal[147]. As Barlow points out, 'most people do not make relationship choices based on rational criteria

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[140] Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (Cambridge University Press 2012), p.4
[141] *Ibid*, p.187
[142] See *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* (2018) UKSC 32 and further discussion on this point on page 53
[143] Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain', p.143
[144] Namely, an intention to create legal relations, certainty, consideration and the absence of undue influence. Nancy Duffield, Kempton, Sabine, *Family Law and Practice 2019* (College of Law Publishing, 2019), p.278. *Sutton v Mischon De Reya and Gower & Co* (2003) EWHC 3166 gave a strong indication that there is nothing contrary to public policy in cohabitation agreements.
[145] See page 90
[146] See page 89
[147] Indeed, 'Only a small number of cohabitants make *any* provision regarding the legal consequences of their relationship', Barlow and James, 'Regulating Marriage and Cohabitation in 21st Century Britain', p.162

assumed by legislators and policy makers, but rather according to a rationality prevailing in their own lives[148]'. The mere availability of cohabitation agreements to alleviate the problems discussed in this section cannot therefore be viewed as a comprehensive solution.

Our neighbouring jurisdiction in Scotland[149] has enacted legislation giving economically disadvantaged partners a claim upon separation[150]. This makes it difficult for England and Wales as a jurisdiction to continue refusing to legislate[151]. In addition, this supports the argument for the devolution of divorce law to Wales in Chapter 6, as it illustrates that devolved administrations are more prepared to legislate in response to changing social boundaries. In addition, the Supreme Court judgement on the application for judicial review by Siobhan McLaughlin in August 2018 presents an added layer to the pressure on the Government to take action[152]. The Supreme Court, by a majority of 4 to 1, made a declaration of incompatibility with Article 14 insofar as it discriminates against the survivor and/or children on the basis of their status[153] in conjunction with Article 8; the right to respect for family life[154].

Though it may seem that legislating in this area is a complex endeavour, Resolution points to a number of steps the Government could take. For example, creating a statutory framework of rights and responsibilities for cohabitating couples on an opt-out basis, or simply giving powers to the court to transfer property and make financial orders on breakdown[155]. Such an opt-out provision is important in terms of providing people with a *choice* and thus able safeguard the

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[148] Anne Barlow, 'Cohabitation Law Reform – Messages from Research', Feminist Legal Studies Vol.14, Issue 2 (2006) p.178

[149] Family Law (Scotland) Act 2006

[150] The Family Law (Scotland) Act 2006 created two rights; a claim upon death and a claim upon separation. In deciding whether the act will apply the court will consider the length of the relationship (there is no qualifying duration), the nature of it, and the financial arrangements between the parties during the relationship - Citizens Advice Scotland, 'Living Together – Your Rights' (Fact Sheet) (5 May 2017). See also Lady Hale's comments in *Gow (FC) v Grant (Scotland)* 2012 UKSC 29 on lessons to take from Scotland regarding legal regulation in this area, paras 44-56. See also Miles Wasoff, 'Cohabitation: lessons from research north of the border?' 23 Child and Family Law Quarterly 302 (2011). Citizens Advice Scotland, 'Living Together – Your Rights' (Fact Sheet) (5 May 2017)

[151] It is worth mentioning that Australia is very progressive in this area, cohabitating couples acquire rights broadly equivalent to those that attach to a married couple on the fulfilment of certain criteria, but the threshold is low - Resolution News Release, '...Common Law Marriage Myth'

[152] The claim related to s.39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, under which a widowed parent can claim widowed parent's allowance but only if he or she was the spouse or the civil partner of the deceased

[153] It is well established that marriage constitutes a status in this context

[154] Press Summary, *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* (2018) UKSC 48 (30 August 2018)

[155] As mentioned, there several jurisdictions that the Government can lean on for insight or inspiration. Resolution News Release

autonomy of those who do not want to be married[156]. Of course, such a system is susceptible to abuse and the most vulnerable may be taken outside the scope of protection. However, measures could be put in place so as to alleviate this risk, such as a requirement on both parties to obtain independent legal advice.

The Law Commission identified serious misgivings regarding the lack of legal protection for cohabitants in their discussion paper *Sharing Homes* in 2002, and stated that the law does not adequately deal with the increasing informality with which people share their lives[157]. The Law Commission's Consultation Paper in 2007; *Cohabitation: The Financial Consequences of Relationship Breakdown,* was more ambitious by proposing reform by way of providing cohabitants with financial remedies on separation, but these were less extensive than the equivalent on marital breakdown[158]. The Government stated in 2011, that it had no plans to implement these changes[159]. The current climate within Parliament[160] suggests that reform is unlikely to be considered in the immediate future with Brexit occupying the bulk of Parliamentary time[161]. The reluctance to take action is however, more deeply rooted that this. The State has a longstanding history of upholding the institution of marriage.

Challenging the Centrality of Marriage: Social Stability and Children

The preceding paragraphs not only demonstrates that marriage carries with it a great deal of legal protection, but that the State also actively encourages it, most clearly demonstrated through the tax concessions made available to spouses[162]. Though the law has detailed rules on

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[156] Anne Barlow and Grace James 'Regulating Marriage and Cohabitation in 21st Century Britain', p. 174

[157] However, the Commission were unable to make suggestions for future legislation, concluding that 'it is not possible to devise a statutory scheme for the determination of shares in the shared home which can operate fairly and evenly across all the diverse circumstances which are now to be encountered'. The Commission also added, rather conservatively, that 'marriage is a status deserving of special treatment'. Law Commission, 'Sharing Homes, A Discussion Paper' (Law Com No 278) (November 2002), page 9

[158] Under the scheme proposed, eligible couples could apply for financial relief but only if the other party had 'retained a benefit' or the applicant had suffered an 'economic disadvantage' as a result of the applicant's contributions during the relationship. However, the proposals would place cohabitants in a much better position that they are currently under ordinary rules of property law. Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown, Executive Summary' (Law Com no 307) (July 2007)

[159] Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain', The Modern Law Review (2004)

[160] e.g see Peter Walker, 'Brexit Chaos: What Happens Next' The Guardian (London, 10 December 2018)

[161] Despite the Supreme Court's declaration of incompatibility in the application for judicial review by Siobhan McLaughlin

[162] Transfers between spouses are not subject to capital gains tax or inheritance tax, whereas cohabitants are subject to the full rate. Also, In the Supreme Court judgement of the Siobhan McLaughlin's application referred to above, the court reiterated that promoting marriage and civil partnerships is a legitimate aim for the purposes of legislation that benefits these individuals exclusively (para 36) The breach of human rights related to the lack

who can marry, when that marriage can come to an end and what the consequences are for the parties, it has neglected to tell us anything about the substance of that relationship. We are therefore left to our own devices to work out why this institution is so supreme to the point of deserving a legal advantage. An examination of the limited law on the rights of cohabitants reveals a common denominator; the closer the relationship is to the traditional idea of marriage, the more likely it is that it will deemed deserving of legal protection. A cohabitating couple will be treated as if they were married in the context of an application for means-tested benefit or tax-credit for the benefit of *children*[163].

This ties into one of the reasons why the law seeks to promote marriage, as articulated by the words of the American Republican Politician Rick Santorum, 'every society in the history of man has upheld the institution of marriage as a bond between a man and a woman. Why? Because...society is based on the future of the society. And that's what? Children[164]'. The purpose of marriage within Christian theology links to procreation and God's command to 'be fruitful' and the concept of marriage encapsulated by the law throughout history has, as we have seen, derived from the religious teachings. However, the link between the law's endorsement of marriage and raising children goes further. Policy promoting marriage is often reliant on research about the apparent causal connection between family structure and the well-being of children[165].

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of proportionality in achieving that aim because the purpose of the Widowed Parent's Allowance is to diminish the financial loss caused to families with children when one of their parents dies (para 39)

[163] The WPA in the McLaughlin application was non-means tested. This alludes to an important point about the shift from the centrality of marriage within Family Law, with some commentators arguing that it is the concept of parenthood and the parent-child relationship which has now become central - Harris-Short, Miles and George, *Family Law Text, Cases, and Materials* (3rd edn, OUP, 2015), p.2. Dewar wrote over a decade ago, 'Parenthood is an increasingly important legal status in modern Family Law. Barton and Douglas cite four reasons for this: that marriage is on the decline while unmarried parenting is on the increase, and that the law has had to accommodate this fact; that there is less stigma attached to extra-marital cohabitation and child rearing; that while the interests of the community in regulating the personal and sexual freedom of adults has been considered problematic, it is regarded as beyond contention that the State has a legitimate role in the protection of children; and that there has been increased attention given to children's psychological needs, to which the marital status of the parents is irrelevant'. John Dewar, 'Family, Law and Theory' Oxford Journal of Legal Studies Vol.16, Issue 4 (1996), p.725

[164] Rick Santorum Quotes. BrainyQuote.com, BrainyMedia Inc, 2018, https://www.brainyquote.com/quotes/rick_santorum_414850 > accessed December 17, 2018.

[165] This line of reasoning is supported by the courts, with Lord Hoffmann stating in *Re P and Others* that 'the State is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not' - *Re P and Others (AP) (Appellants) (Northern Ireland)*(2008) UKHL 38, para 13

The assertion that marriage is the 'ideal' framework for children is not only evidentially doubtful but also discriminatory. Surely it is not marriage in the technical sense of the word which is beneficial to children[166]. Perhaps what the Government thinks is important when raising children is the stability of a relationship, but the rapidly changing nature of family forms and the fact that marriage has lost its monopoly over sexual intimacy and childbearing means that marriage and stability are no longer interchangeable concepts[167]. The rest of Family Law has recognised this reality, and commentators have observed a separation between marriage and parenthood[168].

It has already been argued that marriage is an increasingly fragile institution, and this is bolstered by research conducted by Miles et al, which concluded after taking into account socio-economic factors and age that 'there was little difference in breakdown rates between married and cohabiting respondents[169]'. Therefore, marriage may not provide nor foster the stability that the State believes it can. The law cannot control the rate of relationship breakdown regardless of whether it succeeds to encourage marriage[170]. Conflict within a relationship has and always will be part of human behaviour, and despite divorce often being cited as damaging for children[171], research shows that it is this conflict and tension which harms the child psychologically[172] rather than the divorce itself.

Whether the parents are married or not is irrelevant. It may even be worse for child if the parents delay or avoid divorce under the misguided (though State-sanctioned) belief that it would be worse for the children to 'break up' the family unit than the alternative; 'staying together through gritted teeth[173]' and preserving a toxic environment. The claim that it is possible to

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[166] Often called 'a piece of paper' in everyday speech
[167] It is doubtful that they were ever as closely connected as the Government believes
[168] For example, in the Human Fertilisation and Embryology Act 1990, the need for a parenting couple to be in a marital relationship was dispensed with - Julie McCandless, 'The Role of Sexual Partnership in UK Family Law: The Case of Legal Parenthood' in *Families: Beyond the Nuclear Ideal* edited by Daniela Cutas and Sarah Chan (Bloomsbury Academic, 2012)
[169] Miles, Pleasance and Balmer, 'The Experience of Relationship Breakdown and Civil Law Problems by People in Different Forms of Relationships' Child and Family Law Quarterly Vol. 21, No. 1 (2009) p. 54
[170] See further discussion on page 37
[171] e.g Frances Gibb, 'Revealed: the Shocking Cost of Divorce for Children', The Times (London, November 24 2014)
[172] Morrison, Coiro, Blumental, 'Marital Disruption, Conflict, and the Well-Being of Children', Child Trends Inc (August 1994)
[173] Suzanne Moore, 'Yes, divorce is bad for children, but let's not fetishise marriage at all costs', The Guardian (London, November 24 2014)

isolate one factor such as marriage to illustrate what influences the well-being of children is overly-simplistic; it is often an accumulation of a vast number of complex factors[174].

The State's promotion of marriage is also often couched in terms of 'social stability'. For example, Sir George Baker, the former President of the Family Division, stated that marriage provides the 'building blocks' of society and is 'essential to the well-being of our society as we understand it[175]'. In the same vein, the State wants to avoid relationship breakdown because it is estimated to cost the UK economy around £44 billion a year, and studies that show that conflict between parents can lead to increased anti-social behaviour and deficits in academic attainment[176]. As Cretney points out, this is where we can observe hostility towards divorce that is independent of any religious theology, such a 'view could be based simply on utilitarian notions of the function of social institutions…[177]'. Thus there is a practical, cost-effective argument to be made in favour of the promotion of marriage, but the evidential basis is not robust enough to justify this level of intrusion into the private sphere, and the necessary conclusion need not be the authoritarian method of a fault-based, restrictive divorce law[178].

Challenging the Centrality of Marriage: Gender Inequality, Domestic Abuse and Feminism

Some oppose marriage[179]as the State's main instrument for regulating family life for an independent reason; marriage has formed the backdrop for oppression against women for centuries, and remains a symbol signifying their subordination. It was the feminist movement

[174] Research by Goodman and Greaves found that encouraging parents to marry is unlikely to lead to significant improvement in young children's outcomes. After taking into account pre-existing factors and characteristic, such as ethnicity, socio-economic status and education, there were no longer any statistically significant differences in the children's development whatever the parent's marital status - Goodman, Greaves, 'Cohabitation, Marriage and Child Outcomes' (2010) (Nuffield Foundation, Institute for Fiscal Studies)

[175] Jonathon Herring, *Family Law* (6th edn, Pearson 2013), p.884

[176] Stable Relationships for a Stable Society Summary High Level Policy Consultation: St George's House, Windsor, 8 – 9 March 2012

[177] … The stability of the family unit was seen as the basis of stability in society; and this could best be promoted by insisting that marriage, the basis of the family, should remain intact*' Great debates in Family Law*, p.30

[178] As family breakdown is inevitable, the State should divert its attention and resources towards alleviating the effects through other means such as, for example, enabling single mothers to work with more affordable childcare - R Ruth Deech, 'Divorce – A Disaster?' Family Law Journal (2009) p.1052. Or perhaps intervening at an earlier stage by investing in social and community care.

[179] Many commentators in the feminist literature advocate for the abolition of marriage. See, for example, Dianne Post 'Why Marriage Should be Abolished' 18 Women's Rights Law Review 283 (1996), p.283-314. A detailed discussion on the question of whether marriage should be abolished is outside the scope of this thesis, however see Chapter 6 for a discussion on how a shift in understanding marriage could provide a more realistic alternative

that was largely responsible for making the unmarried state a realistic possibility for women. Until relatively recently in our history, girls were raised to view marriage as their only goal, the only means of achieving a fulfilled life. This is was an inevitable consequence of the fact that State constructed marriage in such a way that women were financially dependent on their husbands. Until the Married Women's Property Act 1882, marriage involved a wife losing her capacity to acquire or retain property in her own name under the doctrine of consortium, and so 'the wife was a mere chattel and for all practical relevant purposes her identity...merged in that of her husband[180]'.

The struggle for legal and financial independence continued into the later decades of the 20th century. The existence of the 'marriage bar' meant that many professions were closed to women, because marriage specifically prevented them from working in certain occupations or required them to leave once they fell pregnant. The flawed logic used to justify this was that a woman would not be able to combine employed work and domestic life[181]; a view that prevailed up until the Employment Relations Act 1999 which gave women legal protection from being made redundant on the grounds of pregnancy[182].

Marriage was and continues to be an economic partnership. For at least the first half of the previous century, financial dependence meant that it was incredibly difficult for women to escape a marriage[183], propelled by the fact that the sum awarded to a wife should she be brave enough to obtain a divorce, was determined on the basis of need rather than the husband's assets, the assumption being that the 'money-maker' was entitled to the money he had had made and the 'non-money maker' was required to show why she should be entitled to some of

[180] *J v C* (1970) AC 668 per Lord Upjohn at 720-721. However, even the introduction formal equality with the Married Women's Property Act 1882, this change was arguably male-focused in the sense that it was prompted by men discontented with the practice of estranged wives or current wives 'pledging their credit' - Mr Justice Mostyn's speech to the All Party Parliamentary Group on Family Law

[181] Remnants of this view-point remain today. As Gloria Steinhem said, 'I have yet to hear a man ask for advice on how to combine marriage and a career' - Gloria Steinem Quotes. BrainyQuote.com, BrainyMedia Inc, 2019. https://www.brainyquote.com/quotes/gloria_steinem_136224, accessed June 23, 2019.

[182] Sisterhood and After Research Team, 'Marriage and Civil Partnership' (British Library, 8 March 2013) https://www.bl.uk/sisterhood/articles/marriage-and-civil-partnership > accessed 20 December 2018

[183] In addition to the fact that additional requirements were placed on women in pursuit of divorce until 1923, see page 62

'his' money[184]. This failed to reflect the societal reality that the majority of women were compelled follow, thereby placing them at a disadvantage on divorce.

With regard to financial orders, it was not until the landmark case of *White*[185] in 2000 that the needs approach was condemned and replaced with the principle of equality. The dominant criterion became the sharing of the marital assets, which was to be divided equally in absence of good reason to the contrary. This was reinforced in *Miller*[186]. The development was controversial. Some took issue with the undemocratic nature of five judges in the House of Lords instituting a fundamental change in the nature of marriage[187]. Others, media outlets in particular, were provided with ammunition for sensational stories of huge 'payouts' to wives of wealthy men[188].

However, in general, the court's jurisdiction over financial matters on divorce needs to be preserved[189] if there is to be a fair balance struck between genders. Whilst Deech's argument that the current law on financial provisions sends the message that 'getting married to a well-off man is an alternative career to one in the workforce[190]', carries some persuasive force, this criticism is subordinated by the overall purpose of the approach taken by the court. That is, to *redress* a balance between spouses when societal ideals of marriage and gender stereotyping will mean that life is more difficult for the woman upon divorce. Lord Nicholls acknowledged in *White* that pursuing a fair outcome means that there 'is no place for discrimination between husband and wife in their respective roles[191]'. This was significant in that it attached value to

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[184] Mr Justice Mostyn's speech to the All Party Parliamentary Group on Family Law. In addition, Germaine Greer wrote in 1970, 'The working wife has her income assessed as a part of her husband's, and he on the other hand is not even obliged to tell her how much he earns' - Germaine Greer, *The Female Eunuch* (Harper Perennial, 1970), p. 630

[185] *White v White* (2000) UKHL 54

[186] With the House of Lords of recognising that fairness would not be achieved without considering the present and foreseeable financial needs of the parties and compensation for any significant prospective economic disparity from the way the parties conducted their marriage. *Miller v Miller, McFarlane v McFarlane* (2006) UKHL 24

[187] Mr Justice Mostyn's speech to the All Party Parliamentary Group on Family Law

[188] e. g Owen Bowcott and Holly Watt, 'Estranged Wife Gets £453m in One of Biggest UK Divorce Settlements' The Guardian (London, 11 May 2017). See also Stephen Cretney, 'Community of Property Imposed by Judicial Decision' 119 Law Quarterly Review 349 (2003)

[189] See page 179

[190] Ruth Deech, 'It's time to update our divorce laws', The Guardian (London, 15 September 2009)

[191] He also added, 'there should be no bias in favour of the money-earner and against the home-maker and the child-carer', para 24.

the responsibilities traditionally associated with a wife, work which had previously disadvantaged women on divorce[192].

Women still undertake a significantly higher proportion of house-work and childcare than men[193]. Once a woman becomes a wife and a mother, conventional gender roles continue to exert a pull, and too often this is characterised as a 'choice'. Instead it is based on gendered assumptions[194], the State's failure to provide adequate childcare facilities and employment protection for women, as well as the fact that the gender pay gap is still endures[195]. Those who argue that the law on financial provisions are biased[196] are therefore missing the point; there needs to be a fundamental change within society first. These financial orders can be seen as a modest albeit important tool in combating this gender inequality.

Financial dependence on a husband not only makes divorce difficult, it also provides the groundwork for domestic violence to flourish[197]. Again, it is worth pointing out that the law has a lot to say about who can get married and in what circumstances it can come to an end, but has steered clear of regulating its content for the most part. This accounts for the (previously) common view that marital life is a 'private' matter outside public intervention[198].

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[192] Lady Hale's dissent in *Radmacher* Stated '…the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled'. *Radmacher v Granatino* (2010) UKSC 42, para 137

[193] The most recent statistics indicate that 93.5% of fathers were in employment whilst the figure was 75.8% for women' - Families and the Labour Market: England 2018' ONS https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2018#how-did-families-structure-their-economic-activity > accessed 20 December 2018

[194] A.Diduck and K.O'Donovan, *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006), p.255

[195] Rupert Neate, 'Global Pay Gap Will Take 202 Years to Close, says World Economic Forum', The Guardian (London, 18 December 2018)

[196] For example, Baroness Deech's comments suggesting that judges tend to favour wives on financial provisions on divorce, 'Our judges are being very old fashioned I'm afraid. They are over-chivalrous and the way they were in the 19th century. People wonder why, 15 years after a marriage has ended, one person has to keep paying money to another' – Patrick Sawer 'Divorces are skewed by judges' outdated chivalry, says female peer pushing for cap on payments' (The Telegraph, 12 February 2017), https://www.telegraph.co.uk/news/2017/02/12/divorces-skewed-judges-antiquated-chivalry-says-female-peer/ > accessed 5 August 2019

[197] For example, see Kim Jinseok and Karen Gray, 'Leave or Stay? Battered Women's Decision after Intimate Partner Violence', Journal of Interpersonal Violence (2008)

[198] To the extent that the police have had a tendency to 'ignore complaints of domestic violence because they do not want to 'intrude' on the private realm of the married couple'. Mary Lyndon Shanley, *Just Marriage* (Oxford University Press 2004)

The State has a long history of failing to protect women against violence, and its existence within a marriage made it easier for the State and society to justify ignoring it.

This insistence on 'privacy' resulted in a deep-seated, patriarchal ideology. Common law allowed husbands to use chastisement to control their wives, and allowed him immunity from rape until 1991[199]. In addition, as Lord Hoff has pointed out, terms such as 'domestic' violence, and 'battered wife', illustrates how it is perceived as a 'family' problem[200]. The impact of the sexual revolution on marriage was profound. It dismantled the assumption that wives should be content with submitting to their husband's demands. An increase in educational opportunities was also significant[201], it meant that in turn, women were able to 'imagine a different kind of life for themselves'[202]. With both of these issues; financial dependence and domestic violence, marriage was not the cause. The problem goes far deeper and relates to the structural inequality of women. However, the way in which marriage has been presented by State and society added to the issue[203].

Another matter that throws doubt upon the superiority of marriage in relation to its disadvantage for women, is the practice of arranged and forced marriages, most often associated today with the culture of Muslims of South Asian origin. It does however, form part of the history of England and Wales with cases of forced marriage occurring before the 18th century[204]. An arranged marriage is where spouses are chosen for each other by other family members, who essentially act as match-makers. Forced marriage is where at least one of the spouses does not give consent to the marriage. The boundary between the two however, is not watertight[205]. The decision to marry and the choice as to who to marry is closely connected to

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[199] *R v R* (1991) UKHL 12 (the common law rule was based on the concept of unity with husband and wife – they were seen as one in the eyes of the law, and the idea that a wife impliedly consented to intercourse at any time on marriage)

[200] Harris-Short, Miles and George, *Family Law Text, Cases, and Materials,* p.519

[201] The Education Act 1944 made secondary schooling free and compulsory for children up to 14, then 15 and then 16, and higher education expanded in the 1960s. Such reforms had the greatest impact on women, both in terms of obtaining more rewarding employment and being able to develop critical skills that would lead to the realisation that the society they were living in was unjust.

[202] Rosemary Auchmuty, 'Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women' Feminist Legal Studies 20 (2) (2012)

[203] Carol Smart's pioneering critique in 'Feminism and the Power of the Law' advocated for the abolition of marriage and suggested the creation of a system of 'rights, duties and obligations' independent of any form of 'coupledom' - Carol Smart, *Feminism and the Power of Law (Sociology of Law and Crime)* (1st edn, Routledge 1989), p.210

[204] See, *Lady Fulwood's case* (1638)

[205] Máiréad Enright, 'Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage', Modern Law Review Volume 72, Issue 3 (2009)

self-determination[206]. In spite of this, forced and arranged marriages are still widespread throughout the world and a contemporary issue in England and Wales[207]. Forced marriage is also a gendered issue, with data indicating that women significantly outnumber men when seeking assistance in avoiding or leaving forced marriages[208]. The rate, scale and gender disparity of forced marriages highlights the extent of the close link between marriage and female oppression[209].

Moreover, marriage's intimate association with the oppression of women endures pervasively outside the West. Rape is still legal within a marriage in more than 40 countries[210]. In Nigeria, a husband has a legal right to exercise violence against his wife 'for the purpose of correcting her' as long as he does not cause grievous bodily harm[211]. These issues may seem far-removed, but such cultural traditions have an impact here in England and Wales. Recent statistic indicate that women who identify within the Mixed/Multiple ethnic group were more likely to have experienced abuse from their partner[212].

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[206] And the requirement that marriage be undertaken with 'free and full consent' is contained in A.16 (2) of the Universal Declaration of Human Rights. Jenni Millbank, Catherine Dauvergne, 'Forced Marriage as a Harm in Domestic and International Law' Modern Law Review, Volume 73, Issue 1 (2010)

[207] There is a designated Forced Marriage Unit, set up in 2005, and in 2012 the Unit had to give advice or support in 1,485 cases. Since this figure only relates to cases the FMU were made aware of, the true scale of the problem is unknown. Sophie Warners, 'How Prevalent is Forced Marriage in the UK?', The Guardian (London, 22 July 2014)

[208] Jenni Millbank, Modern Law Review. For example, in 2012 and 2013, 82% of the victims helped by the Forced Marriage Unit were female. In addition, more than half the victims were under 21, 1 in 8 under 16, and around a third between 18 and 21 - Sophie Warners, The Guardian

[209] Child marriage is also, rather alarmingly, a continuing and common practice. It is estimated that over 650 million women alive today were married as children. Child marriage is practiced most commonly in poor communities and it rooted in profound gender inequality and patriarchal values, operating under the supposition that girls are a burden on the family and marrying them at a young age will ease economic hardship by transferring the onus on the husband's family. Girls Not Brides, 'Child Marriages Around the World' (UNICEF, State of the World's Children 2017) https://www.girlsnotbrides.org/where-does-it-happen/ > accessed 23 December 2018

[210] Julie Bindel, 'Marriage Should Be Abolished. The Civil Partnership Debate Proves That' The Guardian (London, 29 June 2018)

[211] And in Cameroon a husband can prevent his wife from taking up employment if he believes this is not in the best interest of the family. Yosola Olorunshola, '10 Ridiculously Sexist Laws That Have No Place in the 21st Century', (Global Citizen, November 28, 2016) https://www.globalcitizen.org/en/content/10-ridiculously-sexist-laws-you-wont-believe-still/ > accessed 22 December 2018

[212] ONS, 'Women most at risk of experiencing partner abuse in England and Wales: years ending March 2015 to 2017', https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/womenmostatriskofexperiencingpartnerabuseinenglandandwales/yearsendingmarch2015to2017#characteristics-of-women-who-are-most-at-risk-of-experiencing-partner-abuse > accessed 9 February 2019

The oppressive history of marriage shows us that we should hesitate before looking to the law to alleviate these gendered problems, but the discussion at the beginning of this Chapter demonstrates that the institution of marriage has undergone a transformation. It has lost a great deal of power and is more appropriately characterised as a mere lifestyle choice for the majority of women in the UK. Women are now more acutely aware of the fact that protection does not lie in the form of matrimony, but in education[213]. Rather than having a fixed definition, it should now be accepted that marriage is whatever the parties want it to be. For some, it is a celebration of love and commitment between two equal participants, but for others, the institution serves as a constant reminder of centuries of oppression[214]. This is understandable, the wedding ceremony is to many a display of tradition, but on closer examination almost all of the customs have patriarchal rationales[215].

For example, the white dress denotes the bride's virginity and emphasises the importance of her appearance. The father 'giving her away' alludes to how marriage was understood as a man to man exchange of property. The minister declares 'you may now kiss the bride', rather than the bride herself giving permission[216]. A wife will usually take her husband's name after surrendering her own, a tradition which has its origins in the doctrine of coverture; the legal principle that denoted that upon marriage, a woman became her husband's possession[217]. Needless to say, these customs no longer serve the same purpose and most people are unaware of their origins. Some, however, believe that we do not live free of history. Feminist commentary has drawn attention to the patriarchal undertones of these traditions used to celebrate the commencement of a marriage, and the presence of such perspectives has contributed to the questions raised about the centrality of the institution.

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[213] Auchmuty, 'Law and the Power of Feminism...'

[214] see *R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development* (2018) UKSC 32 for an example of such views in the context of trying to extend civil partnership to opposite sex couples

[215] The focus here is on the traditional Western custom of a wedding, ceremonies in other cultures and religions are beyond the scope of this thesis

[216] Clare Chambers, 'Recognizing Marriage as a Symbolic Institution' *(Paper presented at the annual meeting of the American Political Science Association*, 2005)

[217] Sophie Coulombeau, 'Why Should Women Change Their Names on Getting Married?' (BBC News, 1 November 2014) https://www.bbc.co.uk/news/magazine-29804450 > accessed 21 December 2018. Also and rather astonishingly, many are still keen to uphold the tradition of the bride's family paying for most of the wedding. This tradition relates to the concept of the dowry – the money, goods or estate that a woman's family would bring to the soon to be husband in exchange for taking their daughter - The Editors of Encyclopaedia Britannica, Encyclopaedia Britannica, 'Dowry: Marriage Custom'

Marriage is therefore characterised by a discourse many are uncomfortable with. Couples can accommodate this sexist baggage in their understanding of the modern conception of marriage[218]. A marriage, or a wedding, can even be integrated within a feminist viewpoint, in the sense that a component of feminism involves 'forging new paths through old traditions', and the basic premise of a wedding; saying that you love someone in front of family and friends, should not be controversial[219]. But others cannot overlook the connotations. As Ettelbrick put simply, 'Marriage is a great institution...if you like living in institutions[220]'.

The point is that the law should not discriminate against those who are ideologically opposed to marriage. The upshot of this need not necessarily be the abolition of marriage, but the extent of the law's promotion of it and the difference in legal treatment between those in and out of this institution is not justifiable[221]. What is important to decipher from the above discussion is that the sexist connotations of marriage makes it less deserving of the protection that a restrictive divorce law offers it[222]. The historical sexism attached to marriage is clear, what is less clear, is how to proceed from here. It is argued in Chapter 6 that a more contractually-based understanding of marriage should be adopted to better align with the unique historical interpretation of marriage in Wales. However, the same argument applies when seeking to find a conceptual form of marriage which supports rather than restricts women's rights and opportunities, and consequently provide a groundwork for a divorce law fit for gender equality.

Challenging the Centrality of Marriage: The State's Reluctance to Formalise Same-Sex Relationships

A clear correlation between the law and Christianity can be observed from the law's position regarding same sex relationships[223]. Same sex marriage was not permissible in England and

[218] Alex Hern, 'The Civil Partnership Ruling Means We Can Move on from Marriage' The Guardian (London, 27 June 2018)
[219] Laura Bates, 'How to Have a Feminist Wedding', The Guardian (London, 28 June 2014)
[220] Paula Ettelbrick, 'Since When is Marriage a Path to Liberisation?', in Andrew Sullivan *Same sex Marriage: Pro and Con* (London: Vintage 1997), page 118
[221] Theresa May's announcement during the Conservative Party conference in Birmingham that Civil Partnerships will be extended to all couples is therefore welcomed, but celebration should be reserved for when legislation is in place. BBC News (Politics), 'Civil Partnerships: Law to Change for Mixed-Sex Couples' (2 October 2018) https://www.bbc.co.uk/news/uk-politics-45714032 > accessed 23 December 2018
[222] This bolsters the argument that it is unfair for Wales to have to follow this law – not only because it has its own historical interpretation of marriage which is not as discriminatory, it is actively trying to become a feminist government. See Chapter 6.
[223] A fuller discussion of same sex marriage commences at page 47

Wales until 2013[224], with marriage being viewed as the union between 'one man and one woman[225]' until political pressure and public opinion forced the State to act. It has been suggested that opposite-sex couples have no place in the Christian understanding of marriage and they are universally condemned within the Catholic interpretation of the Bible, as it violates the underlying principle of God's design for the union, namely procreation[226].

The requirement of one man and a woman is echoed in the law. Lord Millet stated that marriage was 'a legal relationship between persons of the opposite sex. A man's spouse must be a woman; a woman's spouse must be a man, this is the very essence of the relationship...[227]'. The importance attached to procreation is also reflected in the law, with Sir Mark Potter in *Wilkinson v Kitzinger*[228] insisting that marriage is valued 'as a means not only of encouraging monogamy but also the procreation of children', and so to 'accord a same sex relationship the title and status of marriage would be...to fail to recognise physical reality[229]'. Of course, the inclusion of the element of procreation not only excludes same sex couples but also opposite-sex couples who are either unable to bear children or are voluntarily childless. The bible refers to marriage as one man untied to one woman in matrimony to become 'one flesh[230]', implying a sexual union leading to procreation, thus sterility is another shortcoming of God's intended plan for marriage, and there are even references in the Old Testament to sterility being a consequence of personal sin[231].

The historical discriminatory nature of the legal concept of marriage, excluding same sex couples and indirectly condemning the infertile follows the religious doctrine. It should be pointed out that a ground for the voidability of a marriage in English and Welsh law is the incapacity or wilful refusal of consummation[232]. Though not the same as infertility, it similarly

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[224] Marriage (Same Sex Couples) Act 2013
[225] *Hyde v Hyde and Woodmansee* 1 P. & D. 130
[226] It also violates another tenet of marriage, the complementary nature of the relationship; a man and a woman. Some even go as far as to say that due to the sacredness of marriage, or in other words, the fact that it is a relationship under God's design, 'same sex marriage' is itself a contradiction in terms, as God would never sanction such a marital bond - Andreas J. Köstenberger
[227] *Ghaidan v Godin-Mendoza* (2004) HL 21, para 588
[228] *Wilkinson v Kitzinger & Ors* (2006) EWCH (Fam) 2022
[229] *Ibid*, paras 118-120
[230] Genesis 2:24
[231] Andreas J. Köstenberger. Genesis 20:17 -18
[232] S.12 (1) (b) MCA 1973. It should be borne in mind that it is for the parties to decide whether or not to take steps to annul their marriage. The point is that the law is based on outdated notions of marriage tied to the importance of procreation.

demonstrates a fixation on procreation within a marriage. Couples unable to have children may therefore feel that the social significance attached to the State-sanctioned union they have entered is diminished because of the importance the law attaches sexual intercourse, and the opinion expressed by several Conservative governments that marriage provides the best groundwork for child-rearing[233].

There is little doubt that civil partnerships were introduced as a strategy to avoid the backlash that would have emerged had same sex marriage been legalised, particularly from religious groups. The very existence of civil partnerships demonstrates the strength of the State's commitment to the traditional and Christian concept of marriage[234]. The Government would not want anything that could be interpreted as undermining its key elements, or 'definition'. Instead, civil partnerships were aimed at rectifying what was a perceived unfairness; it was about managing and dealing with a particular community, rather than creating a new way of living for all[235].

Civil partnerships as an institution, like marriage therefore, is not untainted. Marriage has a long history of misogyny, but civil partnerships 'carry a much fresher history of homophobia[236]'. Civil partnerships were created under the Civil Partnership Act 2004 so that same sex couples could formalise their relationship with a civil registration procedure. The status confers the same property rights as married couples, the same exemptions from tax, the same ability to obtain parental responsibility for a partner's children, the same next of kin rights in hospitals, and so on[237]. The process of separation is called dissolution, which is akin to

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[233] For example, see Peter Dominiczak, 'David Cameron: Married couples are the 'bedrock' of society' The Telegraph (London, 19 February 2015)

[234] They emerged out of a reluctance to extend marriage to same sex couples and are thus essentially a 'parody of marriage for homosexuals'. Carl Stychin, 'Couplings: Civil Partnership in the United Kingdom' New York City Law Review 8 (2005), p. 543

[235] *Ibid.* It is also worth noting that we can track similar developments in other jurisdictions, such as France, where a civil solidarity pact (commonly referred to as PACS) was introduced to accord same sex couples some recognition, but with less rights and responsibilities than those attached to marriage. The very language of a 'solidarity' pact, and the idea of a contractual union between two people for the organisation of their 'joint life' suggests a reluctance to view a same sex relationship as a romantic union on par with opposite sex ones. The option of a PACS agreement has now been extended to opposite sex couples, thus the hope is that the mirroring development will continue

[236] Alex Hern, The Guardian

[237] There is scarcely any practical difference between a marriage and a civil partnership, as Lady Hale Stated in *Secretary of State for Work and Pensions v M* (2006) UKHL 11, a civil partnership has 'virtually identical legal consequences to marriage', para 99

divorce bar the absence of adultery as a ground[238]. Some would contend that the reason for this is the well-established case law on the meaning of adultery, but it is at least arguable that the omission represents a reluctance to accept that gay sex is real sex[239]; the Government could have easily altered the definition of adultery to incorporate same sex intercourse[240].

The formal recognition of same sex couples was a positive development (though long overdue), but there is an inescapable tension within the very concept of a civil partnership. It essentially mirrors all the legal rights and responsibilities of a marriage and was characterised several times as a 'marriage in all but name[241]', but the intention was certainly for it to be a distinct institution, or the Government would have just legalised same sex marriage. It therefore possesses a 'lingering odour of homophobia[242]'. Lord Millet's words in *Ghaidan* expressed this sentiment explicitly, he asserted in his dissent that the CPA 2004 did not try and 'do anything as silly as to treat same sex relationships as marriage', rather it only 'pays them the respect to which they are entitled by treating them as conceptually different but entitled to equality of treatment[243]'.

Furthermore, although civil partnerships introduced the same substantive rights overall, it still indirectly discriminated against same sex couples[244]. Regardless of individual opinions regarding the value of marriage, it is undeniable that it carries with it a substantial amount of abstract, symbolic weight that cannot be explained just by reference to legal benefits[245]. What was problematic was the 'parallel but different'[246] rhetoric. Symbolically, it still excluded same sex couples from a socially important institution, and therefore implied that such relationships

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[238] And non-consummation is not a ground for voidability. Harris-Short, Miles and George, *Family Law Text, Cases, and Materials,* p.699
[239] Harris-Short, Miles and George, *Family Law Text, Cases, and Materials,* p.978
[240] As Nicolas Bamforth points out, 'The difference has been explained on the basis that 'adultery' is defined by relation to heterosexual marriage, as something involving partial or complete penetration of a woman by a man, neither party being married to the other and at least one of the two being married to someone else….a more flexibly phrased but directly analogous concept to adultery could have been included within the legislation' – Nicholas Bamforth 'The benefits of marriage in all but name? Same sex couples and the Civil Partnership Act 2004' Child and Family Law Quarterly (2007)
[241] *Ibid*
[242] Lucy Crompton, 'Civil Partnership Bill 2004: The Illusion of Equality' (2004) Family Law 888, p. 889
[243] para 82
[244] Misha Isaak, 'What's in a name? Civil Unions and the Constitutional Significance of Marriage' (2008) Journal of Constitutional Law
[245] Francis Hamilton, 'The Symbolic Status of Same Sex Marriage' Family Law (2017)
[246] Carl Stychin, New York City Law Review

were somehow 'inferior' and that same sex couples were second class citizens because they were placed in a separate category[247].

This was laid out explicitly in *Wilkinson v Kitzinger*[248], where it was held that a same sex couple who had married abroad would not be recognised as spouses in England and Wales, providing confirmation that civil partnerships and same sex marriages are not the same[249]. The public nature of marriage meant that providing same sex couples with civil partnerships prevented true equality, because they had not been accorded the full status of citizenship and were not seen as full members of society[250].

The Marriage (Same Sex Couples) Act 2013 legalised same sex marriage in England and Wales[251]. The fact that it took until 2014 strongly suggests the existence of a reluctance to 'taint' the institution of marriage; societal acceptance emerged long before 2014 with data showing that the proportion of the British public who approve same sex partnerships has 'soared over the past 30 years[252]'. Some argue that marriage was finally extended to same sex couples because marriage itself began to look like a failing institution[253].

Same sex marriage was undoubtedly a slow development. Same sex couples were characterised as 'pretend family relationships' in the 80s[254]. In *Harrogate BC v Simpson* in 1985, Watkins LJ proclaimed 'it would be surprising in the extreme to learn that public opinion is such today that it would recognise a homosexual union as being akin to a state of living as husband and

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[247] Nicholas Bamforth, 'The Benefits of Marriage in all but name'? Same Sex Couples and the Civil Partnership Act 2004'

[248] (2006) EWCH 2022

[249] Sue Wilkinson, the petitioner in the case, expressed her frustration with civil partnerships, stating that it offered homosexuals a 'consolation prize', which is 'offensive and demeaning' - para 5

[250] Francis Hamilton 'The Symbolic Status of Same Sex Marriage'. Sir Mark Potter noted in *Kitzinger,* 'By withholding from same sex partners the actual title and status of marriage, the Government declined to alter the deep-rooted and almost universal recognition of marriage as a relationship between a man and a woman, but without in any way interfering with or failing to recognise the right of same sex couples to respect for their private or family life in the sense, or to the extent, that European jurisprudence regards them as requiring protection'- para 88

[251] S.1 (1) Marriage (Same Sex Couples) Act 2013, but note that s. 1 (3) preserves the Canon law of the Church of England which states that marriage is between opposite sex couples only

[252] However public opinion should not be the law's primary motivation. Rachel Schraer & Joey D'Urso, 'Gay rights 50 years on: 10 ways in which the UK has changed' (BBC News, 29 July 2017) https://www.bbc.co.uk/news/uk-40743946 > accessed 23 December 2018.

[253] Julie Bindel, The Guardian

[254] Carl Stychin New York City Law Review. More alarmingly, Home Office statistics indicate that in 2012 there were about 16,000 men in that year, who had previously been convicted of an offence during the time when homosexuality was criminalised behaviour - BBC News 'Gay Rights 50 Years on...'

wife[255].' Then in 2001 in *Fitzpatrick*[256], the court reiterated that such a relationship was not akin to husband and wife, but it was possible to say that they were akin to being a member of a family. The refusal to accept what was a functionally identical relationship flew in the face of logic, the necessary inference being that homophobia prevented progress; the partners in the case had lived together from 1976 until one them died in 1994[257]. It was not until *Ghaidan* in 2004[258] where it was said that same sex couples were akin to husband and wife[259].

The consultation process that led to the enactment of the Marriage (Same Sex Couples) Act 2013 was one of the largest to date. The Government was perhaps conscious of the fact that several other European countries already had legislation in place[260]. However, the decision to allow same sex marriage was not taken with ease. In response to the consultation Roman Catholic Bishops asserted that the idea had 'the potential to impact...immensely on the social stability of our society[261]'. Nevertheless, the Government decided to legalise same sex marriage on the basis that more people seemed to be in favour than against[262]. The justification was therefore rooted in a majoritarian argument; society must enforce what the majority want.

This however, is not always the most appropriate justification. Public opinion is a weak justification for making same sex couples in England and Wales wait until midnight on 29 March 2014[263] to fully and finally exercise their right to equal treatment in the context of formalising relationships. Not only does public opinion, as a form of societal justification

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[255] 17 HLR 205
[256] *Fitzpatrick v Sterling Housing Association Ltd* (2001) 1 AC 27
[257] However, the Court of Appeal expressed sympathy for the appellant, even citing his selfless dedication in caring for his partner for several years
[258] Which was handed down soon before The Civil Partnership Act 2004, and after the Human Rights Act 1998 came into effect on 2 October 2000 which would have influenced discussion on same sex couples
[259] S Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (Oxford University Press, 2006)
[260] Same sex marriage had been legalized in The Netherlands in 2001, Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, and so on. Lipka and Masci, 'Where Europe Stands on Gay Marriage and Civil Union' (May 30, 2019), Pew Research Centre Web site, https://www.pewresearch.org/fact-tank/2019/05/30/where-europe-stands-on-gay-marriage-and-civil-unions/ > accessed 23 June 2019
[261] Catholic Bishops Conference of England and Wales, Response from the Catholic Bishops' Conference of England and Wales to the Government Consultation of 'Equal Civil Marriage' (June 2012), paras 7 and 11. Further, the Church of England said that for the consultation document 'to talk of a ban on same sex couples marrying is a misuse of the language. There can be no 'ban' on something which has never, by definition, been possible' - The Church of England, A Response to the Government Equalities Office Consultation – Equal Civil Marriage, paras 7 and 22
[262] By a relatively small margin. *Ibid*
[263] 'Same Sex Marriage now Legal as First Couples Wed' (BBC News, 29 March 2014) https://www.bbc.co.uk/news/uk-26793127 > accessed 25 December 2018

'subordinate individual interest to compliance with particular forms of social organization[264]', it is often an inherently deceptive and weak source of decision-making[265]. Public opinion can also be seriously flawed; the Brexit referendum is as good an example as any that there are subject matters on which the public's understanding does not align well with facts[266]. More generally, politicians have a responsibility to shape public opinion, not just follow it dogmatically.

An appeal to equality is required, not because marriage is a pre-political or natural right, but because excluding same sex couples from the institution means denying a legal right to some that is *in fact* given to others. In terms of the European Convention on Human Rights, it should be assumed that every citizen in the 47 countries signed to the Convention has an equal right to participate in the basic institutions of society, and 'for better or for worse', one of these institutions is marriage. On the assumption that marriage's rationale[267] is to enable people to fulfil a familiar and well-understood desire to make a legally binding mutual commitment, which is a desire that is independent of gender or sex, same sex marriage must be allowed as everyone shares this sentiment[268]. Accordingly it is disappointing that the European Court of Human Rights has consistently held[269] that the European Convention on Human Rights does not include the right to marriage for same sex couples[270].

The introduction of the Marriage (Same Sex Couples) Act 2013, introduced a peculiar situation regarding civil partnerships. As it stands civil partnerships still discriminate, as same sex couples now have the option of a civil partnership or a marriage, but opposite sex couples can

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[264] John Eekelaar, 'Perceptions of Equality: The Road to Same Sex Marriage in England and Wales' (2014) International Journal of Law, Policy and the Family

[265] In contrast, public *values* change slowly 'like deep ocean current', *attitudes* shift more quickly 'like a tide' and then there are *opinions* – which 'are like waves and forth on the surface of the sea' - Ben Page, 'It's OK for Politicians to Ignore Public Opinion', The Guardian (London, 23 March 2013)

[266] See, for example 'Brexit: People Voted to Leave EU Because they Feared Immigration, Major Survey Finds' (The Independent, 29 June 2017), https://www.independent.co.uk/news/uk/home-news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html > accessed 23 June 2019

[267] In terms of its social rather than religious meaning

[268] Ralph Wedgewood, 'The Fundamental Argument for Same Sex Marriage', (1999) The Journal of Political Philosophy, Volume 7, Number 3

[269] Most recently in Chapin and Charpentier v France (n°40183/07) (June 9, 2016)

[270] Not under A.8 – the right to respect for private and family life, nor A.14 - the right to marry and to found a family. It has reiterated that EU States have a 'margin of appreciation' regarding the particular status of recognition that they accord same sex relationships - Gregor Puppink, 'The ECtHR Unanimously Confirms the Non-Existence of a Right to Gay Marriage' (European Centre for Law and Justice) https://eclj.org/marriage/the-echr-unanimously-confirms-the-non-existence-of-a-right-to-gay-marriage > accessed 25 December 2018. Many European States, including Northern Ireland, can therefore continue to refuse to liberate marriage at least in the foreseeable future

only marry[271].This raises doubts on the law's compliance with the ECHR; a well-entrenched Strasbourg principle is that 'differences based on sexual orientation require particularly serious reasons by way of justification[272]'. This was the question put to the Supreme Court in *R (on the application of Steinfeld and Keidan)*[273], and the Supreme Court unanimously found that the human rights of a couple, who had genuine ideological objections to marriage and wanted a civil partnership to formalise their relationship, had been violated. The Supreme Court rejected the Government's argument that the unequal treatment could be justified by requiring time to investigate the best way to remedy the inequality. The Supreme Court held this was not a legitimate aim[274], and that the Government had to eliminate the discrimination when same sex marriage was legalised, which could have been done there and then by abolishing civil partnerships or extending them[275].

