DIVORCED FROM HUMAN RIGHTS?
ENGLISH DIVORCE LAW UNDER HUMAN-RIGHTS SCRUTINY

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1. Introduction

Recent developments in English family law, culminating in the adoption of the Divorce, Dissolution and Separation Act 2020 (DDSA 2020), have highlighted the difficulties raised by the near bar on unilateral no-fault divorce. The Supreme Court's *Owens v Owens* ruling[1] confirmed that, notwithstanding changes in social attitudes, the law left a woman in her mid-sixties trapped in an unhappy nominal marriage for five years if her estranged husband was neither reprehensible nor amenable to the divorce. In fact, under the Matrimonial Causes Act 1973 (MCA 1973), unless a person can prove blameworthy conduct on the part of their spouse or secure their consent after two years of separation, a divorce petition can only be filed after the spouses have lived apart for a continuous period of five years. *Owens* showcased a reality seldom unearthed in litigation, since fewer than 1% of divorces are defended:[2] petitions fail if the court is persuaded that the relationship has broken down irretrievably, as required by s.1(1) MCA, but none of the facts in s.1(2) can be cited.[3] The *Owens* majority also found that s.1(2)(b) required a certain level of severity for courts to decide that 'the petitioner cannot reasonably be expected to live with the respondent', whilst inviting Parliament to consider reform.[4]

The Supreme Court regrettably rejected the submission that s.1 MCA was incompatible with the Human Rights Act 1998 (HRA 1998), endorsing the Court of Appeal's conclusion.[5] It also dismissed the statutory construction propounded by the Intervener, Resolution, that, pursuant to s.3 HRA, s.1(2)(b) MCA had to be down-read to require the petitioner's assessment rather than proof of objectively culpable behaviour.[6] Nevertheless, the judgment questioned the desirability of current divorce procedures, and the Ministry of Justice launched a public consultation on possible changes; proposals included replacing the 'conduct' and 'living apart' requirements by a notification process, whereby either or both spouses could notify the court of their intent to divorce, and removing the ability of the other spouse to contest the application.[7] Although the consultation provided the option to leave the law unchanged, the

[1] *Owens v Owens* [2018] UKSC 41. See S Trotter, 'The State of Divorce Law' (2019) 78(1) *CLJ* 38.
[2] See L Trinder and M Sefton, *No Contest: Defended Divorce in England & Wales* (Nuffield Foundation, 2018) 15, www.nuffieldfoundation.org/wp-content/uploads/2018/04/No-contest-final_Nuffield_Foundation.pdf.
[3] See *Buffery v Buffery* [1988] 2 FLR 365.
[4] *Owens* (n 1) para.45. Research suggests that this high threshold is only upheld in defended divorces, whereas petitions with similar or milder particulars result in a divorce decree in undefended cases; see L Trinder, 'Where Next After Owens v Owens?' (2017) *Family Law* 474.
[5] *Owens* (n 1) para.29.
[6] Resolution, Written case for the Intervener, *Owens v Owens* UKSC 1917/0077 (on file with the author). Mrs Owens had withdrawn the HRA ground for appeal in submissions before the Supreme Court; it was mentioned only by Wilson LJ, who merely endorsed the Court of Appeal's views.
[7] Ministry of Justice, *Reducing family conflict. Reform of the legal requirements for divorce* (2018), https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf.

Government expressed its preference for a solution avoiding recrimination between the parties. This was the first attempt to reform divorce law since the failed implementation and repeal of Part II Family Law Act 1996 (FLA 1996) two decades ago.[8]

Perhaps unsurprisingly after *Owens*, human-rights concerns hardly featured in the public consultation. Reform supporters (and the Government's response) highlighted the stressful, acrimonious and dishonest nature of the divorce system (with fabricated facts and no court inquiry in undefended cases), its detrimental impact on children, and the vulnerability of spouses trapped in domestic violence situations; those opposing reform expressed apprehension about higher divorce rates and diminishing the gravitas of marriage.[9] Criticism of the MCA scheme in socio-legal studies focused primarily on the 'incentive to secure freedom by alleging fault', which fosters acrimony,[10] and the unfairness to respondents, who cannot challenge the truthfulness of allegations against them unless they contest the petition.[11]

Conversely, the interference of divorce restrictions with fundamental rights under HRA 1998 has attracted limited attention. Trinder noted that 'producing a long list of misdemeanours raises privacy issues'.[12] For Kay, accepting petitioners' allegations as findings of fact against respondents who do not oppose the petition (albeit disagreeing with the truthfulness of allegations) injures fair trial rights.[13] The MCA presents, however, wider and more far-reaching human-rights shortcomings, affecting individual autonomy, family life, the right to marry and the enjoyment of property. It is this gap in the divorce law literature that the following pages address, examining the human-rights rationale for eliminating fault or lengthy waiting periods.

While acknowledging the reluctance of the European Court of Human Rights (ECtHR) to uphold a right to divorce, this chapter draws on principles emerging from Strasbourg decisions on the regulation and conduct of divorce proceedings in jurisdictions no longer characterised by the indissolubility of marriage: the applicability of the 'living instrument' approach to Article 12; the importance of personal status for individual autonomy and family life after relationship breakdown under Article 8; the need for a fair balance between competing interests in designing divorce legislation. The chapter argues that s.1 MCA is inconsistent with the European Convention on Human Rights (ECHR) due to the disproportionate impact of excessive delays in dissolving marital ties on re-partnering, forming new marriages, the legal affiliation of children born to new *de facto* family units, property rights in the absence of a decree permitting financial and property relief, and the freedom of testamentary disposition. The law's HRA-compatibility will be shown to be further undermined by the increased emphasis on individual autonomy within the couple in other areas of family law (e.g. the enforceability of prenuptial agreements) and by domestic courts' stricter judicial review standards when compared to international supervision.

[8] See H Reece, H. (2000). Divorcing Responsibly (2000) 8(1) *Feminist Legal Studies* 65.

[9] See Ministry of Justice, *Reducing family conflict. Government response to the consultation on reform of the legal requirements for divorce*, 'Summary of consultation responses' (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793642/reducing-family-conflict-consult-response.pdf.

[10] R Probert, 'England and Wales Juxtaposed to the European Principles of Family Law' in E. Örücü and J. Mair (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance* (Antwerp, Intersentia, 2007) 62.