This decision is to be welcomed. It may appear to some that the call for civil partnerships to be extended to opposite sex couples is based on a self-indulgent 'we want what they have' basis[276]. However, the legislation is clearly discriminatory and is illuminating as to the original purpose of civil partnerships. That is, if a civil partnership is not the same thing as marriage it must be available to others or it discriminates. If this is rejected, then the necessary inference is that it is a marriage in all but name. If it is completely separate to marriage, then it must be a form of domestic contract[277], and everyone is entitled to contract[278]. The significance of *Steinfeld* and the Government's announcement that it will take action to remedy cannot be overstated, it provides an alternative to the marriage model that better reflects the diversity of relationships that exist today[279].

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[271] Tim Loughton MP presented a modified form of his Private Member's Bill in 2017 which proposed extending civil partnerships to opposite sex couples, and Stated in Parliament that same sex marriage had, '… created a new inequality, and a Government who argued zealously that same sex marriage was an equality issue seem to have rather lost interest when it comes to an equality that affects opposite-sex couples. *Hansard*, HC Deb, vol 619, col 639 (13 January 2017)

[272] *Schalk and Kopf v Austria* (Application No 30141/04) (2011) 53 EHRR 20, para 97

[273] *R (on the application of Steinfeld and Keidan) (Apellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondents)* (2018) UKSC 32

[274] para 42

[275] In addition, even if this was held to be a legitimate aim, it was not proportionate; the interests of the community regarding extending civil partnerships are unclear, but the consequences of this denial for individuals is potentially serious (as we've seen from the lack of legal protection given to cohabitants).

[276] Julie Bindel The Guardian

[277] The question of whether marriage should be viewed as a contract is explored in Chapter 6

[278] Carl Stychin, New York City Law Review

[279] *Ibid.* Also, as Fenwick and Hayward point out, 'Creating such symmetry of access by extending civil partnerships to different-sex couples is significant, partly because the label accorded to a formal relationship

Extending civil partnerships to opposite sex couples could have an impact on divorce law, by strengthening the case for liberalising the requirements[280]. This is because it has the potential to undermine marriage. Tom Harris MP was of the view that:

> …a real threat to marriage will come from the continuation of civil partnerships and their extension to heterosexual couples… telling all couples that they can now opt for a second-best arrangement that nevertheless offers all the same legal privileges and protections as marriage would surely undermine marriage[281].

As we wait for the Government to legislate to extend civil partnerships and reflect on the introduction of same sex marriage[282], it is worth pointing out that such legislation would follow the pattern already that exists within the regulation of relationships, by being centred on a concept of 'couplehood'. This links to Fineman's point that the law has a tendency to seek to 'expand the traditional nuclear family model'. The inclusion of same sex couples within the definition of family just reinforces this idea, and so merely affirms 'the centrality of sexuality to the fundamental ordering of society and the nature of intimacy[283]'.

In *Burden and Burden v UK*[284], sisters who had lived together all their lives were unsuccessful in arguing that the Inheritance Tax system discriminated against them[285]. It is questionable that a great deal of weight is placed on what differentiates these cases – a sexual element. The focus of the Law Commission's proposals on the rights of cohabitees has been on those is in an

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status matters. In principle, the 'intrinsic value' of such formalisation is diminished where that status does not express the identity of a couple in terms of the signalling of their relationship to others… making civil partnerships available to different-sex couples could aid in breaking down the religious/patriarchal force of marriage by giving individuals the option of avoiding it without disproportionate loss' - Helen Fenwick and Andy Hayward, 'From same sex marriage to equal civil partnerships: on the path towards 'perfecting' equality?' (2018) Child and Family Law Quarterly

[280] Furthermore, though currently the requirements for the dissolution of a civil partnership mirrors the requirements for divorce, it is argued that this is unfitting. As Auchmuty point out, it is the unique history of civil partnerships (that is, in terms of same sex relationships being marginalised for the majority of legal history) which makes civil partnerships 'different from marriage, and dissolution different from divorce, whatever the similarities in legal treatment'. It is argued that the same still applies if and when civil partnerships are extended to opposite-sex couples, the creation of which stems from a very different philosophy to that of marriage. Rosemary Auchmuty, 'The Experience of Civil Partnership Dissolution: Not 'Just Like Divorce'', Journal of Social Welfare and Family Law 38 (2) (2016), p.152

[281] *Hansard*, HC Deb, vol 563, col 1010 (20 May 2013)

[282] It should be remembered, as Resolution points out in its response to Theresa May's announcement that civil partnerships will be extended, this does not resolve the fact that a dangerous number of cohabitating couples think that they're protected by a 'common law marriage', and so the government must still provide at least basic legal rights 'Resolution responds to the governments' civil partnership announcement' – News Release (http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=386) > accessed 26 December 2018

[283] Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1st edition, Routledge 1996)

[284] 13378/0 ECHR 356 (2008)

[285] Meaning that when one of them dies the other may have to sell their shared home

intimate relationship[286]. However, its discussion paper '*Sharing Homes'* was more enlightened, extending the proposals beyond only couples to '…friends, relatives and others who may be living together for reasons of companionship or care and support[287]'.

Conclusion

The historical and legal definition of marriage outlined in the beginning of this Chapter shows how blurred the line between the secular and Christian conception of marriage is in this jurisdiction. It is difficult to deny the existence of strong links between the features of the law surrounding marriage and divorce and particular Biblical teachings. Furthermore, the centrality given to the institution in political and legal thought must, at least in part, derive from the sacred and divine connotations of the religious concept of marriage. However, an examination of marriage's position in contemporary culture and particular external societal factors shows how outdated this traditional concept is. These form a compelling challenge to the continued centrality of the institution and makes the current system of divorce appear out of touch with societal expectations.

Though definitive conclusions should not be drawn from statistics, the data does indicate that marriage's standing as the locus of society has significantly weakened. Marriage now appears to be better characterised as a lifestyle choice rather than a necessity, and the motivations people have for deciding to marry vary significantly from person to person. There has also been a shift in focus towards the wedding ceremony itself, and the advent of technology and individualism cannot be ignored in terms of altering the dynamic of modern relationships.

Perceptions of marriage have not undergone this change in isolation; the shift has been part of a wider transformation within the nature of the family. For many this is a cause for concern, for example Duncan Smith, the former Work and Pensions secretary argued that increase in 'family breakdown' was a considerable contributing factor in the lead up to the London riots in 2011[288]. The think tank set up by Smith, the Centre for Social Justice (CSJ), said in its manifesto that tangible support for marriage 'was vital to restoring stability to family life[289]'.

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[286] As these 'tend to entail a certain emotional intimacy and intensity, often accompanied by the parties sharing a view of their relationship as a joint venture in life'. The Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown- A Consultation Paper' (2006) Law Com 179, para 5.75
[287] Sharing Homes, para 1
[288] Hélène Mulholland, 'Duncan Smith Blames Riots on Family Breakdown and Benefits System', The Guardian (London, 3 October 2011)
[289] *Ibid*

However, attempting to retreat back to the 'nuclear family' ideal is not only fruitless; it also attempts to solve political problems deeply rooted in the socio-economic sphere which go beyond aspects of family life.

The rise in both the social acceptance and practice of cohabitation runs parallel to the decline in marriage's popularity. This bolsters the case for arguing that the nature of commitment has changed and a marriage-centred approach to regulating relationships is no longer tenable. Marriage can no longer claim monopoly over childbearing and stability and both forms of family organisation have the same functions and effects. This has illustrated the extent of marriage's centrality and has exposed a significant omission in legal regulation, with substantial and automatic legal benefits deriving from the status of marriage. This calls for a functional approach to family regulation[290]. The traditional form approach has shown itself to be flawed because it assumes that the law can shape social change, but policy makers should be able to appreciate by now that this is too blunt of an instrument in the field of Family Law[291].

This has implications when it comes to divorce law. If the law were to place greater emphasis on the function of marriage, this would inevitably lead to a liberation of divorce. That is, when it is recognised that marriage has certain benefits as well as specific (albeit personal) goals to fulfil, it should follow that when a marriage has broken down, these positive features are no longer present and marriage becomes purely a matter of status. Requiring fault seems to show an insistence on preservation for the sake of status – no matter how void that relationship is of commitment and stability. The distinction between married and unmarried cohabitants has become, in essence, purely legal[292]. Thus the centrality of marriage supported by restrictive divorce law loses a principled basis.

This Chapter also explored how, outside its religious association, marriage has been privileged by the State and accorded this centrality. The aim of promoting stability within families is not particularly objectionable in and of itself, but the method chosen; promoting marriage, is when

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[290] The argument here is not that family life should not be regulated, but rather it should be regulated in a way which does not discriminate against those who do not want the State to be involved in their relationship. Legal regulation should depend on a different criterion rather than the status of marriage, such as the length of the relationship or whether there are children, which would be a fairer and more rational way of differentiating between family forms.

[291] Anne Barlow and Grace James, Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain'

[292] Barlow, Duncan, James and Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century*, p.87

it is at the expense of causing hardship, most clearly seen with the law's treatment of cohabitants. There is a fundamental flaw in associating marriage with stability, and as will become apparent in Chapter 3 the State has a long history of significantly limiting the availability of divorce in pursuit of this stability[293]. The advent of divorce emerged alongside the realisation that preventing divorce does not equal preventing breakdown[294], but the fact that the law is still restrictive in terms of allowing divorce (with the inclusion of fault) may be an indication that the State has not fully let go of the idea that it can control people's behaviour[295].

It is also far from clear that the institution of marriage deserves to be placed on such a high pedestal in the eyes of the law. As we have seen, marriage has a history of being part of a system of oppression against women, and notions of patriarchal inequality form part of the groundwork that established the institution. Furthermore, the increasing number of prenuptial agreements being entered into[296], and the ease with which anyone can enter and exit[297] a marriage, throws doubt upon the assumed supremacy of the commitment alleged. Arguments supporting marriage are difficult to substantiate when we have not tried society without it[298], Logically speaking, any positive outcomes that the State would want out of a marriage would derive from the quality of the relationship itself rather than the status of marriage, but as expressed by Lord Justice Mostyn 'there is nothing printed on the back of the marriage certificate explaining what are the terms of the agreement they have just entered into[299]'.

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[293] *Ibid.* Even before divorce was available, not all couples were willing to continue to live together, there are historical records of desertion and informal separation. Though most married couples stayed together until death, there is no way of knowing how many of those did so out of a State imposed sense of duty rather than a personal desire to do so.

[294] *Ibid*

[295] Not only does promoting marriage fail in achieving the objective of social stability, there is a sense of inevitable failure with using it as a tool for the benefit of society - given that it is unlikely to succeed in continuing to uphold marriage in high numbers. Barlow and Smithson assert that the State is unlikely to be able to reverse the trends within family forms away from marriage, a trend not unique to the UK but common throughout the West. They corroborate this by pointing out that if using the law was the way to increase the number of marriages and lower the rate of cohabitation, the restrictive divorce laws in Ireland and the lack of legal acknowledgement of cohabitating relationships (before 2010) would not have led to an four-fold increase in cohabitation. Barlow and Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) Child and Family Law Quarterly

[296] It should be noted that prenuptial agreements are another aspect which could be seen as a challenge to the centrality of marriage, but a detailed discussion is outside the scope of this work. Kat Lister, 'Why Couples are Embracing the Postnup (and you don't have to be married to get one)', The Telegraph (London, 28 July 2016)

[297] Following the emergence of the Special Procedure

[298] Herring *Family Law,* p.499

[299] 'What is marriage? What should it be?' – Text of Mr Justice Mostyn's speech to the All Party Parliamentary Group on Family Law https://www.familylawweek.co.uk/site.aspx?i=ed70850 > accessed 30 December 2018

In addition, and as Diduck points out, people may mourn the loss of the nuclear family, but we must also remember its underlying values, such as patriarchy, race and class hierarchy, and the like[300]. Rake similarly contends that the modern family is a testament to a rise in tolerance and choice that was absent in past generations. People are, for example, less likely to continue to live with abusive partners or hide their sexuality. What has remained a constant is that family is the most important institution in UK society[301]. Therefore there are dangers in seeking to promote a very particular form of family life when how we define 'family' and how they operate in the modern world are far from clear.

The analysis on cohabitants and same sex relationships shows that the law's treatment of family forms varies significantly depending on the nature of the relationship and the legal label attached to it, to the extent that it can operate discriminatively[302]. The discussion on how the law has dealt with formalising the relationship of same sex couples again throws doubt on the merit of making marriage so central, and begs the question of whether we want an institution that has been framed in a way that makes it difficult to accommodate same sex relationships to be the main bureaucratic tool used to regulate family life. Extending civil partnerships to opposite sex couples would pose a real threat to this idolisation of marriage, as it would present a genuine *alternative*. With the recent *Steinfeld* case, it has been shown that a civil partnership is an institution capable of changing at a quicker pace than marriage[303] and one that people feel embodies a more equal framework. Subsequently, a system of exiting the relationship which is based on fault, which links to outdated ideology, seems *particularly* ill-suited in the context of civil partnerships. It is therefore perhaps no surprise that the requirements for dissolution are virtually the same as divorce, or the very continuation of the State's traditional view of marriage would be threatened.

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[300] Alison Diduck, 'What is Family Law For?' Current Legal Problems, Volume 64 (2011)
[301] *Great Debates in Family Law*, p.50
[302] Rob George encapsulates this idea in his depiction of a hierarchy of relationships. 'Privileged relationships' appear at the top of the pyramid, consisting of marriage and civil partnerships (though it may be argued civil partnerships are viewed less favourably). Following these there are 'accepted relationships'; where the law admits their existence and gives some (limited) legal recognition, but it is made clear that they are not the same as marriage. Then there are 'non-recognized relationships', where the law does not do anything to try and prevent them but does not get involved, like polygamy. Lastly there are forbidden relationships, such as incest. Harris-Short, Miles and George, *Family Law Text, Cases, and Materials*, p.330
[303] Though Ferguson questions 'If a couple could previously justifiably reject marriage for ideological concerns about its patriarchal nature, should they not similarly reject civil partnership and marriage as extended to same sex couples for their now heteropatriarchal nature?' Lucinda Ferguson, 'The Denial of Opposite-Sex Couples' Access to Civil Partnership as Discrimination', Journal of Social Welfare and Family Law 38 (4) (2016), p.6

Divorce law cannot be viewed in isolation. The purpose of outlining the concepts and developments which have challenged the centrality of marriage was to underline the need for reform. Separate from the legalistic arguments challenging the current law on divorce in Chapter 4, the contention here is simple. Society has seen a stark decline in the centrality of marriage, having lost a significant amount of its influence in defining and guiding human behaviour. Despite this fact, the traditional concept of marriage and the restrictive fault-based divorce law which accompanies it remains a central concept in the State's agenda. It is a matter of logic that when context changes, new understandings need to be fostered. Thus when new societal norms emerge, the law needs to follow suit. The continued centrality of marriage is used to rationalise retaining a fault-based divorce law; if the State acknowledged that marriage is no longer the ultimate bedrock of family life, divorce would not be viewed as such a destructive practice and divorce by mutual consent and unilateral divorce would logically follow[304]. Ignoring reality and denying the extent of the developments which have emerged over the last century has created a disparity that not only makes the law incoherent, but causes hardship.

Chapter 3 - Divorce Law in England and Wales: History, Evolution and Current Form

In order to undertake a comprehensive analysis of the current divorce law, it is essential to appreciate its historical development and understand the rationale behind its evolution. An exploration of the ideologies and beliefs that have influenced the progression of divorce law will shed some light on the failings of the current law. The reluctance of the State to provide easy access to divorce and its continuous endeavour to significantly limit its availability is a peculiar feature of a legal system that operates in a democratic society and falls short of what citizens would expect from a Western liberal State in the 21st century. Divorce law remains restrained by archaic ideals, placing it in stark contrast with the vast majority[305] of Family Law which has been responsive to changes to the nature of the family.

[304] That is, a pure form of divorce by mutual consent and unilateral divorce. Though England and Wales as a jurisdiction recognise both, they are hampered by unnecessary waiting periods.
[305] See discussion on cohabitation on page 28

The research question which forms the basis of this Chapter is, to what extent has current divorce law and practice been influenced by the historical development of the law? In answering this question, it is necessary to focus on *England's* past. It should be borne in mind that despite the fact that the current law, shaped by the historical account outlined below, applies equally to Wales as it does to England. The Welsh have their own unique and separate tradition of marriage and divorce. This is explored in detail in Chapter 6, and forms a significant part of the argument in favour of the devolution of divorce proposed in this work. However, to bolster the case for separate treatment, the English-focused history leading up to the current law in its unsatisfactory state must be explored.

The Pre-Legislative Position: Religious Authority

From the Catholic point of view, death was the only exit from the 'sacred union' of marriage. Catholicism does not recognise 'divorce' as the concept we understand it to be, that is, the idea that a marriage did take place but has now ended and the legal implications that once flowed from the marriage no longer apply[306]. It is therefore distinct from an annulment given by the Church, which asserts that a marriage[307] was never in existence. Pope Clement VII's refusal to grant Henry VIII the annulment he sought led to the English Reformation, where he declared himself the Head of the Church of England to obtain a decree of nullity from 'yes-men' in England[308]. It was however, the Church who retained control over the dissolution of marriage. In spite of the Reformation, England and Wales did not follow the trend amongst Protestant Europe in allowing divorce. By contrast, Scotland[309] legalised divorce in 1560 for adultery and malicious desertion[310]. Catholicism's disproval of divorce persisted even after the ascent of the Church of England; therefore there were only limited options on separation.

Under canon law, an order could be sought from the ecclesiastical court to allow a couple to obtain what was essentially a judicial separation by way of divorce *a mensa et thoro* for

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[306] William P. Roberts *Divorce and Remarriage: Religious and Psychological Perspectives* (Sheed & Ward, 1990) p. 35
[307] The 'sacrament of matrimony' as defined by Catholicism
[308] Cathy Caridi, 'If the Church Has Never Permitted Divorce, Why Did Henry VIII Expect the Pope to Give Him One?' (Canon Law Made Easy, 23 June 2016) http://canonlawmadeeasy.com/2016/06/23/church-never-permitted-divorce-henry-viii/ > accessed 22 October 2018
[309] The current law on divorce in Scotland is explored in Chapter 7, where it is discussed that Scotland continues to be more progressive than England and Wales
[310] Sybil Wolfram, 'Divorce in England 1700-1857' (1985) Oxford Journal of Legal Studies

'offences' such as adultery[311]. Subsequently, after the Duke of Norfolk's divorce in 1700, divorce became available under a Private Act of Parliament. This entailed a costly, lengthy procedure, which sometimes included a drawn out discussion on the marital relationship in the House of Commons. The cost of a Private Act of Parliament meant that this route of separation was, in effect, only available to very wealthy men. As one would expect the rate of divorce was low, with an average of 3 a year between 1800 and 1857[312].

The Development of the Legislation: Matrimonial Causes Act 1857 to the Matrimonial Causes Act 1973

The Royal Commission on Divorce reported in 1853 and advocated for the inclusion of divorce into the judicial process. Parliamentary debates followed, and in 1857 the Matrimonial Causes Act was enacted. The Act was significant in terms of encapsulating a shift towards a model of marriage based on contract rather than sacrament[313], and introducing and legalising divorce for the first time. However, it could be argued that the only meaningful change brought about by the MCA 1857 was the procedure for separation the ground for divorce remained substantially unaltered. That being, in absence of any collusion between the spouses, the respondent had committed adultery.

The position of a petitioning wife was different, having to prove her husband's incestuous adultery, bigamy with adultery, rape[314], sodomy, bestiality, or adultery together with cruelty or desertion for two years[315]. It was not until the Matrimonial Causes Act 1923 that these additional requirements for women were dispensed with[316]. Adultery remained, in effect, the sole ground for divorce until the Matrimonial Causes Act 1937. The Act extended the grounds to include cruelty, desertion for at least 3 years and incurable insanity. With the exception of insanity, the grounds were still couched in terms of 'matrimonial offences'. The petition could be refused if the petitioner had himself committed such an offence, or somehow contributed to

[311] The parties could live apart, but could not remarry.
[312] 'Divorce and Matrimonial Causes Act (UK): 1857' (Wijngaards Institute for Catholic Research) http://www.womenpriests.org/historic/18divorce.asp > accessed 21 November 2018
[313] John Witte, *From Sacrament to Contract: Marriage, Religion and the Law in the Western Tradition* (Westminster John Knox Press, 1997) p.16
[314] With someone other than his wife, since husbands could not be guilty of raping their wives until *R v R (*1991) UKHL 12
[315] Sonia Harris-Short, Joanna Miles and Rob George, *Family Law Text, Cases, and Materials* (3rd edn, OUP2015), p. 304
[316] For a detailed analysis on this point, see Ann Sumner Holmes, 'The Double Standard in the English Divorce Laws 1857-1923', Law and Social Inquiry Vol.20, No.2 (Spring 1995), p.601-620

the other's offence, condoned it, or colluded with the respondent in composing the petition[317]. This generated a peculiar result - if one spouse had committed adultery, a divorce could be obtained by the other party, but if they both committed adultery, divorce was not available[318]. This is a compelling indication of how the purpose of divorce was viewed at the time, the necessary inference being that it was regarded as a remedy for the 'innocent' against the 'guilty'. The law echoed the Christian interpretation of divorce as a question of sin, with fault constituting its very core, and discriminatory perceptions of women and the expectations imposed on them within a marriage shaping its application.

There became an increasing cultural acceptance of divorce, coupled with growing calls for it to be based on martial breakdown, even from religious bodies. Opposition remained strong, with three attempts via Private Members' Bills to introduce divorce based on specified periods of separation being defeated[319]. A breakthrough occurred in 1966, in the form of a report by the Mortimer Commission – the Archbishop of Canterbury's Group, called '*Putting Asunder – A Divorce Law for Contemporary Society'.* The report was referred to the Law Commission[320], who published a response later that year[321]. They agreed with *Putting Asunder* to the extent that the current law caused unnecessary distress to parties and their children by having to prove a matrimonial offence, and that the process was open to manipulation with divorce being available relatively easily where both parties were determined. They disagreed with the solution proposed, that the court would determine breakdown after an assessment of the evidence. The Archbishop's group even advocated for an obligation on the judge to carry out

[317] The Law Commission, 'Facing the Future: A Discussion Paper on the Ground for Divorce (Law Com No 170, 1988)
[318] Harris-Short, Miles and George, *Family Law Text, Cases, and Materials,* p.305
[319] See Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003), p. 345-345
[320] Cretney writes, '…what had originally been intended by the Church as a low-key contribution to the debate (probably not even to be published) was moved to the centre of the stage; and it was the Church which for the first time was made to appear to be advocating a reform it had traditionally opposed.' *Ibid,* p.360
[321] Law Commission, Reform of the Grounds of Divorce: The Field of Choice (Law Com No 6) (9 November 1966)

an *inquest* into the alleged facts in order to ascertain breakdown[322]. Fortunately[323], the Law Commission recognised that this would be humanly and socially undesirable[324], as well as 'procedurally impracticable[325]'. The Law Commission suggested a compromise, in that breakdown would become the sole ground but would be inferred from a number of facts instead. This compromise was subsequently enacted in the Divorce Reform Act 1969.

The Matrimonial Causes Act 1973[326] serves as the basis for the present law, and it is largely as enacted in the Divorce Reform Act 1969. The sole ground for divorce is set out in s.1 (1), and states that 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*'*. The irretrievable breakdown of the marriage must be proved at the date of the hearing, and not the date of filing the petition[327], and the couple must have been married for a period of at least one year beforehand[328]. Irretrievable breakdown in and of itself is not sufficient to obtain a divorce; one of the five facts laid out in s. 1(2) must be proved. Even if the court is of the view that the marriage has broken down irretrievably, in the absence of one of these facts a divorce will not be granted.

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[322] 'What is essential is to render the procedure of the court appropriate to making inquiry into the condition of a marriage instead of to determining the guilt or innocence of a person against whom the commission of an offence has been alleged. Under a law based on breakdown the trial of a divorce case would become in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the 'death' of a marriage relationship'. Archbishop of Canterbury's Group on the Divorce Law, Church of England, 'Putting Asunder – A Divorce Law for Contemporary Society - The Report of a Group appointed by the Archbishop of Canterbury', para 84

[323] The Archbishop's Group argued that judicial inquest was necessary so as to prevent divorce by mutual consent. It is discussed in Chapter 7 why, conversely, divorce by mutual consent should form an integral part of divorce law. In any event and on a practical level, this rationale is inconsistent with the special procedure introduced in 1973, which makes it even more difficult, if not impossible, to distinguish between the breakdown of the marriage and divorce by consent. Ann Sumner Holmes, *The Church of England and Divorce in the Twentieth Century: Legalism and Grace* (1st edition, Routledge, 2017) p.121. For a detailed discussion on Putting asunder and the Law Commission's Report as well as the Government's response to both, see pages 107-121.

[324] A more general discussion on the unsuitability of the adversarial system in the context of divorce is discussed in Chapter 4

[325] *Ibid*, para 58. However, the practical implications seemed to be the main reason why the Law Commission felt unable propose the inquest, rather than its inherent unsuitability. In the House of Lords debate following the publication of both reports, Lord Bishop of Exeter said - ''The Law Commission, having carefully considered this proposal, view it with great favour, it seems to me, and reject it only on purely practical grounds. This is what they say: … 'we are forced to the conclusion that Breakdown with Inquest as proposed by the Archbishop's Group cannot, despite its undoubted attractions and our sympathy with the principles underlying the Group's approach, be made to work because of purely practical difficulties''. Hansard, HL Deb, Vol 278, col 246, 23 November 1966

[326] As amended by the Marriage (Same Sex Couples) Act 2013

[327] *Pheasant v Pheasant* (1972) Fam 202

[328] MCA 1973, s. 1 (3) (1)

Taking s. 1(1) in isolation, a logical reading would conclude that divorce can be obtained by mutual consent; however 4 of the 5 facts set out in s. 1(2) contradicts this assumption. It would be reasonable for a lay person to assume that the irretrievable breakdown of a marriage would be sufficient to obtain a divorce; the phrase 'irretrievable breakdown' itself implies that the relationship no longer has any substance, it is merely a misleading and ill-fitted legal status. However, as the law stands the irreversible breakdown of a marriage is insufficient[329]. The facts required to substantiate the claim of irretrievable breakdown comprise a mix of fault and no-fault elements. It is quicker to obtain a divorce by proving one of the 3 'fault-based' facts, and so people who want to end their marriage without resorting to allegations of fault will find it more difficult to divorce. S.1 (2) has been accurately described as 'a mixed bag of separation and fault-based facts' which are 'at best illogical and at worst destructive[330]'.

The lingering influence of this historical and largely religious development has resulted in an inherent tension within the current law. The State has been unable to ignore the growing consensus that the breakdown of a marriage is not always a product of fault, though it only pays lip-service to this idea by introducing two grounds based on the passage of time rather than a conscious decision made autonomous adults. The remaining three fault based grounds bear a strong link to the early developments of divorce law. They hark back to a time when the Church had a dominant presence, State paternalism was the norm and the government would actively try to control behaviour and faced minimal objection. The MCA 1973 therefore lacks principle, and though some might argue that it achieves a balance by maintaining the gravity of divorce through retaining fault and allowing separation where no fault is alleged, current practice[331] illustrates that this compromise is no longer fit for purpose.

The 5 'Facts' to Establish Irretrievable Breakdown

The first fact is the respondent's adultery as set out in s. 1(2) (a) which reads; 'the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent'. A petitioner cannot rely on their own adultery, and the petitioner must also demonstrate that he or she finds it intolerable to live with the adulterous respondent. The burden of proof is on the

[329] This is demonstrated in *Buffery v Buffery* (1988) 2 FLR 365 where the couple had, over the course of their 20 year marriage, gradually 'drifted apart' and had lost the ability to communicate. Although the marriage had clearly broken down irretrievably, the wife had not shown the existence of one of the fault-based facts and therefore they had to wait to obtain a divorce based on the separation grounds

[330] N. Shepheard, 'Don't Divorce the Lawyer' The Times (London, 25 April 1995)

[331] See page 75 for a discussion on the current practice of the law

petitioner who alleges the adultery[332], as there is a presumption of innocence[333]. The adultery must be proved to the satisfaction of the trial judge[334] on a balance of probabilities[335].

The precise meaning and scope of adultery is shaped by a collection of 'old' case law. The adultery must be voluntary[336], meaning it would not encompass the rape of the respondent[337]. As to the activity encompassed under the term 'adultery', in *Dennis v Dennis*[338], Singleton LJ stated 'I do not think that it can be said that adultery is proved unless there be some penetration....if there is no more than an attempt, I do not think that a finding would be right'[339]. Thus an act of sexual intercourse is necessary though it need not be complete, but an attempt without penetration is not sufficient[340]. The adultery must be with an individual who is not the other spouse[341], and both participants must be of the opposite sex.[342] One act of adultery may be sufficient[343], and motive is irrelevant[344].

Naturally the courts have been tasked with determining precisely what constitutes adultery. Yet, to demarcate the boundaries of the requirements of adultery with such precision is a completely arbitrary exercise; how and when adultery results in marital breakdown is surely a matter of personal judgement. Whether or not 'penetration' occurred will not affect or alleviate the betrayal felt by a husband or wife and the law cannot dictate people's feelings. Everyone has their own limits and will respond differently to extra-marital relations in whatever form, but the notion that the State or the courts should determine exactly when a husband or wife has 'crossed the line' so to speak, is a remarkable intrusion into a very private part of an individual's personal life. In addition, the requirement of the third party being of the opposite sex, even in

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[332] *Marczuk v Marczuk* (1956) P 217
[333] *Owen v Owen* (1831) 4 Hag Ecc 261
[334] *Watt (or Thomas) v Thomas* (1947) AC 484
[335] *Blyth v Blyth* (1966) AC 643
[336] *Redpath v Redpath and Milligan* (1950) 1 All ER 600 (CA)
[337] However, when sexual intercourse is established, the burden of proof is on the respondent to show that it was not consensual
[338] CA 17 (1955)
[339] *Ibid*, p. 153, 160
[340] Lesser sexual acts, even those that might result in conception, are also insufficient though they may satisfy the behaviour fact
[341] *Chorlton v Chorlton* (1952) p. 169
[342] Sexual activity with someone of the same sex may again satisfy the behaviour fact. This is also true for civil partnerships, as adultery is not available as a fact for dissolution - due to s.1(6) MCA 1973, and the long-standing common law definition of adultery as outlined above
[343] *Douglas v Douglas* (1951) P 85
[344] *Woolf v Woolf* (1931) P 134 (CA)

same sex marriages, is patently irrational[345]. The arbitrariness of the above case law on the proscribed requirements appear to flow directly from the non-justiciability of the issue, and reflects a narrow perception of marriage, embodied by Lord Penzance's definition in *Hyde v Hyde and Woodmansee*[346]; 'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.

The second element of the adultery fact is that the petitioner must find it intolerable to live with the respondent adulterer, the test being subjective[347]. It would be logical to assume that this second element hinges on the first, that the intolerability has to arise as a consequence of the adultery, and this was how s.1(2) (a) was initially interpreted[348]. However in *Cleary v Cleary*[349], the Court of Appeal established that it is not necessary to show that the reason the petitioner cannot live with the respondent is *because* of the adultery. A husband or wife may forgive their spouse, but subsequently the relationship breaks down for a different reason. Or the adultery may have been the 'final straw'. Adultery and intolerability are therefore two 'separate and unrelated' facts[350].

A respondent can rely on the irretrievable breakdown of the marriage so long as the spouse has been unfaithful – even if this is wholly unrelated to the breakdown. Few would dispute that this is nonsensical. The intolerability requirement therefore becomes a largely academic point. This peculiarity is qualified to a certain extent by s. 2(1), which states that if the parties have lived

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[345] The Government could easily fill this lacuna in the law with legislation, as Bamforth writes '…whatever the sex of the parties, the law is seeking to deal with the consequences of sexual infidelity within a relationship, and one might imagine - given that other aspects of the law governing marriage have been adapted to cover same sex relationships - that a more flexibly phrased but directly analogous concept to adultery could have been included within the legislation'. The Government's inaction implies the continuation of a status-based (see Chapter 6) and traditional concept of marriage. This is because rectifying this anomaly would require a discussion about gay sex – something the Government might not want to contemplate. In discussing the fact that a civil partnership cannot be ended for non-consummation or venereal disease, Bamforth alludes to this point; 'Other than the marginally greater difficulty of defining non-consummation in the case of a same sex relationship, and the distaste perhaps felt by parliamentarians about specifying the various forms of transmissible sexual infection, no obvious reason has been offered for these drafting differences'. Nicholas Bamforth, 'The Benefits of Marriage in All but Name? Same sex Couples and the Civil Partnership Act 2004', p.137

[346] (1866) 1 P. & D. 130, page 133

[347] *Goodrich v Goodrich* (1971) 2 All ER 1340

[348] *Roper v Roper* (1972) 1 WLR 1314,1317

[349] (1974) 1 WLR 73

[350] *Ibid*

together for 6 months after the adultery then the petition cannot be based on that fact[351], presumably to give the couple an opportunity to reconcile[352]. The inclusion of the additional element of intolerability is perhaps an attempt to reconceptualise adultery as a symptom of breakdown rather than a cause, but the law's insistence on retaining adultery as a ground for divorce whilst attempting to lessen the stigma historically attached to it creates a strange and senseless provision.

How adultery is proven varies according to whether the petition is defended or undefended. If the petitioner answers yes to the question 'Do you admit to the adultery alleged in this petition?' in the acknowledgement of service form, the court will as accept this as sufficient proof of the adultery alleged. In defended cases, the petitioner has to prove the adultery on a balance of probabilities[353], and the court will require evidence of an opportunity to commit adultery as well as an inclination or passion to commit[354], though they are not bound to infer adultery from this[355]. It is generally not possible to rely on direct evidence; it may be disbelieved purely because it purports to be direct evidence[356]. The courts will instead infer adultery from circumstantial evidence, for example through cohabitation, or evidence of intimate association such as time spent alone together[357]. The courts have developed a complex set of rules regarding proof of adultery. Despite the elimination of the phrase 'matrimonial offence', it seems that the substantive law and its jurisprudence directs the court to investigate adultery where disputed with a similar vigour as it would a crime[358]. This is despite the fact that the adultery must only be proved on the balance of probabilities, and the criminal standard is no longer applicable.

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[351] 'Together' meaning in the same household (s. 2(6)) MCA 1973. In *Kim v Morris,* the wife obtained a decree nisi after relying on her husband's adultery but they resumed cohabitation for 4 years before their final separation. The court refused her application for the decree nisi to be made absolute; being of the view that it had no discretion as s. 2(1) effectively creates an absolute bar if the parties cohabit for more than 6 months - *Kim v Morris* (2012) EWHC 103

[352] If it is a case of an ongoing affair, the clock will run from the last act of adultery. The petitioner must also have knowledge of the affair, suspicion is insufficient. *Carr v Carr* (1973) 1 All ER 1193

[353] *Blyth v Blyth* (1966) 1 All ER 524

[354] *Cox v Cox* (1958) 1 All ER 569

[355] *England v England* (1953) P 16. If the wife has given birth to a child who is not the husband's, this will constitute sufficient evidence - *Preston-Jones v Preston-Jones* (1951) 1 All ER 124

[356] *So*pwith *v Sopwith* (1859) 4 Sw & Tr 243

[357] *Ross v Ross* (1930) AC 1

[358] A comparison between divorce law and the criminal law is explored in Chapter 4

In the same vein, a named third party with whom the respondent has committed adultery can be brought into the proceedings as a co-respondent. However the Family Procedure Rules 2010 recommends that this person should not be named unless the petitioner believes the respondent is likely to defend the proceedings[359], and practitioners actively dissuade this in fear of prolonging proceedings[360]. This, as we will see further on, is only one of the several examples of how the practice of the law has swayed from the legal doctrine in order to accord with modern societal views. Nevertheless it shows how, generally speaking, divorcing couples do not feel the need to draw out further conflict by investigating adultery even though the opportunity to do so exists.

The second fact a petitioner may rely on to establish irretrievable breakdown, the successor of the cruelty ground[361], is set out in s. 1(2)(b); 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'. This is the fact that is often, but misleadingly referred to by the shorthand 'unreasonable behaviour'[362]. The extensive review of s. 1 (2) (b) in *Owens v Owens*[363] is as significant as it is illuminating[364], so much so that it merits its own, separate Chapter[365]. An assessment of the 'old' case law is nevertheless important to be able to fully appreciate the impact of *Owens* and to gain a thorough understanding of the reasoning employed by the Supreme Court. In addition, the judgement (though perhaps reluctantly) followed the previous case law despite calls for divergence and so it remains relevant for the time being.

The requisite unreasonableness in the behaviour fact, does not relate to the behaviour itself, but rather the expectation that the petitioner should have to continue to live with the respondent. In *Bannister v Bannister*[366], Lord Justice Ormerod was of the view that the Trial Judge had fallen into the 'linguistic trap' of s. 1(2) (b), being that it requires 'unreasonable behaviour'.

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[359] Family Procedure Rules 2010, Practice Direction 7A
[360] Carla Ditz, 'Adultery and Divorce – Naming and Shaming' (Family Law in Partnership Ltd, September 4 2017) https://flip.co.uk/adultery-divorce-naming-shaming/ > accessed 22 November 2018
[361] John Haskey, 'A History of Divorce Reform in England and Wales: Evolution, Revolution or Repetition?' Fam Law 1407 (2018)
[362] This shorthand will nevertheless be used throughout this thesis, not least because it appears to be a common and accepted practice in the literature.
[363] *Owens v Owens* (2018) UKSC 41
[364] As some commentators have said – it was as if the behaviour fact was itself on trial - Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal
[365] A detailed analysis is reserved for Chapter 5, as the case holds a distinct place in the development of the law due its contemporary nature and some of judges' comments about the behaviour fact and divorce law generally
[366] (1980) WL 148440

He declined the wife a decree nisi on this basis[367], because behaving in a way that makes it unreasonable for the petitioner to be expected to live with the respondent is a 'significantly different concept'. An ample set of case law establishes a wide spectrum of conduct that is considered to fall under the ambit of s. 1(2) (b). An example of a case at one end of the scale is a husband's campaign of attrition to get the wife out of the matrimonial home[368]. At the other end, the commencement of overambitious home improvement projects such as leaving the bathroom without door for 8 months[369]. Where the respondent suffers from mental illness or a disability, a positive element - the respondent's 'involuntary' behaviour caused by the illness is sufficient for the requisite behaviour, as well as a negative element; their inactivity[370]. The illness will be evaluated without reference to its involuntariness if the effect is still that the petitioner cannot reasonably be expected to live with the respondent[371].

Whereas the second element of the adultery fact – the intolerability, is a definitively a subjective test, the position as to the second element of the behaviour fact – whether the petitioner cannot reasonably be expected to live with the respondent, is more complicated. *Owens* confirms that it is a hybrid. *Prima facie*, it is an objective test; whether a right-thinking person would conclude that the petitioner could not reasonably be expected to live with the respondent[372]. However, consideration will be given to the history of the marriage[373], the particular parties in the proceedings and their personalities[374], and the petitioner's character and sensitivity[375]. In *Ash v Ash*[376], it was said that if the petitioner has provoked the respondent or they have themselves behaved unreasonably, this will negatively affect the assessment of the impact of the respondent's behaviour on them. This was expressed in rather disturbing terms by Bagnall J, stating that 'It seems to me that a violent petitioner can reasonably be

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[367] Rather remarkably - as her husband was ignoring her completely and was living an entirely independent life
[368] *Stevens v Stevens* (1979) 1 WLR 885
[369] *O'Neill v O'Neill* (1975) 1 WLR 1118
[370] This was held in *Thurlow v Thurlow* (1976) Fam 32, where the wife suffered from epilepsy and a severe neurological disorder which made her 'unable to perform the role of a wife in any respect' (Rees J)
[371] *Katz v Katz* (1972) 3 All ER 219. Ironically, this contradicts the sentiment 'in sickness and in health' in the widely-used Church of England marriage vows, taken by a couple when they 'make their promises and receive God's blessing' - 'The Marriage' (Church of England) https://www.churchofengland.org/prayer-and-worship/worship-texts-and-resources/common-worship/marriage#mm093 > accessed 22 November 2018
[372] *Livingstone-Stallard v Livingstone-Stallard* (1974) 2 All ER 766
[373] *Buffery v Buffery* (1988) 2 FLR 365
[374] *O'Neill v O' Neill* (1975) 3 All ER 289
[375] *Jamieson v Jamieson* (1952) 1 All ER 875
[376] (1972) Fam 135

expected to live with a violent respondent[377]'. Under s. 2(3) of the MCA 1973, the fact that the parties have lived together for less than 6 months from the date of the last event relied on is to be disregarded in the assessment of whether it is reasonable for the petitioner to continue living with the respondent[378].

The same fundamental objection to the adultery fact can be made against the behaviour fact, in that any determination by the court of what constitutes the required behaviour will be arbitrary. In *Balraj v Balraj*[379], the assessment of reasonableness was summarised as follows; when the subjective element has been evaluated, the question falls to be determined by an objective test. The presence of this objective element is what makes s. 1(2) (b) problematic. Value judgements and moral reasoning are inevitable where objectivity is involved. The crux of the matter, whether the petitioner should continue to live with the respondent, is a decision that is deeply personal. The objective element also introduces incoherence into s. 1(2) (b). It has been established that the unreasonableness relates to the expectation on the petitioner to continue living with the respondent, but the line between an objective finding of unreasonableness of this expectation and an outright determination of the unreasonableness of the behaviour itself is blurred at best. In other words, the court essentially makes an indirect finding of the inherent unreasonableness of the behaviour[380]. The way the behaviour fact operates therefore has an authoritarian quality; it essentially directs the courts to adjudicate on how married couples are to behave towards each other and to identify the acceptable parameters of the burdens of married life.

The last of the facts commonly referred to as 'fault-based' or considered to have originated in the 'old law of divorce[381]' is desertion. Namely, that 'the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition[382]'. Desertion means the destroying of the 'consortium vitae' of marriage without the consent of the other party or without justification. Two elements must be present, the first is

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[377] *Ibid*, para 140
[378] As with the adultery provision on the relevant of cohabitation, it is likely that the rationale for this is to allow for reconciliation. However, unlike adultery, there is no absolute bar if the cohabitation exceeds 6 months, though it may be relevant to the assessment of reasonableness -*Savage v Savage* (1982) 3 WLR 418
[379] (1981) 11 Fam Law 110
[380] Some might have argued such an observation is superfluous given the willingness of the courts to accept 'trivial' incidents of behaviour in practice, but the outcome of *Owens* and the level of detail employed by the Trial Judge when adjudicating on the specific allegations challenges the validity of this opinion
[381] Harris-Short, Miles and George, *Family Law Text, Cases, and Materials,* p. 572
[382] S. 1(2) (c) MCA 1973

the physical separation and the second is the intention to end the matrimonial union[383]. The physical separation required entails a withdrawal from a state of things[384], meaning the concept of a shared 'household', so a spouse may desert the other even if living under the same roof[385]. A party can only be said to have deserted his or her spouse where there is no justification for the departure, and such cause must be 'grave and weighty' for justification to be found[386]. Where there is such justification, the party who left may be able to petition for divorce on the basis of 'constructive desertion' – where one party's conduct drives the other away.

Similar to the behaviour fact, this entails an objective judgement as to what the deserting party is required to tolerate before leaving. The main problem with the desertion fact is the requirement of showing the existence of the intention to desert throughout the 2 year period. As one would expect this is very difficult to prove. A spouse may have left for 2 years but failed to form the required intention until later on in their absence. It is therefore not surprising that this fact is seldom relied upon[387]. Thus the only worthwhile criticisms that can be made of this fact relates to its ineffectiveness. It only serves as a reminder that the law, along with the first two facts, cannot escape the 'continued longstanding practice of implying guilt to one party[388]' as part of its constant bid to uphold the institution of marriage by restricting the availability of divorce.

The Divorce Reform Act 1969 did however, introduce two new grounds based on periods of separation that can accurately be described as 'fault-free'. S.1 (2)(d) MCA 1978 provides that the divorce can be sought if it can be shown '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...and the respondent consents to a decree being granted'. Or, pursuant to s. 1(2)(e), 'the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition'. The key difference is the requirement of consent for the 2 year period. The case law has specified that this consent must be made positively, rather than inferred from lack of objection[389], must be full and informed[390] and exist

[383] *Lang v Lang* (1955) 1 AC 402, 417
[384] *Pulford v Pulford* (1923) P.18 at para 21, Lord Merrivale
[385] *Le Brocq* v *Le Brocq* (1964) 1 WLR 1085
[386] *Yeatman v Yeatman* (1868) 1 P&D 489, 494
[387] As explored on page 182
[388] John Haskey, 'A History of Divorce Reform in England and Wales'
[389] *McGill v Robson* (1972) 1WLR 237
[390] MCA 1973, s 2(7)

at the time of the decree[391]. The 5 year separation ground does not require consent or wrongdoing, but it means a petitioner will have to wait half a decade to obtain a divorce if unable or unwilling to show fault where the respondent refuses to give consent.

S. 2(6) states that the husband and wife shall be treated as 'living apart' unless they are living with each other in the same household. The Act's use of the words 'household' instead of 'house' was interpreted in *Santos v Santos*[392] to refer to a special tie between two people, and so it requires something of more substance than mere physical separation. Sachs LJ was of the view that the court must look for the termination of this 'consortium' first, before looking at physical separation. In other words, the parties cannot be said to be living apart whether 'both parties recognise the marriage as subsisting'[393]. The insertion of this mental element by Sachs LJ is questionable, as there is no mention of this in the legislation. What this means however, is that it is possible to be living under the same roof but not in the same 'household' because the parties are effectively leading separate lives. The case law here varies according to particular facts[394], but the provision has potentially harsh consequences for couples who cannot afford separate accommodation[395].

The introduction of two grounds based on periods of separation rather than fault was certainly progressive, but this was diminished slightly by case law interpreting the words in the legislation conservatively. The above case law on separation allows the court, at least in theory[396], to undertake a detailed examination of the facts as they are directed to do so with the fault-based facts, and place a marriage under a microscope to determine whether the parties 'deserve' a divorce. As mentioned, these time periods are also unreasonably long[397].

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[391] *Beales v Beales* (1972) Fam 210
[392] (1972) Fam 247 (CA)
[393] *Ibid*, paras 260-263. The recognition that the marriage is no longer continuing, but is rather a 'mere shell', need not be communicated to the other party
[394] For example where the husband and wife lived in the same accommodation but did not speak, eat or sleep together, it was deemed to amount to 'living apart' - *Hollens v Hollens* (1971) 115 SJ 237. However, a couple who continued living in the same house and carried on with normal domestic life for the benefit of their children were held not to be 'living apart' for the purpose of the act - *Mouncer v Mouncer* (1972) 1 WLR 321 (Fam Div)
[395] Herring, Probert, Gilmore, *Great Debates in Family Law* (1st edn Palgrave Macmillan 2012), p.34
[396] As we shall see, the practice of the law has proven different with procedure for divorce effectively preventing most judges from doing more than mere 'rubber stamping'
[397] This becomes even more evident when considering that a couple just across the border in Scotland can expect to obtain a divorce in as little as 6 months if they both consent - 'Getting Divorced' Citizens Advice Scotland (https://www.citizensadvice.org.uk/scotland/family/relationship-problems-s/getting-divorced-s/) > accessed 22 November 2018. A full comparative analysis with Scotland commences at page 180

The very idea that there are defences to divorce available is fairly unsettling; one party wants out, but the other can take action to prevent this, leaving the petitioner effectively trapped. In practice however, these defences are usually used to provide bargaining power to one party, to postpone the divorce until a desirable settlement is reached. One such defence is the hardship defence[398], available if the divorce proceeds on the 5 year separation ground. The respondent must show the divorce would result in grave financial or other hardship to them and it would be wrong in all the circumstances to grant the divorce. The courts are generally reluctant to grant defences and therefore they are extremely difficult to successfully obtain[399].