[11] Trinder and Sefton (n 2).

[12] L Trinder, 'Divorce Reform in England and Wales: The Human Rights Perspective' (2018) 6 *European Human Rights Law Review* 557, 558.

[13] R Kay, 'Whose Divorce is it Anyway - the Human Rights Aspect' (2004) *Family Law* 892, 898; Trinder (n 12) *ibid*.

2. The Limited Impact of Human-Rights Arguments in Divorce Litigation, Legal Reform and Scholarship

Marriage is central to the organisation of human society and cannot be reduced to a private contract; indeed, 'the legal framing of family life is intrinsically linked to social cohesion'.[14] Nonetheless, obstacles to the dissolution of marriage greatly impact an individual's self-determination rights, the ability to re-partner or re-marry, have (further) legitimate children, and make decisions about his/her property. It is, therefore, astonishing that English divorce law has remained largely immune from HRA 1998.

The marginalisation of the human-rights discourse in the divorce literature and litigation seems to be owed to the 1979 *Johnston v Ireland* ruling,[15] according to which the ECHR does not enshrine a right to divorce and States do not overstep their margin of appreciation by setting an absolute bar on divorce or, *a fortiori*, lesser impediments.[16] The judgement invoked the ordinary meaning of the words 'right to marry' in Article 12 (covering the formation, not the dissolution, of marriage) and the drafters' intentions, as shown by the *travaux préparatoires*.[17] For the ECtHR, the 'living instrument' doctrine could not update the interpretation of a provision where the omission of a right had been deliberate.[18]

The *Johnston* decision was already received with scepticism at the time.[19] The case concerned the then absolute Irish bar on divorce and the ECtHR controversially accepted that 'in a society adhering to the principle of monogamy, such a restriction cannot be regarded as injuring the substance of the right guaranteed by Article 12'.[20] The argument is certainly underwhelming; monogamy only excludes multiple *contemporaneous* marital relationships and 'the possibility of divorce would precisely serve to avoid situations of factual bigamy'.[21] Moreover, the indissolubility of formal ties does not protect the stability of marriage, as it does not avoid estrangement and new intimate relationships.

Problematically, the unavailability of divorce generates precarious family situations, in which committed couples with children are left outside the protection of the law. This arguably goes against States' obligation to protect effective family relationships. The ECtHR recognised in *Johnston* that the applicants, who had cohabited for fifteen years, raised a child and provided each other economic and emotional support, presented all the hallmarks of 'family life'; for the majority, however, Article 8 did not encompass a positive obligation to permit divorce in order to protect new family units.[22] Having excluded the right to divorce from the scope of Article 12, the ECtHR held that it would be inconsistent to derive it from the more general Article 8.[23] The Court thereby avoided the more difficult analysis under Article 8, which, according to its own jurisprudence, requires positive measures, so as to prevent hardship for *de facto* families

[14] M Rohe, 'Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs' in P Shah, M-C Foblets and M Rohe (eds), *Family, Religion and Law in Europe* (Surrey, Ashgate, 2014) 73.
[15] *Johnston v Ireland* (1987) 9 E.H.R.R. 203.
[16] See Kay (n 13) and *Owens v Owens* [2017] EWCA Civ 182 paras.77-79.
[17] *Johnston* (n 15) para.52.
[18] *Ibid*, para.53.
[19] See K Dillon, 'Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in Johnston v. Ireland' (1989) 22(1) *Cornell International Law Journal* 63.
[20] *Ibid*, para.52.
[21] P van Dijk, F van Hoof, A van Rijn and L Zwaak, *Theory and Practice of the European Convention of Human Rights*, 4th ed (Antwerp, Intersentia, 2006) 852.
[22] *Johnston* (n 15) paras.56-57.
[23] *Ibid*, para.57.

and allow them to develop a normal family life.[24] This may entail an obligation to facilitate the dissolution of purely formal ties, flying in the face of social reality and benefitting no one.[25] This is particularly so where the unavailability of divorce also affects the private and family life of the adulterous couple's children, a situation *Johnston* found in breach of Article 8.[26]

The prohibition of divorce also raises issues under Article 14 taken together with Article 8 where the law recognises foreign divorce decrees obtained by nationals; divorce then becomes available subject to sufficient resources to establish residence abroad for the time required to fall within a permissive jurisdiction.[27] The majority in *Johnston* dismissed Article 14 claims, adducing that the applicants and Irish nationals domiciled abroad were not analogously situated.[28] This overlooks the inconsistency of the law's approach to purportedly core values; if divorce clashed with public order, foreign decrees would not be any more recognisable than nationals' polygamous marriages lawfully contracted abroad (or gay marriage entered into abroad by individuals whose national law prohibits it). A partly dissenting opinion rightly lamented the 'unfortunate contradiction with the absolute character of the principle of indissolubility of marriage' and the irrationality of the distinction between Irish citizens according to their domicile.[29]

The bar on divorce was further challenged in *Johnston* under Article 9 ECHR. The male applicant claimed that, by precluding him from divorcing his estranged wife and marrying his new companion, the law forced him to live in an extra-marital relationship, which was contrary to his conscience.[30] The majority rejected this claim, finding that the ordinary meaning of Article 9 could not be taken to extend to the unavailability of divorce.[31] A similar complaint featured in *J.G. v Ireland*;[32] the applicant maintained that his religion did not ban divorce and therefore the law imposed the tenets of a different religious persuasion on him. Regrettably, the claim was discontinued after the *Johnston* ruling. However, the Separate Opinion in *Johnston* considers the Article 9 implications of the ban at length, deeming it inconsistent with religious liberty and coercive in relation to individuals whose religious views do not prohibit divorce.[33] Judge De Meyer's criticism of the inflexibility of the blanket prohibition in a society advocating pluralism, tolerance and broadmindedness is compelling. He aptly notes that an absolute bar cannot be justified by the support of a substantial majority of the population: 'a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[34]

Although subsequent case-law did not overrule *Johnston*, *Piotrowski v Poland* recognised the need to read Article 12 in light of present-day conditions.[35] The reliance on the