The Failure of the Family Law Act 1996

Unsurprisingly, the dissatisfaction with the needlessly adversarial 'facts' prompted ideas for reform. Accordingly, by 1990, the Law Commission suggested that a conciliatory system should be introduced[400]. This prompted the Conservative Government to enact Part II of the Family Law Act 1996, now repealed by s.18 of the Children and Families Act 2014. The final version of the Act was described as a 'dog's breakfast'[401], and bore little resemblance to the Law Commission's original proposals.

The procedure proposed was complex in comparison to the simple scheme envisaged by the Law Commission. It prescribed a greater role for mediation, and tried to incorporate 'information meetings' as part of the process. Whereas the Law Commission suggested that mediation be used to finalize any issues surrounding the division of assets and care for children, and that the waiting period was to serve an evidential purpose, the Act set out a system clearly aimed at 'marriage saving' and a waiting period aimed at reconciliation[402]. The failure of the Act was largely a result of the failings of the pilot studies trialling the service of counselling

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[398] S.5 MCA 1973

[399] Harris-Short, Miles and George, *Family Law Text, Cases, and Materials*, p.224. It should be noted that the difficulty in arguing defences to divorce contrasts with the difficulty in obtaining a divorce in the first place. This may allude to a tension in the law between, one the one hand, the State's desire to limit the availability of divorce, and on the other, the modern acceptance of the fact that a marriage has come to an end when one party asserts it

[400] Whereby divorce could be obtained by parties registering then waiting a year for 'a period of reflection and consideration', where parties were to be encouraged to use mediation. This was to replace the 'facts' as the means of showing the irretrievable breakdown of the marriage - The Law Commission, 'Family Law: The Ground for Divorce (Law Com 192,1990)

[401] Herring, Probert, Gilmore, *Great Debates in Family Law*, p.13

[402] An applicant was only able to make a 'statement of marital breakdown' following these information meetings which incorporated mediation, and then further on in the process they would be presented with marriage counselling facilities

facilities and 'information meetings', which failed to 'meet the Government's objectives of saving marriages or helping divorcing couples to resolve problems with a minimum of acrimony[403]'.

Extensive critical commentary followed, with several theories as to why the reform failed. Arguably however, the inevitable failure of the proposals could have been predicted prior to the pilot studies, due to the incompatible objectives set out and a fundamental misunderstanding of the nature of mediation, which is only truly effective when undertaken freely. The creation of the information meetings neglected the intricate realities of divorce. Their uniform nature was ill-equipped for the variety of situations encompassed by divorce, and their timing in the divorce procedure rendered them ineffective as most couples had already made a firm and informed decision to divorce by the time they came into play[404]. The involvement of pressure groups and 'the opportunity which the British law-making process gives to those concerned to promote a particular interest'[405] resulted in a complex, unsatisfactory scheme.

Several commentators provide a deeper analysis of the reform's failure. For example, according to Reece, the Act expressed a desire for couples to take responsibility, but it introduced a new form of responsibility not measured by an individual's level of self-control, but rather by their level of self-awareness and capacity for reflection. In this context, where there was an attempt to control behaviour and a clear push towards a particular action, that being the rescue of the marriage, it presented us with a paradox of the individual. This individual has no will, but yet must decide on his own. The divorcee must make a decision, but his decision is not real and so does not warrant respect. The effect of this theoretical shift was that every divorcing couple was found lacking, creating a system that was 'uniquely intrusive and judgemental[406]'. This highlights the underlying tension present in the FLA 1996 that was ultimately responsible for its downfall; between how the State would like people to live their

[403] Herring, Probert, Gilmore, *Great Debates in Family Law*, p.14
[404] In addition, as valuable as mediation can be, it serves a distinct function and will not be appropriate in every case. The values underpinning the reform; trying to direct couples to divorce responsibly and attempting to encourage reconciliation, were unattainable in their own right, and conflicting when combined.
[405] Steven Cretney, 'Breaking the Shackles of Culture and Religion in the Field of Divorce) in K.Boele-Woelki (ed.), *Common Core and Better Law in European Family Law* (Intersentia, 2005)
[406] Helen Reece, 'Divorcing Responsibly' (2000) 8 Feminist Legal Studies 65

lives and the reality of it. As the Advisory Board on Family Law noted, there are limitations to legislation that aims to bring about social change[407].

In a similar vein, Eekelaar draws attention to the inconsistency between treating divorcing couples as if they had freedom of choice and effectively denying any real choice at all. He also observes that the decision to withdraw the reform proposals set out in the FLA was expressed by the Government in terms of a failure to 'get the message across', indicating a tendency to take the correctness of its policy as a given[408]. This policy includes 'taking responsibility' for one's actions in divorce, meaning conforming to ideas about the desirability of marriage[409]'.

The implementation of the FLA project was a fiasco, but the logic that spurred reform came from a progressive idea; that we should move to a system than removes the allocation of blame and the added animosity that comes with it. The failure of the FLA is perhaps a good indication of the deep-seated strength of the ideals and attitudes evident in previous developments outlined above, and of how unwilling the State is to let them go completely.

Divorce Procedure

The Special Procedure was introduced in 1973 and was extended to all undefended divorces in 2011. The reality of modern divorce cannot be understood without a strong grasp of this procedure, as it generates a practice far from what would logically follow from the substantive law. It is effectively only in defended cases that the judge can follow the detailed directions envisaged by the case law that corresponds to the substantive law. A deeper analysis of this procedure is undertaken in Chapter 4, where there is an overall evaluation of the current law.

The MCA 1857 placed an inquisitorial duty on 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[410]'. The court's ability to carry out this function is necessarily limited when the petition is undefended as the evidence presented by the petitioner is not challenged. Long before the introduction of the Special Procedure, undefended cases constituted the vast majority of divorces. Therefore even when such cases required a hearing in open court, they would only take a few minutes as they were 'speedily processed by Special Divorce Commissioners masquerading as High Court

[407] Advisory Board on Family Law, *Fourth Annual Report, 2000/01*
[408] Such a policy bears a strong link to the status-based view of marriage explored in Chapter 6
[409] John Eekelaar, 'Family Law: Keeping us 'On Message'' 11(4) Child and Family Law Quarterly 387 (1999)
[410] This is now contained in s. 1(3) of the MCA 1973

Judges[411]'. Nonetheless, some comments made by judges in appellate decisions emphasised the importance of judges making factual findings even when the petition was undefended[412].

The introduction of the Special Procedure did bring about a fundamental change in the practice of the law. However, it would be wise not to overstate its significance as facets of a divorce law based on religious and status-based understandings of marriage continue to surface throughout law and practice. Defended divorces have long been a rare occurrence, but when a defended divorce does proceed, the respondent is entitled to a 'proper opportunity to put his case[413]'. Findings of fact should be made and a more senior level of judge should hear the case[414]. In addition, the inquisitorial power still exists for undefended cases by virtue of s.1 (3) MCA 1973[415].

It is also worth bearing in mind that the introduction of the Special Procedure was not prompted by a belief that the divorce process should become more administrative. Rather, the economic strain of the time caused the Government to announce there would be little or no increase in expenditure on legal aid for the next few years and the Lord Chancellor concluded that divorce was the most appropriate area to make savings[416]. In any case, the very idea of giving the judiciary an inquisitorial function in this context is senseless and crass[417].

Setting aside the reasons for the extension the Special Procedure, the subsequent decline in court hearings for divorce must be welcomed. The fact that the legal system in England and Wales is thought to be traditionally adversarial provides ammunition for the fault-based facts to aggravate bitterness[418]. A public recital of details of marital breakdown, especially when the

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[411] C.Gibson, *Dissolving Wedlock* (London: Routledge, 1994), p. 175

[412] *Santos v Santos* (1972) Pam 247, 263. And the inquiry remained within the domain of the senior judiciary even after the 1969 legislation.

[413] *Price v Price* (2014) EWCA Civ 665, para 42, per Judge Oliver. In *Price* itself, the Court of Appeal criticised the Trial Judge for his approach as being 'too robust', in finding that husband had not posted an answer to the petition when he did, without a witness Statement from the husband and/or oral evidence

[414] Therefore, in the exceptional case where a divorce is defended the court must carry out its inquisitorial role, as demonstrated in *Owens* (Chapter 5)

[415] Despite the recommendation of its repeal by the Booth Committee - Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (1985), para 2.13, and despite the fact that it effectively no longer serves any useful purpose

[416] C.Gibson, *Dissolving Wedlock*, p.178

[417] As the Law Commission noted, the courts 'should not merely bury the marriage but do so with decency and in a way which will encourage harmonious relationship between the parties and their children in future' - The Law Commission, 'Reform of the Grounds of Divorce: The Field of Choice' (Law Com No 6, 1966), para 17

[418] A detailed examination on the form of procedure that should regulate the divorce process is outside the scope of this thesis, however it is suggested that a 'system of non-litigious judicial administration' such as those used in guardianship and adoption proceedings, which are designed to generate positive outcomes for the spouses and

adultery or behaviour facts are relied on, is humiliating for the parties[419]. The argument in support of system centred on proving one of the facts in the context of an adversarial system because it serves to reinforce that divorce is serious business, is undermined by the fact that it is rare for a divorce not to be granted[420]. It borders on absurdity that 'we use the same kind of apparatus to resolve the problems of marital interaction, the subtle crucial encounters between people in intimate association as we do to determine responsibility in law for collisions between motor cars[421]'. Despite the divorce process becoming increasingly less exposed to the adversarial court system, *Owens* demonstrates that the opportunity remains, and the very nature of the fault-based facts means that an element of adversarialism is inevitable[422].

Regardless of whether a petition is defended or not, it will proceed in two stages. Once it has been established by the court that the petitioner is entitled to a divorce[423], the judge will issue a decree nisi. The petitioner must wait 6 weeks before he or she can apply for the decree to be made absolute, which concludes the divorce process[424]. Another peculiarity of the law which serves as a reminder of the conservatism of the past is the continued existence of the Queen's Proctor, who may interfere in the process between the decree nisi and the decree absolute. The Queen's Proctor is a crown officer who represents the public interest to investigate individuals who try and evade the substantive law[425]. The existence of the office emphasised the public concern and sacrosanct nature of the marriage[426], therefore the fact that this official can still intervene and oppose a divorce today demonstrates how a heavily status-based conception of marriage, viewed as a public institution rather than a private one, is still favoured by the State[427].

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children, would be a better alternative. O.Kahn-Freund, 'The Law Commission: Reform on the Grounds of Divorce. The Field of Choice', The Modern Law Review, Vol. 30, No. 2 (March 1967), pp. 183

[419] Elizabeth Elston, Jane Fuller, Mervyn Murch, 'Judicial Hearings of Undefended Divorce Petitions' (1975) The Modern Law Review, Volume 38

[420] *Ibid*, page 639

[421] Bill Mortlock, *The Inside of Divorce* (1972) (Constable) p.36. The theoretical links between divorce law and the criminal law is discussed in Chapter 4

[422] An examination of fault or conduct to the same degree as is undertaken with divorce is absent in the rest of Family Law, which recognises the inappropriateness of the adversarial system in the context of family matters

[423] Either by examining the evidence or after a defended trial has been carried out

[424] During this period the parties can file a consent order dealing with any financial arrangements, or an appeal against the decree nisi may be lodged. S. 9 (2) of the MCA 1973 States that if the petitioner fails to apply to make the decree absolute in three months, the respondent can apply for it to be made absolute or that it be rescinded

[425] Historically its role was mainly to seek out evidence of collusion when this was a bar to divorce

[426] See Chapter 6 for an analysis of the status-based conception of marriage

[427] For example, *Rapisarda v Colladon* (No 2) (2014) EWFC 35

Conclusion: The Lingering Effect of the History of Divorce on the Current Law

What emerges as a running thread in the development of the legislation is a relentless inclination towards limiting divorce so far as possible, the upshot being that divorce is conceptualised in the most negative terms, as a symptom of moral decay or cause of social dislocation. The substance of divorce law is a reflection of the State's understanding of the nature of marriage, and the development of divorce law is illuminating in this regard. The fact that calls for reform in the mid-1960s ran parallel with a growing religious acceptance of divorce, and the report that spurred such change[428] was backed by religious authority arguably demonstrates that the perception of marriage and the Christian faith are tightly intertwined.

Adultery remained the only ground for divorce until 1937. A parallel may be drawn between the significance placed on this ground alone and how adultery in portrayed in the Bible. In the Old Testament, the definition of adultery only covered women who were unfaithful[429]. In the New Testament, it extended to men engaging in sexual relations with women other than their wives[430]. It was this pattern that the law followed by waiting until 1923 to put women on equal footing. Of course, adultery may be viewed unfavourably from a purely moral rather than religious standpoint but its depiction in the bible as a 'sin against God[431]' and the gravity the law has attached to it suggests that it is the religious view that has heavily influenced the substantive law[432].

Furthermore, other links may be drawn between the historical development and the current law which show that the law has come full circle to a certain extent. As discussed, when divorce law emerged it was only available to wealthy men. In the very recent *Owens* case, it is no coincidence that it was a wealthy man who was able to prevent a divorce petitioned against him. The cost of defending a petition means that it is an option open only to the well-off, which adds to the inconsistency inherent in the law. In addition, the historical lack of gender equality

[428] Despite proposing an inquest, it advocated for a divorce law based on the breakdown of a marriage. Holmes *The Church of England and Divorce in the Twentieth Century: Legalism and Grace*, p.118
[429] For example, Exodus 20:14
[430] For example, Matthew 19:9
[431] Genesis 39:7-9
[432] The fact that adultery remains a ground for divorce illustrates how reluctant the law is to cut ties with this religious dogma, though it is fair to assume that people do not regard adultery with the same dismay as they used to. We have evolved to be able recognise that people have affairs for a variety of reasons, and the situation is never as black and white as the law would have it. Thus it is perhaps inevitable that the current law is unsuitable for what is now a largely secular, more accepting society.

still lingers in the current law. The Trial Judge's treatment of the allegations put forward by Mrs Owens[433], echoes a perception of marriage rooted in patriarchy and gender inequality[434]. In addition and as discussed in greater detail in Chapter 7, the current divorce law in Scotland is significantly more progressive than its English and Welsh counterpart[435], and this has been the case historically[436]. Though an irony rather than an analogy, it is interesting to note that where at one time collusion prohibited divorce, it is now effectively a requirement if couples want a divorce quickly but cannot or will not rope in fault due to the extent of the disparity between the practice of the law and how it exists in the statute[437]. The problems caused by this disparity is explored in greater detail Chapter 4 and forms a part of the argument for devolving divorce law to Wales advocated for in the Chapter 6.

Characterising the change that occurred in the 1960s as 'liberalisation' as some have[438], is possibly misleading. It was not due to marriage being seen as any less significant. It remained the 'gold standard', and the ideal groundwork for the establishment of the 'the nuclear family'. In what appeared to be a tug of war between proponents of reform to relax requirements for divorce and those in opposition, both sides maintained the policy that it was the strengthening of the institution of marriage that was the overriding aim[439]; the disagreement was merely about the methods used to achieve this[440]. The Law Commission's report in 1966 explicitly noted that the aims of reform were to 'buttress, rather than to undermine, the stability of marriage[441]'. Furthermore, the Government's consultation on reform asserts in the executive summary that 'marriage is a solemn commitment, and the process of divorce should reflect the seriousness of the decision to end a marriage[442]'.

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[433] For example the characterisation of her as having been *'*more sensitive than most wives*'*, and that Mr Owens was 'somewhat old-school'- *Owens v Owens* (2018) UKSC 41, para 20

[434] A further exploration of which, including references in Lady Hale's judgement is found on page 121. It also took until 2000 (*White v White* 2000 UKHL 54) for divorce to stop favouring men when calculating maintenance, being calculated on needs and so putting the usually less-wealthy female spouse at a disadvantage by failing to give sufficient recognition to domestic contributions

[435] Discussed in Chapter 7

[436] With Scotland legalizing divorce in 1560 - almost three centuries before the MCA 1857

[437] The very idea of collusion be irrelevant if fault was removed from the system

[438] For example, 'A Brief History of Divorce' The Guardian (London, 19 September 2009)

[439] And thus maintaining a status-based view of marriage (Chapter 6)

[440] Factors that led to reform were a concern that there were an increasing number of children being born outside of marriage, an acceptance of the reality that there was no real barrier to divorce if both parties wanted it, and the realization that so-called 'matrimonial offences' were symptomatic of breakdown rather than the cause

[441] Law Commission, Reform of the Grounds of Divorce

[442] Ministry of Justice Consultation Paper, page 5

Putting marriage on such a high pedestal has remained the constant. Even some calls for reform are often couched in terms of strengthening the institution of marriage[443]. Despite the changes that have taken place since the ascent of the legal concept of divorce in the 1800s (albeit insufficient), developments have been hindered by a constant pull in the direction of upholding the status of marriage, therefore we must now turn to an exploration of the problems that have arisen from giving this institution such unwavering protection.

Part 2: Current Divorce Law – The Failings of a Fault-Based System

[443] For example, Lady Hale in Frances Gibb, 'Top Judge Baroness Hale Calls for No-Fault Divorce' The Times (London, April 24 2018)

Chapter 4 – Challenging the Preservation of Fault in Divorce Law

The idea of fault, assigning blame and responsibility for the dissolution of a marriage, interacts with the current law on divorce in a complex and intricate way. The advent of the Special Procedure, the practice of the lawyers, changing attitudes towards marriage and family responsibility, have all contributed to a decline in fault's presence as the centre piece of divorce. However, in the absence of specific legislation to reform the law, couples who seek divorce remain bound to rely on a vehicle which is over 40 years old[444], and one which retains religious

[444] Tony Roe, 'Opinion: At Fault on No-Fault Divorce', Law Society Gazette (March 2017), https://www.lawgazette.co.uk/commentary-and-opinion/at-fault-on-no-fault-divorce/5060088.article > accessed 10 March 2019

and archaic considerations through the inclusion of fault. The importance of two grounds based on the passage of time; two year separation with consent and five years separation without consent[445], rather than any form of culpability, should not be underestimated, but the problems that arise from the fault-based grounds are still substantial. This Chapter will shed light on the true magnitude of *Owens*, the focus of the following Chapter, for it serves as a bleak and blatant reminder that fault is still the dominant principle within the divorce process, and that the divorce petition is ultimately, a pleading. This Chapter's focus however, will centre on the research questions, what are the negative consequences of the centrality of fault within divorce law? And do the justifications for its retention adequately stand up to theoretical scrutiny?

The sole ground for divorce in s. 1(1) of the MCA 1973, that the marriage has broken down irretrievably, may be established by demonstrating one of the five facts as set out in s. 1 (2). The discussion in the third Chapter gives an illustration of the extent to which fault serves as the ground for divorce, but in short three of the five facts are regarded as 'fault-based'. The court must conduct an inquiry into the facts alleged[446], and be satisfied on the evidence that the marriage has broken down irretrievably[447]. It should be noted, as Bainham explains, finding fault comprises a balancing exercise. The question does not exclusively concern the misconduct of one partner. Rather the behaviour is measured against the actions of the other as well[448]. This is best illustrated in *Richmond v Richmond*[449], where it was held that Mrs Richmond could not rely on the adultery of her husband with Mrs Burfitt as a ground for divorce when she had committed adultery with Mr Burfitt on the same caravan holiday. This suggests that when fault is alleged, a 'pure' fault-finding inquiry should take place. That is, one infused with ideas of guilt, innocence, and adversarialism, with the actual breakdown of the relationship being a secondary concern.

The Main Justifications for the Presence of Fault in Divorce Law

[445] Introduced by the Divorce Reform Act 1969, S. 2 (1)(d) and (e)
[446] S. 1(3) MCA 1973, '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'.
[447] S.1 (4) MCA 1973
[448] Andrew Bainham, 'Men and Women Behaving Badly, is Fault Dead in English Family Law?' (2001) Oxford Journal of Legal Studies
[449] (1952) 1 All ER 838. Though the case dates back to 1952, it illustrates the way the State has historically and persistently viewed divorce.

Before analysing the problematic nature of fault and divorce, it is essential to try and unpack the rationale for its inclusion in the first place. One school of thought focuses on the psychological necessity of blame in the context of marital breakdown. It is argued that blame is a crucial and inevitable part of the process. For example, Richards asserts that 'blame, accusation and the strong feelings of injustice are the norm at divorce…neither legal fiction of the lack of fault or imposed orders do anything to relieve the situation, rather the reverse'[450]. Some therefore would contend that to eliminate fault from divorce is unrealistic when allocating blame is a simple fact (or flaw) of human nature.

Brown and Scatler are of the view that preoccupation with blame, responsibility, and culpability 'reflect psychological coping strategies and will not easily be disposed of simply by virtue of a change in the law[451]'. This argument seems right to the extent that there is often an element of inescapability with playing the 'blame game'. It is easier to deflect blame onto others rather than accept responsibility in order to preserve a sense of self-esteem, and to hear of an amicable divorce is the exception rather than the norm[452]. Arguably, there is also a sense that being able to pinpoint specific 'culpable' behaviour on divorce provides the parties with what they view as a justification to the wider society, or some kind of 'explanation'. This links to the public nature of the marital union and is consistent with a status-based understanding of marriage, which, as explored in Chapter 6, has historically been the State's preferred view.

There is no meaningful or necessary reason however, for the law to mirror this reality or recognise this psychological 'need'. For one thing, it is highly unlikely that an open court room is the most appropriate forum for exploring the issues of a private, intimate relationship between two individuals[453]. This unnecessary intrusion echoes a conservative school of thought and a bygone mentality which viewed families as a single entity rather than a collection of individuals[454] and deemed it acceptable for the State to vigorously promote the nuclear family.

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[450] Herring *Family Law,* p.127

[451] Joanne Brown and Shelly Day Sclater, 'Divorce: A psychodynamic perspective', In Shelly Sclater and Christine Piper *Undercurrents of Divorce* (1999, Ashgate Dartmouth)

[452] There is extensive commentary breaking down the emotional process of divorce into several different stages. For example, according to Wemple there are 5 stages to the process; 'alienation and disaffection', 'crisis', 'conflict and adjustment', 'rebuilding and recovery', and 'renewal and integration'. Chris Wemple, 'An Overview of the Stages in the Process' Preventive Law Reporter 18(3) (2000), p.18-23

[453] In the US, the Supreme Court held in *Griswold v Connecticut* 81 U.S. 479 (1965) that marital privacy was a constitutionally protected right. However, it should be noted that in practice the number of cases heard in an open court in modern times is minimal.

[454] Peter Swisher, 'Reassessing Fault Factors in No-Fault Divorce' (1997) Family Law Quarterly

The rise of individualism within society[455] means that such a view is unlikely to align with modern thinking[456].

Couples are in a vulnerable position when seeking divorce. They are, in a sense, at the mercy of the legal system. The choice between providing the couple with support and encouragement or escalating confrontation and bitterness seems to prompt an obvious answer, but having to prove fault against the backdrop of an adversarial system which by nature forces lawyers to acknowledge separate and competing interests, can only lead to the latter. The pain and confusion a couple will face is intensified by a seemingly indifferent and/or condemning society which has made few provisions for assisting them through an extremely turbulent time[457]. In a national opinion survey contained in the extensive research report by the Nuffield Foundation, 62% of petitioners and 72% of respondents felt that the use of fault made the process more bitter. Respondents also indicated in interviews that there was something inherently upsetting in seeing allegations against them set out in a legal, formal document[458].

Scatler presents an argument against no-fault divorce that is more sophisticated. To put it simply, she contends that attributing blame goes to the essence of what the legal system is and should be about, it ensures justice is not only done but is seen to be done. Divorce as a legal process is at its core, a dispute resolution instrument. The move towards no-fault means that the divorce process moves closer towards being a purely administrative procedure[459], in such a way that it leads to a decline in the need for the input of the legal system in the process[460]. The logic of this contention is persuasive; it is difficult to escape the sense that the family justice system should align with considerations of justice[461]. However, the argument fails to

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[455] Discussed above on page 26

[456] An analogy can be drawn with Mnookin's illustration of a tendency in the American political and legal sphere; liberals generally consider sexuality to be a private issue, while economics are considered to be in the public domain. Conservatives on the other hand believe in private economic enterprise but support legal regulation of sexual matters (abortion and same sex relationships being obvious examples). Similar thinking can be linked to almost all political parties' policies in the UK, and so the fact that the current Conservative Government has shown that it is wary of anything that could be seen to undermine marriage might go some way in explaining why fault has still not been removed from modern divorce. Robert Mnookin, 'The Public/Private Dichotomy' (1982) 130 U. Pa. L. Rev. 1430. And see for example, Stéphane Porion, 'The Implementation of Same Sex Marriage in 2013: Cameron's modernising social agenda in the Conservative Party since 2005' (2014) The Observatory of the British Society

[457] Florence Kaslow, 'Stages of Divorce: A Psychological Perspective' (1980) Villanova Law Review

[458] Even when it was understood that this was just a means to an end. Trinder and Sefton et al, 'Finding Fault? Divorce Law and Practice in England and Wales' (2017) Nuffield Foundation Report, p. 15

[459] An administrative procedure also suggests a contractually-based understanding of marriage, see Chapter 6

[460] Shelley Day Sclater, *Divorce: A Psychological Study* (Routledge 1999) p.16

[461] Bainham, 'Men and Women Behaving Badly…'

hold water in that it fails to acknowledge why its necessary conclusion – a diluted role for the legal system, is specifically undesirable. The point is that divorce *is* ill-suited to traditional legal mediums.

The argument fails to appropriately isolate Family Law and recognise its distinctiveness. Family Law needs to be considered as a discrete area of law, judged on its own terms. What distinguishes Family Law from other fields is that the question of whether we should regulate family life at all and what the extent of this intrusion should be, is always open for discussion. It is also an area characterised by dominating principles *other than* fault when determining legal outcomes[462]. It deals with a peculiar kind of chaos: the complexity of intimate relationships and heightened, intense emotions. To attempt to confine it to the rational coherence of traditional legal theories that were not designed to deal with emotions such as those generated on divorce is ill-considered.

Challenging Fault: The Extension of the Theoretical Justifications for Fault in the Criminal Law to Divorce Law

Fault can be said to underpin the overall operation of the legal system. Fault and the criminal law are of course, intrinsically related. However, the existence of fault in the criminal law has compelling philosophical roots. On a Kantian view, its value derives from securing independence from one another so that we may function as independent beings[463]. Thus the requirement of *mens rea* and subsequent criminal punishment serves as reassertion; that the rights that we have will be respected. Punishing the guilty also leads to deterrence[464], which again provides us with reassurance that our rights will be respected. The parallel duties we owe to one another are a necessary part of forming valuable relationships[465]. This line of reasoning cannot be extended to the divorce process. The very fact that adultery or any other factor thought to be a cause or marital separation is no longer a criminal offence shows an implicit acceptance that such behaviour does not warrant criminal punishment. Such behaviour does not affect our ability to function as independent beings. There is no right to have your spouse

[462] See page 95 below
[463] Arthur Ripstein, *Force and Freedom* (Harvard University Press, 2009) 'Kant on Law and Justice: An Overview', Chapter 1, p.1-29
[464] For a discussion of deterrence in the context of divorce law, see page 90 below
[465] James Edwards, 'Theories of Criminal Law' (Stanford Encyclopaedia of Philosophy, August 2018) https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=criminal-law > accessed 25 January 2019

love you unconditionally and thus no parallel duties that demarcate acceptable martial behaviour.

In response to this, some would contend that it entirely right to have a law which states that a party can divorce their spouse for behaviour society deems inappropriate, for example adultery, desertion, and so on. This relates to a justification often used in the context of the criminal law which is extended to divorce law by some commentators; just as the criminal law has the ability to alter the social morality neglected by some individuals[466], abandoning fault in divorce means removing the moral basis of marital obligations[467]. This is linked to the idea that the law has a responsibility to uphold societal values and discourage conduct that is damaging to society, and that no-fault divorce undermines the idea of marriage as a life-long obligation.

In the Parliamentary debate on the introduction of no-fault divorce during the passage of the Family Law Bill in 1996, Lord Ashbourne commented that 'no fault, or no reason, divorce sends out a series of signals; namely, that marriage is only a temporary relationship and that fidelity in marriage is of no consequence…in short, no one is responsible and no one is accountable[468]'. Similarly, Baroness Young said that 'the message of no fault is clear…it undermines individual responsibility. It is an attack upon decent behaviour and fidelity[469]'. There are therefore indications that the State subscribes to this way of thinking, maintaining that the retention of a fault-based system is a means of setting high standards for marital obligations.

The problem with this argument however, is that though the criminal law does indeed strive to uphold a sense of morality, the value judgements involved are, on the whole, universally accepted. However, as examined in the preceding chapters, the principles and ideologies that underpin the inclusion of fault in the divorce process are not only unacceptable to the greater majority of the modern public, but are also objectionable in their own right as deriving from discriminatory religious and conservative doctrines. The legislation therefore appears to present a series of *guidelines* on acceptable marital behaviour with the inclusion of the 5 'facts'.

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[466] Theories of Criminal Law, *Ibid*
[467] Herring *Family Law*, p.870
[468] HL Deb 29 February 1996, Vol 569, cols 1642 -1643
[469] *Ibid*, col 1638

The legislation does not ban certain behaviour or impose criminal sanctions, but it does attempt to guide behaviour and it carries some symbolic weight. The fact that the stakes are lower does not justify the presence of these controversial value judgements. It should not be forgotten that the law's deterrent[470] and expressive functions are powerful, and the latter is engaged when it expresses that certain values are important[471]. The 5 'facts' guides citizens to behave in a certain way by making them pass certain 'tests' so as to correspond with the State's determination of what constitutes a 'justified' reason to divorce, and making divorce difficult overall, thereby indirectly asserting the significance of the marital bond and the solemnity of divorce.

A more nuanced appreciation of the nature of intimate relationships is required if State regulation is not to become a coercive strategy that it is out of touch with the lives of ordinary people[472]. When the law regulates family life in a way that enforces preferred behaviour, it reflects an authoritarian model of Family Law that should be confined to the annals of history. As Eekelaar suggests:

> We may…become uncomfortable when the government intervenes at key points in the institutional processes of marriage and divorce and attempts to impose its own vision of how people should be behaving at those times. At best, it risks being made to appear foolish and ineffectual. Worse, it can appear heavy handed, domineering and insensitive in an area of behaviour to which all citizens have a strong claim to privacy, provided that they do not threaten the clear interests of other individuals[473].

In line with the argument that divorce law should be used as a tool to dictate certain moral expectations, another claim used to justify a fault is that the absence of fault would somehow undermine the contract and/or commitment entered into by the parties. Reece contends that a no-fault system denies the parties the opportunity to engage in a long-term, committed project. They are deprived of the ability to immerse themselves in the marriage 'confident that the other party cannot (without good reason) withdraw from the marriage[474]'. Similarly, Rowthorm is of the view that no-fault divorce undermines a notion of commitment that is key to marriage[475]. He seeks substantiate this by drawing an analogy between the characteristics of the marital

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[470] Though see the discussion on divorce law's effect on the rate of marital breakdown on page 90 below
[471] Wibren van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues', Law and Philosophy Vol. 20, No.1 (2001), p. 31
[472] Shelly Day Sclater and Christine Piper *Undercurrents of Divorce*
[473] John Eekelaar, 'Family Law: Keeping us on Message' (1999) Child and Family Law Quarterly, p.396
[474] Helen Reece, *Divorcing Responsibly* (Hart Publishing, 2013)
[475] Robert Rowthorn, 'Marriage as a Signal', in Rowthorn and Dnes, *The Law and Economics of Marriage and Divorce* (Cambridge University Press, 2002) p.132

union and modern business partnerships – they are both institutions of trust where both participants are confident enough to make a long-term investment in the partnership[476]. Scott also argues that the commitment integral to marriage is fundamentally altered when it is easy to enter and exit the union; 'easy termination policies can undermine the freedom of individuals to pursue their life goals[477]'.

However, these arguments do not stand up to logical scrutiny. The existence of the divorce process itself, whether or not it requires fault, can be said to undermine the ability of participants to fully 'immerse' themselves in a marriage. The very essence of divorce is that a party wants to exit the union because it no longer fulfils the parties' needs and desires. Even when it can be said on an artificial (yet misguided) level, that the 'culpability' of one spouse can end a marriage, this line of argument for the retention of fault seems to overlook the fact that a marriage can be brought to end when there is truly no trace of fault. In other words, sometimes it is simply the case that the parties no longer love each other and must rely on one of the separation grounds, bearing in mind that 'no one's interest or beliefs or tastes remain preserved in aspic[478]'.

The point is that if the above arguments are followed through to their necessary conclusions, divorce should never be allowed. That is the only way of eliminating the uncertainty attached to the durability of the relationship when taking the marriage vows. In addition, as Scott's quote above indicates, couples embarking on marriage share the same aim as the State in wanting to protect their investment in a long-lasting relationship. This can be done without retaining fault as there are other ways of using legal constraints to disincentivise divorce, for example by extending the mandatory waiting period of one year before issuing a divorce petition, or increasing the cost of the petition, or even making it more difficult to get married in the first place[479]. Such methods are not advocated for, as should be apparent from the discussion in this Chapter, disincentivising divorce is not a legitimate nor viable goal for the State. Any such

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[476] Bainham, 'Men and Women Behaving Badly…'
[477] Elizabeth Scott, 'Marital Commitment and the Legal Regulation of Divorce', in *The Law and Economics of Marriage and Divorce* edited by Antony Dnes and Robert Rowthorn (Cambridge University Press, 2004), p.36
[478] Fleur Britten, 'Meet the New Breed of Happy Divorcee: Women who are Empowered, Positive and Thrilled to be Single', The Sunday Times Style Magazine (23 September 2018)
[479] The limited legal requirements there are for getting married in the first place, the presence of 2 witnesses, signing the marriage register and so on, contrasts with the difficulty of obtaining divorce with the fault-based system. This suggests that the status-based view of marriage is favoured by the State, and the content of the relationship is a marginal concern.

method will still preserve 'empty shell' marriages that should be allowed to come to a legal end. The point is that insisting on fault is not the necessary upshot of wanting to discourage divorce, the Government might be more successful and less intrusive using other means.

Furthermore, it is unlikely given the existence of high levels of marital optimism[480] that an individual's investment in a relationship is dependent on them being aware of the formal barriers to end it. Though it may sound like an elusive concept, marriage optimism is a real phenomenon. In one study[481], almost all spouses interviewed thought that the rate of marital satisfaction would remain stable or improve in the first four years of marriage. The bleak reality however was that, on average, satisfaction did not increase - it declined. Interestingly, the study also suggests that being realistic (or some would contend, cynical) as to one's expectations of the durability of a marriage, is actually better in terms of avoiding breakdown. The women with the most optimistic forecasts demonstrated the steepest decline in marital satisfaction.

The significance the State attaches to marriage surely feeds into this unrealistic positivism, which in turn, leaves the parties further disgruntled when they realise that obtaining a divorce is not as straightforward as anticipated. Of course, people have a general idea of how prevalent divorce is within a society, but the mentality behind marriage optimism is the assumption that 'it won't happen to us'. This also relates to why pre-nuptial agreement[482] have been historically unpopular, as they are perceived to be unromantic or even useless; no one marries with the intention or even the contemplation of divorce. This is surprising given that the rationale for taking out an insurance policy could be applied here. No one intends to damage their vehicle or their personal property, but people usually obtain insurance just in case such damage occurs. This is a form of risk management and protection from financial loss, and the same could be said for pre-nuptial agreements. The State's use of fault to dictate moral behaviour does not carry the same level of legitimacy in the field of Family Law as it does in the realm of the criminal law, but the presence of fault in divorce law may have contributed to a perception of marriage which does not sit well with pre-nuptial agreements.

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[480] Lisa Neff and Andrew Geers, 'Optimistic Expectations in Early Marriage: A Resource or Vulnerability for Adaptive Relationship Functioning' (2013) Journal of Personality and Social Psychology 105 (1), p.38-60
[481] Lavner, Karney and Bradbury, 'Newlyweds' Optimistic Forecasts of their Marriage: For Better or For Worse?' (2013) J Fam Psychology, p.531-540
[482] More detail on pre-nuptial agreements commences on page 90

Challenging Fault: The Non-Justiciability of Assigning Blame, Deterrence and the Divorce-Breakdown Nexus

The argument that the law should serve as a tool to dictate societal morality and behaviour through the inclusion of fault suffers from a more fundamental flaw when it is transferred from the criminal law to the divorce process. When assessing the breakdown of a marriage, it is impossible to demarcate with any degree of certainty who is actually 'to blame'.

Due to the higher evidential burden in criminal cases, having to prove that the defendant has satisfied the requirements of a particular crime beyond reasonable doubt, scarce evidence would mean that the case would not reach the trial stage[483]. Therefore, there will often be a wide range of evidence available, especially given the extent of the police's powers of investigation[484]. In establishing fault in the divorce context however, there are significant evidential and practical difficulties in uncovering the facts of the case when there will almost always be only two witnesses[485].

More significantly, it can be reasonably argued that none of the parties can be said to be at fault; marital conduct is fundamentally non-justiciable. In the criminal context, the issues before a court are justiciable in the sense that determining whether particular behaviour is legal or illegal is suitable for judicial determination. In the divorce context however, as Trinder states succinctly; 'the best judges of whether a marriage has broken down is not a court, but the couple themselves[486]'. This raises questions about a judge's suitability in adjudicating on whether or not a couple should be allowed to divorce.

There is logical justification for allowing courts to adjudicate on criminal matters, not least because judges, we assume, do not engage in any criminality[487]. We cannot say however, that they have not experienced family problems and so their role in family courts is not as straightforwardly legitimate. Judges themselves are not in any way detached from the vast proportion of the general population who have encountered divorce, therefore there is a danger

[483] The case would unlikely pass the Crown Prosecution Service's 'Threshold Test', the second limb in particular– 'further evidence can be obtained to provide a realistic prospect of conviction' – CPS, The Code for Crown Prosecutors (26 October, 2018), https://www.cps.gov.uk/publication/code-crown-prosecutors#section5 > accessed 9 August 2019
[484] See the Police and Criminal Evidence Act 1984
[485] Herring *Family Law,* p.879
[486] Frances Gibb, 'Coming Soon: A Divorce Where no One is to Blame' (The Times, September 13 2018)
[487] The same could be said for lay members of a jury – limits are placed on qualification for jury service when the individuals has a previous conviction.

that personal experience will subconsciously impact on their ability to determine who and whether someone is at fault in a detached way. The practice of the law recognises this reality of non-justiciability[488], as no determination will be made about whether the fault-based ground relied upon in a petition is in fact true or that it led to marital breakdown[489].

On a more fundamental level, the theoretical premise of assigning blame for the breakdown of a marriage is flawed. Often (if not always) the factors that lead to marital breakdown are not attributable to one party, rather they are caused by the incompatibility and irreconcilable differences between *both* parties[490]. Even a party who has committed adultery, perhaps the 'fact' most perceptibly linked to the idea of fault, may not be the one 'to blame'[491]. In other words, a well-matched partnership eliminates the desire to commit adultery, thus when a party is led to be unfaithful it can be said that the very values and positive outcomes that the State itself insists are part and parcel of the marital bond are no longer applicable. At the very least, it is undeniable that the notion of fault in this context is ambiguous and difficult to determine. Divorce may reasonably be viewed as a regrettable, but it should be viewed as a necessary legal definition of marital failure in and of itself[492], but the law continues clutching at straws by trying to assign blame and directing the justice system to preside over something it cannot[493].

History suggests that divorce law cannot notably deter or alter behaviour[494] in the same way the criminal law can[495]. The question of whether the law on divorce is capable of affecting the rate of marital breakdown is highly disputed, but at the very least it is impossible to determine with any degree of certainty whether it bears any causal connection[496]. Proponents of retaining fault are often committed to the idea that restrictive divorce law will lead to a reduction in the divorce rate. The expectation is that fostering a perception of divorce as being difficult to obtain will dissuade those contemplating it from taking action. During the same 1996 Parliamentary

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[488] The practice of the law is explored on page 75
[489] Trinder and Sefton et al, 'Finding Fault…', p.13
[490] Peter Swisher, p.270
[491] Bainham, 'Men and Women Behaving Badly…'
[492] Peter Swisher, p.270
[493] Trinder and Sefton et al, 'Finding Fault…', p.14
[494] Though it may State that your spouse can divorce you if you have behaved in a way the State deems inappropriate
[495] There were 102, 007 divorces in 2017 – Office for National Statistics, 'Divorces in England and Wales: 2017', https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017 > accessed 25 January 2019
[496] Again this supports the idea that the law merely sets out guidelines when requiring one of the 5 'facts'

debate referred to above, Baroness Young referred to statistics in the US in support of her opposition to no-fault divorce; 'They have had a lengthy experience of no fault divorce. In every single American State which has this measure the evidence is overwhelming that once no fault divorce is introduced, divorce increases…[497]'.

However, the data here is highly questionable. It is true that the reforms in US States introducing no-fault divorce have coincided with a marked increase in the divorce rates. Then again, correlation does not imply causation. There is research on these US statistics indicating that the visible increase in divorce was part of a more general pattern beginning before the reforms were introduced[498]. Demographic and social factors cannot be ignored since these are more likely to have influenced the change, and the immediate spike in divorces after the introduction of no-fault divorce is likely to be a consequence of a great number of couples seeking divorce from marriages that had already ended but had previously been unable to satisfy the divorce threshold[499].

Throughout the history of divorce, the rising rates have been attributed to several different factors, whether that be recession, rising income and equality enabling women to afford independence, housing shortages, the end of a war, young age of marriage, the availability of legal aid, increased work pressures, and so on[500]. Changes in societal attitudes can also affect the divorce rate. For example, higher expectations in terms of relationship satisfaction and the rise of individualism as discussed in Chapter 2 may have had an unquantifiable effect. Even the increased life expectancy of today's population affects the rate of divorce, the average length of a marriage is similar to that in the early Victorian era, but then the end of the marriage came about through death rather than divorce[501].

Put simply, there are a range of factors to consider when looking at the rate of divorce. The perception of the law however, is unlikely to be a significant contributing variable. An example of how little weight is attached to legal consequences when the general public make decisions

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[497] HL Deb 29 February 1996, Vol 569, col 1639
[498] Gerald Wright and Dorothy Stetson, 'The Impact of No-Fault Divorce Law Reform on Divorce in American States' (1978) Journal of Marriage and Family, p.577
[499] *Ibid*
[500] Ruth Deech, 'Divorce – A Disaster?' Family Law Journal (2009) p.1050
[501] Herring *Family Law*, page 96

on family life is the sheer number of couples who cohabit whilst being unaware of their legal vulnerability until something goes wrong[502].

It should also be remembered that divorce and marital breakdown are not one and the same. Regardless of how difficult it is to obtain a divorce, or how successful the law is in limiting the amount of divorces, there is no way that this could run parallel to a decrease in the rate of marital breakdown. People rightfully rank their own happiness and well-being above any notion of responsibility thrust upon them through divorce law, and so even when the State makes is difficult to obtain a divorce they would still live apart rather than carry on in their empty shell of a marriage. This is an area that the State cannot and should not try and control. The actions of an individual that may lead to divorce are simply features (or flaws) of the human condition. Society may have an interest in divorce, in terms of ensuring a fair distribution of assets[503] and protecting the welfare of children, but it has no right to an explanation as to why that relationship broke down.

A common theme that emerges from the arguments for a fault-based system of divorce is the over-simplification of the explanations that account for breakdown. The determinants of divorce are much more far-reaching than mere individual behaviour. Research shows that the influences on divorces include factors such as the wife's employment, the financial situation of the household, the presence of children and the quality of the match[504]. In addition, it seems that the risk of divorce depends on the perceived benefits of remaining married set against the perceived benefits of being outside the marriage[505].

Fault clearly adds to the negative connotations surrounding divorce, and so it deprives us of the ability to see that divorce can be a necessary good. The dissolution of a marriage where either one or both of the parties are no longer satisfied is a positive; staying in fear of legal stigmatisation (even if this was successful) is corrosive. Some marriages should not be saved, and sometimes divorce can provide a life-line for victims of domestic abuse. A survey commissioned by Style Magazine for the Sunday Times on the reasons people divorce was

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[502] See page 28 for a discussion on cohabitation
[503] It is argued on page 179 that the court should retain its discretion in making financial orders on divorce, in contrast to allowing divorce, this level State intervention when distributing assets is justified by issues of fairness and equality
[504] Matthijs Kalmijn and Anne-Rigt Poortman, 'His or Her Divorce? The Gendered Nature of Divorce and its Determinants', European Sociological Review (2006), p.201
[505] *Ibid*, p. 202

illuminating in terms of understanding how divorce is viewed more favourably by the current generation. Divorce is of course unfortunate, but 90% of the participants agreed that staying in an unhappy marriage can be more destructive, and words such as 'relief', 'new beginnings' and 'freedom' were associated with divorce[506]. Divorce can therefore be liberating, in terms of marking the end of an unhappy relationship, and for women, in terms of leaving an institution that society uses to define women's identity[507]. Thus, this is perhaps an indication that women are challenging convention and loosening the shackles of social expectation.

Challenging Fault: The Family Law Context and the Need to Balance Competing Interests

The point made by Sclater referred to earlier[508] needs to be revisited; the declining importance of fault runs parallel with the declining necessity for the input of the legal system. In other words, if the arguments against fault succeeds, then it follows that there is no need for the divorce process to be a legal one as no-fault divorce goes against the very essence of what the legal system should be about. However, this is based on a narrow interpretation of the function of the family justice system. We need only look to other areas of Family Law, to see other governing principles that succeed in achieving a fair balance between different interests when regulating family life without the need to resort to fault.

In solving disputes over children, it is well-established that the welfare of the child is the court's paramount consideration[509]. The House of Lords in *J v C* discredited the notion that adulterous parents should be at risk of losing care and control of their children, and rejected the view that an 'unimpeachable' parent's rights should prevail over the best interest of the child[510]. Similarly, when the court adjudicates on financial support for minor children, the court looks towards welfare even when pursuing absent fathers to discharge their legal duty to support the child and mother, who may appear to be 'at fault' in some way for not honouring this

[506] This increase in viewing divorce positively was particularly acute with the women in the study, with 53% reporting that they were 'much happier' post-divorce, whereas only 32% of men said the same. One participant was said that after her divorce, 'I am treated as a separate person and no longer labelled as 'wife', 'daughter', 'mother' - Fleur Britten, 'Meet the New Breed of Happy Divorcee: Women who are Empowered, Positive and Thrilled to be Single', The Sunday Times Style Magazine (23 September 2018)
[507] We can observe this from the tradition of taking the husband's name and adopting the title 'Mrs' (with no equivalent title for a man) – '…when a woman takes her husband's name, she surrenders her former identity and adopts his. She becomes a Jones, not a Smith; a Cook, not a Baker; a wife, not an individual' - Abigail Gliddon, 'Not in the name of marriage' The Guardian (London, 18 March 2009)
[508] See page 85 above
[509] S.1 (1) Children Act 1989
[510] (1970) AC 668

responsibility voluntarily. However, the social security system exists as a safety net for mothers and children, and parents are liable because the welfare of children dictates that they should be provided for financially[511].

Even in the domain of occupation orders in the context of domestic abuse, where it could be assumed that the law would hinge on the existence of fault, introduces a different scheme in the Family Law Act 1996. Here there is a 'balance of harm' test for the court to use when deciding whether to grant an occupation order relating to a dwelling house that is or has been at any time intended to be the home of both parties[512]. It directs the court to ask first, whether the applicant or any relevant children is likely to suffer 'significant harm' attributable to the respondent's conduct if the order is not made[513]. In *G v G*[514], Thorpe LJ directed the courts to concentrate on the effect of the respondent's conduct rather than intention behind it. Therefore there is a noticeable shift from fault and towards welfare. The fact that children may be involved may, in part, account for this shift.

The Family Law Act 1996's failed divorce scheme[515] is a palpable example of the State adopting a radically different approach when children are involved. When showing the irretrievable breakdown of the marriage, the scheme proposed a longer mandatory waiting period for divorcing couples who had children[516]. Scatler and Piper note that '…both proponents and opponents of the Bill mobilised ideas about the centrality of children', and of 'the family' for the children[517]'. It appears that the law actively tries to regulate child matters with a degree of sensitivity and care that is absent in the divorce process[518]. This could however,

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[511] Bainham, 'Men and Women Behaving Badly…'
[512] S. 33 (1) (b) FLA 1996
[513] S.33(7) FLA 1996. Where the applicant satisfies the test, the court has no discretion when making the order. Even where the children are likely to suffer harm when both parents are responsible, the court will exercise its discretion to exclude the husband from the family home - *Re L (Children)* (2012) EWCA Civ 721
[514] *G v G (Occupation Order: Conduct)* (2000) 2 FLR 36
[515] See page 73
[516] The arguments in support of this difference in treatment was that those without children should be able be able to divorce freely and remarry quickly to be able to have children, that longer periods would protect children by making divorce more difficult, and a longer period was more likely to be necessary to make necessary financial and child-related arrangements. Lord Chancellor's Department 'Looking to the Future – Mediation and the ground for divorce' (April 1995), paras 4.17, 4.18
[517] Shelley Day Scatler and Christine Piper, 'The Family Law Act 1996 in Context' in Scatler and Piper *Undercurrents of Divorce* (Ashgate, 1999), p.10
[518] Though it should be noted that the FLA was criticised for its consideration of children, Rodgers and Pryor were of the view that it only 'pays lip-service to its concern for children's well-being, but fails to provide concrete mechanisms to enable children to have a say in decision-making. Rather, parents are exhorted to take their children's views into consideration', Bryan Rodgers and Jan Pryor *Divorce and Separation: Outcomes for Children* (The Joseph Rowntree Foundation, 1998), p.45

be perceived as coinciding with the objective of restrictive divorce law. This is because in portraying children as the 'victims' of divorce, it allows people 'who wish to re-assert the primacy of 'traditional family values to utilise a powerful discourse in support of their case for arresting 'the decline of the family' and for the restoration of the old nuclear arrangement[519]'.

Considering the strong presence of fault in the law on granting divorce, it is perhaps surprising to see its diluted role within the law on granting financial provisions after divorce. The conduct or 'blameworthiness' of one of the parties is only one factor to be taken into account in the exercise of the court's discretion when deciding on the most appropriate financial division. The court *may* consider such conduct if it 'is such that it would be inequitable to disregard it[520]'. Case law has interpreted this provision as requiring conduct that goes beyond what might be expected on marital breakdown; something out of the ordinary, such as firing a shotgun at the husband[521].

Therefore the absence of fault does not equate to the futility of the Family Law system. We need not look far within Family Law to see that most of the guiding principles are scarcely reliant on fault[522], rather the focus is geared towards welfare. Such considerations of welfare can be applied to divorce, and the absence of fault would not necessarily lead to the law in this area losing its principled basis as some would argue[523]. To see what overarching principles could be fitting we have to reassess why we regulate this area in the first place and what we want our divorce laws to achieve. Though we may as a society have an interest in the regulation of the family, again this does and should not encompass a concern with how and why a couple end their relationship.

It is suggested that the only involvement the law should have is ensuring that the result is fair and that the arrangement for the children are their best interest[524]. A fault-based law does not promote a continuing relationship between the spouses or deal with the inevitable emotional

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[519] Scatler and Piper, 'The Family Law Act 1996 in Context', p.10
[520] S. 25(2)(g) MCA 1925
[521] *Armstrong v Armstrong* (1974) 4 Fam Law 156. There must also be disparity between the conduct of both parties, and conduct which directly impacts the family finances is particularly relevant - *Leadbeater v Leadbeater* (1985) FLR 789
[522] The guiding principles that apply to devolved family matters in Wales are even more progressive, which bolsters the argument that it is unfair for Wales to follow a fault-based divorce system – see Chapter 6.
[523] see John Dewar, 'The Normal Chaos of Family Law' (1998) The Modern Law Review, Vol. 61, No. 4, p. 473
[524] Penny Booth, 'Picking Faults in Divorce Law' (2004) Family Law Journal 617 (2)

turmoil in a considered way. The system as it stands is heavily geared towards fault. It encourages the parties to use the fault-based grounds because they are quicker[525], and the number of petitions relying on fault is thought to be around 75%[526]. Another research project reported that 60% of divorces were granted on the adultery or behaviour ground[527]. Whilst the Divorce Reform Act 1969 introduced the *option* of no-fault divorce with the two grounds based on the passage of time, these are not the primary options, and fault remains highly relevant by constituting the majority of petitions. This leads to stress, bitterness and embarrassment. It requires parties to look to the past and the negative aspects of the marriage. At best this destroys any hope of amicability, and at worst it causes psychological harm to the parties and their children.

Challenging Fault: Divorce Procedure, Defended Divorces and Human Rights

It has been argued that the theoretical justifications offered by proponents of a fault-based divorce law either lack logical coherence or are void of any empathy for what divorcing couples experience. However, the ultimate question of whether divorce, or even Family Law generally, should be more focussed on welfare or enforcing responsibility through, for example, the inclusion of fault, has scope for reasonable differing opinions[528]. What is fatal to the argument in favour of a fault-based divorce is that in its current form, its application fails due to the fact that the practice of the law has developed with very different aims directing it. Any argument in favour of fault, even if successful in the abstract, cannot apply insofar as the law in action does not allow the rationale to bite. Furthermore, the problems created by this discrepancy between the law in the books and the law in action, cannot be reasonably defended.

For the purposes of this section, it is worth recapping s.1 of the MCA 1973, which places the court under a duty 'to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent[529]'.Then if the court 'is satisfied on the evidence of any (of the five facts), then, unless it is satisfied the marriage has not broken down

[525] A divorce based on a fault-based ground can be finalised in less than 6 months – Sharon Thompson, 'Divorce can be Nobody's Fault – the Law should do more to recognise that' (The Conversation, December 12 2016) https://theconversation.com/divorce-can-be-nobodys-fault-the-law-should-do-more-to-recognise-that-51836 > accessed 26 January 2019
[526] Ruth Deech, 'Divorce – A Disaster?' Family Law Journal (2009), p.1022
[527] Trinder and Sefton et al, 'Finding Fault?...', p. 17
[528] Bainham, 'Men and Women Behaving Badly…'
[529] S.1(3)

irretrievably, it shall…grant a decree of divorce'[530]. In *Ash v Ash,* Bagnall J was of the view that this requirement on the court was indeed significant, stating that 'simple assertion either way…cannot suffice. What I have to do is examine the whole of the evidence placed before me…[531]'. Rather ironically, Bagnell J's statement in *Ash* was made one year before the introduction of the Special Procedure in 1973. The significance of the advent and subsequent development of the Special Procedure cannot be overstated. Indeed, 'there are times when English law alters the whole character of a jurisdiction by a simple procedural change[532]' and such change can have a greater impact than amendments in the substantive law[533]. This was one such occasion. In response to the increasing rate of divorce and the economic pressure restricting public expenditure, and perhaps the fact that the Divorce Reform Act 1969 had undermined the existence of fault, the Special Procedure was introduced.

It entailed a fast-track procedure initially available to divorcing couples without dependent children and divorcing on the fact of two year separation. It meant that a divorce could be granted solely on the basis of affidavit evidence. This was extended to all childless couples not relying on the behaviour ground, and then all undefended petitions in 1977[534]. By now it is misleading to call the procedure 'special'; it is the well-established norm[535].

Subsequently, all that is now required to initiate the process is that the petitioner lodge Form D8[536] at the Family Court[537]. Some of the information required on the form includes: the marriage certificate, the names and addresses of the parties, the respondent's address for service, a statement to the effect that the marriage has broken down irretrievably, the facts alleged by the petitioner and relied on as evidence that the marriage has irretrievably broken down and a statement of truth. The facts alleged will form the statement of case, and the information provided must be sufficient as evidence to show why the applicant is entitled to

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[530] S.1 (4)
[531](1972) Fam 135
[532] Gwynn Davis, Alison MacLeaod, Mervyn Murch, 'Undefended Divorce: Should Section 41 of the Matrimonial Causes Act 1973 be Repealed?', Modern Law Review, (1983), p.121
[533] Cretney in Herring *Family Law,* p.577
[534] Gwynn Davies 'Undefended divorces…', p.122
[535] Ruth Deech, 'Divorce – A Disaster?' p. 1050
[536] Family Procedure Rules 2010, Practice Direction 5A
[537] 11 centralised divorce centres within England and Wales to handle the issue of divorce petitions, 'Commending the divorce proceedings and drafting the petition' (LexisPSL > Practice Notes> Family > Relationship Breakdown: Divorce)

the dissolution[538]. However, the Family Procedure Rules specifically state that the supporting information should be as concise as possible. For example, it is recommended that if unreasonable behaviour is alleged, the petitioner should only give details of the respondent's behaviour which has affected them the most, and should not give more than six examples of incidents[539].

It is now legal advisers who handle divorce petitions in divorce centres. They are supervised by District Judges, who are also reserved to deal with any defended applications. In undefended applications, the statement of truth attached to the petition is sufficient for the purposes of verifying the facts alleged. In other words, there is no attempt made to ensure that the facts are true, and there is no need for further proof that the relevant ground has been satisfied as there is a presumption that the allegations are true if the respondent has not issued a defence. This is unavoidable given that the legal adviser will have approximately four minutes to devote to each petition[540]. Therefore, contrary to the seemingly onerous duty to inquire into the facts alleged contained in s.1 (1) of the MCA 1973, in practice the court takes the petition at face value[541]. By comparing the words in s. 1(1) with the administrative mechanics of the procedure and the guidance in the Family Procedure Rules, the extent of the disparity between law and practice is rather astonishing.

Petitions are seldom defended and 'contested' divorces are a rare phenomenon[542], constituting less than 1% of divorces in England and Wales[543]. The reality is that defending a petition is a practical impossibility for most people, not least because of the expense involved. From the 1st of April 2013, legal aid has been withdrawn from divorce cases excluding those involving domestic abuse[544]. Without State funding, the costs can be prohibiting; the court fee for filing an Answer is £245, the cost of filing a cross petition is £550, the respondent will have to pay an undetermined sum for their lawyer's fees (likely to run into the thousands with the

[538] FPR 2010 PD 7A, para 1.2
[539] 'Commending the divorce proceedings…' LexisPSL Practice Note
[540] Trinder and Sefton et al, 'Finding Fault?...', p.13
[541] Ministry of Justice, 'Reducing Family Conflict: Reform of the Legal Requirements for Divorce', (September 2018) p.15
[542] The exceptional case of *Owens* is discussed in detail in the next chapter
[543] Trinder and Sefton et al, 'No Contest: Defended Divorce in England and Wales' Nuffield Foundation (2018), p.5
[544] https://www.divorce-online.co.uk/help-and-advice/legal-aid-advice > accessed 2 February 2019

complexity of defending divorces and the reluctance of lawyers to become involved[545]), and may also run the risk of being liable the petitioner's cost if unsuccessful[546]. It is therefore unsurprising that there is a tendency in the profession to discourage it, as well as in the court – respondents are not told automatically what form to use should they opt to defend or that a defence in a letter form will not be accepted until it is too late[547].

Therefore it is not a coincidence that the only successful defended petition in recent years was instigated by a millionaire[548]. This discriminatory operation of the law is intensified by the lack of legal aid available, to the effect that access to a part of the law is denied to a significant portion of the population[549]. The theoretical right to defend a divorce petition is essentially a right reserved for the well-to-do. This crisis of unequal access justice extends beyond defended petitions within divorce law. For example, if the parties do not or cannot rely on a fault-based ground, their only alternative – waiting for 2 or 5 years, can be a financial burden. Not everyone can afford separate accommodation, and the family finances often need to be arranged sooner so that the parties and their children are not kept in limbo[550].

There has also been a marked increase in what is referred to as 'DIY divorce', with over 1 in 5 (21%) people having arranged their own divorce because they could not afford a solicitor[551]. Not having legal representation may also lead to couples having to wait for 2 or 5 years because they lack 'insider' information[552] about how the law works in practice[553]. In other words, they do not know how low the threshold is for fault and how little they would be required in terms of allegations in a behaviour petition[554]. This has far-reaching implications; it defies a well-

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[545] No doubt stemming from a sense of inevitability of divorce (bar *Owens*)
[546] Trinder and Sefton et al, 'No Contest: Defended Divorce…', p.7. Note that Mrs Owens was liable for Mr Owens' fees.
[547] *Ibid*
[548] Suzanne Moore, 'The Courts can't make Tini Owens Love her Husband', The Guardian (London, 25 July 2018)
[549] Herring *Family Law,* p.198
[550] Trinder and Sefton et al, 'Finding Fault?...', p.12
[551] 'DIY Divorce Report' (2013) Family Law Journal, p. 920
[552] Resolution has issued detailed guidance to solicitors on dealing with litigants in person, stating in the foreword that 'it is increasingly likely that you will deal with litigants in person and you should consider how your dealings will differ from those with another lawyer'. Resolution Guide to Good Practice on Working with Litigants in Person. March 2018.
http://www.resolution.org.uk/site_content_files/files/good_practice_guide_litigants_in_person.pdf > accessed 24 June 2019
[553] Trinder and Sefton et al, 'Finding Fault?...', p.14
[554] Though *Owens* throws doubt on understandings of how the threshold actually is

established tenet of the rule of law, that the law must be intelligible, clear and predictable. The irony is that those in support of a fault-based divorce law often draw on the emotive language of justice when the system operates in a very unjust way. This is an example of an area where cutting legal aid has the effect of 'depriving legal rights of all effect'[555].

Leaving aside the intricate shortcomings of defended petitions, the very idea of there being a right to defend a petition or having the ability to resist a divorce can be described as best as strange, and at worst; oppressive[556]. Assuming that no one instigates divorce proceedings without careful consideration, surely there is no clearer indication that the relationship has come to an end, and that the marriage is now a mere 'empty shell'[557]. As Cretney put it simply; 'there is no point in denying that the marriage has broken down if one party firmly asserts it has[558]'. It is therefore worth considering why any rational-thinking person would instigate a formal defence.

In one sense, the right to defend can be seen as giving controlling men a final opportunity to exert power over their wives; a divorce petition signifies a desire to keep a spouse within a marriage against their will[559]. As Miller states, the ability to contest 'may offer abusive spouses the means to continue exerting coercion and control' and be used as a 'bargaining chip' by respondents when it comes to negotiations about finances or children[560]. In the most extensive research into defended divorces conducted by Trinder and Sefton et al, the four primary drivers behind defended cases were deemed to be money (a desire to protect inheritance or avoid reaching a financial settlement), mental health (refusing to accept the end of the marriage or an obsessive personality), power and control (coercive control and domestic abuse), and religion and culture. None of which represent an acceptable or reasonable reason to defend, if such a reason is possible.

A more common motivation is not that the respondent wishes to oppose the divorce itself, rather they object to the allegations laid out before them in the petition. In 9 out of 10 defended

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[555] Rob George, *Ideas and Debates in Family Law* (Hart Publishing, 2012)
[556] Counsel for Tini Owens told appeal court that she was a 'locked-in' wife – Tony Roe, Law Society Gazette
[557] Herring *Family Law,* p.200
[558] Stephen Cretney, *Family Law in the Twentieth Century*: A History (OUP Oxford, 2003) p.391
[559] Janice Turner, 'Our Divorce Laws aren't Fit for Modern World', The Times (London, 28 July 2018)
[560] Jan Miller, 'Divorce Reform for the Modern Age' (2018) New Law Journal 7809, p. 4

divorce cases reviewed by Trinder and Sefton et al, this is what fuelled the defences, they were not an attempt to save the marriage[561]. In addition, in 89% of those defended cases where the petitioner relied on the behaviour fact, the defence was initiated as a threat in an attempt to correct what was seen as falsehood or exaggeration. This nonsensical situation is a direct consequence of fault. The law invites the parties to find or fabricate incidents of blameworthy behaviour so as to avoid having to wait an unreasonably long time for a divorce.

If a respondent receives a petition he or she finds misleading or untrue, they are faced with a choice between defending the petition or grudgingly accepting the claims made. There is little that they can do in this position as defending is often not a real possibility either because of costs involved or because of a respondent comes to the reasonable conclusion that it is unlikely to be in anyone's best interest. Thus, the assumption made by the court, for the sake of speed, that the allegations in the petition are true, is somewhat of a façade. The procedure will inevitably appear unfair to respondents in this position.

Even where there is strong agreement between the parties that the marriage should be ended and the relationship is relatively amicable, there will often be an understanding between them that one will bear the burden of having allegations made against them. Or in other words, one will 'volunteer' to be the respondent[562]. As the s. 1 (1) MCA duty to inquire into the facts alleged is now effectively redundant, there is nothing to stop couples from manipulating facts or even falsely claiming the existence of adultery or unreasonable behaviour. This lack of intellectual honesty was highlighted as far back as the Law Commission's 1990 report; 'the fact which is alleged in order to prove the breakdown need not have any connection with the real reason why the marriage broke down[563]' and 'the system still allows, even encourages, the parties to lie, or at least to exaggerate, in order to get what they want[564]'.

This issue of fabrication is particularly acute in behaviour petitions. In the case of adultery, a respondent can just dispute the allegation by simply not admitting the adultery rather than being forced to issue a defence. The burden shifts back onto the petitioner to prove the adultery took

[561] Trinder and Sefton et al, 'No Contest: Defended Divorce…', p.52
[562] Trinder and Sefton et al, 'Finding Fault?...', p.12
[563] Law Commission, 'Family Law: The Ground for Divorce' (31 October 1990) (Law Com No. 192) para 2.9
[564] *Ibid,* para 2.11

place by some other means. In cases of behaviour however, the case against the respondent can still stand even where the respondent feels that they have been depicted incorrectly and prejudiced. In Form D8, the petitioner is asked only if he intends to formally defend the petition, if he or she answers no in light of the difficulties outlined above, there will be a finding of fact against them. Research carried out by YouGov for Resolution in 2015 found that, of those who relied on the behaviour fact, 27% admitted that the particulars were manufactured[565].

This practice of inviting, but not testing, allegations to show irretrievable breakdown in addition to the fact that defending is an option only for those with substantial means, raises questions about the law's compatibility with Article 6 of the European Convention on Human Rights, the right to a fair trial. To say that the situation is not unfair on the respondent because they could just defend is invalidated by the fact that this would inevitably lead to proceedings being drawn out in an emotionally-damaging and expensive way, only to be concluded with a finding that the marriage has broken down irretrievably[566]. Surely this cannot be said to constitute a fair trial, and Article 6 covers civil proceedings[567].

A challenge to the law based on Article 6 could be a valuable in terms of pushing towards reform[568]. The government would not allow a declaration of incompatibility to pave the way for a more fine-tuned right to defend where respondent (or taxpayer) money would be spent on arguing the issues that exists in a marriage in an open court. That would not be politically feasible, acceptable nor desirable. Rather, it would perhaps force Parliament to consider divorce law in in entirety and move towards an overhaul[569]. In addition, inviting but not testing allegations may also lead to a case of 'who gets the petition filed first' so as to be able to make the allegations rather than be on the receiving end. This of course, does not sit well with the concept of reconciliation, which is popular within the rest of divorce law.

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[565] Resolution News Release, 'MPs need to get behind no-fault divorce if they're serious about reducing family conflict' (3 December 2015) http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=301 > accessed 2 February 2019

[566] Leaving aside *Owens* for the time being

[567] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights', 31 December 2018, https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf > accessed 2 February 2019

[568] The Government's Consultation paper – 'Reducing Family Conflict – Reform of the Legal Requirements of Divorce' (September 2018) (Discussed in greater detail in Chapter 7), outlines the Government's plans to remove the ability to contest. However, there is no sign of legislation happening in the near future.

[569] Roger Kay, 'Who's Divorce is it Anyway? The Human Rights Aspect' (2004) Family Law Journal, p.892 - 900

It should be observed that the problems outlined above are not a result of the Special Procedure, but the underlying law which remains insistent of fault and its interaction with this procedure. The objective of the Special Procedure was simplicity, speed and economy. It is therefore misleading to say that the primary motivation for the way the law has developed was specifically to move away from fault, rather; the financial strain on the family justice system[570] perhaps made it inescapable. However, there is some evidence that there has been a collective shift in the attitudes of the courts, with interviews by Trinder and Sefton et al indicating that judges and legal advisers are 'looking to make the petition work'[571], perhaps in recognition of the non-jusiciability of the issues at hand.

The process is also becoming increasingly administrative. A divorce application can be made online, and we are now witnessing an even greater shift towards 'divorce by internet'; the Family Justice Review proposed that couples could access an online 'hub' where they would be able to enter a 'divorce portal' – a computerised system to enable them to consider the financial issues and those surrounding any children. Then they would be able to fill an online form to apply for divorce, marriage certificates can be 'posted' as PDFs,[572] and a court officer (not a judge) would issue the decree nisi, and the decree absolute 6 weeks later. The testing of a pilot study has already taken place and the Family Procedure Rules 2010 (PD36L) facilitate the next stage of development[573]. Undeniably, not only would this raise serious concerns about the remaining applicability of fault, it would raise questions about the requirement to show any ground for divorce at all.

The declining involvement of the court and legal professionals, and the increasingly administrative nature of the divorce process is, to many commentators, regretful. The idea that the procedure for divorce has become what is, essentially, a 'rubber-stamping' exercise means that divorce has 'been converted unobtrusively into a summary administration procedure, a

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[570] Family Justice Review Final Report (November 2011) p.203
[571] Trinder and Sefton et al, 'Finding Fault?...', p.14
[572] Family Law Week, 'New Phase of Online Divorce Pilot Launched' (August 2018) https://www.familylawweek.co.uk/site.aspx?i=ed191337 > accessed 29 January 2019
[573] Where there has been an application online (currently only available for litigants in person) certain other stages, for example the application for decree nisi, may be completed online where HMCTS selects the application to test the new system - 'Commending the divorce proceedings…' LexisPSL Practice Note

kind of registration divorce[574]'. Strong objection to the digitalisation of divorce is therefore anticipated, and some will argue that the process is undignified and unable to express the solemnity that should mark the end of a marriage[575]. However, it should be noted that 'it is not formal procedure, representation or rules of evidence which determine whether there is a judicial function to be fulfilled. It is the existence of an issue[576]', therefore the law need only intervene when there is a dispute over assets, or issues surrounding the children. The actual decision to divorce cannot be said to constitute an issue. Where it does, that is, when a party disputes the facts alleged, it is because the law itself has created an issue through a system that encourages acrimony.

Even in a defended petition which rejects the very breakdown of the relationship, that is, where there appears to be a genuine dispute; it is a smokescreen for denial. If one party asserts breakdown, the relationship must have broken down. A 'relationship' in this context is an emotional and sexual voluntary association between two people[577] and, by nature, it cannot be maintained unilaterally. A marriage and a relationship are two different things, but a marriage devoid of a relationship is paradoxical. If they are completely distinct concepts, then marriage must still accord with the traditional concept of marriage explored in Chapters 2 and 3, one characterised by a sharp inequality in power relations between men and women. It also veers towards being conceptualised as a status[578] as explored in Chapter 6. In simpler terms, if a marriage can be sustained without the consent of one of the parties, marriage can become a trap[579].

Challenging Fault: The Reality of 'Divorce on Demand' and the Fake Fault System

Getting divorced is difficult in theory, but not in practice. The law on paper can be described as somewhat of a fiction, since we have something tantamount to 'divorce on demand' in reality

[574] Mary Ann Glendod in *Great Debates,* p.78
[575] This, however, should be considered in light of the decline in the social importance of marriage discussed in Chapter 2
[576] Gwynn Davis, 'Undefended Divorces…', p.125
[577] It is fair to assume that this definition would align with the general population's view of what a relationship is, and that a relationship can turn into a marriage – though the basic tenets of what constitutes a relationship still apply.
[578] Rather than a contract – where consent is vital
[579] Getting divorced is often couched in terms of 'breaking free' in common language, a phrase more usually associated with escaping imprisonment. For example, Rebecca Zung *Breaking Free: A Step by Step Divorce Guide to Achieving Emotional, Physical and Spiritual Freedom* (2013)

(not to be equated with no-fault divorce). An analysis of the law such as the one carried out in Chapter 3 would not reasonably lead a person to think that 'conceptually and procedurally, it is far more difficult to terminate those other pillars of stable life, employment and a tenancy, than marriage[580]', but that is the position under the now universal Special Procedure. Though the Special Procedure eased the burden on proving the breakdown of a marriage, it did not alleviate the fundamental problems inherent in fault-based system.

The law still evokes notions of guilt and innocence. The seemingly straightforward 'divorce on demand' is masked by a harmful legal ritual, and the discrepancy between the two has caused its own set of problems and has led to an area of law rife with contradictions. One of the basic tenets of a fault-based divorce law is that the parties are made aware of the seriousness of the decision they are making, but a system that allows parties to divorce quickly through an application form (and perhaps soon through an online version) makes a mockery of this reasoning. The law loses a great deal of integrity and respect through this, bolstered by the fact that the vast majority of the legal profession in this area are dissatisfied and frustrated with the current state of divorce law[581]. Anna Rosier, speaking from her experience as a practitioner states that; 'as solicitors we can advise clients that the allegation of fault is simply a hoop to be jumped through, and that behaviour allegations should be mild and where possible agreed in advance[582]'. It seems clear from this that parties who are not legally represented may be disadvantaged as they cannot fully appreciate the complex relationship between the law 'in the books' and the law 'in action'.

Lady Hale, has also voiced her concerns about the current state of divorce law[583] and has suggested that no fault divorce would actually serve to increase a general sense of family responsibility. Speaking at Resolution's annual conference, she stated that 'the contents of the (divorce) petition can trigger or exacerbate family conflict entirely unnecessarily. Respondents are encouraged by their lawyer to 'suck it up' even though the allegations are unfair'[584].

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[580] Ruth Deech, 'Divorce – A Disaster?', p.1051

[581] See Law Society Report, 'Law society response – Reform of the legal requirements for divorce' (December 2018)

[582] Anna Roiser, 'No Fault Divorce: Where Next?'(2015) Family Law Journal, p.1541

[583] Her comments in *Owens* will be discussed in the next chapter

[584] Stowe Family Law, 'Baroness Hale: No Fault Divorce Would Strengthen Responsibility' (24 April 2018) https://www.stowefamilylaw.co.uk/blog/2018/04/24/baroness-hale-no-fault-divorce-would-strengthen-responsibility/ > accessed 2 February 2019. Furthermore, Sir Paul Coleridge, a former High Court judge and the

Similarly, the former President of the Family Division Sir James Munby, suggested back in 2014 that it was time to move to no-fault divorce. Taking a practical stance, he proposed that 'the reality is that we have and have had for quite some time... divorce by consent in the sense that, if both parties wish, there will be a divorce if they're able to establish the grounds for divorce which is very easy to establish[585]'. The fault retained is therefore artificial. Criticism stemming from such prominent figures in the senior judiciary cannot be ignored and must surely serve as a profound signal that the problems caused by a fault-based divorce law warrant serious attention.

Some of the language used to defend the Special Procedure involves a rhetoric of 'facing up to the reality' of the position that we are in with divorce, as it can effectively be produced 'on demand', which conflicts with the concept of fault. However, the free availability of divorce by request should be implemented in its own right. Intuitively, and arguably, obtaining a divorce this way is a human right. It is unfortunate that under the ECHR, specifically A.8 (right to respect for private and family life) and A.12 (the right to marry and found a family), the European Court of Human Rights has consistently maintained that this is not a recognised right. There is not even an implied right to this effect[586].

In 2017, the court again refused a challenge to restrictive divorce in *Babiarz v Poland*[587], with the majority of the view that whilst A.8 protected against arbitrary inference in private or family life, it did not prohibit all inference. As such 'In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake[588]'. It was also reiterated that A.12

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founder and chairman of the Marriage Foundation (the organisation's self-proclaimed mission is to be the 'national champion for marriage) acknowledged that the removal of fault would not undermine marriage and referred to Lady Hale's stance as 'entirely right'. In a separate interview, he also expressed the view that 'current divorce law is a fake fault system, which drives people to commit perjury on a wholesale basis if they are not prepared to wait to divorce for two years or longer'. Marriage Foundation, 'Our Vision', http://marriagefoundation.org.uk/ > accessed 1 February 2019. Frances Gibb, 'Divorce Law is Out of Date, Cruel and Far Too Costly', The Times (London, 17 November 2017). Frances Gibb, 'Divorce Law Revolution puts end to Blame Game', The Times (London, 8 September 2018)

[585] Anna Roiser, 'No Fault Divorce…' p.1542

[586] *Johnstone v Ireland* (Application No. 9697/82) (1987) 9 EHRR 203

[587] (n° 8923/12)

[588] *Ibid*. para 47

deals with a right to marry and is concerned with restrictions on marriage, and cannot imply a right to divorce[589]. This interpretation can be questioned, with marriage and divorce being intrinsically linked it cannot be appropriate that entering a marriage is heavily regulated by human rights but the exit from it is not. Two powerful dissents in *Babiarz* referred to the importance of considering the Convention as a living instrument, and Judge Sajó was of the opinion that 'leaving is a right accorded to both parties equally[590]'.

A visceral sense that restrictive divorce through the requirement of fault is a breach of the right to respect private and family life is bolstered by the fact that marriage is increasingly viewed as a form of contract[591]. Furthermore, autonomy has become a significant principle in Family Law in recent years[592], arguably 'becoming the very essence of family justice[593]'. Autonomy means that people should be able to make their own decisions as to how they conduct their family life as long as they do not harm others, divorce may be harmful to society, but the harm caused to individuals when the State insists on perseverance when a marriage has broken down, significantly outweighs this.

Conclusion

This Chapter has explored the various ways the preservation of fault in divorce law could be challenged. It was necessary to question whether the rationale behind fault was robust enough to justify its restrictive nature and to understand why no-fault divorce is a better alternative. One of the main justifications centres on the argument that, between the parties themselves, when a marriage breaks down, attributing blame is an inevitable and psychological fact. Though that is difficult to dispute, the conclusion that the law should mirror this reality is not as clear. Law, by its very nature, encapsulates a rationality that is free from emotion and human flaws. This relates to wider questions raised by challenging the presence of fault in divorce law, from the perspective of normative jurisprudence and the philosophical purpose of law. An examination of divorce law from these perspectives could be explored further in future. It is worth mentioning however, that if we accept Finnis' theory of law, then it could be argued that

[589] *Ibid*, para 48
[590] *Ibid*, para 7
[591] Moira Wright, 'Marriage: From Status to Contract?' (1984) Anglo American Law Review, p.17-31
[592] Herring *Family Law*, p.989
[593] Alison Diduck, 'Autonomy and Family Justice' (2016) Child and Family Law Quarterly 23, p. 133

a system which encourages bitterness and antagonism through the inclusion of fault, contradicts the very purpose of law. This is because the law no longer facilitates choices that further human flourishing[594] and direct us away from those that do not[595].

The presence of fault was also analysed against the framework of the criminal law. It was found that the justifications for the centrality of fault in the criminal context cannot be extended to the divorce process. With the former, a well-established justification for fault is that it can be used as a tool to set moral standards. With the latter, fault has been used to set a standard for what society deems to be appropriate marital behaviour by guiding and deterring certain behaviours and expressing certain values. This justification, however, does not carry the same force of legitimacy as it does in the criminal law. This is because the values that are being upheld through the retention of fault are not universally accepted, and they do not reflect the reality of family life in modern England and Wales[596]. Fault has been hijacked by the divorce process as a tool to promote marriage, however, as Chapter 2 has shown, this may not be an appropriate aim.

Another line of argument for the preservation of fault is that it undermines the commitment inherent in marriage, which could be an indirect way of asserting that fault is key if the State is to deter divorce. It was found that this argument does not hold up to logical scrutiny, and in any case, attempting to deter divorce is a futile exercise. An important distinction was drawn between divorce and breakdown, and though it is possible (though not necessarily desirable) to affect the rate of the former, attempting to influence the latter cannot be done. Not least because it is difficult to isolate one blameworthy individual or course of conduct in marking

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[594] This is measured by reference by what Finnis would describe as 'self-evident' basic goods (values of human existence). He provides non-exhaustive list of these, and one is marriage. His theory could therefore be used to argue that a restrictive fault-based divorce law does encourage human flourishing because it promotes marriage. It is argued however, that this is not the appropriate interpretation. Rather, marriage as a basic good means a fulfilling marriage – a sustainable and happy relationship, and if parties are able to divorce more freely, they can pursue this relationship sooner rather than later. It should be mentioned that Finnis believed that marriage as a basic good meant a heterosexual marriage only where both participants could form an intention to procreate, but this is seen as a flaw in his theory as it is inconsistent with his own reasoning (the basic goods should be open to everyone). This does not mean that the basic premise of his theory is invalidated – that there are objective basic goods that can be discovered through practical reason, how we specify these basic goods is open to debate and is a secondary issue.

[595] See John Finnis, 'Law and What I Truly Should Decide', 48 Am. J. Juris 107 (2003, 'Natural Law: The Classic Tradition' in *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press, 2004).

[596] See the discussion on cohabitation on page 28

the breakdown of a marriage, with factors leading to breakdown varied, complex, and arguably part of human nature. Therefore, if the State wants to make divorce difficult it must be prepared to admit that it is chooses to require 'empty shell' marriages to continue in an authoritarian way.

Using fault to express certain ideals, such as the significance of marriage and the disproval of divorce, is ineffective in any case. It is worth repeating the comment by Barlow in relation to cohabitation, but equally applicable here, that people do not usually make their life choices based on a certain policy in legislation, but according 'to a rationality prevailing in their own lives'[597]. This is heightened by marital optimism, which prevents people's rational contemplation of divorce, and the fact that a decision to leave or stay in an unhappy marriage is both significant for the life of an individual and deeply personal.

On a fundamental level, it was found that trying to assign blame on divorce is not as simple a task as it may be in the criminal law. That is, the determination of whether a marriage has broken down, and who or what is responsible, are inherently non-justiciable issues. Not only is fault in the criminal law supported by an extensive fault-finding framework that is absent in the divorce process, situations are never black and white in intimate relationships to the extent that blaming one person or incident is overly simplistic. Instead of using fault as a guiding principle, inspiration could be drawn from the rest of Family Law, which shows how different interests could be balanced in a fairer and more sympathetic way.

The very theoretical premise of fault in divorce law is therefore open to challenge, but the most compelling challenge to its preservation is the current practice of the law. This is caveated slightly by the recent *Owens* case, the focus of the next Chapter, however the exceptionality of the case means that the arguments in this Chapter are not diminished. As the fault-based grounds are the quickest grounds for divorce, they are relied on in the majority of petitions. The unreasonable behaviour ground is the most popular because of the flexibility it offers and its susceptibility to manipulation. The allegations made are not scrutinised, which means that divorce is effectively 'on demand', and a respondent who faces allegations which are exaggerated or even fabricated is in a difficult position. Defending a divorce is not a realistic possibility as a result of the cost and inevitability of divorce.

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[597] See page 35 above

The support for no-fault divorce is undisputable, both from the general public and the legal profession. The Special Procedure is aimed at speed, simplicity and economy, but the legislation is encapsulated by opposing ideals such as deterring divorce and expressing the solemnity of the occasion. It is this disparity that has caused the dissatisfaction with the current law and the problematic *Owens* case.

Chapter 5 - *Owens v Owens*

The problems with divorce law in its current form as outlined thus far were given real-life footing in *Owens v Owens* in 2018[598]. Though this case is a palpable example of just how unpredictable and unsatisfactory the operation of the law can be, it may potentially play a vital role in the context of reform. Ever since the Family Law Act 1996 failed in its attempt to introduce no fault divorce, calls for reform had fallen on deaf ears[599] and hopes of progressive change dwindled as efforts to implement such changes were continually resisted[600]. However, there is little doubt that *Owens* 'thrust the country's lack of provision for no-fault divorce into

[598] *UKSC 41*
[599] Tony Roe Opinion: At fault on no-fault divorce, Law Society Gazette, (6 March 2017)
[600] For example, see Richard Bacon's Private Member's Bill – 'No Fault Divorce Bill 2015-16', introduced to Parliament on 13 October 2015, and progressed no further than a first reading in the House of Commons

the spotlight[601]' and added another layer of urgency to the calls for reform. Regrettably, such a valuable contribution to the campaign comes at a price. The Supreme Court declined to interfere with the Trial Judge's conclusion that despite the marriage between Mr and Mrs Owens having broken down without any prospect of reconciliation, Mrs Owens had not successfully proven the allegations in her unreasonable behaviour petition. Mrs Owens, who presented her petition in 2015, will therefore remain trapped in a 'loveless and desperately unhappy marriage[602]' until 2020[603]. This Chapter will examine the extent of Owens' influence in the context of reform, as well as the ways in which the case is illustrative of the deficiencies in current English and Welsh law as explored in the previous Chapter. The decision of the Supreme Court will also be critically analysed, focusing on the Justices' reasoning based on the facts of the case, and the potential scope of other interpretations of the law.

One preliminary point should be noted. The case attracted widespread media attention and elicited inflammatory headlines from certain media outlets, such as 'Divorce laws 'in crisis' after Supreme Court forces woman to stay married'[604] and 'Unhappy wife Tini Owens told she CANNOT divorce her husband of 40 years by Supreme Court judges[605]'. Critical remarks were also rife the academic commentary[606]. However, the case must be considered in its appropriate legal context[607]. As already mentioned in the previous Chapter, defended divorce petitions such as the one in *Owens* are exceptionally rare. What is even rarer, is a successfully defended

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[601] Damien Gayle, 'Unhappy marriage not grounds for divorce, supreme court rules' The Guardian (London, 25 July 2018)
[602] *Owens v Owens* (2017) EWCA Civ 182, para 83
[603] When she can apply for a divorce on the basis of the 5 year separation ground
[604] The Daily Mail Press Association (25 July 2018) https://www.dailymail.co.uk/wires/pa/article-5990945/Divorce-laws-crisis-Supreme-Court-forces-woman-stay-married.html > accessed 12 February 2019
[605] Brian Farmer and Amber Hicks (The Mirror, 25 July 2018) https://www.mirror.co.uk/news/uk-news/unhappily-married-british-woman-told-12976970 > accessed 12 February 2019
[606] For example, 'the risk remains that family solicitors are forced to use more extreme examples of unreasonable behaviour in order to cross the threshold, thereby unnecessarily increasing the animosity between the parties, or that a party remains trapped in a loveless marriage long after they believe it has broken down' Lucy Bridger, 'Analysis: *Owens v Owens* – the Difficulty in Divorce' Family Law LexisNexis (18 February 2019). See also the Graeme Fraser, 'Reflections on the State of Family Law' New Law Journal (20 September 2018) for a criticism of the Government's inaction following a series of Supreme Court Family Law judgements, including *Owens.* See Sarah Trotter 'The State of Divorce Law' The Cambridge Law Journal 78 (2019), p. 39-41 for an analysis of the wider questions which divorce law must address. See Mark Harrop, 'There Are No Winners in Owens v Owens' Solicitors Journal (April 2017) for an exploration of whether the Court of Appeal's judgement undermined the practice of the law despite calling for reform. See David Burrows 'Relationship Breakdown and the Law' Family Law 788 (2019) for a discussion on the wider issue of how the law deals with relationship breakdown in Family Law generally. See Elizabeth Walsh, 'Where next after *Owens v Owens*?' Family Law 474 (2017) for an analysis of the potential consequences for the practice of divorce law.
[607] Caroline Bridge, Case Comment - 'Divorce – Owens v Owens' (2018) UKSC 41, Fam Law 1111

petition; *Owens* marks the first of its kind in recent years, as most are settled before trial[608]. It is remarkable that Mr Owens was able to resist all attempts at settlement.

In addition, the fact that the case was presented on the basis of the behaviour ground is significant. As discussed below, the Supreme Court considered, in effect, the extent to which the Matrimonial Causes Act 1973 requires a petitioner to prove that the respondent's behaviour caused the breakdown of the marriage; a question which goes to the very essence of s.1(2)(b). Thus as Blain points out, it could be said that the very concept of unreasonable behaviour was itself on trial[609]. As explained in the previous Chapter, this is the most frequently used ground, and so the wider implications of *Owens* in the context of pleading a divorce petition based on behaviour must be considered.

The Facts

As several commentators have pointed out, despite the exceptionality of *Owens*, being a case that was not only subject to the formal court process but one that was successfully defended, the facts are rather unremarkable. The particulars as set out by Mrs Owens were rather typical of a behaviour petition[610], to the extent that 'such petition particulars would be approved by all District Judges in box work'[611]. Tini Owens, the wife and the petitioner, and Hugh Owens, the husband and the respondent, married in January 1978 and have two adult children. A draft divorce petition was sent to Mr Owens in December 2012 but was not pursued further. Mrs Owens had an affair between November 2012 and August 2013. They separated in February 2015 and had since been living in separate accommodation. Mrs Owens filed the petition under discussion in May 2015[612].

Mrs Owens initially had four complaints. Firstly, she alleged that Mr Owens inflexibly prioritised work over family and home life, missing family holidays and family events which allegedly caused unhappiness to Mrs Owens[613]. Secondly, he failed to show her love and affection during the later years of marriage and was not supportive of her role as a homemaker

[608] Trinder and Setfon, 'No Contest: Defended Divorce…', p. 3
[609] Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal
[610] David Emmerson, 'Unreasonable Behaviour' (7 April 2017), Family Legal Update, New Law Journal, p.9
[611] *Ibid*
[612] EWCA Civ 182, para 3
[613] *Ibid*, para 4 (1)

and mother causing her to feel unappreciated[614]. Thirdly, she alleged that Mr Owens suffered from mood swings which led to arguments which Mrs Owens claimed she found distressing and hurtful, and she cited 9 examples of such incidents[615]. Lastly, Mr Owens was allegedly unpleasant and disparaging about Mrs Owens in the company of family and friends, criticising, undermining and consequently embarrassing her, and she specified 18 examples of such incidents[616].

Mr Owens indicated his intention to defend the petition in his acknowledgement of service and filed his answer shortly afterwards, denying that the marriage had broken down irretrievably. Mrs Owens was instructed to file more detailed particulars and was subsequently invited by the Trial Judge, Judge Tolson, to focus on the top 27 allegations, primarily related to the final point about embarrassing her in front of others. A case management hearing followed, and Mrs Owens' legal advisers indicated to the court that only half a day was needed to determine the issues raised by her petition, and that she did not intend to call any witnesses[617]. The case was set for a one day hearing before Judge Tolson in the Central Family Court.

Counsel for Mrs Owens then proceeded to set out a number of specific examples of Mr Owens' behaviour. The three matters discussed in detail and those which Judge Tolson invited Mrs Owens to rely on as the top three allegations[618] in terms of seriousness were the 'airport incident', the 'restaurant incident' and the 'pub incident.' Particular attention was dedicated to the first. In brief, the couple were at an airport in Mexico on the way home after attending a wedding. Mr Owens told Mrs Owens that he had seen a gift for the housekeeper. When Mrs Owens went to see for herself, she couldn't find the item Mr Owens was referring to and so bought a necklace for the housekeeper instead. According to Mrs Owens he then raised his voice and snapped at her, chastising her in front of strangers and refusing to drop the matter[619]. During the 'restaurant incident', when the couple went out for dinner with a friend, Mr Owens started to make 'stinging remarks' about Mrs Owens and snapped at her for speaking to the

[614] *Ibid*, para 4(2)
[615] *Ibid*, para 4 (3)
[616] *Ibid*, para 4(4)
[617] David Burrows, 'Pleading and Pursuing a Behaviour Petition after Owens' (August 2018), New Law Journal, p.12-13
[618] EWCA Civ 182, para 11
[619] EWCA Civ 182, para 13

waiter[620]. During the 'pub incident'[621], Mr Owens sat silently in the pub with his head resting in his hands[622].

The particulars of the behaviour set out in *Owens* have been described by commentators as 'anodyne'[623]. It is clear why some would conclude that these are typical skirmishes that couples will inevitably engage in after a marriage of such length. Sir James Munby, giving the leading judgement in the Court of Appeal, stated that 'many petitions are anodyne in the extreme. The petition in present case is a good example; I cannot help thinking that, if the husband had not sought to defend, the petition would have gone through under the special procedure without any thought of challenge from the court.[624]' The fourth incident raised at the trial, but discussed only briefly - the 'housekeeper incident', seemed to highlight the lack of drama present in the particulars. Mr Owens approached Mrs Owens and the housekeeper in the kitchen and criticised Mrs Owens for putting cardboard in the skip incorrectly and complained that pieces of the cardboard were all over the garden. When Mrs Owens and the housekeeper went outside, they found only four small pieces on the floor[625].

It is true that the facts are likely to be similar to many other behaviour petitions. However, the language used to describe these particulars arguably demonstrate a tendency to minimize their gravity, especially in terms of the effect on Mrs Owens. As discussed earlier[626], the question for the Trial Judge in a behaviour petition, is to be focused on the effect of the behaviour on the petitioner. That is, whether Mrs Owens found it unreasonable to live with Mr Owens, not whether the behaviour itself was unreasonable. The Trial Judge was therefore required to make a finding of fact regarding this question. When faced with detailed behaviour examples such as those outlined above, the unjusticiability of this central question becomes even clearer.

The Trial Judge found as a matter of fact that the marriage had broken down, but refused Mrs Owens a decree nisi based on his determination that she had failed, on the balance of probabilities, to show that Mr Owens had behaved in such a way that meant that she could not

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[620] EWCA Civ 182, para 14
[621] Mrs Owens wanted to have supper at a local pub, and a reluctant Mr Owens booked a table or he 'would never hear the end of it'
[622] EWCA Civ 182, para 16
[623] Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal, p. 12
[624] EWCA Civ 182, para 93
[625] *Ibid*, para 18
[626] See Chapter 3

reasonably be expected to live with him. In other words, the marriage had broken down in fact, but not in law. He referred to the application of an objective test; what would a reasonable observer make of the allegations, with subjective elements, taking into account the whole of the circumstances of the marriage[627].

The Trial Judge's criticism was scathing, describing Mrs Owens' petition as 'hopeless', 'anodyne' and said it 'lacked beef because there was none'[628]. He was particularly sceptical about Mrs Owens' complaints about Mr Owens' lifestyle, the suggestion that he was pre-occupied with work and neglected home life. He insinuated that this was fabricated and opportune, because 'no complaint seems to have been made' prior to his retirement, when he was working in the business that made them both wealthy[629]. He referred to the 27 allegations put forward by Mrs Owens as 'at best flimsy', and in any case, 'the best the wife can come up with[630]'. In his concluding remarks, he stated that he was 'satisfied that the wife has exaggerated the context and seriousness of the allegations to a significant extent. They are all at most minor altercations of a kind to be expected in a marriage. Some are not even that[631]'.