[24] See *Marckx v Belgium* (1979-80) 2 E.H.R.R. 330 para.31: 'there may be positive obligations inherent in an effective "respect" for family life. … [the State] must act in a manner calculated to allow those concerned to lead a normal family life'.
[25] See *Kroon v Netherlands* (1995) 19 E.H.R.R. 263 para.40, on an unrebuttable *pater est* presumption: '"respect" for "family life" requires that biological and social reality prevail over a legal presumption which … flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'.
[26] See *Johnston* (n 15) para.75. Difficulties included the lack of automatic parental authority for natural fathers, no retrospective legitimisation through marriage, less extensive succession rights for illegitimate children.
[27] To become habitually resident in a jurisdiction, one needs to work, own property, have children in school there. For the rules governing English courts' jurisdiction see Art.3(1) Council Regulation (EC) No 2201/2003.
[28] See *Johnston* (n 15) paras.59-61.
[29] *Johnston* (n 15) Separate Opinion Judge De Meyer, para.7.
[30] *Ibid*, para.62.
[31] *Ibid*, para.63.
[32] See *J.G. v Ireland* (App No 9584/81). The applicant's wife had abandoned the matrimonial home and he wished to dissolve the purely formal bond.
[33] *Johnston* (n 15) Separate Opinion Judge De Meyer, para.5.
[34] *Ibid*, para.6.
[35] *Piotrowski v Poland* (2017) 64 E.H.R.R. SE6 para.46.

decades-old *Johnston* authority was robustly discredited by Judge Sajó's Separate Opinion in *Babiarz v Poland* based on the living instrument doctrine.[36] The opinion recalls the Grand Chamber's position in *Magyar Helsinki Bizottsag v Hungary*: the *travaux préparatoires* are not dispositive of whether a right falls within the scope of an ECHR article 'if the existence of such a right was supported by the growing measure of common ground that had emerged in a given area'.[37]

An example of evolutive interpretation going against the drafters' intention is the recognition of a right to strike under Article 11 as part of freedom of assembly.[38] Furthermore, Article 2 case-law shows that a new European consensus can displace not only the preparatory works, but also the express wording of a provision, and create obligations for States lagging behind an overwhelming legislative trend.[39] Although Article 2 permits capital punishment as an exception from the prohibition on intentional deprivation of life, the subsequent penal policy of most ECHR parties was seen as 'establishing the agreement of the Contracting States to abrogate the exception'.[40] The wide ratification of Protocol 6 and the Council of Europe's policy requiring an undertaking to abolish capital punishment as a condition of admission[41] were taken as further indicators of agreement to modify Article 2(1).[42] Subsequently, the vast participation in Protocol 13 (extending the abolition to times of war) and the consistent State practice in observing the moratorium on capital punishment were found 'strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'.[43] If, initially, the ECtHR invoked Article 2 in conjunction with Protocol 13[44] or Protocol 6 against a ratifying party,[45] the prohibition of capital punishment in *A.L. v Russia*, a respondent not bound by either protocol, was grounded in the evolution of Article 2 alone.[46] This demonstrates the potential of State practice to create new ECHR rights, notwithstanding the drafters' intentions or even the text itself. The right to divorce, whilst not enjoying consensus in 1950, could be seen nowadays as part of ECHR rights; the *contra legem* interpretation of Article 2 was a far more radical leap than disregarding an omission in Article 12.

In *Owens*, the Court of Appeal dismissed HRA claims relying on *Johnston* and *Babiarz*, seen as authorities for the proposition that there is no Convention right to divorce or to a favourable outcome in divorce proceedings.[47] The judgement did not discuss the impact of the living instrument doctrine on divorce procedures (recognised since *Piotrowski*) and Strasbourg jurisprudence narrowing States' margin of appreciation in this area. It is this stream of case-law that the following section will examine.

3. The Case for a Holistic Reading of Strasbourg Jurisprudence on Divorce

[36] *Babiarz v Poland* [2017] 2 F.L.R. 613, Separate Opinion Judge Sajó, paras.3-4.
[37] *Magyar Helsinki Bizottsag v Hungary* (2020) 71 E.H.R.R. 2 para.125. The judgment upheld the right of access to State-held information of general interest (para.148).
[38] See *Schmidt and Dahlström v Sweden* (1979-80) 1 E.H.R.R. 632 para.36; *Enerji Yapi-Yol Sen v Turkey* (App No 68959/01) para.24.
[39] See C Draghici, 'The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?' (2017) *Public Law* 11, 23.
[40] *Soering v UK* (1989) 11 E.H.R.R. 439 para.103. The Court refrained here from 'updating' Article 2 insofar as ECHR States had adopted a protocol abolishing death penalty, which indicated their preference for traditional amendment.
[41] Council of Europe Parliamentary Assembly Resolution 1044(1994) para.6.
[42] *Ocalan v Turkey* (2005) 41 E.H.R.R. 45 paras.162-165.
[43] *Al-Saadoon v UK* (2010) 51 E.H.R.R. 9 para.120.
[44] *Ibid*, para.123.
[45] *Al Nashiri v Poland* (2015) 60 E.H.R.R. 16 para.576.
[46] *A.L. v Russia* (2018) 67 E.H.R.R. 30 para.64.
[47] *Owens* (n 16) paras.77-81.

While *Johnston* and *Babiarz* are important authorities, the assessment of s.1 MCA must be based on a holistic reading of Strasbourg jurisprudence. The ECtHR has recognised that the regulation of purely domestic rights (not mandatory under the Convention) connected with existing ECHR rights may also breach the Convention.[48] Examples include domestic entitlements affecting status, such as the ability to adopt a child or to form a civil partnership; although States have no obligation to legalise these institutions, they affect ECHR rights and their administration must be ECHR-compliant.[49] The UK's Supreme Court has also accepted that the ECHR is engaged whenever there is a link between a domestic measure and an ECHR right, even if the measure exceeded ECHR requirements.[50] Accordingly, States permitting divorce must regulate access in conformity with ECHR principles.

Additionally, Strasbourg case-law on divorce confirms that the regulation and conduct of proceedings (duration, grounds for divorce, burden on laypersons) remain subject to human-rights obligations, and that any interferences with ECHR rights arising from such proceedings must pursue a legitimate aim and be necessary in a democratic society.