This is surprising given that the facts laid out in the particulars are far from unusual. Mere boredom with the marriage or simple incompatibility is not sufficient[632], which is understandable as s. 1(2) (b) would therefore be rendered meaningless. However, what is remarkable about *Owens* is that the behaviour cited was held to be too minor in nature when some of the examples included in Practitioner Guides include failure to help around the house, nagging the petitioner to do household chores and failure to spend time with the petitioner's family[633]. If disliking your in-laws can potentially constitute a ground for divorce, the threshold for unreasonable behaviour seems very low[634]. Furthermore, there are similar examples in the

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[627] Previous case law waters down the requirement of objectivity by making allowances for the petitioner's own characteristics. For example, in *Carter Fea v Carter Fea* (1987) 17 Fam Law 131 CA, the court allowed the petitioning wife a divorce, based on her husband's financial irresponsibility. Though was explicitly said to be insufficient on its own, its effect or the wife's mental health enabled her petition to be successful

[628] *Ibid*, para 42

[629] *Ibid* para 43

[630] *Ibid* para 44

[631] *Ibid* para 46

[632] *Kisala v Kisala* (1973) 4 Fam Law 90

[633] Thompson Reuters Practical Law Database, 'Divorce and Dissolution: Unreasonable Behaviour' Practice Note (updated 2019)

[634] Cambridge University Psychologist Terri Apter's study found that 3 out of 4 couples 'experience significant conflict with their in-laws' – Yvonne Fulbright, 'Have In-Law Issues?' (Psychology Today, 14 October 2013), https://www.psychologytoday.com/us/blog/mate-relate-and-communicate/201310/have-in-law-issues > accessed 25 June 2019

case law which indicate a low threshold, such as *O'Neill v O'Neill*[635], where being a DIY fanatic and taking months to replace a door constituted unreasonable behaviour.

It is also appears that Judge Tolson failed to turn his attention to (or refused to accept) May LJ's comments in the well-established unreasonable behaviour case of *Buffery v Buffery*, namely that 'the gravity or otherwise of the conduct complained of is of itself immaterial[636]'. Judge Tolson also commented that 'the wife did have something to hide and she had hidden it[637]', when referring to her affair. He interrupted the cross-examination of Mrs Owens and put to her that some of the condescending comments Mr Owens made when he became suspicious of the affair were 'fair enough[638]'. Regarding the top 3 incidents (the airport, restaurant and pub incident), Judge Tolson was of the view that these were 'isolated incidents consisting of minor disputes[639]'. He described Mr Owens as 'somewhat old-school' without expanding on what exactly he meant by that, and described Mrs Owens as 'more sensitive than most wives[640]'.

After the Trial Judge refused to grant Mrs Owens a decree, she appealed to the Court of Appeal on the ground of process; that Judge Tolson had not been thorough enough in his assessment of the 27 examples of behaviour, neglecting the cumulative impact and her subjective characteristics, as well as the ground that the law was inconsistent with her rights under the European Convention on Human Rights[641]. Crucial to the Court's view, was that in applying the law to the facts, Judge Tolson's 'self-direction was entirely adequate, correctly drawing attention to both the objective test and the subjective elements[642]'. The Court of Appeal endorsed the 'test' for the unreasonable behaviour ground as set out in the 'divorce bible textbook[643]', *Rayden on Divorce,* namely:

> …whether a right-thinking person, looking at that particular husband and wife or civil partners, would ask whether the one could reasonably be expected to live with the

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See also, Joshua Krisch, 'Science Says you Hate your In-Laws Because of your Kids' (Fatherly.com, 8 August, 2017), https://www.fatherly.com/health-science/hating-in-laws-grandparents-science/ > accessed 25 June 2019

[635] (1975) 3 ALL ER 289

[636] (1987) EWCA Civ 4

[637] *Ibid* para 47

[638] *Ibid*

[639] *Ibid* para 49

[640] *Ibid*

[641] Sarah Trotter, 'The State of Divorce Law', p.40

[642] *Ibid*, para 47

[643] David Emmerson, 'Unreasonable Behaviour'

> other taking into account all circumstances of the case and the respective characters and personalities of the two parties concerned[644].

Regarding the objective element, Sir James Munby expressed the view that the question:

> …has to be addressed by reference to the standards of the reasonable man or woman on the Clapham omnibus; not the man on the horse drawn omnibus in Victorian times … not the man or woman on the routemaster clutching their paper bus ticket on the day in October 1969 when the 1969 Act received the royal assent but the man or woman on the Boris bus with their Oyster card in 2017[645].

In terms of the subjective element, when considering what is reasonable, the court must have regard to the history of the marriage and the individual spouses, as well as the cumulative impact of the behaviour on the petitioner[646]. What is unreasonable to one person may not be unreasonable to another[647], therefore the presence of a subjective element is clear. On this basis, the Court of Appeal held that Judge Tolson was entitled to evaluate the facts as he did had not made an error of law or procedure by focusing on particular allegations. It was this entitlement that was ultimately fatal to Mrs Owens' case.

The initial grounds of the appeal were therefore unsuccessful. Ironically, on Valentine's Day in 2017, the Court of Appeal declared that Judge Tolson had not failed when applying the law, not in relation to undertaking a proper assessment into the wife's subjective characteristics, nor in relation to assessing the cumulative impact of the behaviour on Mrs Owens (though this was questioned by Lady Hale[648]). In addition it was decided that Judge Tolson had not failed to take into account the wife's Article 8 and Article 12 rights under the ECHR, with *Babiarz v Poland* being 'determinative' on the non-existence of a right to divorce or a favourable outcome in divorce proceedings[649].

This interpretation and application of the law was undisputedly held to be the correct one through the entire appeal process, but the majority of the judges who presided over both appeals came to this conclusion reluctantly. In the Court of Appeal, Sir James Munby stated that the

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[644] *Rayden & Jackson on Relationship Breakdown, Finances and Children*, 12th edn, Vol. 1 (LexisNexisUK, 1974), para 6.85
[645] EWCA Civ 182, para 41
[646] Lucinda Ferguson, 'Hard Divorces make Bad Law' Case Comment (July 2017) Journal of Social Welfare and Family Law
[647] David Emmerson, 'Unreasonable Behaviour'
[648] See page 121 below
[649] EWCA Civ 182, para 77

Trial Judge was best placed to consider the case, he could not be criticised for making the findings of fact that he did[650]. He caveated this with a strong statement however; 'Parliament has decreed, that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage[651]', and Lady Justice Hallet reached the same conclusion on the law as the President of the Family Division, but 'with no enthusiasm whatsoever[652]'. This indicates that the criticism in the Court of Appeal's judgement was not primarily aimed at the way Judge Tolson had applied the law to the facts, rather it was directed at the law itself.

The appeal to the Supreme Court was different. By this point, Resolution had intervened in the appeal, rather unsurprisingly, as it marked the first time a case concerning divorce itself, rather than financial or child-related matters, was to appear before the Supreme Court[653]. Permission to bring the appeal was granted on the basis that the case would raise a novel issue regarding the interpretation of the behaviour ground as set out in s.1(2)(b), but this was discarded by Mrs Owens' counsel at the hearing. Resolution however, instead of calling for reform, argued that the existing law could be interpreted to allow the Supreme Court to overturn the Court of Appeal's decision[654]. Instead, the Supreme Court unanimously agreed with the Court of Appeal. They were of the view that, regardless of whether they wanted to, it would be inappropriate for them to intervene and to overturn the Trial Judge's conclusion given that he did not make an error of law in reaching that conclusion.

Such a decision may be viewed as somewhat of an anti-climax given that the Court which hears cases of the greatest public importance was offered an immense opportunity to transform an extremely problematic area of law. Especially since there has been shift in the perceived constitutional role of the Supreme Court. Lord Falconer stated in 2004 that the courts are simply 'bodies who resolve disputes between people[655]', but since then the Supreme Court has had an vital role in the progress of devolution, the application and interpretation of the ECHR,

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[650] David Emmerson, 'Unreasonable Behaviour'
[651] EWCA Civ 182. para 84
[652] EWCA Civ 182, para 99
[653] Mills & Reeve, 'Ending the blame game? Mills & Reeve represent Resolution in landmark Supreme Court case' (17 May 2018), https://www.mills-reeve.com/ending-the-blame-game-mills-and-reeve-represent-resolution-in-a-landmark-case/ > accessed 22 February 2019
[654] Niger Shepard interview (https://blogs.lexisnexis.co.uk/content/family-law/time-for-constructive-divorce)
[655] In discussing the Constitutional Reform Act 2005, Hansard, HL Deb February 2004, Vol. 656

and of course most recently[656], in navigating the unchartered mechanics of Brexit[657]. Then again, this reluctance to interfere with the Trial Judge's determination is not surprising to anyone familiar with the English and Welsh judicial system. Following the Woolf and Jackson Reforms and the increasing costs and case management powers given to first-instance judges, greater importance has been placed on the value of the Trial Judge's determination. Lord Neuberger speaking extra-judicially, said that '…Trial Judges almost always have, and should have, not only the first word, but also the last word[658]'. In considering the Trial Judge's conclusion, the Supreme Court deflected jurisdiction onto the Court of Appeal[659]. The Court of Appeal was not prepared to interfere with the first-instance judge's findings, relying on Lord Reed's guidance in *Henderson v Foxworth*[660]:

> …in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

Nevertheless, the unyielding faith in the Trial Judge's determination did not preclude both courts from discussing the wider issues. Sir James Munby, in his Court of Appeal judgement, cited Cretney by posing the question '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?[661]'. As Ferguson points out, *Owens* posed another question for the Supreme Court. They had to consider whether one party's experience is enough for a marriage to be broken down as a matter of law, without the significance of that experience being vulnerable to challenge by either the party or the state. The Supreme Court did indeed engage with these conceptual and challenging questions. Unfortunately for Mrs Owens however, such commentary was mere obiter dicta.

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[656] Byron Karemba, 'Brexit, the Separation of Powers and the Role of the Supreme Court', LSE Blogs (14 August 2018) https://blogs.lse.ac.uk/brexit/2018/08/14/brexit-the-separation-of-powers-and-the-role-of-the-supreme-court/ > accessed 5 April 2019

[657] For example, *R (Miller) V Secretary of State for Exiting the European Union* (2017) UKSC 5

[658] Lucy Hayes, 'Lord Neuberger: First-instance judges have duty to make parties 'fall into line'', UK Supreme Court Blog (9 February 2015) http://ukscblog.com/lord-neuberger-first-instance-judges-have-duty-to-make-parties-fall-into-line/ > accessed 26 February 2019

[659] 'the complaints of Mrs Owens about his judgment have already been analysed and dismissed by members of the Court of Appeal who have unrivalled authority in this sphere' - UKSC 41, para 43

[660] *Henderson v Foxworth Investments Ltd* (2014) UKSC 41 1 WLR 2600, para 67, referred to in para 58

[661] EWCA Civ 182, para 87

The Application of the Law to the Facts – An Analysis

Though Judge Tolson was entitled to apply the law to the facts in the way that he did, it is still worth analysing the 'findings of fact' which led to his decision, in order to see whether the Court of Appeal and the Supreme Court's reluctance to interfere was justifiable, and because it illustrates the non-justiciability of the issues at hand and the hostility the law can generate. It is at least arguable that his treatment of the facts did indeed demonstrate a misunderstanding of the relevant evidence and was unjustified, thereby on the *Henderson v Foxworth* test relied on by the Court of Appeal, there was scope for interference.

Judge Tolson's characterisation of the incidents were, in Lady Hale's words, 'troubling'[662]. The allegations provided by Mrs Owens were described as 'flimsy', but as Turner points out, such domestic clashes are only flimsy if there is still love; in absence of that love, the incidents from Mrs Owens' perspective are not only unreasonable, they are hell[663]. The Justices of the Supreme Court were sceptical that the Judge had paid sufficient regard to the cumulative impact of the behaviour on Mrs Owens, placing their faith in the President of the Family Division's conclusion that he had paid such regard. As explored below, given how the case was directed to be tried before Judge Tolson, it could be said that counsel for Mrs Owens were never given an opportunity to paint a persuasive picture of the cumulative effect of Mr Owens' behaviour.

In any case, it is almost remarkable that Judge Tolson was unable to appreciate that context is so crucial, as Lady Hale put simply; 'those who have never experienced such humiliation may find it difficult to understand how destructive such conduct can be of the trust and confidence which should exist in any marriage[664]'. Lady Hale was prepared to send the case back for another hearing before a different judge, presumably on an amended, wider petitioner. However she was inhibited by Mrs Owens' counsel's self-proclaimed 'dread' at the prospect of another hearing, and in any event the 5 year separation ground would be available to Mrs Owens in 2020[665].

[662] UKSC 41, para 50
[663] Janice Turner, The Times
[664] UKSC 41, para 50
[665] *Ibid*, para 53 and 54

Judge Tolson's gender did not automatically preclude him from having compassion for someone in Mrs Owens' position, but his description of her as 'more sensitive than most wives[666]', whilst Mr Owens was 'somewhat old-school', is symptomatic of a chauvinistic mentality. Despite having a duty to take into account the characters and the personalities of the parties in his assessment of the respondent's behaviour and its impact on the petitioner, the language used suggest that a traditional concept of marriage with distinctive gendered roles formed the backdrop of this analysis.

All of the 27 examples of behaviour given were 'flimsy', and Mrs Owens had exaggerated their context according to Judge Tolson[667]. However, it is possible that his outdated views on marriage and his prejudiced concept of 'the wife' precluded him from seeing conduct that potentially formed a pattern of controlling and bullying behaviour. Not only did Mr Owens deny the very breakdown of the marriage in his answer to the petition[668], some of his responses to the allegations had a troubling tone. In response to 'the housekeeper/cardboard incident' cited by Mrs Owens, he said that it was her own fault that the incident had turned out badly; 'the Respondent accepts that since this topic had been raised before his frustration may have shown but any embarrassment caused over this incident was because it was the Petitioner who 'flew off the handle' in a manner which was unwarranted[669].' During cross-examination on the 'airport incident', he vigorously denied that Mrs Owens was embarrassed by his behaviour, stating that 'my wife has not got the monopoly on embarrassment[670].

Owens can therefore be viewed from a feminist perspective, as part of a wider discussion on Supreme Court decision-making. Lady Hale subtly alluded to the potential inability[671] of her all-male fellow judges to assess the real impact of a man's behaviour towards his wife in a fully

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[666] A more technical criticism of this phrase is that it does not accurately reflect the case law, in *Birch v Birch* (1992) 1 FLR 564 the court granted a divorce whilst acknowledging that the wife's sensitive nature made it unreasonable for her to go on living with the husband
[667] EWCA Civ 182, para 20
[668] UKSC 41, para 11
[669] EWCA Civ 182, para 19
[670] *Ibid*, para 21
[671] Lady Hale has expressed similar sentiments in other cases. For example, in *Radmacher v Granatino* (2010) UKSC 42, she was keen to remind her (again, all-male) fellow judges, not to 'lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled' (para 137)

neutral, objective way[672]'. There are several other cases where Lady Hale has eloquently suggested that a male-dominant judiciary will invariably fail to be fully sympathetic to women's issues[673], and she has also spoken on this extra-judicially in more explicit terms[674]'.

It is entirely appropriate that sexist tendencies such as those observables in *Owens* are confronted; they are not rare occurrences. Out-dated conceptions of marital responsibility still play a part in determining legal outcomes, to the detriment of women. There is scope to argue that the law on divorce itself operates in a discriminatory way. For example, a report by the charity Rights of Women found that the having to rely on unreasonable behaviour as a ground for divorce places women who are victims of domestic abuse at greater risk. Many do not wish to cite abuse in the petition in fear of angering the perpetrator, but *Owens* may put pressure on these women to do so by upping the threshold. What we can also see from *Owens*, though perhaps on a smaller scale – is the law providing a potential mechanism for controlling men to continue to exert power and control by abusing the court process and prolonging proceedings[675].

The discussions surrounding the affair were problematic. Mr Owens claimed that Mrs Owens had an ulterior motive for collecting evidence by documenting the incidents pleaded, and described them as 'a collection of molehills which she felt suited her purpose to build up into mountains because she had aspirations outside of our marriage[676]'. Judge Tolson seemed inclined to agree with Mr Owens on this point, namely, that Mrs Owens' affair was the true reason for the breakdown of the relationship. He seemed adamant that 'the fact that she does not live with the husband has other causes[677]'.

This is a strong statement to make given that we can, of course, never be sure of what leads to relationship breakdown between two individuals. We can never be sure of people's feelings, much less adjudicate on them and pinpoint a specific cause to account for the end of the

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[672]Again it is worth reiterating her statement; 'those who have never experienced such humiliation may find it difficult to understand how destructive such conduct can be of the trust and confidence which should exist in any marriage', UKSC 41, para 50

[673] For example, see *Stack v Dowden* (2007) UKHL 17

[674] In an interview with the Guardian, she expressed her desire for a more gender balanced judiciary, to avoid the risk of a lack of respect for judges- the idea that the general public will view them as 'beings from another planet'. Owen Bowcott, 'White and Male UK Judiciary 'From Another Planet', says Lady Hale' The Guardian (London, 1 January 2019)

[675] Rights of Women, Briefing on Divorce Reform, (July 2018)

[676] UKSC 41, para 50

[677] EWCA Civ 182, para 50

complex, intimate relationship that forms a marriage. The petition presented to Judge Tolson, was brought by Mrs Owens and was based on the behaviour ground, it was not brought by Mr Owens and based on the adultery ground. At the hearing however, Judge Tolson indicated his view that the affair 'knocks out' the allegations in the petition. This suggestion contributes to the inherent irrationality of a divorce law based on fault. That is, the existence of an affair surely bolsters the case for divorce – it is further proof that the marriage has well and truly broken down irretrievably, but the law invited Judge Tolson to assume that Mrs Owens' affair negated Mr Owens' behaviour in some way. This is an inevitable consequence of a law that is firmly grounded in notions of blame, guilt, innocence and adversarialism.

As Lord Wilson stated in the Supreme Court, it was 'wrong' for Judge Tolson to suggest that this was the case[678]. It is argued that this could have been expressed in stronger terms. If Lord Wilson is correct that 'we should be referring to the 'facts' in section 1(2) (a) and (b) as 'conduct-based' rather than 'fault-based[679]', as well as the case law[680] that has established that s.1 of the MCA does not require the behaviour under the subsection to have caused the breakdown of the marriage, then the logical conclusion is that Mrs Owens' affair should have been irrelevant to her petition. What we see however, is an example of how the law invites, almost encourages, blame and accusation.

If the court is to carry out its duty under s.1 (3) to inquire into the facts alleged, but to do this detached from ideas of fault as Lord Wilson would have it, it is difficult to see how a petition could be refused. That is, if a marriage has broken down irretrievably (which it has, by definition, having reached divorce proceedings), and the petitioner cites behaviour that has made it unreasonable for him or her to continue to live with the respondent – there are no rational or justifiable grounds for allowing a court to tell them that they are wrong on this point if blame is not to factor into its decision-making.

Despite his finding that Mrs Owens had not cited behaviour which showed that she could not reasonably be expected to live with Mr Owens, Judge Tolson was sure that the marriage had, without a doubt, broken down. In addition, despite finding for Mr Owens and defending his 'old-school' nature, he acknowledged that his insistence that the marriage had not broken down

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[678] UKSC 41, para 8
[679] *Ibid*, para 48
[680] see *Stevens v Stevens* (1979) 1 WLR 885 and *Buffery v Buffery* (1988) 2 FLR 365

was fanciful. Mr Owens was of the view that he and his wife had learned how to 'rub along'[681], and he still hoped that his wife would change her mind and return to live with him[682], to which Judge Tolson replied that 'he is deluding himself[683]'. During his concluding remarks, Judge Tolson also recognised that the impact of his decision was to leave both parties 'stymied in lives neither of them wish to lead[684]'.

Given this context, it is strange that he 'had not found this a difficult case to determine[685]'. As Burrows explains, where a case is properly pleaded it is difficult to imagine how a spouse can show that the marriage has broken down, but cannot also show that their spouse has behaved in such a way that they cannot reasonably be expected to live with them[686]. This goes to the heart of why Owens is such a problematic case; it was not properly pleaded. At the same time, counsel for Mrs Owens presented it as they would any other behaviour petition in light of the practice of the law.

Family Lawyers are already placed in a difficult position, having to balance protecting their client's interests without stirring up bitterness. This challenge is particularly acute in the divorce context. Counsel for Mrs Owens would have been aware of guidelines such as paragraph 9.3.1 of the Fourth Edition of the Family Law Protocol which explicitly states that 'where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court…'. They also would have borne Resolution's Code of Practice in mind, which advocates a constructive and non-confrontational approach, and emphasises that members are to 'reduce or manage any conflict and confrontation; for example, by not using inflammatory language[687]'. They were therefore, in effect, pulled in two contradicting directions. On the one hand, they needed to cite examples of Mr Owens' behaviour so as to successfully aid Mrs Owens in her pursuit of a divorce, but on the other hand, the culture of the profession in recent years has been geared towards citing the bare minimum to avoid increasing conflict.

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[681] UKSC 41, para 11
[682] Damien Gayle, The Guardian
[683] EWCA Civ 182, para 1
[684] *Ibid*, para 50
[685] *Ibid*
[686] David Burrows, 'Owens and How to Plead a Divorce Case' (August 2018) New Law Journal
[687] Code of Practice for Resolution Members, http://www.resolution.org.uk/site_content_files/files/code_of_practice_full_version_web.pdf > accessed 5 March 2019

It is possible that they severely underestimated the level of examination that would be undertaken by Judge Tolson, and failed to anticipate a Trial Judge who would construe his inquisitorial duty under s.1 (3) MCA in quite so literal terms. As the preceding chapters show however, they would be forgiven for doing so (and for recommending such a short hearing), because the level of scrutiny that is devoted to behaviour allegations is minimal, and divorce has effectively been 'on demand' for a number of years. The President in the Court of Appeal summarised this Catch 22 situation in the following way: 'the challenge for the divorce lawyer is therefore to draft an anodyne petition, carefully navigating the narrow waters between Scylla and Charybdis to minimise the risks that if the petition is too anodyne it may be rejected by the court whereas if it is not anodyne enough the respondent may refuse to cooperate[688]'.

Mrs Owens' counsel were not the only ones who underestimated the case. During the case management conference conducted prior to the trial, the Recorder directed that the parties should file only short witness statements and there should be no witnesses other than the parties themselves. He also directed a hearing of one day[689]. Judge Tolson had himself told counsel to focus in on particular allegations. The Supreme Court sympathised with the position Mrs Owens' counsel were put in, and seemed critical of the Trial Judge's approach:

> How could he find the three examples of behaviour to which he made specific reference to be no more than isolated incidents, not part of a persistent course of conduct, in circumstances in which it had been agreed to be convenient to place so many other pleaded examples, albeit verified in writing by Mrs Owens, to one side?[690].

The Supreme Court also raised the possibility that Judge Tolson had erred (after being misled by representations on behalf of Mr Owens) by requiring that Mrs Owens establish that the behaviour she cited caused the breakdown of the marriage, when this is not the law's position[691]. His focus on the affair suggested this.

The concerns raised by the Supreme Court are profound. The Justices said that they were satisfied with the Court of Appeal's finding that Judge Tolson had paid sufficient regard to the cumulative impact on Mrs Owens, but this seems to be directly inconsistent with the above criticisms on how he dealt with the case. In reality, it is doubtful that the way the evidence was

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[688] EWCA Civ 182, para 93
[689] UKSC 41, para 12 and 13
[690] *Ibid*, para 40
[691] *Ibid*, para 41

presented could have enabled a proper evaluation of the cumulative impact of the behaviour in the first place. It was this approach to the evidence that was 'the most troubling' aspect of a 'very troubling case' for Lady Hale[692].

The Supreme Court's comments also demonstrate just how confusing the current law is. That a Trial Judge *may* have failed to apply the law correctly is a peculiar suggestion in a field of law which, on a common sense view, should be fairly uncomplicated. Even reasonable proponents of fault would agree that the question of whether two individuals should be allowed to divorce is an inappropriate one for the Supreme Court. The complexities which faced the Justices are a result of contradicting aims of legal doctrine and legal practice, as well as fact that the law enables an intrusive investigation into what should be private (and non-justiciable) matters, via the retention of fault.

Despite the confusion, commentators seem to think that the Supreme Court was right on the law[693], but that does not automatically mean that dismissing the appeal was unavoidable. It could be argued that given the strength of the criticisms made, they warranted overturning Judge Tolson's determination. It is of course, a possibility that the Supreme Court had the intention of coming to a decision that would have an impact on the law itself. That is, their focus was on the broader issue of the current state of divorce law and practice, rather than on the immediate case before them. Though such an approach is harsh on Mrs Owens, she will obtain a divorce in due course. Had the Supreme Court interpreted the law in such a way that enabled them to overturn the Trial Judge's determination and allow Mrs Owens her decree, this may have sent the wrong message; that the law is fit for purpose and the need for reform is not as needed and urgent as it might have previously been thought.

Not only was the Supreme Court concerned that Judge Tolson had failed to consider the cumulative impact when assessing the subjective element properly, the objective element was also examined. This time however, the question was more fundamental, and did not concern whether the Trial Judge had applied the law correctly, but whether the objective element is (or should be) a requirement at all. A question perhaps more suited to the attention of the Supreme Court. Counsel for Mrs Owens and Resolution raised the issue, and asked whether an interpretation of the unreasonable behaviour ground as contained in the MCA could lead to the

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[692] *Ibid*, para 46 and 50
[693] Lucinda Ferguson, 'Hard Divorces Make Bad Law'

sole requirement that the petitioner demonstrate that the respondent's behaviour has caused him or her to feel that they can no longer live with the respondent. In other words, whether the subjective test is sufficient on its own.

It has been established that the behaviour in question does not need to bear a causal link to the breakdown of the marriage. Despite the misleading shorthand, there is also no requirement for the behaviour in question to be 'unreasonable' and there is no definition or examples of behaviour in the legislation. The practice of the law has diverted significantly from notions of fault. It is understandable therefore, that counsel for Mrs Owens saw scope for arguing that the subsection may not actually require blame. In addition, on a purposeful interpretation of the MCA, it could be argued that its main objective is to enable the courts to dissolve marriages which have broken down irretrievably[694] , which would mean that if the marriage has broken down virtually any behaviour cited would be sufficient to grant a decree. Furthermore, to satisfy the adultery fact in s.1(2)(a) of the MCA, the petitioner must prove the adultery as well as the fact that he or she finds it intolerable to live with the respondent, but this is a purely subjective test.

Unfortunately, the previous case law is determinative on the presence of the objective component in the behaviour ground. In *Balraj v Balraj*[695] for example, it was stated that 'when that subjective element has been evaluated, at the end of the day the question falls to be determined on an objective test[696]'. Judge Tolson took this objective test to mean that he was required to ask himself, 'what would the hypothetical reasonable observer make of the allegations?[697]', and the Court of Appeal was right that Judge Tolson's self-direction was correct based on the law. Nevertheless, questioning the very basis of this self-direction was, and still is, important.

The requirement of an objective *and* subjective element is illogical. It is worth repeating the precise wording used in the legislation which forms the behaviour ground: 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'. The only person who can answer this question is Mrs Owens herself; she is the

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[694] Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal, p. 13
[695] (1981) 11 Fam Law 110
[696] *Ibid*, Cumming-Bruce LJ, para 112
[697] UKSC 41, para 39

only one who will ever know the true effects of Mr Owens' behaviour and know how they made her feel. If she says that she can no longer tolerate living with Mr Owens, it brings the inquiry to its logical conclusion. No matter how reasonable an outside observer is, he or she will never be able to answer the same question with any degree of certainty without being party to the marriage themselves. The only rational explanation for involving objectivity is to invite judgement on people's feelings, to the effect that the courts are ultimately dictating how people should react to situations[698]. The irony is that it the law establishes a high threshold to show the unreasonableness of having to continue to live with your spouse, but it seems that it is not unreasonable to force your partner to stay in the relationship against their wishes.

No doubt it is likely that the Justices of the Supreme Court were acutely aware of how unsatisfactory this situation is, and subtle but powerful criticism of the law was weaved into almost every separate judgement. Early on, Lord Wilson stated that 'unless and until repealed by Parliament, section 1 of the 1973 Act must conscientiously be applied, the family court takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being[699]'. Lady Hale said succinctly, that she '…found this a very troubling case[700]', and Lord Mance shared Lord Wilson's 'unease'[701]. The question therefore becomes whether they *could* have done anything despite the relatively clear position of the law.

The Supreme Court has a historic role in interpreting statutes purposefully, in light of current social values, and the limits of this power were truly tested in *Owens*. Anyone familiar with some of the landmark cases in English and Welsh jurisprudence will know that judges must sometimes make law themselves, either covertly or explicitly, because of the indeterminacy of statutes and 'the rule that a statute is always speaking[702]'. When they do this, they should respond to changes in societal values and act as a deputy to the legislature - acting as they would.

In *White v White*, the court interpreted s.25 of the MCA so that there was no place for discrimination between husbands and wives on the basis of the nature of their contribution to

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[698] This supports the contention that the State perceives marriage as more a status than a contract, discussed more fully on page 139
[699] UKSC 41, para 15
[700] *Ibid*, para 46
[701] *Ibid*, para 58
[702] *R (Quintavalle) v Secretary of State for Health* (2003) UKHL 13, Lord Bingham of Cornhill, para 9

the marriage[703]. However, Lord Wilson in *Owens* seemed to imply a change in society regarding equality of the sexes, was the only relevant kind of change which would warrant the Supreme Court using its interpretive power in this case[704]. However, though the legislation itself does not discriminate, how the law was applied by Judge Tolson arguably set Mrs Owens at a disadvantage. He expressed his disproval with Mrs Owens' complaints regarding Mr Owens' lack of work-life balance, as if to say that she should have to tolerate negative aspects of the marriage because she knew what she was in for by marrying a wealthy man. His description of Mr Owens as 'somewhat old-school' is problematic as it is a phrase generally used to describe men, and implies some defence for his poor behaviour. Again, this raises questions about the gendered assumptions forming the backdrop of Judge Tolson's analysis.

There have been times where judges have been accused of 'judicial activism' or 'judicial vandalism[705]' when using their interpretive powers, by 'reading in' words into statutes or omitting them. That is, the courts have not only interpreted the language of a statute creatively, but have amended it, to the extent that some would describe the process as 'legislation from the bench[706]', as in *Ghaidan v Godin-Mendoza*[707] for example. However, these 'linguistically …strained[708]' interpretations have occurred in the context of the use of the court's power under S.3 of the Human Rights Act 1998 to interpret legislation 'so far as possible' in a way compatible with the ECHR. As discussed, the courts have resolutely denied the presence of any Article right in the context of divorce law.

Whether the court is interpreting legislation in light of changes in societal attitudes or in the context of the ECHR, they are still constrained to the extent that the statue must remain consistent with its essential scheme. This perhaps, is why the Justices felt that their hands were tied in *Owens*. The third Chapter on the history of divorce makes it is clear that the MCA was a compromise, and introduced a fault-based procedure for couples who had been separated for less than 2 years. This means that Parliament clearly had in mind a requirement that the petitioner establish fault. In addition, Parliament would not have troubled themselves with

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[703] Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal, p. 12
[704] UKSC 41, para 39
[705] Adam Wagner and Gideon Barth, 'Judicial Interpretation or Judicial Vandalism? Section 3 of the Human Rights Act 1998' Judicial Review Journal (July 2016) pages 99-104
[706] *Ibid*, page 99
[707] The words 'as his wife or husband' in the Rent Act 1977 were read 'as if they were his wife or husband' so as to encompass same sex couples (2004) 2 AC 557
[708] Adam Wagner and Gideon Barth

attempting to implement the 'no fault' provisions in the FLA 1996 had the existing provisions not required fault[709]. If the Supreme Court had accepted the argument that the subsection only required the question of whether Mr Owens behaved in a way which made it unreasonable for her to continue to live with Mr Owens based on her word alone, it would seem that any meaningful notion of fault would be made redundant and thus directly inconsistent with an indispensable part of the legislative framework.

A final point about the objective test needs to be made. When applying this test, as is the case with any 'reasonable person' test of which there are several throughout the law, the judge must set aside his own personal views, and hypothetically place himself in the shoes of a modern day reasonable observer. The President of the Family Division in the Court of Appeal depicted this individual as 'the man or woman on the Boris Bus with their Oyster Card in 2017[710]'. It is fair to say however, that in all likelihood, a London commuter would not have come to the same conclusion as Judge Tolson. The public response and media outcry to the case as referred to in the first paragraph of this Chapter is one indication of this, and the shift in attitudes towards marriage explored in the second Chapter is another.

A debate over whether a London commuter would or would not have thought that it was unreasonable for Mrs Owens to continue to live with Mr Owens is neither here nor there. Though it is implicit in the language used by the Supreme Court that most of the Justices would have decided the case differently and been persuaded that an objective onlooker would have thought it was unreasonable, that opinion is not sufficient to justify interference with a Trial Judge's determination, who heard the case first-hand. In any case, it would have been extremely difficult to argue with any degree of certainty that Judge Tolson had erred in applying this test, when such a test is inherently malleable. It is for this reason, as well as the lack of entitlement a London commuter has in passing judgement on the private affairs of a married couple, that it is argued that this test is a futile exercise from the outset.

Lady Justice Hallet succinctly summarised the conclusion that both the Court of Appeal (and subsequently the Supreme Court) came to; 'It is for Parliament to decide whether to amend section 1 and to introduce "no fault" divorce on demand; it is not for the judges to usurp their

[709] Simon Blain, 'Owens: Unreasonable Behaviour on Trial' New Law Journal, p. 13
[710] EWCA Civ 182, para 41

function[711]'. In other words, the Justices could not have interpreted the subsection in favour of Mrs Owens in a way that would not have directly encroached onto Parliament's domain. It must be borne in mind however, as previously mentioned[712], that this may indicate both the Court of Appeal and the Supreme Court's motivation in declining to intervene. That is, to allow the case to have a greater transformative effect than it would have had they decided to overturn the Trial Judge's determination. The number of times deference to Parliament was mentioned in both judgements may be allude to this point.

There is no such thing as pure deference to Parliament, the court is obliged to make a determination when a case brought before it, and one party will have to lose. Therefore, it is an inevitably frustrating result for Mrs Owens, who will have to remain married until 2020. Of some comfort however, is the fact that all the Justices in the Supreme Court made their views on the current law clear. Lord Wilson, in concluding his leading judgement suggested that 'Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances[713]'.

The Implications

The result of *Owens* is also problematic when considered in its wider context. Dworkin's popular theory embedded view of the law suggests that decisions must be coherent with other rules and principles in the legal system. Legal decisions are more likely to be seen as justified when the principles underlying those decisions could also provide justification of a more general nature in the area in which the case arises[714]. Placing *Owens* in the wider context of Family Law does raise serious questions about how the decision is justified. Within Family Law, the principles and values that have emerged in recent years have been geared towards equality and a recognition and a more democratic form of family living. As discussed, key to Family Law is the constant endeavour to balance the different rights engaged in an egalitarian way.

For example, within the law on financial provisions on divorce, the 'fruits of the marital partnership' shall now be shared without discrimination between the breadwinner and the other

[711] EWCA Civ 182, para 99
[712] See page 124 above
[713] UKSC 41, para 45
[714] Ronald Dworkin, *Taking Rights Seriously*, (Duckworth 1977)

spouse[715]. There has also been an increased focus on autonomy and choice, in *Radmacher v Granatino*[716] for example, the court decided to enforce a pre-nuptial agreement primarily on the basis of promoting respect for individual autonomy[717]. It is well-established that welfare is the paramount principle with all child-related matters. These overarching concepts and principles are progressive and sympathetic to the difficulties of family life. A divorce law which allows a court to force a woman to remain married to her husband despite her saying that she is miserable, effectively because she didn't show that his behaviour was bad enough, echoes outdated notions of marital responsibility and a judgemental paternalism which stands in stark contrast with the rest of Family Law. The mere fact that the judgement in *Owens* cited old case law illustrates how out of touch the law here is[718].

Furthermore, Judge Tolson's decision arguably flies in the face of 'treating like cases alike', a principle that is commonly associated with the rule of law. The purpose of this principle is mainly to protect expectations; there needs to be an element of predictability with legal reasoning. Of course, legal reasoning is indeterminate, in the sense that statutes do not provide a definitive answer and the judge has an element of choice, but these choices are often predictable because these judges are part of a legal culture and convention that we are familiar with, in other words, we know how they think and how they usually operate[719]. Judge Tolson however, though technically correct on the law according to the Supreme Court, deviated so significantly from how behaviour petitions are now dealt with, that his decision borders on being arbitrary. This is because his decision seemed to stem from his own values and beliefs.

It is therefore unsurprising that there is some apprehension within the legal profession regarding how behaviour petitions should proceed post-*Owens*. The worry is that stronger petitions will now be encouraged and the particulars will have to be 'beefed up' (to use the Court of Appeal's language). A divorce lawyer cited by Gayle said that it is 'likely that we'll see a rise in divorce petitions containing embellished and inflammatory grounds for divorce to

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[715] Alison Diduck, 'What is Family Law For?' pp. 287–314
[716] (2010) UKSC 42
[717] It is also worth noting that, although conduct is a factor to be taken into account under the discretionary S.25 MCA factors on financial provisions on divorce, only exceptional conduct will suffice, such as a husband's conviction for the attempted murder of the wife (*H v H (Financial Relief: Attempted Murder as Conduct)* (2005) EWHC 2911)). Conduct can therefore play a crucial role in obtaining a divorce, but most conduct will be excluded completely when it comes to dividing the matrimonial assets
[718] Caroline Bridge
[719] Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) Yale Law Journal, pp. 2-70

ensure that applications proceed without any issues as in the Owens' case[720]'. Lucinda Ferguson also acknowledges that the threshold for proving the ground may now be raised in practice, at least in the immediate future[721]. The necessary consequence of this will be an increase in bitterness and acrimony, which flies directly in the face of the legal profession's endeavour to minimize such ill-feelings[722].

Other commentators however, are convinced that the case should not change things. Burrows believes that until there is any substantive law reform, practice need not change, so long as the parties bear in mind Lord Wilson's three stages for the court's determination. First, by reference to allegations in petition, the court should determine what the respondent did or did not do. Second, it will assess 'the effect which the behaviour had upon this particular petitioner in the light of the latter's personality and disposition and of all the circumstances in which it occurred' (the subjective test). Lastly, in the light of these two assessments, is there 'an expectation that the petitioner should continue to live with the respondent would be unreasonable?[723]'.

Emmerson reminds practitioners that the petition in *Owens* failed not because the words used were insufficient, but because Judge Tolson decided that there was a lack of evidence in support, and a petition can be amended if the divorce is defended[724]. In addition, the Court of Appeal advised Family Lawyers that they should continue to be 'very moderate' when considering what to include in behaviour petitions[725]. Trinder and Sefton interpret this as a clear signal to carry on business as usual[726]. Excluding *Owens'* impact on the reform campaign, its effect on the existing law remains to be seen. It certainly has complicated the behaviour ground and caused a peculiar situation; the behaviour in question does not have to be grave and weighty, but *Owens* suggests that there must be something of substance[727]. This must mean

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[720] Damine Gayle, The Guardian
[721] Lucinda Ferguson, 'Hard Divorces Make Bad Law'
[722] Textbooks for prospective lawyers continue to explicitly advocate this practice, for example, by stating that 'If a solicitor takes an aggressive stance, advising in terms of 'winning' and 'losing'…then this is likely to serve up bitterness and lead a client to set his face against compromise'. Nancy Duffield, Jacqueline Kempton, Christa Sabine, *Family Law and Practice 2019* (College of Law Publishing, Guildford, 2019)
[723] David Burrows, 'Pleading and Pursuing a Behaviour Petition after Owens'
[724] David Emmerson, 'Unreasonable Behaviour'
[725] EWCA Civ 182, para 96
[726] Trinder and Sefton, 'No Contest: Defended Divorces…'
[727] Nancy Duffield, Jacqueline Kempton and Christa Sabine, *Family Law and Practice 2019*, (College of Law Publishing, Guildford) page 30

that what constitutes unreasonable behaviour will more than ever, depend on the circumstances of the case.

Conclusion

This Chapter has analysed the legal intricacies of the *Owens* case, but it is worth taking a step back to look at the broader implications that would be on the forefront of a layman's mind. Mrs Owens will have to go through the expense and the turmoil of presenting a new petition in 5 years. Emmerson rightfully questions the point in making the marriage continue, and what useful purpose there is for the court, the state and society in forcing the couple to remain together when one of them does not want to[728]. As Turner put it simply, all of this painful nonsense because 'I don't love you anymore' is not enough. Based on the way Mr Owens defended the case it is doubtful that he will consent to divorce before then, setting aside all the allegations laid out in the petition, on a purely common sense view, that very act is unreasonable[729].

Owens has illustrated how the criticisms of a fault-based law explored in abstract in the previous Chapter, are actually live issues that affect people's lives in a very real way. The counter-arguments and justifications for fault, again considered in the previous Chapter, also appear weaker after an analysis of *Owens*. Even if such arguments have some merit conceptually speaking, the case raises the question of whether encouraging taking responsibility or protecting the institution of marriage is worth this inconsistency and unfairness. As Emmerson says, the introduction of no-fault divorce would not bring conflict and differences to an end, but instead 'unnecessary flammable liquid will not be poured onto already smoking fires[730]'.

Since the Supreme Court's judgement was handed down on the 25th of July 2018, there cannot be an adequate discussion on the problems of no-fault divorce without reference to *Owens*. The case has forced such discussions away from what may be perceived as academic hyperbole and towards the political and public sphere, raising profound questions in the process. For one, questions about the acceptability of an out-of-date law which, through the inclusion of fault, serves to intensify animosity. Second, it has roused serious consideration of the purpose of

[728] David Emmerson, 'Unreasonable Behaviour'
[729] Janice Turner, The Times
[730] David Emmerson, 'Unreasonable Behaviour'

divorce law, and more fundamentally, the consideration of who we want to decide whether or not a marriage has or should be ended; whether that be the spouses themselves or the State[731].

Considered in this thesis' context, the fact that Mrs Owens is not allowed to divorce her husband until 2020 even though it is clear from the facts that the marriage has irretrievably broken down, the costs both parties must have incurred in litigating the divorce, and the undisputable absurdity of the highest court in the jurisdiction adjudicating on the details of a private relationship, means that arguing for retaining the status quo has become unfeasible. The fact that we are still awaiting legislative action, and that proposals for such[732], (despite advocating for the removal of fault) still retain some of the ideology which has facilitated the current situation, means that it is entirely reasonable to argue that divorce law should be devolved to Wales so as to enable legislation that accords with the country's own historical view of marriage and divorce. One which, as will be observed from the following Chapter, differs significantly from the one currently embodied in the jurisdiction of England and Wales.

[731] Sarah Trotter, 'The State of Divorce Law', p.41
[732] See page 182

Part 3: The Way Forward – A Welsh Perspective

Chapter 6 - The Tradition of a Status-Based View of Marriage and the Case for Devolving Divorce Law

The Status vs Contract Debate

A significant proportion of the literature surrounding the conceptual recognition of marriage is devoted to the question of whether marriage is to be understood as a status or a contract. Commentators often introduce the discussion by tracing it back to 1861; when Henry Maine promulgated the idea that the nature of relationships in progressive societies was defined by a shift from 'status'[733] to contract[734]. In essence, this entailed a shift towards relationships rooted in free agreement rather than kinships[735]. In this Chapter, the status vs contract debate will be outlined, with a focus on the merits of a contractual-based understanding. This will then be analysed in the context of Welsh legal history as well as recent legal and political developments in Wales, to argue that divorce law should be a devolved matter. This would afford Wales the opportunity to form its own, customised no-fault divorce, free of the problems discussed in detail in Chapter 4 and the applicability of *Owens* detailed in Chapter 5.

To describe marriage as a status is to refer to its nature as a public union which serves an institutional purpose. The marriage must follow a prescribed form as fixed by the State[736]. According to this view, marital obligations are defined by reference to the purpose marriage serves, which cannot be altered by the parties. By way of a useful analogy, the parties accept these moral obligations in a similar way to a doctor accepting the professional moral obligations necessary to become a doctor; they must be voluntarily accepted, and there is no scope to negotiate their content[737]. Hegel's account of marriage can be viewed as the epitome of marriage conceived purely as a status. He understood marriage as the foundation of a healthy State, and thought that the most ethical form of marriage was an arranged marriage, as it involves the subordination of personal choice to the institution. It means the parties give their

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[733] Some argue that it is misleading to apply the modern definition of 'status' to Maine's analysis and his words should be considered in their proper, historical context, for a fuller discussion see J.Russell VerSteeg, 'From Status to Contract: A Contextual Analysis of Maine's Famous Dictum', Whittier Law Review (1989)

[734] 'The movement of the progressive societies has hitherto been a movement from Status to Contract'. Henry Maine, *Ancient Law*, Chapter V (Reprint ed. 1986) (1st ed. 1861)

[735] Jonathon Herring, Rebecca Probert, Stephen Gilmore, *Great Debates in Family Law*, (Palgrave Macmillan, 2012), p. 45

[736] Marie Louise Parker, 'Marital Property Agreements, The Family and The Law: Status *and* Contract?' (DPhil Thesis, Bangor University, November 2012) p. 7

[737] Elizabeth Brake, 'Marriage and Domestic Partnership', Stanford Encyclopaedia of Philosophy (July 2009),

'consent *to constitute a single person* and to give up their natural and individual personalities within this union[738]'. There is a great deal that could be said about this interesting area, which forms part of a wider tradition of philosophical reflection on marriage[739], but the discussion needs to be properly focused.

The question of whether or not there *has* been a recognisable shift from marriage as a concept which confers a status to one characterised by contract is highly disputed[740]. The existence and extent of this development cannot be asserted with any degree of certainty, a much more definitive change in the nature of marriage has been the recognition of equality between husband and wife[741]. In any case, the aim of this section is not to try and resolve or add to the factual examination of whether or not there *has* been a shift from status to contract. Instead, for the purpose of assessing the wider implications of the status vs contract debate in the particular context of divorce reform, discussion will be centred on which characterisation of marriage *should* be favoured when shaping divorce law. This however, does not diminish the fact that the latter question is influenced by visible examples of a shift in legal thought.

An important preliminary point to make is that although the question of whether marriage should be viewed as a status or contract seem to invite a conclusive answer either way, analysis is more appropriately framed against the backdrop of a status-contract continuum[742]. In other words, rather than being categorised absolutely, status and contract should be viewed as 'two poles of a gradient or spectrum along which marriage moves[743]'. The combination of the public and private spheres makes Family Law, more generally, a unique area of law. Marriage forms part of this trend as an institution with elements of both status and contract, but the dominant presence of one over the other has wider implications. The argument here is that marriage

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[738] Hegel, *Elements of the Philosophy of Right* (edited by Allen. W. Wood) (1821), 162–63, 163A
[739] Elizabeth Brake, 'Marriage and Domestic Partnership', Stanford Encyclopaedia of Philosophy
[740] Some Family Law textbooks State that marriage in English law is understood as a contract, for example see Jonathon Herring *Family Law* (Pearson 8th edn, 2017), p.45. However the court's position seems to have been geared towards viewing marriage as a status – see Marie Louise Parker, 'Marital Property Agreements, The Family and The Law: Status *and* Contract?' (DPhil Thesis, Bangor University, November 2012), p.23.
[741] R.H.Graveson, 'The Movement from Status to Contract', The Modern Law Review, Vol 4, No. 4 (1941), p. 272
[742] See Marie Louise Parker, 'Marital Property Agreements, The Family and The Law: Status *and* Contract?' (DPhil Thesis, Bangor University, November 2012), Chapter 9.
[743] Janet Halley, 'Behind the Law of Marriage (I): From Status/Contract to the Marriage System', Unbound: Harvard Journal of the Legal Left (2011), p.2

should veer towards the contractual end of the continuum[744], so as to warrant a more liberally based divorce law void of any mention of fault, one which reflects a concept of marriage which is truly equal, and one which accords better with Welsh identity.

Modern marriage can be accurately described as a status due to the fact that it is still the law which primarily prescribes who can get married, when that marriage can end, and the consequences of it ending[745]. As previously discussed on page 30, the State provides a long list of benefits which attaches to the relationship upon marriage, and these permeate into almost all areas of life. In addition to the benefits, some burdens are also set out in law. The duty to cohabit is now obsolete[746], but there still exists a legal duty to provide financial support to the other spouse, with recourse to the courts if necessary[747]. Furthermore, the case of *Owens*, the focus of the preceding Chapter, can be seen to bolster this idea of marriage as a status; the simple fact that Mrs Owens must remain married to Mr Owens until 2020 echoes a sentiment that marriage is not a contract that can be exited freely by will, it is a status that merits the law's full backing. It follows that the case also demonstrates that these ideological debates surrounding marriage are not useless academic rhetoric, they have a real and profound impact on people's lives.

From a Christian perspective, the literature depicts marriage as a covenant[748], rather than directly contributing to the status vs contract debate. However, it is clear from their philosophy on marriage that they would for our purposes, favour the interpretation of marriage as a status. This is largely due to the importance attached to marriage being a public and permanent commitment[749], and thus it logically follows that the Christian belief supports the secular status-based, institutional view of marriage, which the State advances for the 'benefit' of society as a whole. The Report of the Archbishop's Commission on the Christian Doctrine

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[744] The main reason why it can never go all the way towards the contractual end of the spectrum seems to be linked to the idea that marriage will always be a different *kind* of contract – Janet Halley, 'Behind the Law of Marriage (I): From Status/Contract to the Marriage System', p. 2
[745] Herring *Family Law,* p.175
[746] Marie Louise Parker, 'Marital Property Agreements…', p.68
[747] Citizens Advice, 'Living together and marriage: Legal differences', https://www.citizensadvice.org.uk/family/living-together-marriage-and-civil-partnership/living-together-and-marriage-legal-differences/ > accessed 13 April 2019
[748] Which is wholly different from a mere contract because it involves 3 parties – man, woman and God. See Paul Palmer, 'Christian Marriage: Contract or Covenant?' Theological Studies, Vol 33, Issue 4 (1972). Though it should be borne in mind that it is largely the US literature that refers to marriage as a covenant, it is nevertheless relevant to the discussion on the Christian perception.
[749] Explored in greater detail on page 22

expressed this sentiment; 'People sometimes regard marriage as 'their own affair'; but in fact the whole community is involved…A strong social tradition is a great safeguard...[750]'.

In any event, the level of significance accorded to marriage[751] within the Christian faith almost precludes the possibility of it being characterised as a 'mere' contract. Rather, its importance 'warrants a special position within the social and legislative framework of our society[752]'. The Church of England's disproval of marital property agreements also goes some way in demonstrating the incompatibility of the Christian and contract-based view of marriage[753]. It is however, important to keep in mind that whichever way the State defines marriage, this formulation is entirely separate from the 'divine truth' so far as Christianity is concerned[754].

The history and development of divorce and marriage outlined in Chapters 2 and 3 paint a strong picture of marriage as an institution which is above all, a status. Christianity's impact here cannot be understated[755]. The conceptualisation of marriage as a status and the Christian faith are intrinsically linked[756]. However, marriage viewed as a status is not a phenomenon exclusive to the religious doctrine. The secular position has also historically favoured the status end of the spectrum; because the State has a direct interest in regulating marriage[757]. Teller and Teller argue that false cultural assumptions about marriage are 'sacred cows'; ideas that society prevents us from questioning or criticising, and form part of our subconscious[758]. Assumptions such as; marriage is always good and divorce is bad, divorce is selfish and harms children, no one should leave a marriage to be with a new partner, and so on, are all social narratives that some may absorb from an early age[759]. The initial unavailability of divorce followed by

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[750] The Report of the Archbishop's Commission on the Christian Doctrine of Marriage (1972)
[751] Marriage is considered to be a gift from God – BBC, 'Marriage and Weddings' (Religion, Christianity, June 2009), http://www.bbc.co.uk/religion/religions/christianity/ritesrituals/weddings_1.shtml > accessed 15 April 2019
[752] Quotation from https://www.churchofengland.org/our-views/marriage,-family-and-sexuality-issues/marriage/pre-nuptial-and-post-nuptial-agreements.aspx > accessed 15 April 2019
[753] Marie Louise Parker, 'Marital Property Agreements…', p.261
[754] Steven Osborne, 'Marriage is not a Contract, it is a Covenant', (BearingDrift.com, 21 May 2012), https://bearingdrift.com/2012/05/21/marriage-is-not-a-contract-it-is-a-covenant/ > accessed 15 April 2019
[755] A fuller discussion on Christianity's influence of the development of marriage and divorce takes place in Chapter 2 and 3
[756] With both, marriage is seen as 'the crucial mode of social and moral being; as the crucial site of privileged reproduction; as the destination of social resources aimed to support human needs; and as the spot where we put the fulcrum for crucial social control projects in intimate life. To think this way is to envision marriage as status,' – Janet Halley, 'Behind the Law of Marriage…, p.11
[757] A fuller discussion on the State's interest in regulating marriage commences on page 37
[758] Danielle Teller and Astro Teller, *Sacred Cows: The Truth about Divorce and Marriage* (Diversion Books, 2014), p.21
[759] *Ibid*, p.12

centuries of restrictive divorce law is one, albeit persuasive indicator of a long tradition of marriage as a State-sanctioned status which denotes behaviour we should aspire to. The State's motive may be, in part, explained by a misplaced fear of the nuclear family disintegrating leading to a less stable society[760].

For the majority of previous centuries, the idea that the State sets the terms and conditions of the marital union went largely unchallenged. The law set out the rights and duties of married couples in a much more intrusive, tightly-controlled way. These were framed so as to form a significant contribution to centuries of female oppression. A wife was under a duty of obedience, manifested through the husband's right to beat her, described as 'moderate correction'[761]. This encompassed any violence short of murder, and the attitude encapsulated in following 18th century rhyme was sustained by law; 'a woman, a spaniel, a walnut-tree: the more you beat them, the better they be[762]'. Not surprising therefore, was a husband's additional right to force sexual intercourse with his wife when he so demanded[763]. This again formed part of the wife's duty of obedience[764] and provided the justification behind the duty to cohabit. Historically speaking, the idea of marriage as a contract, with all the freedom and autonomy that would entail, was unimaginable; the only way contract factored into the equation was the suggestion that marriage was a contract between the husband and the woman's father[765].

It is clear that a status-based view of marriage, heavily regulated by the State, has not served women well. Marriage is, of course, a very different institution today. It also exists and operates within a much more equal society; 'the new women's movement in Western societies has accomplished significant improvements when it comes to the role of women in politics, in the labour market and in society in general[766]'. Many would therefore question the relevance

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[760] *Ibid*, p.21
[761] The High Sheriff of Oxfordshire's Annual Law Lecture Given by Lord Wilson, 'Out of his shadow: The long struggle of wives under English law' (9 October, 2012), p. 12
[762] *Ibid*, page 13
[763] It is worth reiterating that rape within marriage was not criminalised until *R v R* (1991) UKHL 12, and referring to the very recent case which mentioned a man's 'fundamental human right' to have sex with his wife discussed on page 123
[764] The High Sheriff of Oxfordshire's Annual Law Lecture …page 14
[765] Merav Michaeli, 'Cancel Marriage' Ted Talk at TedxJaffa, (20 March, 2017), Transcript - https://singjupost.com/merav-michaeli-cancel-marriage-at-tedxjaffa-full-transcript/?singlepage=1 > accessed 13 April 2019
[766] Bearing in mind that some 'sections of modern society…have been more resilient', and while there has been change in Western democracies, 'fairly little has changed elsewhere'. Emanuela Lombardo, Petra Meier, Mieke Verloo, *The Discursive Politics of Gender Equality: Stretching, Bending and Policymaking* (Routledge, 2009), p.14

of discussing its patriarchal history in objecting to its characterisation as a status. It should not be forgotten that marriage is still that, an institution; political, legal and economic. One which the State still vigorously promotes, and has an interest in doing so for the assumed benefit of society overall.

People are now given more freedom to determine the content and boundaries of their marriage[767], but the idea that the institution has some special moral status is still prevalent in popular thought. This status can never fully become disentangled from its long history of misogyny. The marriage-as-a-status narrative that perpetuated gender inequality still lingers, albeit in a more subtle way. For example, on the 29th of April 2011, 72 million people watched the royal wedding between Prince William and Catherine Middleton[768]. It served as a reminder of what the State's ideal marriage looks like. The aptly named Patriarch gave a speech about what the goals of marriage should be; it is an honourable estate meant for the increase of mankind, and mutual society, help and comfort. Marriage therefore serves the State by maintaining control, and does so through organising gender roles. Marriage conceived this way maintains the economic status quo; a gender wage gap[769] and the continued prevalence of a woman's 'choice' to elect to stay at home to care for the family[770].

The view of marriage as a status and the concept of same sex marriage interact in a complex way. The fact that marriage was not extended to same sex couples in England and Wales until 2013[771] provides a paradigm example of the State defining the terms of marriage; it was defined by reference to gender. Some argue that the debate surrounding same sex marriage revived and intensified the social commitment to viewing marriage as a status, both in the US and the UK[772]. The notion that marriage is a status and a public institution was cited as a definition of marriage

[767] Especially following *Radmacher v Granatino*, see below
[768] Joanne McCabe, 'Royal wedding live YouTube stream watched by 72m' (Metro.co.uk, 9 May 2011) https://metro.co.uk/2011/05/09/royal-wedding-live-youtube-stream-watched-by-72million-people-4558/ > accessed 13 April 2019
[769] Jo Faragher, 'Gender Pay Gap Reporting 2019: Only half of employers are improving' (Personnel Today, 16 January 2019), https://www.personneltoday.com/hr/gender-pay-gap-reporting-2019-are-employers-improving/ > accessed 14 April 2019
[770] Judith Warner, 'The Mythical Choice of the Stay-at-Home Mom' (Time Magazine, April 20, 2012), http://ideas.time.com/2012/04/20/the-mythica-choice-of-the-stay-at-home-mom/ > accessed 16 April 2019
[771] via the Marriage (Same sex Couples) Act 2013
[772] Janet Halley, 'Behind the Law of Marriage…, p.2

for the specific purpose of arguing against its expansion to same sex couples prior to the Marriage (Same Sex Couples) Act 2013[773].

This line of argument provides us with nothing by way of substance, and so perhaps the status model did appear to revive to the extent that opponents of same sex marriage were forced to refer to their beliefs on the very purpose of marriage in justifying their position. Not least because referring back to the traditional *Hyde*-definition of what marriage *should* be, that is the union of 'one man and one woman', is not a sound argument[774]. For example, Justice Cordy in the landmark US case of *Goodridge v Department of Public Health,* argued that marriage could be reserved for heterosexual couples as a means to channel their reproduction into a legally regulated space[775]. Such arguments bolster the idea of marriage as a public union which serves a wider purpose, such as procreation.

It is possible to interpret the enactment of the Marriage (Same Sex Couples) Act 2013 as a move towards a contractual model of marriage. Not least because of the fundamental principle that *anyone* is free to contract[776]. Moreover, the existence of sexual difference; a 'husband' and 'wife' (an aspect of status), is irrelevant in a truly contractual relationship[777]. When same sex marriage was legalised, marriage looked more like an institution that allows individuals to define, embrace or ignore it as they see fit[778]. It can therefore be viewed as part of wider move towards the privatisation of marriage.

On the other hand, same sex marriage can be seen as a component of a more general expansion of status-based Family Law, one which focuses on form over function. Though liberal developments via legislation such as The Civil Partnership Act 2004, the Gender Recognition Act 2004, and the Marriage (Same sex Couples) Act 2013 were all well-intended and indeed, welcomed, they all centred on status. An aspect of status entails according significance to one group of people and elevating them above others, and so any status-based concept in Family Law will potentially operate discriminatively. This may add to the notion that it is unrealistic

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[773] Marie Louise Parker, 'Marital Property Agreements…', p.194
[774] As previously discussed on page 23, commentators have shown that Lord Penzance's words in *Hyde* constitute a defence of marriage rather than a definition.
[775] *Goodridge v. Department of Public Health*, 440 Mass (2003), p. 309, 363
[776] Based on the belief that the courts 'should interfere as little as possible with the affairs of individuals' – Paul Richards, *Law of Contract* (Pearson, 11th edn, 2013), p.151
[777] Carole Pateman, *The Sexual Contract* (Polity Press, 1988), p.167
[778] Torcello, Lawrence, 'Is The State Endorsement of Any Marriage Justifiable? Same sex Marriage, Civil Unions, and The Marriage Privatization Model', Public Affairs Quarterly, Vol. 22, No.1(January 2008) p.51

to expect a view of marriage conceived purely in terms of contract, such a mix of the public and private sphere is politically unattainable[779]. Again it is worth pointing out what is argued for here is a conceptualisation of marriage as a contract to inform the law on marriage and divorce, though in reality it is likely marriage will always be, on some level, a status-contract hybrid[780]; a 'contractually acquired status[781]'.

The formulation of marriage as a status goes a long way in accounting for the presence of fault within divorce law. If marriage is a status rather than a contract and it is the State that has the monopoly over its definition and its limits, formulated against the backdrop of a conservative (and potentially religious) purpose, a *restrictive* divorce law is the logical conclusion. The State has an interest in preserving marriage, and so makes it difficult (at least in theory, see page 103) to exit the union, through requiring the apportionment of blame or waiting a minimum of 2 years. By putting these barriers in place, the State reinforces the element of commitment which attaches to marriage, as part of its enduring attempt to uphold it as a *status*.

Therefore it is unsurprising that those who oppose the same sex marriage invoke similar arguments to resist proposals for no-fault divorce. They refer to the supposed weakening of the status of marriage, particularly in relation to the element of permanence which has, in reality, never been a convincing or successful defining feature of the institution[782]. Thomas Pascoe from the Coalition for Marriage thinks that such changes trivialise marriage, weaken it as an institution by asking less of the participants, and reduces its status 'to that of a tenancy contract[783]'.

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[779] Carole Pateman, *The Sexual Contract*, p.166

[780] Marriage in English and Welsh law has traditionally been considered a mixture between the two, summarised succinctly by Lady Hale in Granatino: 'Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means... the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the State. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children' - *Radmacher v Granatino* (2010) UKSC 42, para 132

[781] John Dewar and Stephen Parker, 'English Family Law since World War II: From Status to Chaos', in Katz, Eekelaar, and MacLean, Cross *Currents: Family Law and Policy in the US and England* (OUP Oxford, 2000), p.125

[782] See page 24

[783] 'No-fault divorce: another step towards abolishing marriage' (Christianconcern.com, September 12, 2018), https://www.christianconcern.com/our-issues/family/no-fault-divorce-another-step-towards-abolishing-marriage > accessed 16 April 2019

Another development which has been interpreted as forming part of a broader shift towards contract is the enforceability of marital property agreements. The very concept of these agreements; with the negotiation involved, the presence of the parties' will and their private nature, undoubtedly point towards a contractual model of marriage[784]. Conversely, these agreement are not compatible with a purely status of view of marriage; marriage as a public union entails the State having a say in the financial arrangements of a couple following divorce[785]. As expected[786], initially the idea that people could tailor the law of ancillary relief to their own plans and wishes was categorically rejected by the English courts[787]. However, as the Law Commission observed; 'over the last 15 years or so we have seen a movement in the courts' approach to pre- and post-nuptial agreements, from entrenched caution, bordering on hostility, to growing acceptance[788]'.

Radmacher v Granatino[789] in 2010 propelled this area forward significantly. Following this case, prenuptial agreements are to be given decisive weight so long as they are reasonable and fairly contracted. The Supreme Court was keen to stress that the contention that agreements regulating future separation are void on grounds of public policy is now obsolete[790]. The term 'contract' was used frequently throughout the judgement, which is surprising given that judges have previously been reluctant to use the term in the context of personal affairs[791]. It is important to stress the limits of this case regarding the contractual status of marital agreements. Though nuptial agreements are capable of being legally enforceable, in reality it will be one the various factors the court will take into account in line with the other S.25 Matrimonial Causes Act 1973 factors.

However, the three-stage test laid out by the Supreme Court at paragraph 75 of the judgement does introduce a quasi-presumption that marital property agreement will be upheld; when they are freely entered into, when the parties had full appreciation of the implications, and in the circumstances it would not be unfair to do so. The important point for our purposes, is that the

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[784] M Brinig, 'Status, Contract and Covenant' 79 Cornell L. Rev. 1573 (1993-1994), p.1596.
[785] Marie Louise Parker, 'Marital Property Agreements…', p. 50
[786] Given the historical development of marriage outlined in Chapter 3
[787] See for example, *Hyman v Hyman* AC 601 (1929)
[788] The Law Commission, Marital Property Agreements (Consultation Paper No 198) (2011), para 3.27
[789] *Radmacher v Granatino* UKSC42 (2010)
[790] *Ibid*, para 52
[791] Anne Sanders, 'Private Autonomy and Marital Property Agreements', The International and Comparative Law Quarterly, Vol 59, No 3 (2010), p. 571

Court emphasised that autonomy should be respected, and that it is 'paternalistic and patronising' to override it on the assumption that the 'court knows best[792]'. This attitude provides a demonstrable shift in how the English courts view marriage[793], which appears far removed from the previous authoritative, top-down control that was characteristically status based.

The overarching theme which emerges from the arguments against these developments towards privatisation, is an unshakeable faith in the value and superiority of marriage. However and as discussed, it is not clear that marriage deserves being put on such a high pedestal to the extent that it is elevated above all other types of contract. Some commentators argue for the abolition of marriage[794], not least because of its ethical and religious associations; it has been perverted by patriarchy and arguably treads close to violating the State's neutrality or religious freedom[795]. It is also an enterprise with a high failure rate[796].

However, given that marriage (however defined) is still cherished by the general population and in Lady Hale's words 'still counts for something[797]', its abolition, at least in the near future, is not a realistic prospect. The contractual model may provide an alternative solution, by providing an opportunity to reformulate marriage. There is certainly a need for reformulation; as discussed in Chapter 4, the use of fault in divorce law is inherently flawed. Assigning blame in a meaningful way on marital breakdown is impossible, and it only serves to increase animosity. The law also attempts to fight a losing battle; human nature cannot be controlled and couples will separate regardless, as the practice of the law demonstrates. This gulf between law and practice suggests that the majority of the population tend to gravitate towards a view of marriage as something akin to contract, rather than some form of superior status.

On a contractual understanding of marriage, the consequences of the partnership would flow from the parties' intentions. Autonomy plays a significant role here, a contractual model offers a couple who want a long-term committed relationship a way to pursue their self-defined

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[792] *Radmacher*, para 78
[793] Which, again, reinforces the inconsistency produced by *Owens* – where a status-based conception of marriage was clearly favoured
[794] For example, see Julie Bindel, 'Marriage Should Be Abolished. The Civil Partnership Debate Proves That' The Guardian (London, 29 June 2018)
[795] Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for their Divorce* (Princeton University Press, 2010)
[796] See page 24
[797] *Radmacher*, para.195

goals[798]. Whatever obligations spouses have to each other must originate from voluntary agreement, and the contractual model assumes that there is no particular moral reason for the particular form a marriage takes[799]. State interference and State-imposed conservative values are excluded from the realm of private choice.

Though such a regime cannot correct social inequality, by its very nature, a contractual model is likely to provide women with a stronger voice. Contract is perceived as a universal category, which includes women. It is an exchange between individuals as equals[800]. With a push towards aligning marriage with the contractual principles of individualisation, marriage would no longer impose gender-specific obligations and it would not prohibit marital property arrangements. As Shultz points out, contract 'offers a rich and developed tradition whose principal strength is precisely the accommodation of diverse relationships[801]'. Most importantly for the purpose of this work, a contractual model would allow the parties to exit the union when they wish to do so through no-fault divorce[802].

In an increasingly *liberal* society, it is fair to assert that competent individuals should be permitted to define the limits of their interaction. Additionally, in an increasingly *diverse* society, a uniform set of behavioural norms determined by the State cannot rationally be applied to the varied number of modern relationships[803]. Marriage may never be a feminist institution, but it remains the powerful default option for arranging relationships and it is still valued in society. It is argued that an alternative way forward is to construct a view of marriage as a contract. The question of what would be the most appropriate form of contractual regime is beyond the scope of the current discussion, the thrust of the argument is that marriage should be *understood*, at its core, as no more than a legal contract. If this was the view of marriage that informed the legislation, no-fault divorce would be a natural consequence of such a shift in understanding. The parties agree on the specification and terms advantageous to them both[804].

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[798] Elizabeth Scott and Robert Scott, 'Marriage as a Relational Contract', Virginia Law Review (1998), p. 1334
[799] Elizabeth Brake, 'Marriage and Domestic Partnership', Stanford Encyclopaedia of Philosophy
[800] Carole Pateman, *The Sexual Contract, p.167*
[801] Marjorie Shultz, 'Contractual Ordering of Marriage: A New Model for State Policy' (California Law Review 204, 1982) p.248
[802] *Ibid*
[803] Lenore Weitzman, *The Marriage Contract: Spouses, Lovers and the Law*, (1983), p.137
[804] Carole Pateman, *The Sexual Contract*, p. 167. This contradict the current fault-based model which, as discussed in Chapter 4, benefits no one.

The Government has said that they will reform the divorce process, but will do so as and when 'parliamentary time allowed'[805]. The vagueness of this statement means that we have no concrete time frame for the proposed changes[806]. The Divorce, Dissolution and Separation Bill 2017-2019, which mirrors the recommendations in the response paper, was introduced into Parliament on the 12th of June 2019 and it has since progressed through the Committee Stage in the House of Commons and is awaiting the Reporting Stage[807]. However, with the UK set to remain in the EU until at least the 31st of October[808], the Prime Minister having just introduced a revised Brexit deal[809], and the potential for an early general election[810], the current political climate makes it highly unlikely that the Divorce, Dissolution and Separation Bill will return to Parliament's agenda in the near-future.

It is fair to doubt the sense of urgency the Government claim they have with regard to reforming divorce law when the position remains all talk, no action[811]. There is an alternative to relying on Westminster to initiate change. The history of marriage and divorce outlined in Chapters 2 and 3 provide and account why the law is in the position it is in now, but that history is an *English* history. Wales, being a part of the jurisdiction, has been required to follow this

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[805] BBC, 'Divorce Law: Reforms to end 'blame game' between couples', (9 April 2019), https://www.bbc.co.uk/news/uk-47860144 > accessed 16 April 2019

[806] Discussed in Chapter 7

[807] The Official Report of the Committee on the 2nd of July 2019 is a worthwhile read for a discussion on the state of divorce law. Nigel Sheperd, the former Chair of Resolution, as witness, said the following; 'We call it a blame game, because at the moment if someone comes to see me as a practising family lawyer and says, "We both agree that the marriage has broken down. It is very sad, but we want to do this in the right way for our children and move forward. Can we get a divorce?" I say, "Not unless you want to wait two years." They are aghast. They say, "That's crazy. What do we do?" and I say, "Well, one of you is going to have to blame the other. Has there been adultery?" They say, "No," so I say, "In that case, it is a behaviour petition." They ask, "What do I have to say?" And that does not really matter. It has to be true—as a lawyer, I cannot put them through something that is untrue—but you can practically go on to the internet and cut and paste things such as, "I don't like the way they control the remote control.". Parliamentary Debates, House of Commons, Official Report, Public Bill Committee, 'Divorce, Dissolution and Separation Bill' (2nd July, 2019) https://publications.parliament.uk/pa/cm201719/cmpublic/DivorceDissolutionandSeparation/PBC404_Divorce%20Dissolution%20and%20Separation%20Bill_1st-2nd%20Combined_02-07-19.pdf

[808] Jessica Elgot,' What are the key dates between now and the Brexit deadline', The Guardian (London, 12 April 2019)

[809] See Peter Barnes, 'Brexit: What Happens Now?' (BBC News, 23 October 2019), https://www.bbc.co.uk/news/uk-politics-46393399 > accessed 23 October 2019

[810] Tom Edgington, 'Could there be an early general election?' (BBC News, 24 October 2019), https://www.bbc.co.uk/news/uk-politics-49004486 > accessed 25 October 2019

[811] Though the Divorce, Dissolution and Separation Bill was introduced into Parliament, it was dropped following the suspension of Parliament. See, BBC News 'What laws have been lost after Parliament's suspension?' (12 September 2019) https://www.bbc.co.uk/news/uk-politics-49655201

unsatisfactory law. An analysis of Welsh history and as well as the current Welsh legal climate, provides scope for arguing that divorce law should be devolved.

A Welsh Perspective

Prior to the conquest of Wales by Edward I between 1277 and 1283 (the Edwardian Conquest of Wales), which led to the annexation of the Principality of Wales[812], there is evidence of the existence of a system of native Welsh law referred to as *Cyfraith Hywel* (Laws of Hywel). These native laws were in all likelihood, custom-based, but they are commonly referred to as *Cyfraith Hywel* as it is believed that these laws were famously discussed under Hywel Dda's reign during a meeting convened by him in Hendygwyn-ar-Dâf (Whitland) in Carmarthenshire[813]. Hywel Dda, or Hywel ap Cadell, was a Welsh King who ruled a significant portion of Welsh land after successfully invading Gwynedd in 942 AD and subsequently Brycheiniog in 944 AD[814]. It should be borne in mind that, as Watkin states, 'The Welsh King's role was to enforce the customs of his country; he was not in himself a source of law[815]'. Furthermore, Pryce draws attention to the lack of solid contemporaneous evidence to link the Welsh laws directly to Hywel Dda himself[816].

There are no manuscripts of these Welsh law's texts dating back to the period of Hywel Dda's reign, the earliest written laws are believed to have been compiled during the twelfth and thirteenth century[817]. Generally, the manuscripts are considered to fall into three Redactions

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[812] David Carpenter, *The Struggle for Mastery: Britain, 1066-1284* (Oxford University Press, 2003). p.221

[813] It is likely that the purpose of such a meeting was to help bring about a sense of unity amongst the people according to Thomas Watkin. Thomas Watkin, *The Legal History of Wales* (2nd ed, University of Wales Press, Cardiff) 2012, p. 45.

[814] 'Wales never reached a stage whereby it was ruled by one King, but Hywel came very close to achieving this…' Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', p.184 in the Welsh Legal Society, *Camlwyddiant, Cyfraith a Chymreictod Volume XI*, edited by Noel Cox and Thomas Watkin (2013)

[815] Thomas Watkin, *The Legal History of Wales*, p. 47

[816] Huw Pryce, 'The Prologues to the Welsh Lawbooks' Bulletin of the Board of Celtic Studies 32 (1986), p.151-87. Both as cited in Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law' in The Welsh Legal Society, *Camlwyddiant, Cyfraith a Chymreictod Volume XI*, edited by Noel Cox and Thomas Watkin (2013), p. 184. Jenkins writes, '…we cannot say exactly what Hywel did for the legal system of Wales. He certainly left his mark on it, but he must share the glory with a body of skilled lawyers who worked to develop and adapt the law before and after this time'. Dafydd Jenkins, *The Law of Hywel Dda:: Law Texts from Medieval Wales* (Gomer Press, 1986), preface.

[817] Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', p.184-185. Before this time, Pryce concludes that '…it seems that lawbooks were used principally as mnemonic aids in the training of jurists, although some compilations may have been produced for others, such as ecclesiastical lords, who needed a knowledge of the law. Legal processes, on the other hand, may well normally have been conducted with- out reference to lawbooks or other written texts. This does not mean that the law as practiced was unsophisticated: on the contrary, it demanded the ability to draw upon a substantial and complex body of rules stored in the memory as

produced by Aneurin Owen in 1841, the threefold division was intended to reflect the customs and law practiced in north Wales, south Wales and the south-east. He called them the Venedotian, Gwentian and Dimetan Codes, which are also referred to as the Books of Iorwerth, Cyfnerth and Blegywryd[818]. It is worth pointing out that codification has returned to Welsh legal thought, with the Law Commission, in 2015, proposing that the Welsh Government should consider implementing a programme of codification[819]. Such proposals have been welcomed, not only would codifying legislation of the devolved areas alleviate the complexity and inaccessibility of the law applicable in Wales and 'confer real benefits within a relatively short term[820]', it would also seem 'certainly appropriate by reference to Welsh legal history[821]'.

An important preliminary point is that the precise extent of the practice of these native laws, and their application to a particular time or place is far from clear. For one, in medieval Wales 'political loyalties were centred on kindred and region rather than on anything resembling a State…'[822], and Wales never attained political unity under native rulers, even under Hywel Dda[823]. Furthermore, the text of *Cyfraith Hywel* was subject to frequent revision and thus not regarded as sacrosanct. This means that the text is problematic for 'those seeking to use the law as evidence for social and political conditions or legal development[824]'. Though there is a lack

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well as considerable forensic skills', Huw Pryce, 'Lawbooks and Literacy in Medieval Wales' Speculum, Vol.75, No.1 (January 2000), p.65

[818] *Ibid*, p. 38. It should be borne in mind that, as Owen points out, 'it is reasonable to assume that whatever the laws might have been at the time of Hywel Dda, they might not have been the same as those in use then the jurist/scribes set about their work of compiling the manuscripts'. Owen, 'Another Lawyer Looks at Welsh Land Law', p.186

[819] Law Commission Consultation Paper No 223: Form and accessibility of the Law Applicable in Wales 2015, Chapter 8, pp. 140-168. As cited in – Gwilym Owen and Dermot Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales' *The Irish Jurist*: Volume LVIII (Thomson Reuters Round Hall, 2017), p.247

[820] Lord Lloyd-Jones (Justice of the Supreme Court), 'Codification of Welsh Law' Lecture, Association of London Welsh Lawyers (8 March 2018), p.9

[821] Gwilym Owen and Dermot Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales', p.247

[822] Robin Chapman Stacey, *Law and the Imagination in Medieval Wales*, University of Pennsylvania Press 2018, p.7

[823] Jenkins writes, 'Wales was not a political unit in the Middle Ages. It was not a single 'country' under one rules, but a collection of countries whose pattern was always changing. The rules of each country was in theory an independent sovereign, no matter how small his country might be; but the chances of inherience and marriage, of battle and murder, and of sudden death, meant that from time to time a rules would build a bigger kingdom – which would break up again when he died. So it happened with Hywel'. Dafydd Jenkins, *The Law of Hywel Dda: Law Texts from Medieval Wales*

[824] David Sellar, Book Review: *The Law of Hywel: Law Texts from Medieval Wales* by Dafydd Jenkins, Law and History Review, Vol 6, No 1 (1988), p. 187

of historical evidence, it appears that the native laws date back to pre-Roman times, but a definitive conclusion cannot be drawn as to when these Welsh laws were first practiced[825].

A detailed analysis of Welsh legal history is beyond the scope of this thesis, however some relevant conclusions can be drawn from the academic literature regarding the continuation of these native laws. In relation to the native laws on marriage and divorce, Pryce concludes with confidence that 'before the Edwardian conquest, the supporters of Welsh custom in north Wales were both more numerous and more influential than the protagonists of canon law'. It seems that clear that the region of Wales least subject to the influence of canon law before Edward I's conquest of Wales in 1282 was Gwynedd[826]. The picture becomes less clear as to the extent of their continued practice into the later Middle Ages *after* this time. In contrast to the literature on native Welsh land law[827], the extent of the practice of the native laws on marriage and divorce is under researched[828].

Prior to the Acts of Union 1536-43 and after the Conquest, Wales was divided into the Principality of Wales[829] and the Marches of Wales[830]. With the former, the Statute of Rhuddlan 1284 formed the basis for introducing English common law and English jurisdiction in Wales[831], however some local variation was permitted[832] and native Welsh laws and customs still held sway where appropriate[833]. Court structure also differed from England in the

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[825] Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', p.186-187

[826] Huw Pryce, 'Welsh Custom and Canon Law 1150-1250', in K Pennington (ed.), *Proceedings of the Tenth International Congress of Medieval Canon Law,* (2001 edn), Monumenta Iuris Canonici Series C; Subsidia, 11; Biblioteca Apostolica Vaticana, Vatican City, p.794

[827] See, for example, Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law' and Gwilym Owen and Dermot Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales'

[828] Similarly, as Swett writes, 'Unexplored by social historians of early modern Wales, and omitted of studies of women in early modern England, the experience of Welsh women is largely unknown; whether their lives differed from or ran parallel to the lives of English women has yet to be determined'. Katherine Swett, 'Widowhood, custom and property in early modern north Wales'. Welsh History Review 18 (1996), p.186

[829] Effectively becoming an annexed territory of the English Crown

[830] Gwilym Owen and Peter Foden, *At Variance, The Penrhyn Entail,* Vol. XIV(Welsh Legal History Society, In press), p.6

[831] Edward asserted that he had examined these Welsh laws and customs - '…Which being diligently heard and fully understood. We have, by the advice of the aforesaid Nobles, abolished certain of them, some thereof We have allowed…' Statute of Rhuddlan preamble, 12 Edward I, as cited in Thomas Watkin, *The Legal History of Wales,* p.62.

[832] On the Statute's preamble (above) R.R Davies writes, 'These were indeed generous words, but the policy they announced was not altogether unexpected. Diversity of laws within lands ruled by one king was not at all unusual in the middle ages', 'The Twilight of the Welsh Law' 51 History (1996) p.147

[833] For example, native laws in relation to criminal justice were abolished and replaced with an English approach - Thomas Watkin, *The Legal History of Wales,* p.105. Conversely, the Welsh concept of *cyfran,* a system of partible inheritance where land was shared between male heirs (as opposed to the sole inheritance principle of primogeniture under English common law), remained. However, this is likely 'due to self-serving reasons of the

Principality[834]. The Marches were run by Marcher lords who were judicially autonomous, but these areas were generally of a lawless nature, the King's writ did not run[835], therefore native Welsh law and customs would have been practiced. In essence, the English common law and the native Welsh laws and customs co-existed. As Watkins states,

> For even though the native legal system suffered somewhat inevitably following the annexation, it is clear from the continuing production of manuscripts recording Welsh legal development that the study and application of the native laws continued, so that some form of schooling in the native tradition clearly survived[836].

To some extent therefore, though their use may have declined, native Welsh laws were permitted until their abolition in Henry VIII's Acts of Union 1536-43, which effected the union of England and Wales and 'accomplished the necessary incorporation of Wales into the Tudor Empire'[837]. However by this time, as Davies writes, 'English law or rather English modes of procedure at law made great advances in Wales in the fourteenth and fifteenth centuries and the importance of Welsh law declined proportionally[838]', and thus it can be concluded that Welsh law had already 'died a natural death[839]'.

However, the second Act of Union in 1543 gave the Court of Great Sessions, not the Westminster courts, primary responsibility for administering justice in Wales[840]. Therefore it is important to remember that Wales was not simply absorbed into the English Kingdom. Not only did it retain some constitutional autonomy and legal identity, but it appears that some native Welsh customs were preserved[841], particularly in relation to land law[842].Significantly for the purpose of this work, these native Welsh laws were separate

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Crown, and not out of any respect for the native Welsh laws' – Gwilym Owen and Dermot Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales' *The Irish Jurist*: Volume LVIII (Thomson Reuters Round Hall, 2017), p.157-179

[834] Wheres the courts were divided into the King's Bench and the Common Pleas in England, their function was carried out by the Sessions in Wales, and the Courts of the Great Sessions after the union of England and Wales. Gwilym Owen and Peter Foden, *At Variance, The Penrhyn Entail*, p. 8

[835] Save 'those areas of the Marches comprising the Crown lordships of Glamorgan and Pembroke' as 'there were legal institutions similar to those of England'. Gwilym Owen and Peter Foden, *At Variance, The Penrhyn Entail*, p. 10

[836] Thomas Watkin, *The Legal History of Wales*, p.112

[837] Thomas Watkin, *The Legal History of Wales*, p.124

[838] Davies, 'The Twilight of the Welsh Law', p.148

[839] *Ibid*, p.149.

[840] Gwilym Owen and Peter Foden, *At Variance, The Penrhyn Entail*, p.11

[841] *Ibid*, p.144-145

[842] See Gwilym Owen and Dermot Cahill, 'The Acts of Union 1536-43 – Not quite the end of the road for Welsh Law?' Proceedings of the Harvard Celtic Colloquium, Volume 37, edited by ceeste Andrews, Heather

from and different to the English common law and canon law[843] explored in Chapter 2. Indeed, these native Welsh laws differed significantly from law and practice east of the border[844].

Cyfraith Hywel was consistently criticised by the Normans for contradicting canon law[845]. When writing to the Pope in 1150, Archbishop Theobald of Canterbury stated that the inhabitants of Gwynedd were 'ignorant of the divine and still more of canon law[846]'. This was particularly true in relation to the laws on marriage and divorce, which will be the focus of this section. However, it is worth highlighting a few other relevant differences to emphasise the extent of the disparity between the laws of the Welsh and that of their Norman-English counter-part, and to illustrate how enlightened the former were in comparison to the latter.

Firstly turning to the position on inheritance, the medieval Welsh legal system was unique in omitting to classify children as legitimate or illegitimate. Thus children born out of wedlock were deemed to be under the responsibility of their natural father in the same way as those born within a marriage[847]. Moreover, illegitimate children received the same rights as legitimate children, including the entitlement to their respective share of their father's land on his death[848], and an illegitimate son of a Welsh ruler could establish himself as his father's successor[849]. In plain contrast, under canon law illegitimate children could not inherit real property, nor could they be subsequently legitimised if the father married the mother (with the exception of papal dispensation)[850]. In a unilineal society, the role of a female partner with no claim to inherit is reduced to a child-bearer, in rejecting the legitimate-illegitimate distinction, the Welsh system therefore reflected a more developed view of the position of women in society[851].

Newton, Joseph Shack and Joe Wolf (The Department of Celtic Languages and Literatures Faculty of Arts and Sciences, Harvard University, 2017), p.217-250

[843] Sara Elin Roberts, *The Legal Triads of Medieval Wales*, University of Wales Press (2007), p. 2

[844] T.P. Ellis, 'Hywel Dda: Codifier', Transactions of the Honorouble Society of Cymmrodorion (1928), p. 17,18

[845] University of Wales and Coleg Cymraeg Cenedlaethol funded website - 'Cyfraith Hywel' > The Church, http://cyfraith-hywel.cymru.ac.uk/en/canllaw-cydtestun-eglwys.php > accessed 19 April 2019

[846] *The Letters of John of Salisbury*, edited by W.J Millor, H.E. Butler and C.N.L Brooke (London, 1955-79), p. 135

[847] Thomas Glyn Watkin, *The Legal History of Wales*, (2edn, University of Wales Press, 2012), p.34

[848] Owen and Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales', p.157-159

[849] R.R. Davies, *Conquest, Coexistence and Change: Wales 1063-1415* (Oxford, 1987), p.377

[850] William Blackstone, *Commentaries on the Laws of England*, Book II, Chapter XV, 'Of Title by Purchase and I. Escheat', Section 5.

[851] R.R. Davies, 'The Status of Women and the Practice of Marriage in late-medieval Wales', in *The Welsh Law of Women* (edited by Jenkins and Owen) (University of Wales Press, 2017), p112-113

Furthermore, an aspect of the concept of *cyfran*, the system of partible inheritance where land was shared between the male heirs, was the concept of *mamwys*. This meant that, in respect of a woman who had been given in marriage to a foreigner, any son born from that marriage could claim land from the family that had given the mother in marriage[852]. It originated from the idea that 'a woman's relations had failed in their duty towards her children by marrying her to a foreigner, and must provide for the children accordingly[853]'. Those children would therefore be entitled to inheritance equal to that the mother would have been entitled to if she had been a male heir[854]. Important to note is that the right of the children to *mamwys* derived from the wrongdoing done to their mother, it was not inherently their right[855].

Consistently with the laws surrounding inheritance, the laws relating to women more generally under *Cyfraith Hywel* were uniquely progressive. Indeed, the status of the women in medieval Wales was better than that in other countries[856]. For example, in a claim of rape, precedence was given to the woman's word. If found guilty, the rapist was required to pay considerable compensation to the victim personally[857]. One of the most notable features of *Cyfraith Hywel* was the obvious emphasis placed on paying compensation to the victim rather than punishment of the perpetrator. As discussed on page 62, in England there remained a stark gender imbalance between a husband and wife regarding adultery for a long time. Native Welsh laws were more favourable towards betrayed women; if a woman discovered her husband's adultery, she was entitled to the payment of half a pound (six score pence) for the first incident, a pound for the second, and with the third, she could divorce him[858].

Arguably the Native laws that were the most far removed from canon law, and those which scandalised the non-native clergy to the greatest extent, were those relating to marriage and divorce[859]. The crux of this inconsistency stemmed from how marriage was conceptualised. Astonishingly, given what we know from the development of marriage which serves as a basis

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[852] *Mamwys* was a means of uniting two powerful families. Owen and Cahill, 'A Blend of English and Welsh Law in Late Medieval and Tudor Wales', p.163
[853] Thomas Peter Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, Vol.1, (History of Economic Thought Books, McMaster University Archive for the History of Economic Thought, 1926), *p.188*
[854] Thomas Peter Ellis, *Welsh Tribal Law and Custom in the Middle Ages, p.427*
[855] Thomas Peter Ellis 'Mamwys': Textual References', *Y Cymmrodor* Vol XL (1929), p.242
Ellis, T. P., '"Mamwys": Textual references', *Y Cymmrodor* 40 (1929), 230-250.
[856] Thomas Glyn Watkin, *The Legal History of Wales,* p.49
[857] Dafydd Jenkins, *The Law of Hywel Dda:: Law Texts from Medieval Wales, p.51, 52*
[858] Morfydd Owen, 'Shame and reparation: Woman's place in the kin', in *The Welsh Law of Women*, p.51
[859] Huw Pryce, 'Welsh Custom and Canon Law…' p.788

for the current law outlined in Chapter 2, marriage in Wales was deemed to be a secular contract[860] rather than a holy sacrament and a spiritual union[861].

As Ellis writes, 'to use the modern phraseology, the old Welsh Laws regarded marriage as a purely civil contract, to the sanctity of which no religious ceremony could add anything not implied by the contract itself[862]'. Interestingly, it seems that it was the time of Hywel Dda that England saw the Church secure legislative sanction over the marriage ceremony[863]. Marriage under native Welsh laws, is better characterised as a form of marital union, for they were loose unions not necessarily permanent[864].

Consequently, marriage was dissoluble, either at will or for a cause recognised by custom, a position which was 'virtually unique among compilations of European customary law in the later twelfth and thirteenth centuries[865]'. In the words of Archbishop Pecham[866], these native laws on marriage were 'contrary to Gospel[867]', and he went as far as condemning them as the work of the devil[868].

Wales was a Catholic country until the Reformation in 1517-1648[869], but nowhere in the legal texts of *Cyfraith Hywel* is it mentioned that jurisdiction over marriage was to be within the

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[860] T.P. Ellis, 'Hywel Dda: Codifier'… p.60
[861] Phil Carradice, 'Hywel Dda – the Lawmaker of Wales' BBC blog
[862] Thomas Peter Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, p.393
[863] In the Laws of Edmund (A. D. 940-6) that ' at the nuptials there shall be a mass-priest by law, who shall, with God's blessing, bind their union to all posterity '. Thomas Peter Ellis, *Welsh Tribal Law and Custom in the Middle Ages, p.393*
[864] Owen and Probert contend that, in the context of the various marriages of Edward Griffith of the Penrhyn Estate located in north-west Wales, there is evidence suggesting, '…that the native Welsh laws might have provided parties with some internal moral justification for working around the rigours of the Canon Law. There are good reasons to believe that this practice was specific to Wales and that Edward's Welsh identity was a significant influence on his actions'. For one, Edward's return to his former wife is consistent with a principle of Welsh native law unparalleled in canon law or English customary law. Further, some of the family's settlement patters indicates a preference for the norms of *cyfran* within the inheritance provisions of native Welsh law and vast proportion of the Penrhyn Estate derived from these native principles. Lastly, evidence of a power struggle between the Bulkeley family of Anglesey and Edward Griffiths show Edward's Welshness. This means that 'the appeal of native Welsh law relating to marriage as a means of rationalising Edward's behaviour in respect of his marriage to Anes and Jane Puleston cannot be discounted'. Gwilym Owen and Rebecca Probert, 'Marriage, Dispensation and Divorce during the Years of Henry VIII's 'Great Matter': A local case study', Law and Humanities (29 April 2019), p.12-14
[865] Huw Pryce, 'Welsh Custom and Canon Law...', p. 789
[866] The Archbishop of Canterbury 1279-1292
[867] Registrum Pecham 2.474
[868] Huw Pryce, *Native Law and the Church in Medieval Wales*, (Clarendon Press, 1993), Abstract
[869] For a detailed analysis on religion in Wales see Glanmor Williams *The Welsh Church From Conquest to Reformation* (University of Wales Press, 1962)

authority of the Catholic Church[870]. Indeed, not only did *Cyfraith Hywel* not require ecclesiastical benediction for the validity of a marriage, but it deviated significantly from the teachings of the Church in several other respects[871]. For example, incestuous marriage was allowed between parties who were related within the prohibited degrees of consanguinity[872]. In fact, such a marriage was desirable from an economic perspective; the property consequences of marriage was the main concern, therefore the question of who the parties were allowed to marry was neither here nor there. *Cyfraith Hywel* also directly contradicted Biblical teachings surrounding monogamy, that is, the notion that marriage is a union between *one* man and *one* woman in matrimony to become 'one flesh'[873]. An implicit acceptance of extra-marital affairs was demonstrated through *Cyfraith Hywel's* legal treatment of legitimate and illegitimate children, when dealing with inheritance rights in particular. The concept of monogamy was therefore compromised[874].

Several other facets flowed from the characterisation of marriage as a secular arrangement. The parties' consent was vital, and the marriage contract did not require a ceremony, rather it was simply entered into verbally in the presence of witnesses[875]. Medieval Welsh society attached great significance to blood relationships and the kindred family (*cenedl*), particularly regarding birth and noble descent. Marriage did not however, affect women's standing within their *cenedl*, upon puberty, unmarried women could hold property in their own right and go wherever they willed[876]. In view of these features, it can be convincingly argued that if this conception of marriage was placed on the continuum referenced above, it would feature securely on the contractual side.

This is bolstered by the Welsh approach to divorce, referred to in the Welsh law books as *ysgar*[877]. Divorce was not difficult to obtain, with no reference to ecclesiastical procedures or

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[870] Huw Pryce, 'Welsh Custom and Canon Law...', p. 788-789
[871] Pryce notes that 'the tolerance of native customs by Welsh clergy – who themselves came under fire from ecclesiastical reformers on account of their disregard for canonical prohibitions on clerical marriage – helps to explain why those customs remained so resilient'. *Ibid,* p.784
[872] Huw Pryce, 'Welsh Custom and Canon Law...', p. 790
[873] Genesis 2:24
[874] Huw Pryce, *Native Law and the Church in Medieval Wales,* Marriage and Inheritance Chapter 4
[875] Thomas Glyn Watkin, *The Legal History of Wales,* p.55
[876] *Ibid,* p.54
[877] Meaning 'parting', Huw Pryce, 'Welsh Custom and Canon Law...', p. 789

annulment required[878], divorce was simply the termination of a contract[879]. When a marriage was terminated by mutual consent it was considered a divorce, whereby termination by one side only was deemed to be repudiation[880]. Both were acknowledged by medieval Welsh law[881]. Once divorced, the parties were free to marry again[882], which contrasts sharply with the position under canon law; the lack of recognition of the very concept of divorce necessarily leads to the impossibility of remarriage. These laws on divorce therefore 'struck at the heart of the canonical view of marriage as an indissoluble sacrament[883]'.

Not only were perceptions on marriage and divorce enlightened under *Cyfraith Hywel*, so too were the provisions relating to the division of property following divorce. Jenkins summarises the position as follows; 'when living partners separate, they share the chattels as instructed by the law texts. The rules are no doubt meant to ensure that both parties are reasonably provided for, in default of agreement…'[884]. Different rules applied depending on whether the parties had separated before or after 7 years of marriage. Historical analysis of the relevant text of *Cyfraith Hywel* as contained in book *Iorwerth*[885] suggests that when the marriage lasted longer than the statutory 7 year period, the rationale behind the codified law was to enable the parties to start anew on relatively equal and viable terms[886].