3.1 Unreasonable Obstacles or Delays in Divorce Proceedings as ECHR Violations

Strasbourg judgments found that unreasonable delays or practical impediments in divorce proceedings breach the Convention and recognised the fundamental interest an individual has in dissolving a failed marriage and reacquiring the capacity to marry. In *Airey v Ireland*,[51] the ECtHR held that, by failing to provide an accessible judicial separation procedure for impecunious litigants, unable to meet the costs of legal representation, Irish law violated Article 8. Although a procedure for obtaining judicial separation from an abusive spouse existed, and the authorities had not actively interfered with the applicant's rights, there had been a breach by omission; in fact, 'there may be positive obligations inherent in an effective respect for private or family life'[52] (e.g. to introduce proceedings easy to navigate for litigants-in-person or legal funding). Once domestic law recognises a person's right to secure judicial separation in certain circumstances, this 'means of protection' must be 'effectively accessible'.[53] Arguably, if a legal system recognises that protecting private and family life may require the dissolution of marital ties, a drawn-out process or one contingent upon the other party's consent fails to satisfy the accessibility requirement.

Furthermore, according to *F. v Switzerland*, 'if national legislation allows divorce, it secures for divorced persons the right to remarry without unreasonable restrictions'.[54] The case regarded a temporary interdiction to marry (three years since the last divorce, after three failed marriages). The ECtHR found that 'Article 12 does no distinguish between marriage and remarriage',[55] and therefore the interdiction impaired the very substance of the right to marry. The Court acknowledged States' wide margin of appreciation in matrimonial matters, a field 'closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit'; consequently, a waiting period no longer existing in other ECHR

[48] See C Draghici, 'Equal Marriage, Unequal Civil Partnership: A Bizarre Case of Discrimination in Europe' (2017) 4 *CFLQ* 313, 315-319.
[49] *E.B. v France* (2008) 47 E.H.R.R. 21 para.49; *Vallianatos v Greece* (2014) 59 E.H.R.R. 12 paras.75, 78.
[50] *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32.
[51] *Airey v Ireland* (1979-80) 2 E.H.R.R. 305.
[52] *Ibid*, para.32.
[53] *Ibid*, para.33.
[54] *F. v Switzerland* (1988) 10 E.H.R.R. 411 para.38.
[55] *Ibid*, para.33.

States did not necessarily constitute a breach.[56] However, albeit accepting the stability of marriage as a legitimate public interest, the Court was not persuaded that the impugned bar was an appropriate means to achieve that aim: it did not protect the intended spouse's rights (she was neither under age nor mentally incompetent) and any children born out of wedlock would have suffered social stigma.[57] The Court dismissed paternalistic concerns about the prospective spouse, flowing from the assumption that divorce was evidence of wrongdoing,[58] and about the divorcee himself, allegedly protected through a compulsory period of reflection (an argument seen as insufficient to justify interferences with the rights of mentally competent adults).[59] It could be argued, *mutatis mutandis*, that any restrictions on a person's capacity to re-marry after a relationship breakdown resulting from procedural hurdles to divorce must also be necessary and proportionate.

In addition, the excessive length of proceedings for judicial separation was found in breach of Article 6(1) in *Laino v Italy*, insofar as inconsistent with the right to have one's case heard 'within a reasonable time'.[60] The Grand Chamber highlighted that special diligence is required of State authorities in proceedings concerning civil status, given the importance of what is at stake for the applicant, namely the effective enjoyment of the right to respect for family life.[61] Disappointingly, the Court did not entertain the Article 8 claim separately.[62] Subsequently, however, in *Charalambous v Cyprus*, the length of divorce proceedings was examined not only as an Article 6 violation, but also as a violation of Article 12. Although on the facts the Court disagreed that the length of proceedings had been excessive, given the various appellate stages, the ruling firmly established that 'a failure of the domestic authorities to conduct divorce proceedings within a reasonable time could, in certain circumstances, raise an issue under Article 12'.[63]

The ECtHR found an Article 12 breach on the facts in *V.K. v Croatia*,[64] where the duration of divorce proceedings had exceeded five years. The judgment consolidated the principle outlined in *Charalambous*:

> [A] failure on the part of the domestic authorities to conduct divorce proceedings with the required urgency may impair the right to marry of an individual who has, for example, sought to have his previous marriage dissolved in order to marry again, or who has acquired a serious and genuine opportunity to remarry after he had instituted divorce proceedings.[65]

Due to the lack of efficiency in the conduct of proceedings, 'the applicant was left in a state of prolonged uncertainty which amounted to an unreasonable restriction of his right to marry'.[66]

Problematically, two subsequent cases suggest that the length of divorce proceedings breaches the Convention only if the applicant had concrete plans for a new family. No breach of Article 12 was found in *Truszkowska v Poland*, where 'the applicant has not shown that she actually wanted to and was prevented from re-marrying'.[67] Similarly, the absence of a new

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[56] *Ibid*.
[57] *Ibid*, para.36.
[58] *Ibid*, para.35.
[59] *Ibid*, para.37.
[60] *Laino v Italy* (App No 3158/96).
[61] *Ibid*, para.18.
[62] *Ibid*, paras.23-25.
[63] *Charalambous v Cyprus* [2008] 1 F.L.R. 473 para.56. See also *V.K. v Croatia* [2013] 2 F.L.R. 1045 para.99.
[64] *V.K.* (n 63).
[65] *Ibid*, para.100.
[66] *Ibid*, para.106.
[67] *Truszkowska v Poland* (App No 52586/99) para.3.

partner in *Berlin v Luxemburg* led the Court to conclude that no violation of Article 8 had occurred.[68] These two cases under-recognise the inherent interest an individual has in the clarification of their civil status, its alignment with social reality, disentanglement of property and reacquisition of the capacity to marry. This unfortunate development does not detract, however, from the principle that divorce proceedings are not free from human-rights oversight: divorce, where available as a means to protect a person's private and family life, must be effectively accessible; Article 12 safeguards the right to re-marry; and excessive delays or practical obstacles to securing a divorce may breach Convention obligations.