This way of thinking echoes the 'clean break' principle enshrined in the current law on the division of assets on divorce, which directs the court to consider the possibility of settling the parties' financial responsibilities towards each other and ending their financial

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[878] Huw Pryce, *Native Law and the Church in Medieval Wales,* Chapter 4
[879] R.R Davies, , 'The Status of Women and the Practice of Marriage in Late Medieval Wales' in D Jenkins and ME Owen (eds) *The Welsh Law of Women* (University of Wales Press, 1980), p. 112-113.
[880] Thomas Glyn Watkin, *The Legal History of Wales,* p.56
[881] It is worth referring again to *Owens,* which shows that divorce law in its current form can prevent a party who wants a divorce from obtaining one if the other spouse does not consent. Medieval Wales therefore seems more progressive than the current picture.
[882] Aneurin Owen, *Ancient Laws and Institutes of Wales* (The Commissioners of Public Records, 1841), p. 84-87, paras 17 and 18. Parties were free to remarry with the exception that a husband having second thoughts could reclaim a wife.
[883] Huw Pryce, 'Welsh Custom and Canon Law...', p. 789
[884] Dafydd Jenkins, 'Property Interests in the Classical Welsh Law of Women', *The Welsh Law of Women,* p. 84
[885] The Iorwerth redaction is thought to be the most developed of the lawbooks, with a structural coherence lacking in other texts. Pryce States that 'it is clear that the Iorwerth Redaction and other texts written in thirteenth-century Gwynedd were the work of the legal experts known as *ynaid,* from whose ranks official judges were drawn. These appear usually to have been laymen whose expertise was transmitted within families, some of which also included professional poets'. Huw Pryce, 'Lawbooks and Literacy in Medieval Wales', p.44
[886] Robin Chapman Stacey, 'Divorce, Medieval Welsh Style' (The University of Chicago Press Journal, Vo.77, No.4, October 2002) p. 1112

interdependence[887], after the principle was given statutory backing in the form of S.25A of the MCA 1973[888] .This reaffirms how radical the Welsh position was for its time. All the more radical, is how historians have interpreted the *Iorwerth* text regarding the issue of fault. It has been suggested that the Welsh did not see one party as being more at fault than the other; both were held responsible for the failure of the union[889]. The notion that the current law on divorce is 'archaic[890]' and is in need of reform by way of removing fault becomes even more compelling against this backdrop; the Welsh recognised the fallacy of fault about a millennium ago.

The significance of reciting the history in relation to *Cyfraith Hywel* is not to provide a lesson in Welsh medieval history. Rather, it is important for the purpose of arguing in favour of a shift in legal thought. As the first section of this Chapter highlights, the theoretical foundation underpinning the native Welsh conception of marriage, namely that marriage was in essence, simply a secular contract, was centuries ahead of its time[891]. In particular, it was indicative of the fact that 'Hywel Dda was fully alive to the essential distinction between the fields of law and ethics, a distinction which even today is not always understood[892]'. Even though it would be nonsensical to classify, for example, the permissibility of incestuous marriage as progressive, the philosophy behind it was that marriage was a *contract,* and thus whatever the Catholic view of such unions may be[893], separate concerns should inform the law. It was this understanding of separation between Church and State, rather than outright rejection of the

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[887] Nancy Duffield, Jacqueline Kempton, Christa Sabine, *Family Law and Practice* (College of Law Publishing, 2019) p.66

[888] Following the enactment of the Matrimonial and Family Proceedings Act 1984

[889] Robin Chapman Stacey, 'Divorce, Medieval Welsh Style', p.1121

[890] BBC News, 'Divorce Law: Plans to overhaul 'archaic' laws revealed' (15 September 2018), https://www.bbc.co.uk/news/uk-45525979 > accessed 23 April 2019

[891] It is worth pointing out that, similarly, Roman law also recognised that marriage was a private, secular agreement and thus also could be said to be ahead of its time. Marriage in Roman law 'is a status created by simple private agreement. Its validity results from this understanding and is absolutely independent of the betrothal which ordinarily precedes, of physical cohabitation….of the festivities or of the religious ceremony by which it may be accompanied it is finally independent of any settlement which confirms the pecuniary terms of the union and serves as its evidence'. Andrew Bierkan, Charles Sherman and Emile Stocquart, 'Marriage in Roman Law', Yale Law Journal Vo. XVI, March 1907, p. 303. It is possible that 'the foundations laid down by the Romans influenced the later development of medieval Welsh law'. Lukasz Korporowicz, 'Roman Law in Roman Britain: An Introductory Survey', The Journal of Legal History, 33:2, p.133.

[892] T.P. Ellis, 'Hywel Dda: Codifier', p.60

[893] Under canon law 1091.1, marriage is invalid between persons related in all degrees of the direct line, and under 1092.2, marriage is invalid up to and including the fourth degree. Presumably this is because it contravenes natural law which is established by God himself- 'Can Cousins Marry in the Church', (Canonlawmadeeasy.com, 9 September 2010), http://canonlawmadeeasy.com/2010/09/09/can-cousins-marry-in-the-church/ > accessed 20 April 2019

Biblical teachings that prompted the Welsh's different treatment of marriage; Hywel Dda was himself believed to be a devout Catholic[894].

The notion that we should not confuse ethical (or religious) considerations with legal ones, is perhaps more of a live issue today than ever. In other words, there are compelling arguments and an increasing desire[895] for the disestablishment of the Church of England from the State. The argument for reform of divorce law may add to this debate; it is argued Chapter 3 that the restrictive divorce law is, to a significant degree, a consequence of the Church's distaste for divorce. It is also explored in Chapter 2 how marriage, as conceived in popular thought has deviated from this conservative conception. Thus a fault-based divorce law is perhaps less unexpected when considered in the context of a State that continues to 'remain locked constitutionally so far as religion is concerned in the geopolitics of late seventeenth century[896]'.

We can see the Church's intimate relationship with the State by drawing on a few examples. For one, there is a requirement for the Head of State as monarch, to be a member of the episcopal Church of England[897]. Moreover, 2 archbishops and 24 bishops of the Church of England sit in the House of Lords as of right. Such a privilege is almost unheard of in other jurisdictions[898]. Under this practice however, there is no similar representation for any other religious group[899], nor for any from Scotland[900], Wales[901] or Northern Ireland either. The desire to diminish the Church of England's influence on law and politics can be linked to the move from status to contract. The historical position of understanding marriage as a status intertwines with the Church's teachings on the sanctity of the institution.

It is not difficult to argue that this state of affairs is no longer acceptable in the 21st century. Data from the British Social Attitudes survey last year showed that the proportion of the population identifying themselves as part of the Church of England had fallen to 14%, a record

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[894] T.P. Ellis, 'Hywel Dda: Codifier', p. 61
[895] See Giles Fraser, 'The disestablishment of the church is now necessary and inevitable', The Guardian (London, 7 September 2017) – 'disestablishment could be framed as an attempt to rationally redesign a Britain fit for a global role beyond the EU. After all, who needs Christian morality in the age of human rights?',
[896] R.M.Morris, *Church and State in 21st Century Britain* (Palgrave Macmillan 2009), p.1
[897] Indeed, the monarch has the dual role of being Head of State and Head of the Church. Andrew Brown and Linda Woodhead *That Was The Church That Was: How the Church of England Lost the English People* (Bloomsbury Continuum, 2016) p.15-20
[898] Iran is the only other country to ring-fence seats in the legislature for clerics. *Ibid*
[899] R.M.Morris, *Church and State in 21st Century Britain, p.1*
[900] Scotland regards the established Church as distinct from the State, *Ibid,* p.1
[901] Perhaps a further point that may add to the case for devolution discussed below

low. 70% of 18-24 year olds said they had no religion[902]. These statistics are not particularly astonishing; we know we live in an increasingly diverse, pluralized, multi-faith and secular society. This raises doubts as to what justifies the enduring privilege accorded to the Church of England when 'there can no longer be majoritarian argument for an established church[903]'. More specifically for our purposes, the Church's influence on divorce law should no longer be tolerated. Bishops have said that divorce is not a private matter[904], but a secular view would likely treat it as one of the most private affairs of modern citizens. Marriage viewed as a contract reflects this reality and opens the door to no-fault divorce.

The likelihood of the disestablishment of Church and State in the near future is at best, uncertain[905]. Arguing for such is not one of the purposes of the work, the point of the discussion is to emphasise the influence of the Church on this area of law, and more specifically highlight the difference between the state of affairs in Wales and England. From a Welsh perspective, to escape the grasp of a fault-based divorce law, a better alternative to pushing for disestablishment is to devolve divorce law to the Welsh Government. There are several factors which differentiate England and Wales in this regard. For one, the Church of England's Welsh equivalent, the Church in Wales, is no longer established. The Welsh Church Act 1914 led to its disestablishment and its disendowment in 1920[906]. Moreover, this Chapter has shown that native Welsh laws codified in *Cyfraith Hywel* present an alternative view of marriage that directly conflicted with the position in medieval England.

Speculating over how divorce law in Wales would look like today had it had the opportunity to develop within an independent jurisdiction is pure guesswork. Some might therefore question the purpose of drawing on these customary medieval laws and their relevance to the question of whether divorce law should be devolved given how intertwined the histories of England and Wales became after their obliteration. It is argued that these laws are in fact, highly

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[902] NatCen, 'Church of England numbers at record low', (Pres Release, 7 September 2018), http://www.natcen.ac.uk/news-media/press-releases/2018/september/church-of-england-numbers-at-record-low/ > accessed 20 April 219

[903] Quote by David Voas, Professor of Social Science at University College London (UCL) - Harriet Sherwood, 'Church and State – an unhappy union?'

[904] Catholic News Service, 'Bishops say no-fault divorce in UK undermines marriage from outset' (Cruxnow.com, 9 April 2019) https://cruxnow.com/church-in-uk-and-ireland/2019/04/09/bishops-say-no-fault-divorce-in-u-k-undermines-marriage-from-outset/ > accessed 25 April 2019

[905] For one thing, as Giles Fraser points out, disestablishment would raise serious questions about the purpose and retention of the monarchy, who are still supported overall. See Giles Fraser, 'The disestablishment of the church is now necessary and inevitable' The Guardian (London, 7 September 2017)

[906] David Walker, *A History of the Church in Wales* (Church in Wales Publications) 1976 p.164

relevant. It provides a means to ensure that what is being shaped for the future is not formed in a vacuum, but in recognition and appreciation of past generations[907]. This history, as well as the development of devolution and the current Welsh legal landscape explored in the next section, provide a strong case for devolving divorce.

The Case for Devolution

The United Kingdom is a product of its historical development, formed of territories that were previously separate and distinct. The Royal Commission on the Constitution defined devolution as 'the delegation of central government powers without the relinquishment of sovereignty[908]'. During the late 1990s, the UK Labour Government of the time, under Tony Blair, formed the view that the decentralisation of the executive and legislative power of Westminster would be in the national interest[909]. Parliament subsequently enacted the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998, referred to collectively as the 'devolution acts'[910]. Devolution is asymmetrical; the constitutional arrangements in these territories differ[911].

It signified the first time Wales had its *own* laws again, having foregone this opportunity since the abolition of *Cyfraith Hywel* almost 500 years prior[912]. Following the Acts of Union, Wales was essentially annexed into the English realm, and operated only as a 'somewhat semi-detached entity[913]'. Then in 1830 the Court of Great Sessions were abolished[914], marking Wales' full integration into the English legal system[915]. However, since 1998 Wales have had

[907] Thomas Glyn Watkin, *The Legal History of Wales*, p.21
[908] The Royal Commission on the Constitution 1969-73, Kilbrandon Report, para. 543, p.165
[909] Parry notes that a form of legal devolution had already preceded political devolution. This is because of other developments which supported the growth of Welsh legal identity, such as the Administration of Justice Act 1970, which enabled the High Court to sit outside London, with Cardiff becoming a venue. Cardiff has also become a venue for Court of Appeal sittings. Further, a Mercantile Court for Wales was set-up in Cardiff. R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', The Irish Jurist 57 (2017), p. 61
[910] Andrew Le Sueur, Maurice Sunkin, Jo Murkens, *Public Law; Text, Cases and Materials* (Oxford University Press, 2010), p.156
[911] R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p. 73
[912]Gwilym Owen and Peter Foden, *At Variance, The Penrhyn Entail*, p.12
[913] R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p. 65
[914] The Great Sessions were royal courts, unique to Wales, and were replaced with the English assizes in 1830. Subsequently, Wales 'lost the remaining vestige of distinctive legal identity. This completed the incorporation of Wales into England so that governance and justice in Wales was consistent with that of England'. *Ibid*, p.64
[915] With the exception of statutory rights about the use of the Welsh language in court proceedings in Wales, through the Welsh Language Act 1967

a directly elected National Assembly[916]; a devolved legislature with limited powers. There is therefore a degree of constitutional differentiation[917]. It has also become commonplace to speak of 'Legal Wales' as a concept, an expression which encapsulates the notion of an autonomous legal region with the potential to shape its own future[918].

The development of devolution in Wales since 1998 is long and complex, a detailed analysis of which is beyond the scope of this thesis. By way of a brief overview of the most notable events, Part IV of the Government of Wales Act 2006 allowed the National Assembly to pass primary legislation in the 20 areas to be within its legislative competence, as set out in in Schedule 7 of the Act. It also created a separate executive body in the form of the Welsh Government. A referendum on 3 March 2011 led to the Welsh Assembly's ability to make law directly without having to consult Westminster. The framework for devolution underwent significant change via the Wales Act 2017[919]. It converted the system from a conferred powers model, where powers were specifically devolved to the National Assembly, to a reserved powers model, meaning that everything not reserved to Westminster is automatically devolved[920]. This will inevitably increase the National Assembly's powers further[921].

Therefore the 'process of devolution continues at a speed' and 'the possibility that the law applicable in Wales differs from that in England has become a reality[922]'. Writing in 2012, the Law Society was of the view that any separation from the laws of England was likely to be restricted to the field of civil law for the time being[923]. However last year Lord Lloyd-Jones, the only Welsh Justice of the Supreme Court, said that the powers given to the National Assembly means that 'for the first time since the age of the Tudors it has once again become

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[916] The Welsh Assembly is set to renamed ' (Parliament) in the foreseeable future, see 'Assembly set to be renamed Welsh Parliament' (BBC News Wales, 13 June 2017), https://www.bbc.co.uk/news/uk-wales-politics-40263684 > accessed 27 June 2019

[917] Andrew Le Sueur, Maurice Sunkin, Jo Murkens, *Public Law; Text, Cases and Materials,* p.160

[918] R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p. 66

[919] Parry states that the Wales Act 2017 'maintains the current position whereby the laws made for Wales are part and parcel of "the laws of England and Wales", and denies "Welsh Law" as a distinct and separate body of law' and thus '…there currently exists an ideological refusal on the part of the UK Government to allow the full implications of legislative devolution to mature into the recognition of the existence of Welsh Law as a distinct body of law, and that a Welsh legal system must develop as a consequence'. *Ibid,* p.71

[920] Lillian Stevenson and Dr Catrin Fflur Huws, 'Researching Applicable Law in Wales – What is Unique in Wales?' (NYUglobal.org, May 2018), http://www.nyulawglobal.org/globalex/Wales1.html > accessed 26 April 2019

[921] The new model only came into force just over a year ago, on the 1 April 2018

[922] The Law Society's Annual Lecture at the National Eisteddfod Montgomeryshire and the Marches, 'Legal Services – the challenge of the next five years' (2015)

[923] The Law Society Report, 'Wales: Separate Jurisdiction' (February 2012)

meaningful to speak of Welsh law as a living system of law', and 'we are now witnessing a rapidly growing divergence between English law and Welsh law[924]'. In other words, the constitutional trend is undoubtedly leaning towards greater devolution and legal autonomy.

The vast number of differences in Lord Lloyd-Jones mention of 'divergence' cannot be listed here in full, but it is worth referring to some examples. One area of notable disparity is residential tenancies. The Renting Homes (Wales) Act 2016 provided for a significantly simplified system for renting private residences[925]. This had the effect of implementing a 'far superior system concerning residential tenancies[926]'. Education is also an area that has been subject to devolution; schools, colleges and universities in Wales now operate differently to the rest of the UK[927]. One notable difference is the opportunity to speak Welsh in schools, all pupils are taught Welsh until they reach 16[928].

Healthcare and health services are almost entirely devolved, and this is perhaps an area where the Welsh population are more likely to recognise and experience devolution first-hand. For one thing, care is provided by National Health Service Wales, operated under the direction of the Welsh Government. The provision of free prescriptions[929] and the move from an 'opt-in' to an 'opt-out' system for organ donation[930] have both been the subject of extensive commentary[931]. However, they should be viewed as a testament to the Welsh devolution

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[924]Lord Lloyd-Jones, Justice of the Supreme Court, Association of London Welsh Lawyers, 'Codification of Welsh Law' (8 March 2018), p.1

[925] Following a Law Commission Report implemented in Wales but rejected by the Government in England. The original 2006 LC Report on Renting Homes was updated in 2013 with specific reference to Wales, 'Renting Homes in Wales/ Rhentu Cartrefi yng Nghymru' (Law Commission 337, 9 April 2013)

[926] Lord Lloyd-Jones, 'Codification of Welsh Law', p. 2

[927] BBC News Wales, 'Is devolution working for education in Wales?' (12 June 2014), https://www.bbc.co.uk/news/av/uk-wales-27825662/is-devolution-working-for-education-in-wales > accessed 26 April 2019. For example, the Assembly replaced the requirement SAT testing for children between 3 and 7, with a play-based 'foundation phase' - Foundation Phase Framework Report (Revised 2015), April 2015 > accessed from the Welsh Government's Learning Wales website at www.gov.wales/learning 26 April 2019

[928] Wales.com (Welsh Government), 'A Passion for Learning', https://www.wales.com/lifestyle/studying/passion-learning > accessed 26 April 2019

[929] To all patients registered with a Welsh GP who receive their prescriptions from Welsh Pharmacists, under The National Health Service (Free Prescriptions and Charges for Drugs and Appliances (Wales) Regulations 2007

[930] Human Transplantation (Wales) Act 2013, which came into force in 2015. There is 'deemed consent' if the person has not opted out, however relatives are still consulted and so the system is described as a 'soft' opt out system. Applies to adults who lived in Wales for at least 12 months and who died in Wales, but the organs are made available UK-wide. (Emily Jackson, LSE Lecture, Medical Law, 2018)

[931] For example, see James F. Douglas and Antonia J. Cronin 'The Human Transplantation (Wales) Act 2013: an Act of Encouragement, not Enforcement' The Modern Law Review Volume 78, Issue 2, (March 2015), pages: 324–348. See also, Gareth Wyn-Williams, 'Scrap free prescriptions to solve council 'funding crisis' (The Daily Post, 23 October 2018),

project. Not only because England is set to mirror the Welsh opt-out organ donation system by 2020[932], but because Northern Ireland and Scotland followed suit regarding free prescriptions in 2010 and 2011 respectively[933].

When judged against the above developments, it is fair to say that the devolution of family matters has been modest. Nevertheless, of the family issues devolved, it is possible to identify key pioneering developments in legislation brought forward by the Welsh Government[934], particularly in relation to child and social care. Though these may only touch upon a small fraction of family matters, their positive and powerful impact should not be underestimated.

The Welsh Government has been praised for appreciating the importance of children's rights from early on, and for being enthusiastic about raising public awareness on the UN Convention on the Rights of the Child (CNC)[935]. To protect the rights set out in the Convention[936] and more generally, to promote and safeguard the rights and welfare of children in Wales, the Assembly created the office of the Children's Commissioner for Wales[937]. This post was novel, it was 'the first institution of its type in the United Kingdom, and was possibly the most significant achievement of the first Assembly[938]'. Since its establishment, the Commissioner is said to have had a positive impact in terms of intervening in individual cases and in more general policy work[939]. Again, this provides an unmistakeable example of the capabilities of the Welsh when power is devolved as institutions parallel to the Commissioner were introduced in England[940], Scotland[941] and Northern Ireland[942], taking inspiration from the Welsh original.

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[932] BBC News, 'Opt-out organ donation 'in place by 2020' for England', (2 August 2018), https://www.bbc.co.uk/news/health-45056780 > accessed 26 April 2019
[933] BBC News Wales, 'Free Prescriptions 'saving Welsh NHS money for 10 years' (1 April 2017), https://www.bbc.co.uk/news/uk-wales-politics-39457033 > accessed 26 April 2019
[934] Osian Rees, 'Devolution and Family Law in Wales – A Potential for Doing Things Differently?' (Statute Law Review, June 2012), p.193
[935] Jane Fortin, 'Children's rights – flattering to deceive?' (Child and Family Law Quarterly vol.26, 2014), p. 57
[936] The Welsh Government also launched a 5 year action plan to promote children's rights in Wales in November 2009 – 'Getting it Right: A 5-Year Plan' (Welsh Assembly Government, 2010)
[937] Established under the Care Standards Act 2000
[938] Osian Rees, 'Devolution and Family Law in Wales…', p.191
[939] *Ibid*, page 192
[940] Established under the Children Act 2004
[941] The Children and Young People's Commissioner Scotland was established by the Commissioner for Children and Young People (Scotland) Act 2003
[942] Norther Ireland Commissioner for Children and Young People, established by The Commissioner for Children and Young People Order (Northern Ireland) 2003

In 2011, the Rights of Children and Young Persons (Wales) Measure incorporated the CRC into Welsh law[943]; a unique development in the United Kingdom, as the CRC had not been incorporated into English and Welsh law despite calls for such. This move is significant in context; the UK Government has been reluctant to commit themselves fully to the CRC and its principles. For example, The Joint Committee on Human Rights criticised the UK Government and said it was time for them to 'act upon the recommendations of the UN Committee of the Rights of the Child concerning the corporal punishment of children[944]', to which the UK Government responded, 'the use of physical punishment is a matter for individual parents to decide[945]'.

Some other developments in relation to family matters also merit comment. The Children Act 2004 devolved the provision of welfare advice in family courts, which led to the establishment of the Children and Family Court Advisory and Support Service (CAFCASS) Cymru. Wales have also adopted a leading role in tackling domestic abuse. Described as 'a landmark piece of legislation', in 2015 the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act was introduced, enacted with the explicit aim of improving the public sector's response to domestic abuse. One manifestation of this was placing a duty on Local Authorities to report on how they are tackling the problem, another was providing Welsh Ministers with powers to publish statutory guidance to help authorities meet the requirements of the Act[946]. Regrettably, the Act does not impact on criminal justice issues[947], and its effect remains limited in scope so long as policing remains under the exclusive legislative competence of Westminster[948].

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[943] Which included placing a duty on Welsh Ministers to have regard to the CRC when making 'decisions of a strategic nature'

[944] The House of Lords and House of Commons Joint committee on Human Rights, The UN Convention on the Rights of the Child, Tenth Report of Session 2002-2003, p.55

[945] 'Government Responses to Reports from the Committee', HL 104, HC 850, Session 2005-2006, para 82

[946] Welsh Government, 'Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015', (livefearfree.gov), https://livefearfree.gov.wales/policies-and-guidance/vawdasv-wales-act-2015?lang=en > accessed 26 April 2019

[947] Osian Rees, 'Devolution and Family Law in Wales…', p.205

[948] Hannah Al-Othman, 'This Politician Wants to make Wales the Most Feminist Country in Europe' (Buzzfeed News, 21 May 2018), https://www.buzzfeed.com/hannahalothman/this-politician-wants-to-make-wales-the-most-feminist > accessed 27 April 2019

This relates to an important point, in absence of criminal *Welsh* law, Wales cannot constitute a separate legal jurisdiction[949]. Devolution of criminal justice has not yet taken place despite increasing and repeated calls[950]. In 2014 the Commission on Devolution in Wales, known as the Silk Commission, published Part II of their findings. They acknowledged that the administration of justice is a crucial element in the development of Wales and the justice system should be brought as close as possible to the communities it serves[951]. They made what some would consider, rather bold recommendations in this regard. For one, they advocated for devolving policing[952], the lack of which was viewed as an anomaly in the devolution settlement considering how closely police officers interact with the already devolved services[953].

In contemplating the devolution of the justice system as whole, the Commission discussed the resistance expressed by the UK Government, who 'support the continuation of the current unified system, which in our view works well…[954]'. The Commission questioned the effectiveness of this status quo in Wales, and was keen to note that 'both criminal and civil law are devolved in Scotland and Northern Ireland without any apparent adverse consequences[955]', but exercised restraint in its recommendations. If the Commission's suggestions that policing, prisons and probation, youth justice and administration of court system should take place in the following years, it envisioned that attention would turn to devolution of the criminal justice system in its entirety and the question of how a distinctive Welsh legal system might emerge.

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[949] A detailed discussion on whether Wales should constitute a complete separate jurisdiction is beyond the scope of this thesis. Though it is argued that this should be considered an end-goal, the purpose of this work is to show that devolution of divorce law in particular has a robust and legitimate foundation. Though it is recognised that this would likely lead to an independent jurisdiction. For a compelling case for a separate legal jurisdiction for Wales see R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', The Irish Jurist 57, p. 61- 93

[950] Plaid Cymru have consistently and resolutely advocated for devolution of policing and criminal justice, MP Jonathan Edwards stated that, 'for as long as our justice system is designed and delivered from Westminster it'll never meet the needs of Wales' - Plaid Cymru, 'Plaid Cymru urges devolution of policing and criminal justice following Welsh Government announcement on prisons' (partyof.wales, 6 April 2018), https://www.partyof.wales/plaid_cymru_urges_devolution_of_policing_and_criminal_justice > accessed 26 April 2019

[951] Commission on Devolution Report, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales', (March 2014), p.115

[952] Possibly by 2017

[953] Commission on Devolution Report, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales', (March 2014), p.103

[954] *Ibid*, p.112

[955] *Ibid*, p.40

It thought that the matter should be reviewed by 2025, to see whether a distinct Welsh law had developed to warrant it[956].

For our purposes, it is important that the Commission expressly stated that civil justice, including Family Law, should be included in this debate alongside criminal justice[957]. Though policing has still not been devolved in line with the Commission's timetable, the question of devolving justice is still a live issue[958]. Though the debate surrounding a separate jurisdiction is still in its infancy, 'it seems to be common ground, even among those not previously disposed to devolution, that a distinct Welsh jurisdiction, or something very much like it, will emerge[959]'.

The prospect of devolving criminal law, an area that directly affects the lives of citizens in an unparalleled way, would inevitably lead to devolving Family Law, which has a bearing on intimate family life. Indeed, through mere developments towards the former, the case for devolution of divorce law would be bolstered. Establishing the groundwork for devolving criminal justice has already begun, and since this would lead to divorce law eventually following suit, it is worth considering how that law would look in Wales. It is argued that the evidence convincingly points to a no-fault system[960].

Given that the Welsh Government's efforts in family welfare as outlined above have been uniquely progressive thus far, there is no reason why family justice would be any different. In addition and as discussed, the traditional concept of marriage (shaped by Christianity and English-specific historical events) which informs divorce law, can be linked to sexist ideals. No-fault divorce could therefore be seen as a move towards untangling marriage from its patriarchal history. There is evidence to argue that Wales would relish such an opportunity. The former first minster Carwyn Jones speaking in 2018, said that the Welsh Government was committed to making Wales 'a truly feminist government', and commissioned Cardiff University to research 'what that needs to look like'. He added that he would look to countries

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[956] *Ibid*, p.131
[957] *Ibid*, p.115
[958] Another commission chaired by Lord Thomas of Cwmgiedd, the immediate former Lord Chief Justice, is set to report in 2019 on the possibility of a distinct legal system for Wales, including the possibility of the devolution of family justice - BBC Wales News, 'Lord Chief Justice to examine 'distinct' legal system for Wales' (19 September 2017), https://www.bbc.co.uk/news/uk-wales-politics-41307648 > accessed 27 April 2019
[959] UK's Changing Union Project, quoted in Commission on Devolution Report, 'Empowerment and Responsibility…, p.113
[960] If it were afforded the opportunity, it is also likely that Wales would introduce legislation giving protection to cohabitants as Scotland have done – as discussed in Chapter 2

such as Sweden, who created the first feminist government in the world with gender equality central to policy-making, for inspiration and look to 'take it even further'[961]. In the Welsh Assembly, 47% of the members are female, representing the best gender balance in UK parliamentary bodies[962]. Such powerful ambition cannot be ignored, and it brings into question the justification for requiring Wales to follow laws on marriage and divorce which are tied to a status-based model inherently linked to gender discrimination.

It is here that we can return to the relevance and legacy of *Cyfraith Hywel.* Back in December 2012 the National Assembly's Constitutional and Legislative Affairs Committee Inquiry into a Separate Welsh Jurisdiction noted that 'from the evidence received, we believe that a Welsh legal identity is getting stronger[963]'. In shaping the future of this emerging legal identity, reference to the past is an inevitability, especially when values that were held by the Welsh can still be seen today.

Though there are elements from the Northern Ireland and Scotland settlements that could be used in the future progress of Welsh devolution, there is a distinctive dimension that needs to be focused on. There is a Welsh language policy and a legislative framework to accompany it[964], bearing in mind, as Parry writes, that 'it is even possible to argue that the struggle to save the language has been at the heart of the struggle to save the very idea of Wales as a nation[965]' and Wales' legal framework has distinctive needs as a bilingual country[966]. Further, Wales has a rich and unique legal history that is closely tied to the political struggle against England. Parry argues that the Welsh laws were key in the political quarrel of the middle ages, and legal sovereignty and autonomy was key for national sovereignty[967]. Another unique feature is that Wales' legal history is also closely tied to its literary history. A number of the Welsh medieval princes' bards were also lawyers, and there was a strong link between the bard and the lawyer's craft; both were the craft of noblemen[968]. A sense of unfairness emerges from the fact that

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[961] Hannah Al-Othman, 'This Politician Wants to make Wales the Most Feminist Country in Europe'
[962] BBC Wales News, 'Men need to understand feminism to tackle inequality says Carwyn Jones' (21 May 2018), https://www.bbc.co.uk/news/uk-wales-politics-44196315 > accessed 27 April 2019
[963] Commission on Devolution Report, 'Empowerment and Responsibility…', p.114
[964] R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p.79.
[965] *Ibid*, p.80
[966] *Ibid*, p.89
[967] In the last few years of Llywelyn ap Gruffydd's reign, who was a Welsh prince declared a rebel by Edward I, the war for political independence also became a war for the protection of the laws and customs of the Welsh. R. Gwynedd Parry, *Y Gyfraith yn ein Llên* (University of Wales Press, 2019), p.17
[968] *Ibid*. p.19, 20

Scotland and Northern Ireland have the power to legislate their own respective divorce law. On the principal of constitutional parity, Wales should have the same or similar powers as these countries 'unless there is a compelling case for it to be otherwise[969]'. Not only is there no such compelling case for this refusal, this Chapter has shown that there is, in fact, a positive and powerful case *for* devolving divorce law.

Devolution in Wales has had its fair share of critics[970], but it is reasonable to contend that it is a project that is continuously expanding, a 'process not an event[971]'. Every political party now endorses devolution, and every credible opinion survey suggests that it accepted by Welsh voters[972]. Brexit has threatened the devolution settlement[973], but the response is indicative of a strong desire to hold on to this system of 'government closer to the people[974]'.

The UK Government has stated that legislative powers currently held in Brussels will initially be retained by Westminster, to preserve the internal market of the UK. There is no support for this stance in the Scottish Parliament or the Welsh Assembly[975], with the latter making the case for a constitution charter[976] where the UK Government would need the consent of at least one of the devolved bodies to alter devolution[977]. Moreover, despite the narrow majority for

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[969] R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p.91

[970] For example, see David Moon and Tomos Evans, 'How not to do devolution: Wales and problem of legislative competence' (LSE Blogs, Politics and Policy, 30 March 2017), https://blogs.lse.ac.uk/politicsandpolicy/wales-and-the-problem-of-legislative-competence/ > accessed 27 April 2019

[971] David Torrance, House of Common Briefing Paper Number 08318, 'A Process not an Event: Devolution in Wales, 1998-2008' (11 July 2018)

[972] Huw Edwards, 'Devolution in Wales is here to stay – Brexit must not change that', The Guardian (London, 18 September 2017)

[973] The Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* (2017) UKSC 5 ruled that the devolved assemblies do not have a veto on Brexit, they do not need to be consulted before Article 50 is triggered. However, if the UK leaves the EU, amendments will be required in the 'devolution acts'. Dr Jo Murkens, #LSEBrexitVote YouTube Video: 'Will Northern Ireland and Scotland have a say on Brexit?' (25 January 2017)

[974] John Smith, the former Labour Government's trade secretary speaking at a debate on devolution held at the Oxford Union before the referendums in Scotland and Wales in 1979, https://www.bbc.co.uk/news/av/uk-scotland-scotland-politics-29147146/scottish-independence-devolution-79-john-smith

[975] A discussion on the implication of Brexit on Northern Ireland is significant but beyond the scope of this thesis

[976] Vernon Bogdanor, 'Post-Brexit Britain may need a constitution – or face disintegration', The Guardian (London, 18 January 2019)

[977] This would contravene parliamentary sovereignty, which was expressly preserved through the devolution process

withdrawal of the EU in Wales, the Welsh Government has indicated that it favours continued members of the single market and customs union[978].

By way of a brief summary on a highly complex issue, the potential impact of Brexit on the devolution settlement 'is one of the most technically complex and politically contentious elements of the Brexit debate[979]'. For the purposes of our inquiry, the point is that the alarmist nature of the narrative surrounding Brexit and devolution demonstrates the strength that devolution has now acquired. The idea of restricting devolution when the path has always been towards greater powers is politically unfeasible[980]. Simply put, devolution is here to stay, and the brief outline above of the stage is has now reached in Wales suggests that Family Law could be devolved.

Furthermore, if it is believed that devolving divorce to Wales goes too far, it is worth remembering that the UK has existed with its current boundaries for less than 100 years, Brexit and the strength the SNP has acquired since the Scottish referendum on independence in 2014 has highlighted that its future as a nation state is uncertain[981]. In any event, it can be said that devolution has an element of inevitability; decentralisation and the internalisation of government is a worldwide phenomenon. It is part of a general change in the way people are being governed[982].

In conclusion, the contractual view of marriage under *Cyfraith Hywel* provides an embedded tradition of marriage firmly based in contract to help shape a distinct Welsh legal identity. The Welsh Assembly have already made significant headway in progressive action thus far in the

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[978] Welsh Assembly Report, 'Welsh Government Response to Recommendations from the External Affairs and Additional Legislation Committee Report: Wales' Future Relationship with Europe' (24 April 2019)
[979] European Union Committee, 'Brexit: Devolution', Fourth Report, House of Lords 9, London HMSO 2017, p. 5
[980] Parry writes, 'Events gather pace following the referrendum of 23rd June 2016 on the UK's membership of the EU, and the future of the UK and its constituent parts continues to exercise political minds.49 The constitutional future of Wales must be considered with haste and urgency in light of rapidly changing circumstances…With the repatriation of law making powers from the EU to the UK being an inevitable consequence of Brexit (although the detail is yet to be determined), the impact of this on the legislative competence of the National Assembly for Wales vis-à-vis that of the Westminster parliament will be the subject of further deliberation in the coming months.' R. Parry 'Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction', p. 68
[981] See Martin Kettle, 'Boris Johnson's full English Brexit could rip the union apart', The Guardian (London, 26 June 2019)
[982] Dr Jo Murkens, LSE LLB Public Law Lecture (October 2015)

devolution settlement, particularly in relation to family matters. The Welsh Government have expressed a firm commitment to achieving a feminist government.

If divorce law was devolved to Wales, the combination of the above would almost certainly result in a divorce law better equipped for Welsh citizens, and would not, in all likelihood, parallel the failings of the current law outlined in detail in Chapter 4. As Elisabeth Jones, the Chief Legal Adviser for the Welsh Assembly stated, there is a 'possibility of a new language of law in Wales, that could also be a new language of legal - and therefore social - concepts and relationships…There are people in Wales – lawyers, politicians and people of ideas - who are capable of that challenge[983]'. In any event, in order to envisage what Welsh divorce law would look like, a suitable starting point, is to look to another Celtic nation in the British Isles who have been afforded the opportunity.

[983] Law Society Lecture, Eisteddfod Genedlaethol 2014, 'Who Cares about Clarity? The Present and Future Legislative Competence of the National Assembly for Wales', p.14

Chapter 7 - An Alternative, Welsh Model of Divorce Law

The previous Chapter sets out the argument *for* the devolution of divorce, so as to provide Wales with a *different* model of divorce law; one that is consistent with progressive values already prevalent in Welsh legal thought, one that aligns with Welsh identity, and one which does not fall ill to the theoretical and practical failings of the current version under English and Welsh jurisdiction. This Chapter will explore the question of *how* this divorce law might look. A starting point will be a comparative analysis with other jurisdictional models, to see whether and how these might provide inspiration. Particular attention will be dedicated to the Scottish no-fault model, not only because of its relevance; a similarly-sized Celtic nation closely aligned with English and Welsh law, but also because of the respectability[984] commanded by this progressive model of divorce law. Discussion will then move on to the current proposals for reform in England and Wales, to see whether they appropriately iron out the problems outlined in Chapter 4 and if they can provide an adequate system for Wales based on the considerations outlined in the preceding Chapter. Finally, recommendations will be made and the possibility of these being implemented in Wales will be examined.

Overarching Models of Divorce Law

The analysis thus far demonstrates that this work favours a system no-fault divorce[985]. However, acceptance of no-fault divorce is one matter, the question of what specific form it should take and how it should operate in practice is another, less straightforward matter. As Roiser points out, there are several jurisdictions who operate no-fault divorce, yet the concept has been implemented in different, varyingly liberal ways[986]. Indeed, no-fault divorce can manifest in several altered forms, depending on the theoretical foundation which underpins the system.

Antokolskaia identifies four categories or 'generations' of divorce law and explains the central ideology underlying each[987]. These are discerned from the development of divorce laws across

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[984]For example, 'The vast majority of divorce now proceed on the basis of non-cohabitation, bringing attendant benefits in terms of privacy, and the wisdom of the reform was illustrated graphically in the recent English case, *Owens v Owens'* – Elaine Sutherland, 'Scots Child and Family Law: Liberty, Equality and Protection Revisited' Juridical Review 2019, p.34

[985] See Chapter 4 for an analysis of the failings of a fault-based system

[986] Anna Roiser, 'No Fault Divorce: Where Next?', Family Law Journal (2015), p.1540

[987] Masha Antokolskaia, 'Convergence and Divergence of Divorce Laws in Europe', Child And Family Law Quarterly, Vol. 18, No. 3, (December 2011), p.310-311

Europe, but can be applied to divorce law generally. First is a fault-based divorce law, which conceptualises divorce as a sanction. It is rooted in the belief that the State, and perhaps the Church, are the ultimate arbiters of morality; accordingly they should be able to 'punish' a guilty spouse. As three of the five 'facts' required to obtain a divorce in England and Wales entail assigning blame and it is these facts that are usually relied upon[988], the system is primarily 'fault-based'. No European country maintains fault as the sole ground for divorce, but its mere inclusion makes England and Wales a minority[989]. Should Wales diverge from this system, there are several precedents in the form of no-fault European jurisdictions from which to draw inspiration.

The second category identified by Antokolskaia is divorce based on the concept of irretrievable breakdown. This is a multi-faceted idea, but by way of generalisation, divorce is treated as a remedy for a failure (of maintaining a life-long union). It is underpinned by a belief that the State has a responsibility to protect the institution of marriage for the benefit of society, and protect spouses from their supposedly reckless decisions[990]; an idea that clearly speaks to a status-based conception of marriage. Following this, divorce is only allowed under a prescribed set of circumstances where the State is satisfied that the marriage cannot be saved. As we know from English and Welsh law, divorce based on irretrievable breakdown does not necessarily mean no-fault. Irretrievable breakdown was made the sole ground for divorce following the Divorce Reform Act 1969, but it retained fault-based facts for its proof. This was a clear attempt to achieve a compromise, but as discussed, the inherent conflict in trying to marry up different guiding principles led to a problematic law that lacks integrity. The Law Commission report which instigated the reform in 1969 recommended that irretrievable breakdown be the sole ground of divorce specifically so as to fulfil one of the explicit aims of divorce law, namely 'to enable the empty shell to be destroyed with maximum fairness, and minimum bitterness, humiliation and distress[991]'. It is fair to say that retaining fault directly conflicts with this aim.

There are several countries who have irretrievable breakdown as the sole ground for divorce but showing fault as evidence of this is not a requirement. One such example is Australia, where

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[988] See page 182
[989] Masha Antokolskaia, 'Convergence and Divergence of Divorce Laws in Europe'
[990] *Ibid*
[991] The Law Commission, 'Reform of the Grounds of Divorce: The Field of Choice' (Law Com No 6, 1966), para 15, p.10

irretrievable breakdown is evidenced by 12 months separation[992]. Irretrievable breakdown is also the sole ground for divorce in the Netherlands, but no period of separation is required (and no apportionment of blame)[993]. New Zealand, Canada, South Africa, and several other have embraced the terminology of 'irretrievable breakdown', but it is an inherently elusive and malleable phrase. A possible instinctual definition would be; that the marital relationship has failed to the extent that there is no longer any reasonable prospect of the husband and wife being willing and able to provide each other with comfort and support. Or in simpler terms, the love which at one time may have existed between two individuals has ceased. Portugal has adopted the concept most authentically; where divorce is contested it can still be obtained by showing one of four circumstances including, importantly - 'any other factors that prove the marriage has irretrievably broken down, regardless of who is to blame'. Fault as a legal concept was abolished in 2008[994]. The takeaway point is that the phrase operates within jurisdictions with vastly differing divorce laws, in both fault and no-fault based systems. Therefore there are limits to how helpful a concept it can be when trying to formulate an optimal divorce law.

The third category is divorce by mutual consent. Heavily implicit in this concept is a view of divorce as an autonomous, private decision and an acceptance that the people best placed to make decisions about leaving the marital union are the parties themselves; an idea that is symptomatic of a contract-based conception of marriage. In essence, the idea is that where the parties agree that the marriage has broken down, this fact alone is sufficient to obtain a divorce. By way of example, Bulgaria recognises mutual consent as an individual ground for divorce, and bases this on a 'declaration by the spouses of their solemn and unwavering mutual consent to the termination of the marriage[995]'. No examination is undertaken by the court as to the reasons for the termination. English and Welsh law only pays lip service to the idea of divorce by mutual consent, making it contingent on the heavy burden of showing two years separation. However, it can realistically be argued that divorce by mutual consent is actually a common

[992] Anna Roiser, 'No Fault Divorce: Where Next?', p.1542
[993] Bowmer and Nuiten Advocaten, 'Divorce in the Netherlands' > Services > Family Law https://www.veldlaw.nl/en/services/family-law/divorce-in-the-netherlands > accessed 14 May 2019
[994] Expatica, 'Getting a Divorce in Portugal' > Living in Portugal > Divorce, Marriage and Partnership (30 January, 2019), https://www.expatica.com/pt/living/love/getting-a-divorce-in-portugal-1174558/ > accessed 14 May 2019
[995] European Justice, European Judicial Network > Divorce > Bulgaria, https://e-justice.europa.eu/content_divorce-45-bg-en.do?member=1#toc_2 > accessed 14 May 2019

occurrence in practice, due to the evidence of collusion under the fault-based facts and the absence of any meaningful scrutiny of the alleged conduct[996].

Clearly, divorce by mutual consent cannot, in isolation, form a complete and comprehensive model of divorce law, there must be other avenues to divorce for people who have either been abandoned by their spouse or who face a spouse in denial over the breakdown of the marriage[997]. It is nevertheless an important element in any system of divorce law. Allowing divorce by mutual consent without enquiring any further is a necessary part of any liberal democracy that claims to allow political freedom and limited State intervention[998]. It also coincides with a contractual view of marriage, given the unqualified respect accorded to individual autonomy.

A concept known as 'divorce on demand' is Antokolskaia's final category. The phrase is relatively self-explanatory and it sometimes referred to as unilateral divorce, because divorce can be obtained even if only one party wants it. It entails an acceptance of the idea that a marriage cannot be kept intact if one party wants to leave. Countries that recognise this often attach a requisite separation period. For example, under Norwegian law, either spouse may demand a divorce after a year unless they opt for a legal separation sooner[999]. In Brazil[1000] however, there is no such separation period required, following the 66th amendment to the Constitution in 2010, which also removed the requirement of providing a reason for separation[1001].

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[996] Discussed further on page 103

[997] Mr Owens was of the view that him and Mrs Owens had learned how to 'rub along' – *Owens v Owens* (2018) UKSC 41, para 11

[998] Divorce is a unique area of Family Law when it comes to State intervention. The position can be contrasted with child public law, where, if a local authority is to successfully obtain a care order in respect of a child, a high 'threshold criteria' must be met. The stringency of this test has been justified several times in case law, for example, Lord Templeman said that it is 'not the provenance of the State to spare children all the consequences of defective parenting; the compulsive powers of the State could only be exercised when the significant harm criteria in S. 31(2) of the Children Act 1989 (the 1989 Act) had been made out' (*Re KD (A Minor Ward) (Termination of Access)* (1988) 1 AC 806, para 141. Similarly, Lady Hale said in *Re B* (2013) UKSC at para 143; 'the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs'.

[999] The Marriage Act 1991, accessed via the Norwegian Government website, https://www.regjeringen.no/en/dokumenter/the-marriage-act/id448401/ > accessed 14 May 2019

[1000] Interestingly, historically Brazil has a close relationship with the Roman Catholic Church

[1001] Rebeca Duran, 'How to Get a Divorce in Brazil' (The Brazil Business, 7 August 2013), https://thebrazilbusiness.com/article/how-to-get-a-divorce-in-brazil > accessed 14 May 2019

Again, divorce 'on demand' does not necessarily equate to no-fault divorce. It is arguable that in England and Wales we have a form of divorce 'on demand' because the practice of the law means that, in effect, if two people agree that they want a divorce the only significant or real formal barrier is the one year bar[1002]. However, though divorce 'on demand' *can* exist alongside a fault-based divorce law, both conflict to the extent that the ability to produce a divorce on demand effectively renders the requirement of showing fault redundant. It is this combination which makes current English and Welsh law a contender for one of the most ineffective and conceptually chaotic systems of divorce in the context of Western democracies.

The terminology of divorce 'on demand' and the way the phrase has been applied[1003] has negative undertones; implicit in the language is the idea that divorce is somehow trivialised, and arguably it alludes to the most pure form of a contract-based understanding of marriage. However, we can see this model operate successfully and positively in Sweden, where the law on divorce is exceptionally liberal in comparison to England and Wales. No legal separation period[1004], nor any allegation of fault or wrongdoing is required under Swedish law, only that one spouse has a desire to withdraw from the marriage; requesting divorce is an incontestable and unconditional *right*[1005]. Clearly this is the effect of a conception of marriage and divorce that vastly differs from the one discussed in detail in this work.

Marriage viewed as a voluntary union underpins Swedish divorce law. The natural upshot of this is that if one of the parties is no longer satisfied within the union they should be able to demand a divorce[1006]. The rules of property division on divorce are also founded on very different principles. They reflect 'a view of the spouses as individuals with each having his or her own economic sphere[1007]'. Given what we know about the view of marriage as a contract

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[1002] A petition for divorce cannot be presented before the expiration of one year after marriage – S.3 Matrimonial Causes Act 1973

[1003] For example, used in inflammatory media headlines, e.g-'Divorce on Demand: New Law will make marriage splits 'no-fault', The Mirror (9 April 2019) https://www.mirror.co.uk/money/new-rules-end-outdated-divorce-14263499 > accessed 21 May 2019

[1004] However, both parties will be subject to a reconsideration period if they have a child under 16, if they request it, or if one party contests the divorce. The length of this period is 6 months. The requirement does not apply if the parties have been separated for two years. However, how often this requirement may apply in practice is questionable.

[1005] Michael Bogdan and Eva Ryrstedt, 'Marriage in Swedish Family Law and Swedish Conflicts of Law', Family Law Quarterly, Vol.29, No.3, (1995), p. 677

[1006] *Ibid*, p.679

[1007] *Ibid*

from the preceding Chapter, the Swedish model of divorce law seems to align well with the preferred conceptualisation of marriage argued for in that Chapter.

It may appear contradictory to commend a model of divorce law which, when deciding on the division of the marital assets, assumes that spouses are able to support themselves (a notion which would almost always tend to disadvantage women), when it has been argued in Chapter 6 that a contractual model would be *beneficial* to women. Indeed, such a system would operate unfairly if it were employed here immediately. Sweden is a pioneer when it comes to gender equality[1008]. A high proportion of women are employed outside the home, and the country operates an extensive social security system[1009]. This alludes to an important point; changing divorce procedure for the better entails more than merely amending the legislative text, more fundamental changes in society are needed regarding how women and perceived and treated[1010]. The fact that the Welsh Government has explicitly proclaimed that this is to be Welsh society's direction for the future[1011], means that the Swedish model for divorce law, characterised by a liberal and pragmatic approach, is a valuable source of guidance should divorce be devolved.

These 'generations' or categories of divorce law; fault-based divorce, divorce based on irretrievable breakdown, divorce by mutual consent and divorce 'on demand', all currently exist in some form in Europe[1012]. Further, they are not mutually exclusive; elements from all four can be observed from the overall system of divorce in England and Wales. Importantly, the concept of no-fault divorce can exist alongside and interact with all four categories in different ways. Consequently, simply arguing for no-fault divorce elicits more questions than

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[1008] Sweden's feminist Government is contemplated on page 170
[1009] Michael Bogdan and Eva Ryrstedt, 'Marriage in Swedish Family Law and Swedish Conflicts of Law', p.678
[1010] A detailed analysis on the question of whether the courts should preserve their role in adjudicating over the division of assets if divorce law was to be reformed is beyond the scope of this work, and only touched upon briefly on page 42. However there are some important points to make. A divorce law grounded in a contract-based view of marriage and the increase in individual autonomy such a shift embodies would inevitably run parallel to a decrease in the court's authority when making financial orders, and pre and post-nuptial agreements would be more readily accepted. However, there must first be a social shift towards gender equality and the general perception of women in society if the law is to operate fairly. It is true that the law on the division of assets currently gives the court considerable discretion of a kind that would clash with a contractual-based view of marriage, but the approach taken by the courts (see *Miller v Miller, McFarlane v McFarlane* (2006) UKHL 24) is necessary to redress the inequality between the spouses when they have arranged their married life in such a way that puts the woman at a disadvantage on divorce. Furthermore, whether a party is granted a divorce (that is, the concept of a legal separation) and financial and child-related matters are separate and different; the former does not involve a justiciable dispute, but the latter issues do.
[1011] See page 169
[1012] Masha Antokolskaia, 'Convergence and Divergence of Divorce Laws in Europe', p.310

it answers. It can be implemented inadequately in a half-hearted way as it has in England and Wales, or it can adopt a more dominant position within divorce law, as in Scotland.

Scottish Divorce Law

It would be misleading to describe divorce law in Scotland as wholly different to that in England and Wales. Though as Smith points out, *Owens* highlighted the significance of the differences that do exist[1013]. The legal ground for divorce is the same; the marriage must have broken down irretrievably[1014]. Furthermore, adultery and unreasonable behaviour are both means to establish this. However, the third fault-based ground in England and Wales, desertion, was abolished in Scotland in 2006[1015]. In addition, if a Scottish couple wish to rely on adultery or unreasonable behaviour, there is no one year bar or any minimum length of time that they must remain married before being able to bring divorce proceedings. Therefore it is possible obtain a divorce immediately. The other two ways of showing irretrievable breakdown is another area of notable difference; smaller periods of time are required for the separation grounds.

If both parties consent, a divorce petition can be presented after two years of non-cohabitation in England and Wales, whereas the length of this period in Scotland is only one year. If the divorce petition is contested, an applicant in England or Wales must wait five years, the equivalent applicant (the 'pursuer') is only required to wait two years in Scotland. Had *Owens* been a Scottish case, in theory the same conclusion could have been reached regarding the law on unreasonable behaviour as the behaviour ground set out in s.1 (2) (b) in the Divorce (Scotland) Act 1976 is substantively identical (though worded differently) to s. 1(2) (b) of the Matrimonial Causes Act 1973. However, it may never have reached the Supreme Court[1016] because the prospect of tolerating marriage for another two years instead of five would have been an easier pill for Mrs Owens to swallow.

[1013] Harper Macleaod LLP, Jenny Smith, 'Tini Owens and the difference between divorce law in Scotland and England' HM Insights, (28 March 2017), https://www.harpermacleod.co.uk/hm-insights/2017/march/tini-owens-and-the-differences-between-divorce-law-in-scotland-and-england/ > accessed 16 May 2019

[1014] Bar that in Scotland the issuing of an interim Gender Recognition Certificate is also a ground for divorce. S.1(1) Divorce (Scotland) Act 1976

[1015] Following the Family Law (Scotland) Act 2006

[1016] The Supreme Court is the final court of appeal for Scottish *civil* cases. The Supreme Court website - https://www.supremecourt.uk/ > accessed 16 May 2019

Though this difference in the separation period requirements may appear minimal, the effect should not be underestimated. Locking people in an intimate union against their will is cruel, and 'a chronically unhappy marriage starts a cascade of stressors and depression that sets the stage for significant physical and psychological vulnerability, with women at higher risk than men[1017]'. Scottish law alleviates the animosity inherent in marital breakdown in another way; through the simplified divorce procedure. Where the couple seek to rely on one of the separation grounds; there are no children under 16 and no financial matters to be resolved, there is no need to engage a solicitor and the couple can go directly to the local sheriff court, pay a £107 fee and get divorced[1018]. In addition, a court does not have to rubber-stamp formal agreements where the parties have resolved the issues themselves[1019].

An analysis of the legal history of marriage and divorce in Scotland is beyond the scope of this work, the important point is that there is clearly a different rationale informing the law. On the division of assets on divorce, in contrast to the position here, the only assets that can be divided under Scottish law are those which were acquired during the marriage. The items owned by the parties prior to the marriage or received by way of gift or inheritance from a third party are excluded[1020]. In addition, spousal maintenance is less common in Scotland and is avoided where possible. If it must be granted, it is usually limited to a short period; a maximum of three years in absence of exceptional circumstances[1021]. Under English law the court has the power to award maintenance payments indefinitely[1022]. What emerges from the Scottish system is a conceptualisation of marriage as a voluntary union between two individuals; a view closer to the contract end of the status-contract continuum than the English law equivalent.

[1017] Maureen Gaffney, 'Divorce, Irish style: The wait just adds to the heartbreak' (The Irish Times, May 11 2019), https://www.irishtimes.com/life-and-style/people/divorce-irish-style-the-wait-just-adds-to-the-heartbreak-1.3880072 > accessed 16 May 2019

[1018] GibsonKerr, '7 Things you Need to Know about Divorce in Scotland', https://www.gibsonkerr.co.uk/divorce-edinburgh/7-things-you-need-to-know-about-divorce-in-scotland/ > accessed 16 May 2019

[1019] Jenny Smith, 'Tini Owens and the difference between divorce law in Scotland and England'

[1020] Morton Fraser Lawyers, 'A brief guide to Scottish matrimonial law', https://www.morton-fraser.com/knowledge-hub/brief-guide-scottish-matrimonial-law > accessed 16 May 2019

[1021] *Ibid*

[1022] Thompson Reuters Practical Law, Practical Law Family, Practice Note, 'Spousal Periodical Payments Orders'

Despite retaining two fault based grounds, Scotland is considered a no-fault State[1023]. This is the appropriate categorisation. In 2015, Trinder and Sefton's report noted that 60% of divorces granted in England and Wales were based on the adultery or the behaviour fact (which were often founded on exaggerated situations). That figure was only 6% in Scotland - in all likelihood a result of the divergence in procedural and legal rules that create different incentive structures[1024]. The Family Law (Scotland) Act 2006 introduced these changes in Scotland which amended the Divorce (Scotland) Act 1976 and this is what led to the disparity between the north and south of the border. Around this time Cathy Jamieson, the Justice Minister for Scotland, stated that the previous law no longer served the needs of the Scottish people nor did it accord with the way they lived their lives[1025]. There is no reason why this statement does not carry the same applicable force in Wales. Relinquishing jurisdiction over divorce law to the Scottish Parliament and the Scottish Government has undoubtedly been a success story for devolution[1026], and has provided a precedent for Wales. Giving Scotland the autonomy to control their own divorce law has allowed them to legislate in accordance with their own history, and Wales' own unique history as outlined in the previous Chapter should justify the same treatment. The analysis in the preceding Chapter indicates that Wales would follow Scotland in adopting an enlightened and pragmatic approach, if not to a greater extent. This is due to the fact that the historical perception of divorce in Wales did not entail assigning fault, and the current direction of Family Law in the devolved areas indicate a similar philosophy.

The Future of English Divorce Law

From the 15th of September to the 10th of December 2018, the Government ran a consultation on the prospect of introducing no-fault divorce[1027]. The Justice Secretary David Gauke said

[1023] Thomson Reuters Practical Law, Practice Note, 'Family Law in the UK (Scotland): Overview' (1 September 2017)
[1024] Trinder and Sefton et al, 'Finding Fault?' Divorce Law and Practice in England and Wales', Nuffield Foundation (October 2018), p. 9
[1025] Penny Booth, 'Picking Faults in Divorce Law' Family Law Journal 617(2) (August 2004), p. 1
[1026] As it currently stands, Schedule 5 of the Scotland Act 1998 sets out the matters reserved to the UK Parliament, for example, the constitution and foreign affairs. All other matters are deemed to be devolved. Schedule 7A in the Government of Wales Act 2006 sets out the areas of policy on which only the UK Parliament can legislate on. Both therefore have a Reserved Powers Model. However, as expected, the list of matters reserved for Westminster is longer in relation to Wales than Scotland. See Gov.UK - 'Devolution' - https://www.gov.uk/topic/government/devolution > accessed 20 June 2019
[1027] Government website, 'Reform the legal requirements for divorce', https://www.gov.uk/government/consultations/reform-of-the-legal-requirements-for-divorce > accessed 19 May 2019

that the consultation was consistent with the Government's desire to scrap 'archaic requirements' to allege fault[1028]. The consultation prompted over 3000 responses and unsurprisingly, there was a strong consensus supporting the removal of fault[1029]. On the 9th of April 2019, the Government published its response to the consultation in a 57-page document named 'Reducing Family Conflict'. Only a brief outline of the proposals will be discussed here, the main point to note is that the changes proposed are modest. As a starting point, the impression given to the reader on first glance of the report is that there seems to be a focus on 'retaining' several elements, with reference to change being minimal. However, the deeply problematic nature of divorce law analysed in detail throughout this work would lead to the conclusion that a few tweaks here and there will not suffice if real improvement is to be made.

The Government intends to keep the ground for divorce as irretrievable breakdown. This is unsurprising, as discussed several countries adopt this rhetoric when framing divorce law, the material significance lies in the evidential criteria. Retention of this concept is also a corollary of how the Government continues to conceptualise divorce. As mentioned irretrievable breakdown equates to treating divorce as a remedy for failure and is linked to *protecting* marriage. It does not leave any scope for viewing divorce in a positive light. It is a shame that the opportunity to be creative and seek a different basis for divorce was not taken. The justification that retaining irretrievable breakdown 'supports the government's belief that divorce should continue to be unavailable for frivolous reasons or because of temporary difficulties[1030]', is highly patronising and shows how little development has been made in terms of modernising and reformulating ideologies.

Indeed, the first sentence in David Gauke's forward in the Government's response paper reads; 'Divorce is an unhappy event in the lives of too many couples[1031]'. However, there is no inherent need for divorce to be described in such negative terms[1032]. Of course, divorce is term associated with a difficult situation, but at its core divorce is simply a formal document

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[1028] Law Society Gazette, 'Divorce Law Consultation attracts at least 600 responses', https://www.lawgazette.co.uk/law/divorce-law-consultation-attracts-at-least-600-responses/5068731.article > accessed 19 May 2019

[1029] Ministry of Justice, Government Response to the consultation on reform of the legal requirements for divorce, 'Reducing Family Conflict', p.5

[1030] *Ibid*, p. 24

[1031] *Ibid*, p. 3

[1032] This may however, contribute to the continued stigma attached to divorce

recognising a new chapter in the lives of two people. As Weiner puts it, 'divorce isn't such a tragedy. A tragedy is staying in an unhappy marriage, teaching your children the wrong things about love. Nobody ever died of divorce[1033]'. The more negative the State's language surrounding divorce is, the more likely it is that the laws on divorce will be restrictive. It should be noted one of the two overarching aims of legislation for reform is 'to make sure that the decision to divorce continues to be a considered one[1034]'. The position maintained therefore is that there is, in no way, a right to divorce.

Similarly, the Government endeavoured to emphasise that they support the institution of marriage. 'Marriage is important to society[1035]' (a phrase that almost symbolises a status-based view of marriage) features in the response, and in the run up to its publication, David Gauke repeatedly spoke of 'helping the institution of marriage[1036]'. Also noteworthy is the frequency with which a concern over the well-being of children is mentioned[1037], with divorce being viewed as damaging. This heavy focus on children goes some way to show that the concept of marriage which informs the discussion is still the traditional model. The other aim of the legislation was also stated to be making sure that 'divorcing couples are not put through legal requirements which do not serve their or society's interests and which can lead to conflict and accordingly poor outcomes for children[1038]'. Following the analysis of the traditional concept of marriage in this work, this language does not instil the reader with confidence that changes will be enlightened or in any way radical.

The Government proposes to replace the requirement of showing one of the fault-based grounds or a period of separation, with the mere requirement of a statement that the marriage has irretrievably broken down; a 'notification' process. However, couples will still have to wait an unreasonably long time to be able to divorce. The response paper firmly defends the bar on divorce within the first year of marriage, and the Government expressed its desire to retain it

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[1033] Jennifer Weiner, *Fly Away Home* (Atria Books, 2010), p.21
[1034] Parliament website, House of Commons Library Briefing Paper, 'No-fault Divorce' (10 April 2019), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409 > accessed 20 May 2019
[1035] p.5
[1036] Graham Coy, Stowe Family Law blog post, 'No-fault divorce: are we a step closer?' (9 September 2018), https://www.stowefamilylaw.co.uk/blog/2018/09/09/no-fault-divorce-are-we-a-step-closer/ > accessed 20 May 2019
[1037] 'Divorce brings far-reaching effects on children…', House of Commons Library Briefing Paper, 'No-fault Divorce' , p. 3
[1038] Parliament website, House of Commons Library Briefing Paper

as 'an important measure that underlines the importance of marriage[1039]'. Furthermore, the Government intends to introduce a minimum timeframe of 6 months, and keep the two-stage process of decree nisi and decree absolute. These were depicted as safeguards, so as to allow 'couples to consider the implications of divorce and for the court to investigate any matters or refer them to the Queen's Proctor[1040]', and to provide an 'additional check on the decision to divorce[1041]'.

Under current law the minimum amount of time a couple needs to wait before initiating the divorce procedure if they are not willing to allege fault is two years[1042], under these proposals only six months would be deducted from that time period. This is still too long; if the marriage is over, there is no sense in making a couple wait to 'reflect' on the decision to end it. Realistically, the Government should have considered how often people change their mind about divorce, and reminded themselves of the failure of Part II of the Family Law Act 1996 – its patronising efforts to make the parties consider whether divorce was the right course of action ultimately being its downfall.

As the title of the Government's response paper suggests, reform is aimed at reducing *conflict* – 'Reducing Family Conflict – Reform of the Legal Requirements for Divorce'. They are responding, largely, to pressure following *Owens* and the fact that the fault no longer serves the purpose intended and has been reduced to a legal fiction. There is no indication that the concept of marriage and divorce should be reformulated in line with modern times, the traditional view still lingers throughout the response. The flaws in the response paper are considerable, however it should not be forgotten that its publication it is a step in the right direction. In addition, there are a few progressive developments proposed, for example, there is a clear intention to dispose of the requirement of proving fault and the ability to contest a

[1039] Government Response to the consultation on reform of the legal requirements for divorce, 'Reducing Family Conflict', p. 29
[1040] *Ibid*, p.30
[1041] *Ibid*, p.31
[1042] Assuming, for the purposes of this discussion, that they separated immediately after the wedding. Which, although rare, is not unheard of.

divorce[1043] . There is also an explicit recognition that divorce needs to be brought in line with the rest of Family Law[1044], as well as a need to modernise the language[1045].

Nevertheless, not only are there reasons to be sceptical of the substance of these proposals, there are also grounds to doubt that they will be implemented at any time in the near future. Calls for reform are not new, but attempts in the past have categorically failed. If history is any indicator of the Government's ability to successfully overhaul divorce law, the future appears fairly bleak. No-fault divorce was deemed unworkable at the time of the Family Law Act 1996, and in 2015 a No-Fault Divorce Bill presented by Richard Bacon MP failed to proceed after first reading in the House of Commons. Even if the proposals are brought forward, time is needed for parliamentary debate and enactment[1046], and in any event, 'it's been a while…since this country had a government with a strong enough mandate to reform our domestic laws[1047]'.

The main political barrier however, comes in the form of another type of divorce; a divorce from the European Union. It is true that when the Brexit-fuelled turmoil comes to its conclusion the Government may have more time to focus on reforming divorce law[1048]. However, though the new deadline for Brexit is the 31st of October 2019, legally speaking another extension is possible[1049]. The withdrawal agreement has been rejected three times by Parliament. The Labour party and the Conservatives are currently attempting to reach a consensus, which would lead to MP's voting on different options on Brexit, another referendum could be one of these options. Leaving without a deal is also a possibility[1050]. In short, it is impossible to predict when Brexit will take place, and even when (or if) it does, there is a danger that Parliamentary time will be absorbed by dealing with the vast amount of EU laws currently in force in the UK. Perhaps this will be a test of how high divorce reform is on the Conservative Government's political agenda.

[1043] Save that a divorce application can still be challenged on the basis of jurisdiction, the validity of marriage, fraud, coercion or procedural requirements. Response paper, p.29
[1044] Response paper, p.5
[1045] *Ibid*, p.27
[1046] Graeme Fraser, 'Reflections on the State of Family Law', New Law Journal (20 September 2018)
[1047] *Ibid*
[1048] Zoe Bowler, Legal Cheek blog post, 'Is Brexit the reason we don't have a no-fault divorce law?' (2 November 2017) https://www.legalcheek.com/lc-journal-posts/is-brexit-the-reason-we-dont-have-a-no-fault-divorce-law/ > accessed 21 May 2019
[1049] BBC News, 'Brexit: All you need to know about the UK leaving the EU' (10 May 2019) https://www.bbc.co.uk/news/uk-politics-32810887 > accessed 21 May 2019
[1050] *Ibid*

The response paper presents a warning that we should not expect too much from no-fault divorce. The Commission on European Family Law, with the view or harmonising divorce law, advocated allowing divorce by mutual consent without any period of separation, and unilateral divorce after such a period[1051]. Immediate divorce, whether by mutual consent or not, should be the end goal. Moving on from the century in which these laws were enacted, societal norms and the nature of marriage has changed in such a way that 'I don't want to be married anymore' is enough justification for allowing divorce. This would accord with a contractual view of marriage, and sit better alongside society's acceptance of alternative family forms. Should divorce law be devolved to Wales, there would be a real possibility of such a model of divorce being enacted.

Having to rely on Westminster is indefensible; the Government's response to recent case law such as *Steinfeld*[1052], *Owens*[1053] and *McLaughlin*[1054], illustrates its half-hearted commitment to change, undertaking consultations and reviews 'but often without any sense of urgency[1055]'. Furthermore, it is unrealistic to expect a Conservative Government, who have historically and consistently supported a traditional, status-based form of marriage, to be able to legislate appropriately for the people of Wales given what we know from the preceding Chapter and the unique history of marriage and divorce in Wales. It is also unmerited; the Welsh Conservatives only hold 11 of the 60 seats in the National Assembly[1056].

As a result of what we know about the history of marriage and divorce in Wales, the current legal landscape following devolution, and in particular, the Welsh Government's desire to emulate the Swedish Government regarding gender equality[1057], there is no reason why the Swedish model of divorce should not serve as an aspiration. It is of course, difficult to say with

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[1051] Herring, Probert and Gilmore, *Great Debates in Family Law*, p.89
[1052] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* (2018) UKSC 32
[1053] *Owens v Owens* (2018) UKSC 41
[1054] *Re an application by Siobhan McLaughlin for Judicial Review* (2018) UKSC 48
[1055] Graeme Fraser, 'Reflections on the State of Family Law'
[1056] National Assembly for Wales, Senedd Seating Plan, http://www.assembly.wales/en/memhome/Pages/mem-seating-plan.aspx > accessed 23 May 2019
[1057] Carwyn Jones, the former First Minister for Wales, on Sweden's creation of the first feminist government in the world, said 'we want to learn from international best practice. Sweden is one example, but you learn from people, you don't try and copy them. You try and move even further forward.' Hannah Al-Othman 'This Politician Wants to Make Wales The Most Feminist Country in Europe'. Buzfeed.News (May 21, 2018), https://www.buzzfeed.com/hannahalothman/this-politician-wants-to-make-wales-the-most-feminist > accessed 20 June 2019

any degree of certainty whether such a model would be automatically accepted by Welsh citizens; since the age of *Cyfraith Hywel* where Wales consisted of distinct kingdoms, culture and society differs significantly from area to area. However, the Scottish model of divorce provides a solid and reasonable starting point, as Wales continue to follow in the footsteps of Scotland in the devolution process and calls for analogous powers intensify [1058].

[1058] 'It would be naïve to characterise current Anglo-Welsh relations as somehow more harmonious when compared to Scotland' – 'The Dragon Roars? Welsh Devolution and the UK Supreme Court', UCL The Constitution Unit blog, https://constitution-unit.com/2013/02/05/the-dragon-roars-welsh-devolution-and-the-uk-supreme-court/ > accessed 20 June 2019

Chapter 8 - Conclusion and Proposals for Reform

This thesis has shown that the chaos of the current law on divorce in England and Wales has now risen to the level of breaking point, and the significance of *Owens v Owens* in reaching this conjuncture cannot be understated. The case should be viewed as a necessary impasse. Before this landmark judgement claims that the law is unsuitable for modern living, logically incoherent and potentially damaging to family relationships were rife, but such commentary tended to follow the pattern of academic hyperbole. The Special Procedure caused the practice of the law to diverge significantly from the legislation, but this separation went unchallenged because, by definition, it is the practical side of the law rather than the enacted law that divorcing couples encounter. *Owens* was a *direct* challenge to this status quo. It rocked the boat by serving as a clear reminder that it is that State who has the final word. The conflict between the opposing aims and guiding principles of law and practice came to a head, and the legislation's potential to negatively affect people's lives by using archaic notions of marriage manifested itself in an undisputable way. Post-*Owens,* it was necessary to re-visit and delve deeper into the law's reluctance to let go of the heteronormative idea of the family, to explore why social changes have not been able to shake the state's faith in these traditional ideals, and see how progress could be made in future. The necessity of this inquiry is bolstered by the simple fact that divorce is a widespread sociological as well as legal phenomenon, that all of us will encounter in one way or another at some time.

The purpose of extensive criticism of the ideological and historical framework leading up to divorce legislation in its current form and the status-based conception of marriage that underpins it, has been twofold. It has shown how and why the current law in its application to England and Wales, is unsustainable and categorically no longer fit for purpose. It has also shown why it is *particularly* unacceptable and unfair for Wales to be a party to this state of affairs. This is due to the unique historical development of the law on marriage and divorce in Wales and specifically, the fact that the concept of marriage in Medieval Wales mirrored a contractual model, and the concept of divorce was void of any notion of fault. There have rightly been continuous calls and suggestions for reform in this area of law both pre and post-*Owens*, but the discussion seems to have been centred on reforming the law of the English and

Welsh jurisdiction as whole. There does not seem to be comprehensive analysis isolating the justifications, of which this work has found there are many, in allowing Wales to regulate its own divorce law through devolution. These observations were reached through three main parts.

Part 1: The Historical Background – Marriage, Divorce and the Underlying Principles

In Chapter 2, the traditional and legal concept of marriage was explored. The examination centred on the extent to which this caused problems in the regulation of different family forms, as well as whether the legal definition of marriage could provide an adequate justification for a fault-based divorce law. A significant disparity was found between the legal, traditional concept of marriage and the one now prevalent in popular thought. In seeking to answer the first limb of this Chapter's research question; what are the consequence of the centrality of the traditional, legal concept of marriage in the context of divorce law? It was found that, deeply-embedded in the State's traditional conception of marriage is the Christian doctrine and a view of achieving societal stability and organisation. These were found to be flawed theoretical justifications for privileging marriage as they were instrumental in making marriage a tool to enable patriarchal ideals and centuries of female oppression, and a means of validating a restrictive, fault-based divorce law. This Chapter then sought to discover the extent to which the centrality of the traditional, legal concept of marriage has diminished in modern legal and political thought.

Demonstrating the discriminatory principled basis was, for one, the rapid change in the cultural perception of marriage, propelled forward by the influence of feminist views, making marriage a personal choice rather than an economic necessity. Second was the rise of cohabitation and the growing societal acceptance of same-sex relationships, which presented a fundamental challenge to the centrality of the traditional legal definition of marriage by forcing the State to create a hierarchy of relationships, creating a disparity in legal treatment which required justification. The significant increase in cohabitation in the 21st century and the lacuna in legal regulation which has followed, illustrates the lack of a solid theoretical justification inherent in privileging marriage through law. An arbitrary distinction has emerged in the legal treatment of both family forms, but both are substantively indifferent and generally accepted as legitimate by modern society. The introduction of civil partnerships, the length of time it took to legalise same-sex marriage, and the delay between the Supreme Court's ruling that civil partnerships

must be extended to opposite-sex couples and any legislative action being taken in this respect[1059], highlighted the strength of the State's belief in the traditional legal definition of marriage and its reluctance to reformulate its tenets. It was found that the conflict between this reluctance to accept that the institution of marriage was, and still is, being reshaped and questioned, has a direct bearing on maintaining fault in divorce law.

Read together, Chapters 2 and 3 lead to the conclusion that entrenched in the law on divorce are inconsistent philosophical foundations which leads to unprincipled anomalies in the way the fault-based facts operate. Cretney notes that a process which can be described as the 'secularisation of the marriage rite' began with the passage of both the Marriage Act and the Birth and Deaths Registration Act in 1836[1060]. Therefore, the establishment of the State's interest in the field of marriage dates back to the Victorian era, though the creation of secular marriage was backed by 'remarkably little enthusiasm[1061]'. Both the State and the Church's interest in marriage have however, interwoven in the course of their respective historical development. Though the closeness of this union may have dwindled over time, the analysis on the current law on divorce in England and Wales shows that it is almost impossible to isolate them. However, this fusion is problematic, civil marriage and religious marriage are two completely different beasts with different aims.

This idea was explored in detail in Chapter 3, where the evolution of divorce law and its English-focused history was analysed in order to shed light on the philosophy behind the specific requirements in the Matrimonial Causes Act 1973. Despite the increased separation between the Biblical teachings and the legal text that emerged over time, it was found that Christian ideology and the rationale behind the requirements of fault in particular, are intertwined to the extent that the concept of fault in the context of divorce law cannot be disentangled from its religious origins. The fact that the initial exclusive ground for divorce was adultery ran parallel to the Church's condemnation of extra-marital relations, and this is only one example of the law embodying the religious doctrine. Such are not historical quirks;

[1059] S. 2 of the Civil Partnerships, Marriages and Deaths (Registrations ect) Act 2019 paves the way for legislation to brought in to extend civil partnerships to opposite sex-couples. The Act came into force on the 26th of May 2019. The Supreme Court's judgement in *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and Education Secretary) UKSC 32* was handed down on the 27th of June 2018.

[1060] The Marriage Act 1836 legalised civil marriages and the Births and Deaths Registration Act 1836 made civil registration of marriage compulsory. Cretney, *Family Law in the Twentieth Century: A History*, p.3

[1061] *Ibid*, Introduction, page LIX.

it remains the case that extra-marital relations with someone of the same sex is insufficient to prove adultery, a notion which carries an undertone of the Christian belief in the importance of procreation in marriage.

Further, unprincipled inconsistencies in the law, such as the requirement of objectivity for the intolerability limb in the unreasonable behaviour fact but not the adultery fact, can be traced back to a desire to keep the law restrictive so as to mirror the sanctity accorded to the institution of marriage through the Church's teachings. The historical position, which still resonates today, is summarised succinctly by Cretney;

> Marriage might be created simply by the parties' agreement; but the notion that marriage could be ended in the same way was for long anathema. Indeed, for the first 60 years or so years of the century the fact that a couple were agreed that their marriage should be ended could be a reason for denying them the divorce the both sought. And even at the end of the century it still seemed axiomatic that the State had such a vital interest in marriage that is should require complex procedure, in form at least judicial, to bring the legal status to an end[1062].

This Chapter sought to answer the research question; how and to what extent has current divorce law and practice been influenced by the historical development of the law? We can conclude that despite the significant changes in family life in the 21st century as observed in Chapter 2, the State's adopted position on divorce has remained constant. The lack of systematic reform to align divorce law with the reality of modern family life means that current divorce law has not developed at an adequate pace and remains inhibited by archaic ideologies.

This has resulted in an unparalleled level of paternalism that is problematic when there are no robust justifications for its presence; the alleged harm caused by divorce is not an empirical fact and it is not clear that marriage deserves to be protected to this extent. Even when trying to liberalise divorce law through the Family Law Act 1996, the State did not loosen its grip on the status-based view of marriage. Giving the parties 'autonomy' to make their own decisions and encouraging them to take responsibility, whilst trying to control that behaviour and direct them towards action that accords with the State's own view on the desirability of marriage, resulted in a confused law which was, arguably, bound to fail.

[1062] *Ibid*, page LX

Part 2: Current Divorce Law – The Failings of a Fault-Based System

Chapters 4 and 5 focused in more detail on how current divorce law as a whole causes problems when fault remains central to the scheme. Chapter 4 found that justifications for retaining fault which are independent of religious or historical contingencies do not stand up to logical scrutiny. None offered a satisfactory explanation robust enough to outweigh the acrimony which was found to be an inescapable consequence of a system which encourages assigning blame. A popular argument in the literature defending fault in divorce law is that blame is a natural feature on divorce and thus a psychological advantage of the procedure in England and Wales, as it mirrors this reality. However, there does not seem to be an appreciation of the fact that conflict and legal disputes are two different concepts capable of isolation.

More fundamentally, seeking to establish fault and giving judges a power to adjudicate on these matters is not only an unacceptable intrusion, but a futile exercise. Holding one person to account for the breakdown of a marriage is simplistic as such situations are seldom black and white; often marital breakdown does not have one cause but many salient causes. In the same vein, it was found that the justifications for fault in other areas of law, such as the criminal law, which are backed by extensive philosophical study, cannot be carried over into Family Law. Indeed, notions of fault are scarce in the rest of Family Law, more forward-thinking and egalitarian ideals such as welfare and fairness are prevalent. Divorce law therefore presents a gap in the thematic connection between different areas of Family Law.

The practice of the law has developed in such a way that recognises this reality through the Special Procedure. This may have been fuelled partly by cuts to legal aid and financial strains on the family justice system and partly by a different way of viewing divorce emerging amongst those who deal with divorce on the ground. Regardless, it has generated a situation which is *unjustifiable*. The Special Procedure has generated a divorce process that is irreconcilable with the substantive law. With the process of divorce becoming increasingly administrative, the view of marriage implied is one closer aligned to contract than status. The process reflects a completely different theoretical basis; one which moves towards liberal individualism and away from the Biblical traditionalism observed from the analysis in Chapters 2 and 3.

One of the principle areas of discrepancy is between the duty to inquire into the facts alleged by virtue of s.1 (3) MCA 1973 and the reality of the administrative process. This disparity is hugely problematic, as defending a petition is not a realistic prospect, respondents are often

presented with allegations which they must grudgingly accept. This results in hypocrisy, a lack of intellectual honesty and an increase in animosity beyond that caused by the mere inclusion of fault. The conclusions in response to this Chapter's research question were therefore reached with relative ease. Simply put, the negative consequences that flow from the centrality of fault are numerous, and the theoretical basis for its centrality is weak.

Whether disincentivising divorce is a legitimate aim for the state to pursue, for example, because it can be shown that divorce is harmful to society, and whether this has a solid empirical basis, could be explored in greater detail in future work. Here the focus centred on whether or not fault was the appropriate and effective means of limiting divorce. It was clear that in any case, a fault-based system is not the appropriate and proportionate way of averting divorce and family breakdown. By using fault to make the law restrictive, not only is the State administering an inherently authoritarian, paternalistic and blunt instrument, but it is unlikely to discourage the practice of divorce.

This can be deciphered from the existence of marriage optimism, greater individualism[1063], and, as we saw with the discussion on cohabitation, the fact that people are unlikely to arrange their family relationships as a direct response to perceptions of the law. A more fundamental flaw in the fault-based system is therefore the reluctance to accept that the law cannot prevent relationship and marital breakdown, and the law's inability to control human behaviour, as shown through the failure of the Family Law Act 1996, has not been fully grasped.

The analysis of *Owens* in Chapter 5 could be said to demonstrate that this lack of coherence both within the law itself and between law and practice is not a workable state of affairs. In answering the researching question; what does Owens v Owens demonstrate about the state of the current law and what are the implications for the future of divorce law? This Chapter looked at the ways the case manifests the failings of the current law outlined in the preceding Chapter. It found that although the trial judge may have adjudicated in an acceptable way on a technical reading of the law, he contravened case law, practitioner guidance, and common sense. Judge Tolson did not give appropriate weight to the cumulative effect of the behaviour and in doing so, expressed his personal opinion on the gravity of the incidents.

[1063] 'Divorce becomes a real modern man right when his marriage has not provided a minimum of what is reasonably expected of it'. Tanja Kitanovic, 'Phenomenon of Divorce in the Modern World', Balkan Social Science Review, Vol. 6 (December 2015) p.10

To this extent, the case demonstrated the fallacy of unreasonable behaviour as set out in s.1 (2) (b). Furthermore, though the Justices of the Supreme Court were of the view that Judge Tolson was wrong to suggest that Mrs Owens' affair offset Mr Owens' behaviour, the fact that this formed part of his judgement and was insufficient the Supreme Court to feel able to intervene. This alludes to the inconsistency inherent in a fault-based system; the affair bolsters the case that this was an empty shell of a marriage that necessitated a divorce, but paradoxically this fact was used to argue that a divorce should not be granted. Further, the case highlighted the unprincipled disparity between defended and non-defended divorce petitions. When a divorce is not defended, it undergoes a purely administrative procedure and approximately 4 minutes of 'scrutiny'. In contrast, the level of examination undertaken in relation to the examples of behaviour in *Owens* was meticulous. We know from Chapter 4 that contesting a divorce is not, financially nor emotionally, a realistic option for most people. Any attempt to apply the legal principles meaningfully is therefore only made in a small minority of cases. *Owens* can therefore also be seen as epitomising the inconsistency produced by the current law on divorce.

The practical implications of the case in the context of behaviour petitions are also potentially problematic. In theory, practitioners are now placed in an awkward position, having to walk a fine line between adhering to guidance which encourages modest accusations of behaviour on the one hand, and on the other, showing behaviour with enough substance to constitute an objectively-judged unreasonable expectation to live with the respondent. It was found that although the precise extent of *Owens* on the practice of the law in the immediate future cannot be ascertained, the inevitable increased guesswork involved in what constitutes sufficient behaviour exacerbates the complexity of the law. This is worsened by the fact that it will increasingly be litigants in person who have to navigate their way through the process[1064].

The wider implications of the case were also examined. Ferguson argued that the case as presented to the Supreme Court, posed the question of whether one party's assertion that the marriage has come to an end can be rejected by the State. Through gritted teeth the Justices answered this question in the affirmative. The blatant invasion on autonomy involved in this idea is an unequivocal sign that the State deems marriage to be an institution that is, above all,

[1064] This, in large part, is an inevitable result of the legal aid cuts under the Legal Aid, Sentencing and Punishment of Offenders Act (2012). Even before *Owens*, there was a concern that the divorce process in England and Wales was too complicated for litigants in person. See Monidipa Fouzder, 'Divorce Process 'too complicated' for litigants in person' The Law Gazette (London, March 2019)

a status. This paternalistic case contrasts sharply with the 2010 case of *Radmacher*[1065] as discussed in Chapter 6; a strong autonomy judgement which paved the way for a contractually-based understanding of marriage. *Owens* is therefore a regressive step in the development of the law, not only because of its paternalistic nature, but also in terms of moving on from the patriarchal ideals historically advanced by the institution of marriage.

The words of Judge Tolson can also be viewed as reverting back to a bygone view of marriage by the standards of modern cultural thinking. This reactionary move bolsters the case for reforming the law as it stands, and the case for devolving divorce law to Wales. With the former, *Owens* refutes the argument that we can tolerate the substantive law because the practice of divorce has rendered it redundant. With the latter, as Wales has an even stronger case for adopting a divorce law based on a contractual and equality-driven understanding of marriage than England, having to follow this troubling case is not only unfair, but contradicts the more fundamental principle that the law is a system of values[1066].

Chapter 2 showed that a status-based conception of marriage informs the law on divorce, Chapter 5 indicated that this view continues to be the State's favoured understanding via the judgement in *Owens* and Chapter 6 substantiated this further. Fault, in particular, has been used as a means of shaping marriage and divorce in a way that accords with misguided public goals rather than individualistic concerns. This can be viewed as the underlying root which has caused many of the problems discussed throughout this work.

Part 3: The Way Forward – A Welsh Perspective

Chapter 6 re-visited the ideological basis of marriage and asked; in the context of the theoretical debate of whether marriage should be framed as a status or contract, what conception of marriage and divorce aligns with Welsh history? To what extent does the historical Welsh perception of marriage differ from the ideologies enshrined in the current law on divorce in England and Wales? This Chapter showed that the problematic elements of marriage observed in Chapter 2 directly flow from the State's conception of marriage as a status. Though it is relatively clear that marriage's centrality in modern society has decreased, its precise prominence and strength could be analysed in further detail in future. However, it seems that

[1065] *Radmacher v Granatino* (2010) UKSC 42
[1066] See Sir Rabinder Singh Lecture at the University of Leicester, 'Law as a System of Values' (24 October 2013)

it is still valued as it remains a socially accepted way of exhibiting commitment and promoting relationships of care. Reformulating it to accord with a more contractual understanding would perhaps, therefore, be more acceptable than complete abolition.

The takeaway point from the research undertaken in this thesis is that there needs to be an acknowledgement that marriage is not the sole, nor necessarily the best way of formalising a relationship, and the institution needs to be rethought if it is to continue as the main method of assigning public recognition to relationships[1067]. There is a need for a public discussion reassessing the importance of marriage in society, one without reference to dated and unconvincing arguments relating to tradition and the myth that is provides for better families[1068]. Moving towards a contractual model would enable such discussions by removing the mystical and almost spiritual significance accorded to marriage, and force the State to revaluate its role in the relation to promoting marriage, and in turn, lessen the discrimination historically caused by the traditional status-based model.

The second limb of Chapter 6 gave a snapshot of the relevant law and development in Wales. It was found that the concept of marriage and divorce during Welsh medieval times under *Cyfraith Hywel* differed sharply to its English contemporary under the influence of canon law. Marriage was regarded a secular arrangement with consent at its heart, and divorce was a freely available means of dissolving what was perceived to be a form of contract. Church and State were kept separate; which is still the case in Wales, but not in England[1069]. An analysis of legal history, such as the one undertaken in Chapters 2, 3 and 6, is an important exercise to identify events that pertain to facets of the law, and help us understand and interpret modern law. To this extent, the law on divorce which applies to Wales under the current system does not accord with its unique history and an inescapable sense of injustice follows from this.

This is bolstered by contemporary events such as devolution, where Wales is making progress that is being emulated by the other countries of the United Kingdom, including in the field of Family Law. These are fuelled by principles far-removed from those that inform the current

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[1067] Jonathon Herring, *Family Law: A Very Short Introduction* (Oxford University Press, 2014) p. 24
[1068] Tauriq Moosa, 'We need to have a frank discussion about marriage' The Guardian (London, 4 January 2014)
[1069] A detailed discussion on the concept of disestablishment is outside the scope of this thesis, however see R. Morris *Church and State in 21st Century Britain: The Future of Church Establishment* (Palgrave Macmillan, 2009)

law on divorce. Not only was the law relating to women in medieval Wales was significantly more progressive, but the Welsh Government have expressed a desire to emulate Sweden in achieving a feminist government, and active steps have been taken to tackle domestic abuse. In contrast, it is possible to identify sexist ideals as a running thread through the development of the current law on divorce under English control. Double standards existed when divorce was first introduced as adultery was not a ground available to women, we can then observe the strong link between marriage and female oppression, and an uneasy feeling emerges from *Owens* in 2018 with the Trial Judge's handling of the case, and in particular, his description of Mrs Owens as 'more sensitive than most wives[1070]'.

Wales is therefore required to follow a law which does not accord with its own history *and* is required follow a law informed different principles to those envisioned by Welsh legal culture. Brexit has highlighted the fragility of the Union and in turn, confirmed that the tide is geared towards greater devolution. In addition, preventing Wales from continuing to follow in the footsteps of the powers being given to Scotland is now politically unfeasible. The devolution of the criminal justice system and the question of whether Wales should operate its own legal jurisdiction needs to be explored further, here it has been shown that the justifications for devolving divorce law specifically, carry significant weight.

Chapter 7's research question was focused on future prospects, both in terms of what divorce law would look like in Wales if it were given the necessary powers, and whether Government proposals for reforming English and Welsh law are satisfactory and what bearing this may have on the argument for devolution. No-fault divorce would flow naturally from the historical interpretation of marriage in Wales, and the current approach taken by the Welsh government in its limited areas of competence. However, it was found that no-fault divorce is an elusive term that can appear in several different models of divorce law. Four examples of overarching models of divorce law were identified, all of which a product of a state's ideological conception of marriage and its view of the purpose of divorce.

Irretrievable breakdown was found to be an overvalued concept used frequently and misleadingly as a framework for divorce law in different jurisdictions. Its combination with a fault-based system in England and Wales is deeply problematic; both concepts aren't capable

[1070] *Owens v Owens* (2017) EWCA Civ 182, para 49

of aligning in a logical way. Divorce in England and Wales is said to be based on the irretrievable breakdown of a marriage. The facts contained in S.1 (2) are framed in such a way so that their purpose is to prove the irretrievable breakdown as set out in S.1 (1). However, as *Owens* confirms, if the marriage is deemed to have broken down irretrievably, a divorce cannot be obtained without proof of one of these facts. Because of the existence of S.1 (1), there needs to be a logically coherent reason for having to demonstrate one of the five facts, there is nothing to be gained from asserting that a marriage has broken down irretrievably when it has not; not least because we have seen from Chapter 2 that the state privileges marriage in several ways. This interplay between s.1 (1) and (2) strikes at the heart of the logical fallacy of the current law. It also indicates that the State views divorce, not as a means of ending non-salvageable marriages, but as a way of preventing people from divorcing in the first place by using, by the standards of a Western liberal democracy, paternalistic and authoritarian means.

Divorce by mutual consent and unilateral divorce both resonate strongly with contractual understandings of marriage. Both would therefore be useful concepts in forming a system of divorce in Wales. Elements of both can be observed in the practice of the law under the current system, and though this conflicts with the substantive law in a way that causes chaos, it gives an indication of the kind of model of divorce the general population in England and Wales favour. Sweden is a prime example of divorce on demand, where divorce is seen as a right, similar to the thinking embraced in medieval Wales. It was found that the Welsh Government's desire to emulate Swedish equality could be extended to the Swedish divorce model serving as an aspiration. As this model differs significantly from the current English and Welsh model, a starting point could be similar to the system in Scotland, which loosely follows the structure of the law here, but is reflects a more contractual understanding of marriage.

It was found that the proposals for reform in the Government's consultation response paper do not satisfactorily address the deep-seated problems of the current law so as to lessen the need for devolution. The response paper confirms that no-fault divorce and a status-based conception of marriage are not mutually exclusive. We can see this, not only from the importance-of-marriage-to-society rhetoric declared at the very beginning and repeated throughout, but more specifically, from the Government's decision to keep the one year bar on divorce. By removing the requirement to show fault and replacing it with a simple notification procedure, there exists an implicit acceptance of the fact that there are no advantages to be gained from trying to salvage a marriage that has broken down, nor is it worthwhile trying to instil a sense of

responsibility in divorcing couples. The purpose that the one year bar serves therefore becomes suspect. What is clear is that the Government have missed the point in their attempt at reform. Specifically, the crux of the problematic nature of the current law; irreconcilable concepts that cause incoherence, remains the likely outcome of the new proposals.

The proposals are fitting to the extent that they are in line with the development of the law as explored in Chapter 1, with changes being made out of necessity and in response to strong calls for action to be taken, rather than an acceptance that there needs to be a fundamental re-characterisation of marriage to align with modern reality.

Proposals for Reform

Fundamental differences with the historical interpretation of marriage and the current legal climate makes it unfair that Wales must continue to follow this narrative. There is no indication that the Government is aware that, even if it recognises the unnecessary burden the requirement of fault places on parties and legislates to remove it, a law that is rooted in outdated notions of the family will be pulling the law in an opposing direction, and the practical effects of an incoherent law are detrimental.

It is clear that the current Government's proposals for reform as outlined in its response paper are not adequate enough to lessen the strength of the justifications for devolving divorce law to Wales. The arguments in favour of the devolution of divorce law in this thesis are capable of justifying devolving divorce law to Wales irrespective and independent of the kind of reform brought forward in England and Wales. However, it is worth considering what changes should be implemented in England and Wales should divorce remain a matter for the jurisdiction as a whole, not least because England itself now deserves a divorce law that accords with its modern reality.

Though the Government intends to eliminate fault as the basis of the system of divorce, it has adopted a modest position. There is little doubt however, that divorce law needs to be overhauled. This means that there must be a fundamental re-examination of what principles and norms should underpin the law. In other words, our very understanding of the purpose of marriage and divorce and what divorce law should aim to achieve needs to be considered. Only through asking these profound questions and undertaking a comprehensive analysis will divorce law be able to untangle itself from the outdated, religious, and discriminatory

ideological basis it currently carries and be able to regulate intimate relationships in a fair and reasoned way.

The form that divorce law takes is linked to the significance accorded to marriage. This can be observed from the historical development of the law; the law has become less restrictive over time, both in terms of law and practice, more or less in line with the decline of the centrality of marriage in society. In this thesis, the means of protecting the institution of marriage by making divorce difficult was questioned. More fundamentally, the significance the State attaches to marriage in the legal and political sphere more generally was challenged. It is acknowledged however, that the importance of marriage, on an individual level, is and should depend on personal conviction.

Allowing easy exit from marriage through unilateral divorce or divorce 'on demand' and removing the obstacles in the legal process may offend those who still associate marriage with a sense of sanctity, be that through tradition or religious reference. However, they constitute the minority. The practice of the law has developed organically in such a way that enables divorce 'on demand', which must, at least in part, be indicative of what the general population want from divorce law. The requirements for demonstrating fault have weakened to the extent that the formal barriers that fault places have become virtually redundant. The level of attention received by the *Owens* case as an exception to this usual practice is evidence of this.

Divorce 'on demand' may appear inappropriate in a society that still values marriage to some, albeit uncertain extent. However, any form of divorce that does not allow a party to unilaterally leave an unhappy marriage is an insult to individual autonomy. It assumes that the rational faculties of a divorcing spouse are somehow absent when they issue a petition. Providing a humane process should override protecting the sanctity of marriage as an aim for divorce law. The chaos of the current law and the damaging practical results are a product of such aims coming into conflict. A serious public discussion addressing the regulation of intimate relationships and substantial, rather than piecemeal, reform is therefore necessary if the law is to be fit for contemporary society. The removal of fault is a necessary starting point, but it is not the end of the conversation.

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