3.2 The Requirement for Divorce Grounds to Strike a Fair Balance between Competing Interests

Admittedly, the afore-mentioned cases (*F. v Switzerland*, *Laino v Italy*, *Truszkowska v Poland*, *Berlin v Luxemburg*, *Charalambous v Cyprus*, *V.K. v Croatia*) concerned the conduct of proceedings once instituted, not legal standing rules. However, another stream of case-law has established that the grounds for divorce must strike a fair balance between competing interests.

The ECtHR indicated in *Ivanov and Petrova v Bulgaria* that an Article 12 breach may arise where, despite an irretrievable breakdown of marital life, domestic law regards the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party.[69] In *Piotrowski v Poland*, the Court recalled that, under Article 8, a fair balance had to be struck between competing interests, although in the area of divorce law that task was largely delegated to States.[70] The *Babiarz v Poland* judgment (invoked in *Owens* as evidence that the ECHR did not guarantee a favourable outcome in divorce proceedings)[71] further reiterated States' duty to reconcile competing interests in designing and applying divorce legislation:

> 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.[72]

Albeit finding against the applicant on the facts, the Court did not suggest that States enjoy unfettered discretion as regards divorce legislation, nor that the ECHR did not apply to it.

Consequently, while a right to divorce did not gather international support when the ECHR was adopted, it is no longer disputed that the regulation of divorce must accommodate Convention rights and that everyone has a fundamental interest in dissolving a failed marriage and reacquiring capacity to marry. Even if the right to divorce is optional under the Convention, its administration must remain consistent with the rights engaged under Articles 8 and 12.

3.3 Unsuccessful Challenges as Product of the Subsidiarity of Strasbourg Supervision

The justifications underpinning the pro-State outcome in *Piotrowski* and *Babiarz* further confirm the human-rights constraints on divorce laws. First, the ECtHR declined to act as a

[68] *Berlin v Luxembourg* (App No 44978/98) paras.64-65.
[69] *Ivanov and Petrova v Bulgaria* (App No 15001/04).
[70] *Piotrowski* (n 35) para.44.
[71] *Owens* (n 16) paras.80-81.
[72] *Babiarz* (n 36) para.47.

fourth instance, since domestic courts had had the benefit of direct testimony and relevant legal context:

> The courts examined the facts in detail and in the proper context of domestic law. During the divorce proceedings comprehensive evidence was gathered. The applicant had an opportunity to present his position to the court and put questions to the witnesses. The first-instance judgment was subject to a review by the appellate court.[73]

It is, in fact, a well-established principle in Strasbourg jurisprudence, derived from the general rule of subsidiarity of international courts, that the ECtHR is not an appellate jurisdiction and only provides broad-brush supervision of domestic courts' rulings, not a full retrial of the case.[74] As the ECtHR explained:

> [I]t is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action.[75]

The fourth-instance doctrine carries, however, the risk of reducing Strasbourg supervision to a 'perfunctory control of procedural propriety',[76] and divorce litigation illustrates this difficulty.

Secondly, when assessing divorce provisions (rather than their application to a case), the Court is deferential to the balancing exercise sought by the legislative scheme. In *Piotrowski* it was readily satisfied that domestic law 'can be seen as intended to be a safeguard to protect one party, usually the weaker, against the machinations and bad faith of the other party'.[77] This wide margin afforded to domestic lawmakers and the superficial scrutiny of their balancing exercise are further problematic expressions of subsidiarity, but the way in which the Court rationalises its decision confirms that divorce law is subject to ECHR obligations.

Thirdly, in evaluating proportionality, the Court adopts a narrow focus on individual circumstances and deems the divorce regime reasonable where the applicant had no new project of marital life. In *Piotrowski*, this over-simplistic approach led the Court to conclude that no violation had occurred because the applicant did not mention 'any concrete marriage plans frustrated by the refusal to obtain a divorce'.[78] Equally unconvincing is the observation that nothing prevented the applicant from submitting a fresh divorce petition if/ when circumstances changed.

However unsatisfactory in those specific cases, the Court's analysis reinforces the notion that divorce laws must obey the same criteria as any other interference with fundamental rights, i.e. pursue a legitimate aim and avoid a disproportionate impact on the individual rights concerned.

4. Applying Strasbourg Jurisprudence to the English Divorce Regime

[73] *Ibid*, para.53. See also *Piotrowski* (n 35) para.50.
[74] See C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Oxford, Hart, 2017) 24-25.
[75] *Kemmache v France (No.3)* (1995) 19 E.H.R.R. 349 para.44. See also *Kearns v France* (2010) 50 E.H.R.R. 33 para.75; *Winterwerp v Netherlands* (1979-80) 2 E.H.R.R. 387 para.46; *Bozano v France* (1987) 9 E.H.R.R. 297 para.58.
[76] Draghici (n 74) 24.
[77] See *Piotrowski* (n 35) para.49.
[78] *Ibid*, para.51.

Taking stock of Strasbourg jurisprudence, this section considers whether the MCA 1973 interferences with Articles 8 and 12 pursue a legitimate aim and strike a fair balance between the public and private interests at stake. It thus examines the policy objectives of the MCA scheme, questioning whether it benefits the non-consenting spouse, the couple, children of the family or society at large.

4.1 Balancing Private and Public Interests

4.1.1 Secularised Divorce and the Non-Justiciability of Marital Breakdown

Rohe noted the undisputed Christian heritage of European family laws, with institutions such as marriage based on Christian convictions (monogamous lifetime heterosexual union) and with religious bodies procedurally involved at least optionally.[79] This reality made it difficult for ECHR drafters to include a right to divorce in 1950. As Eekelaar pointed out, the right could not take hold because of its clash with a widely held religious precept.[80] In *Johnston*, the indissolubility of marriage was seen as 'largely a religious matter',[81] which attracted deference. The same guarded approach to community beliefs explains the outcome in *A, B and C v Ireland*, notwithstanding the European consensus on abortion rights.[82]

By contrast, the civil dissolution of marriage in England can be analysed with independence from religious qualms. Haskey noted that the 1969 divorce reform was possible due to the change in the position of the Church and its support for 'fault-free' divorce options, which 'implicitly acknowledged the further transition from a religious basis for divorce to a secular one'.[83] Divorce restrictions should be disconnected from religious sensitivities and expected to meet the criteria of necessity and proportionality.

Admittedly, the law's approach to divorce does not have exclusively religious foundations. Hale LJ, writing extra-judicially, explained the State's pragmatic interest in the stability of marriage: by strengthening family responsibilities, spouses look after one another and the children, and less State support is required.[84] Nonetheless, this goal can be achieved by cementing child and spousal support obligations after divorce; keeping the parties married goes beyond that legitimate collective interest and is not logically connected to it.

Nor can it be assumed that the State is better placed than the spouses themselves to decide if their marriage has failed. Whether the irretrievable breakdown of a marriage is a justiciable matter was a concern already raised before the 1969 reform, although doubts mainly focused on courts' workload.[85] In recent times, the idea has been revived that it is not the law's task to determine when a marriage is no longer viable.[86]

Whilst marriage is not an ordinary contract, rescindable according to the parties' wishes, it also cannot be viewed as a primarily public interest, and the State cannot have an overwhelmingly greater say in its termination than those who are directly affected.

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[79] Rohe (n 14) 55. See also S 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* (Antwerp, Intersentia, 2005) 3.
[80] J Eekelaar, 'Naturalism or Pragmatism? Towards an Expansive View of Human Rights' (2011) 10(2) *Journal of Human Rights* 230, 236.
[81] Dillon (n 19) 87.
[82] *A, B and C v Ireland* (2011) 53 E.H.R.R. 13.
[83] J Haskey, 'A History of Divorce Law Reform in England and Wales: Evolution, Revolution, or Repetition?' (2018) *Family Law* 1407, 1418.
[84] B Hale, 'Equality and Autonomy in Family Law' (2011) 33(1) *Journal of Social Welfare & Family Law* 3, 4.
[85] JC Hall, 'Divorce Reform?' (1966) 24(2) *CLJ* 184, 185.
[86] M Welstead, 'Divorce in England and Wales: Time for Reform' (2012) 24 *Denning LJ* 21, 36.

4.1.2 Still a 'Voluntary Union'? The 'Entry' and 'Exit' Discrepancy

Self-determination in the intimate sphere of family life is an important feature of human rights law. Article 23(3) of the International Covenant on Civil and Political Rights 1966 protects marriage as a commitment entered into 'with full and free consent'. In English law, marriage was defined as a 'voluntary union'[87] or 'a contract for which the parties elect'.[88] The law of nullity recognises the importance of choice, allowing a party to have the marriage voided if he/she did not consent to it.[89] Annulment is granted even if the reality of consent was impaired by mere psychological pressure[90] or the non-disclosure of an important aspect of the partner's life (venereal disease, sex at birth, pregnancy by another man).[91] Indeed, public order in England likely encompasses protection against forced marriage, as evidenced i.a. by the preventative and remedial measures in ss.63A-63S FLA 1996.

Conversely, under MCA 1973, once a person has validly entered a marriage, the principle of autonomy loses force. Consent to the marriage appears to be only an 'entry' requirement, whereas the marriage should arguably be contingent upon its remaining voluntary.

4.1.3 Recognition of Individual Autonomy within the Couple in Other Areas of Family Law

Under the ECHR, 'morals' and 'public order' justifications for restrictions are country-specific. The proportionality of the divorce regime must therefore be assessed in light of the evolution of other areas of English family law in a direction more respectful of individual autonomy within the married couple.

The law has abandoned the doctrine of unity between husband and wife, as demonstrated by the relaxation of affinity bars. Former step-parents and step-children can intermarry in circumstances set out in s.1(3) Marriage Act 1949, as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, and the bar on former in-laws' marriages was repealed by the Marriage Act 1949 (Remedial) Order 2007 No 438.

Departure from the doctrine of unity is also evidenced by the special treatment reserved to non-marital assets in proceedings for financial and property remedy upon divorce. Courts have allowed pre-marital or inherited property to be ring-fenced by the owner where the needs of the other spouse could be met without including it in the pool of assets available for redistribution.[92] The binding nature of prenuptial agreements since *Radmacher v Granatino*[93] further promotes autonomy within the couple and limits State's intervention in the regulation of the consequences of relationship breakdown. This trend was corroborated by the refusal in *Sharp v Sharp* to apply the principle of 'sharing the fruits of the matrimonial partnership' to short, dual-income marriages where parties kept their finances separate.[94] The principle of testamentary freedom, recently upheld by the Supreme Court,[95] also privileges autonomy.

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[87] *Hyde v Hyde* (1866) LR 1 PD 130, 133.
[88] *Bellinger v Bellinger* [2001] 2 FLR 1048 para.128.
[89] s.12 MCA 1973.
[90] *Hirani v Hirani* [1983] 4 FLR 232.
[91] See s.12 (e), (f), (h) MCA 1973.
[92] *White v White* [2000] 2 FLR 981; *K v L* [2011] EWCA Civ 550. See also *P v P (Inherited Property)* [2004] EWHC 1364 (Fam) on landed estate intended to be retained in specie for future generations.
[93] *Radmacher v Granatino* [2010] UKSC 42; *Kremen v Agrest (No.11)* [2012] EWHC 45.
[94] *Sharp v Sharp* [2017] EWCA Civ 408.
[95] *Ilott v The Blue Cross* [2017] UKSC 17.

Family law has increasingly recognised that spouses maintain their individuality within the marital union, rather than being absorbed by it. Divorce law has lagged behind these developments. For the ECtHR, proportionality requires consistency between the various areas of domestic law; this is so even in matters of wide State discretion (e.g. bioethics).[96] The anachronistic vision of marriage in MCA 1973 is at odds with the law's more modern regulation of intimate relationships in other respects.

4.2 Balancing Private Rights: Innocent Spouses and New De Facto *Family Life*

Strasbourg case-law has shown that the Convention does not protect a spouse's desire to remain married against the other party's wishes. According to *Slimani v France*, the right to marry does not encompass a right to the indissolubility of the marriage or a right to immunity against nullity proceedings; thus, Article 12 does not assist a respondent wishing to contest an annulment action in which they had a fair opportunity to make representations.[97]

Moreover, as Judge Sajó noted in *Babiarz*, it is improper to speak of a balance between the competing rights of the spouses, as the party who does not wish to be divorced has a mere interest, rather than a right, in maintaining the formal legal bond to an estranged spouse,[98] whereas the spouse who has formed a new *de facto* family unit has a right to its protection under Article 8, as well as a right to remarry without unreasonable obstacles under Article 12. Even assuming that the legislator had to perform a balancing exercise between the two spouses' rights, greater weight would have to be afforded to 'the private life right not to be forced to live in a marital union with another person, whether as an instance of self-determination or as a precondition to family life'.[99]

4.3 Trapping Spouses in Unhappy Marriages: Necessary and Proportionate?

The MCA 1973 restrictions are far-reaching: in the absence of fault or cooperation from the other spouse, a person is unable to form a new marriage for over five years, their private life is affected by their civil status, and any children with other *de facto* partners are confusingly born under the *pater est* presumption. The unavailability of divorce also impinges on the right to property under Article 1 Protocol 1 ECHR. When death occurs during the five years of separation required by s.1(2)(e) MCA, the devolution of property under s.46 Administration of Estates Act 1925 benefits the estranged spouse notwithstanding the breakdown of the marriage; intestacy rules apply even after a decree nisi,[100] let alone *de facto* separation. Nor can a will adequately safeguard the wishes of the deceased, as the law is protective of spousal claims under the Inheritance (Family and Dependents) Act 1975.[101] Further knock-on effects include the ineligibility for assisted reproductive services with a new partner, since, under s.38(2) Human Fertilisation and Embryology Act 2008, the *pater est* presumption prevails over the 'agreed fatherhood conditions'.

The five-year wait to commence divorce proceedings after the breakdown of the marriage is a disproportionate interference with the right to re-marry and affects the very essence of that right. A three-year delay in forming a new marriage after several failed marriages was

[96] See *Costa and Pavan v Italy* (App No 54270/10).
[97] *Slimani v France* (App No 33597/96) para.2.
[98] *Babiarz* (n 36), Separate Opinion Judge Sajó, para.6.
[99] *Ibid*, para.7.
[100] *Re Collins* [1990] 2 All ER 47.
[101] See *Davis v Davis* [1993] 1 FLR 54, *Fielden v Cunliffe* [2005] EWCA Civ 1508, *P v G* [2006] Fam Law 179.

condemned in *F. v Switzerland*, and Article 12 violations were ascertained in cases involving the right to marry of prisoners detained for relatively short sentences.[102] If the ECHR does not permit States to postpone prisoners' exercise of their right to marry, however briefly, despite society's legitimate interest in preserving the punitive and deterring function of criminal law, it is equally unacceptable to compel individuals whose marriage has collapsed to wait several years before they can enjoy Article 12 rights again.

Moreover, the MCA scheme purports to ensure the stability of marriage but in practice it fails to achieve that aim. The legal unavailability of divorce does not prevent spouses from living separate lives and forming new intimate relationships. The near bar on non-consensual divorce leads to estranged spouses, vulnerable *de facto* family structures, extra-marital re-partnering and adulterous children, benefitting neither the parties nor society. As the ECtHR held in *B. and L. v UK*, restrictions pursuing legitimate aims but incapable of achieving them are intrinsically disproportionate.[103]

4.4 'Pressing Need'? A Comparison with Closely Related Jurisdictions

The Australian Family Law Act 1975 and the Canadian Divorce Act 1986 indicate that legislators in like-minded democracies did not deem it necessary to curtail individual autonomy in order to safeguard the institution of marriage. In Australia, a spouse can petition for divorce on the grounds that the marriage has broken down and there is no reasonable likelihood of reconciliation, and proceedings may be started after 12 months of separation (whether living apart or living separated under the same roof). In Canada, divorce is available if the breakdown of the relationship is proven through adultery, cruelty or one year of continuous separation (allowance being made for a period of resumed cohabitation of up to 90 days); proceedings may be introduced as soon as the parties cease living together or start living separate lives at the same address.

In other European jurisdictions, such as Spain and Sweden, the law was amended so as to recognise as sole ground for divorce the decision of one or both spouses to end the marriage, without any requirement to justify the reasons underlying that decision, in recognition of the petitioner's right to privacy.[104] Within the UK, the Family Law (Scotland) Act 2006 reduced the separation period to one year if there is consent to divorce and two years if there is not.

All these developments call into question the 'pressing need' for a bar interfering with Convention rights in England and Wales.

5. European Minimum Standard and Enhanced Domestic Rights

Although the impact of divorce restrictions on private and family life is so significant as to raise human-rights concerns, the impetus for legal reform did not proceed from Strasbourg adjudication. The ECtHR has been notoriously reluctant to intervene in matters pertaining to personal law, e.g. to read an obligation for ECHR States to introduce civil partnerships[105] or to

[102] *Hamer v UK* (1982) 4 E.H.R.R. 139; *Jaremowicz v Poland* (App No 24023/03); *F. v Switzerland* (n 54). See Draghici (n 74) 62-68.
[103] *B. and L. v UK* (2006) 42 E.H.R.R. 11 para.38 (banning marriage between former parents-in-law and children-in-law did not prevent intimate relationships and confusion for children).
[104] Y Bernand, 'Évolution de la place de la volonté des époux dand le divorce' in F Ferrand and H Fulchiron (eds), *La rupture du mariage en droit comparé* (Paris, Société de législation comparée, 2015) 68-69.
[105] See Draghici (n 74) 198-209.

recognise religious or traditional marriage.[106] As Chowdhury and Herring pointed out, in family law cases, the ECtHR tends to apply the least strict standard of review, recognising socio-cultural diversity in Europe.[107]

By contrast, domestic judicial review was equipped to challenge the necessity and proportionality of the divorce regime under MCA 1973. In fact, the scope of ECHR rights as interpreted and applied under HRA 1998 can go beyond the minimum ECHR standard.[108] Indeed, British courts recognised same-sex couples as 'family life'[109] before they received Strasbourg recognition,[110] and, despite the lack of European common ground on surrogacy arrangements,[111] a s.4 HRA declaration was issued in relation to the bar on single-applicant eligibility for parental orders.[112]

The distinction between an international claim of ECHR violation and a domestic claim of HRA-incompatibility was clarified in *Re G (Adoption: Unmarried Couple)*.[113] Lord Hoffman pointed out that, in cases where the ECtHR has declined to take a stand on a matter, deeming it within States' margin of appreciation, it is for the domestic courts to shape the understanding of rights under HRA 1998.[114] Similarly, in *Nicklinson*, the Supreme Court recognised that its re-examination of assisted-dying claims was not precluded by the Strasbourg finding that each State could decide how to reconcile the competing interests at stake.[115] Divorce legislation warranted the same approach and it was rather surprising to see human-rights arguments swiftly dismissed.

6. Conclusions

Fifty years after the liberalisation of the law with the Divorce Reform Act 1969, another momentous change is underway. The DDSA 2020, expected to come into force in autumn 2021, will amend MCA 1973 so as to introduce procedures akin to divorce on demand. However, unlike for other areas of family law, such as transgender marriage, same-sex couples' legal recognition or mixed-couples' access to civil partnerships,[116] human-rights arguments were not at the forefront of reform.

The limited impact of HRA 1998 on divorce law apparently flowed from a superficial reading of ECHR jurisprudence and its relationship with domestic law. On closer inspection, the dissolution of marriage is no longer a *laissez-faire* area under the ECHR. Recent Strasbourg case-law has recognised that divorce laws may breach Articles 8 and 12 and that their design and implementation require an adequate balancing of competing interests. Unsuccessful applications were typically due to the light-touch international oversight of the balancing

[106] *Ibid*, 43-47.
[107] S Choudhury and J Herring, *European Human Rights and Family Law* (Oxford, Hart, 2010) 32-34.
[108] See C Draghici, 'The Human Rights Act in the Shadow of the European Convention: Are Copyist's Errors Allowed? (2014) 2 EHRLR 154, 167-168.
[109] *Fitzpatrick v Sterling Housing Association* [2000] 1 FCR 21; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[110] *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20.
[111] *Mennesson v France* (App No 65192/11), *Paradiso v Italy* (2017) 65 E.H.R.R. 22.
[112] *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).
[113] *Re G (Adoption: Unmarried Couple)* [2008] 3 WRL 76 (Northern Ireland regulations preventing an unmarried couple from adopting children breached their right to respect for family life).
[114] *Ibid*, para.36.
[115] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, para.76. See also *Conway v Secretary of State for Justice* [2018] EWCA Civ 1431 para.128, rejecting the submission (para.127) that s.2 HRA and cases such as *R (Ullah) v Special Adjudicator* [2004] UKHL 26 and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 require courts 'to go no further than what has been decided by the ECtHR'.
[116] Major changes in these areas were prompted by human-rights litigation; see *Goodwin and I v UK* (2002) 35 E.H.R.R. 18, *Bellinger v Bellinger* [2003] 2 All ER 593, *Fitzpatrick* (n 109), *Ghaidan* (n 109), *Steinfeld* (n 50).

exercise undertaken by legislators and of domestic courts' assessment of facts, in deference to States' wide margin of appreciation. A heightened degree of scrutiny was expected under HRA 1998 and could have supported calls for reform.

The inability to dissolve marital ties without spousal consent or a lengthy period of separation is a serious interference with an individual's private and family life and their right to re-marry; as such, it requires cogent justification, based on either societal interests or rights of the non-consenting spouse. No genuine societal interest exists in keeping estranged spouses legally tied for many years, which leads to *de facto* bigamy, precarious family units, uncertain parent-child relationships, financial difficulties in the absence of a decree permitting the reallocation of property, and inheritance distribution inconsistent with family realities and the deceased's wishes. The formal preservation of failed marriages does not secure the stability or gravitas of the institution, admittedly a legitimate goal. Nor does MCA 1973 protect non-consenting spouses by maintaining the 'empty legal shell'[117] intact once the marriage has collapsed, and Article 12 does not confer a right to the indissolubility of the marriage. The bar on unilateral no-fault divorce is, thus, ill-suited to address any superior need, and hence it unjustifiably curtails individual autonomy and the effective enjoyment of family life. Additionally, it unduly restricts Article 12 rights, as it prevents individuals from reacquiring the capacity to marry and formalising new relationships for a considerable amount of time, without benefitting anyone.

The lack of an unequivocal Strasbourg precedent asserting a right to divorce should not be seen as dispositive of human-rights objections to the MCA 1973 bar. ECHR case-law has acknowledged that divorce proceedings must take place within a reasonable time and without insurmountable impediments, such as a veto right for innocent spouses. The ECtHR defers to States in matters affecting personal status, recognising their closer link with their communities and their ability to strike a fairer balance, within certain common parameters. Although the margin of appreciation doctrine has been occasionally (mis)interpreted as requiring municipal courts to defer to legislatures,[118] the discretion afforded to States in applying Convention norms is shared by all branches of government. Domestic judicial review, unencumbered by the subsidiarity of international tribunals or by the absence of European consensus, can accommodate human-rights concerns to a greater extent than Strasbourg litigation.

The domestic interpretation of Convention rights must also take into account the evolution of other areas of family law, such as the now binding nature of prenuptial agreements, the non-sharing of assets after short dual-income marriages, and the ring-fencing of non-marital property where needs are otherwise satisfied. This changing landscape of English family law, prioritising individual autonomy within the marital couple, casts doubt on the legitimacy of MCA 1973 divorce restrictions. The comparison with other common law and European jurisdictions further suggests that the enduring bar on unilateral divorce does not respond to a pressing social need.

The inescapable conclusion, notwithstanding the mainstream approach to divorce in the literature, the courts and the public debate, is that the soon-to-be-replaced MCA 1973 divorce scheme is inconsistent with HRA 1998, in that it disproportionately interferes with the rights protected by Articles 8 and 12 ECHR, as understood and applied domestically. Despite the ECtHR's cautious position, requiring divorce laws to achieve a fair balance between competing interests but deferring that exercise to States, overall its jurisprudence invited more rights-protective domestic standards. The *Owens* litigation was a missed opportunity to affirm those

[117] *Putting Asunder: A Divorce Law for Contemporary Society* (1966); see S Cretney, *Law, Law Reform and the Family* (Oxford, OUP, 1998) 33-72.

[118] See Government's contention *vis-à-vis* legislative bans in *Conway* (n 115) para.132: 'the question of proportionality on the domestic plane should reflect th[e] wide margin of appreciation at the international level'.

standards; nevertheless, the ensuing public consultation paved the way towards a historical transformation of divorce law into a more modern and rights-sensitive framework.