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### Protecting privacy in divorce actions

Article 8 and the need for law reform

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# Protecting Privacy in Divorce Actions: Article 8 and the Need for Law Reform

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## A. INTRODUCTION

The role of divorce in society and the allied challenge of law reform in this area constitutes one of the most contentious areas of family law and adult relationships. Whether divorce should be a vehicle for upholding the institution of marriage and punishing fault, or a means to allow a couple to retreat gracefully from their broken marriage, mark opposite ends of the divorce spectrum. Society's position has shifted along this spectrum over time, yet the two ends remain much as they ever were: with conservatives arguing that any liberalisation of divorce laws jeopardises the institution of marriage and imperils society; and progressive camps contending that divorce law is not there to prevent a marriage from failing, but to provide a dignified exit from an already-failed relationship.<sup>1</sup> Across Europe, divorce laws reflect this range, from those jurisdictions which require fault on the part of one spouse, typically through adultery, behaviour, or desertion, to the more consensual "divorce on demand" favoured for example in the Scandinavian jurisdictions. The full spectrum, and the typical co-mingling of different approaches within any one jurisdiction, has been summarised by Antokolskaia:

These grounds [for divorce] have entered or re-entered the European stage at various moments in history and under the influence of various circumstances and ideas, and so could be characterised as different generations of divorce law. The fault divorce (in other words, divorce as a sanction) came into play during the Protestant Reformation under the influence of Reformed theology, while irretrievable breakdown of the marriage (in other words, divorce as a remedy of failure) and mutual consent (in other words, divorce as an autonomous decision by the spouses themselves) developed on the eve of and during the French Revolution under the influence of the Enlightenment, and divorce on demand (in other words, divorce as an individual right) appeared after

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<sup>1</sup> For an overview of historical and current European trends, see Masha Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia* (Intersentia, 2006), ch 14. For a summary of the conservative and liberal debates in divorce law, see Jonathan Herring, Rebecca Probert, Stephen Gilmore, *Great Debates in Family Law*, 2<sup>nd</sup> ed (Palgrave, 2015), at 194-203.

the Russian Revolution of 1917 as a result of the radical secularisation and de-ideologisation of marriage. These grounds are products of different epochs, and all are simultaneously present in contemporary Europe. Moreover, they all exist in many jurisdictions alongside or in combination with one another.<sup>2</sup>

Scotland is one such jurisdiction. While fault-based grounds remain, they sit alongside the more neutral fact of non-cohabitation for a period of time. Moreover, the reality of litigation means that Scots law has, in effect, divorce on demand, in cases where the spouses are prepared to cooperate, for example by not defending the action. While there is a case for reform of divorce law on the substantive merits of such reform alone,<sup>3</sup> this article seeks to make the case that divorce law in Scots law is fundamentally flawed for a very specific reason: it breaches the parties' article 8 ECHR right to privacy. There is thus a strong case for law reform to ensure that the statutory basis of divorce provided by the state respects the privacy of all parties concerned. In this article, I will advance this argument by outlining the basis for divorce at present, and the personal and private information which must be disclosed to the state in order to secure a divorce. I will then examine this against the requirements of article 8.<sup>4</sup> I will conclude by framing briefly a revised divorce law which would facilitate divorce without infringing the privacy rights of the spouses or any other parties.

Before turning to this argument, three critical points must be made. The first is to emphasise that the argument I seek to make here, advocating for divorce law reform on the grounds of privacy rights under article 8, is distinct from the case for reform (or not) based on the substantive merits of fault and no-fault divorce. The campaign for divorce law reform has gathered pace in England and Wales in the last two years, prompted by growing concern amongst practitioners and the judiciary that the current law promotes antagonism and conflict, rather than seeking the most constructive exit from the marriage.<sup>5</sup> Academic

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<sup>2</sup> Masha Antokolskaia, "Divorce Law in a European Perspective", in Jens M Scherpe (Ed) *European Family Law Vol III* (E Elgar 2016), at 68.

<sup>3</sup> Problems with the continued reliance on fault-based divorce have been set out clearly, albeit in the context of English law, by Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales*, Nuffield Foundation, October 2017 (hereafter "Trinder *et al*, *Finding Fault?*").

<sup>4</sup> Data protection will not be considered, as the Data Protection Act 2018 specifically exempts certain personal data from the scope of the GDPR where it is processed by a court or tribunal acting in its judicial capacity: The Data Protection Act 2018, Schedule 2, Part 2, para 14.

<sup>5</sup> *Resolution*, the English family lawyers' association, has been actively campaigning for law reform: [http://www.resolution.org.uk/editorial.asp?page\\_id=984&displayMode=preview](http://www.resolution.org.uk/editorial.asp?page_id=984&displayMode=preview) . Comments from Sir James Munby in decided cases and in public lectures have also made the case: "Changing families: family law yesterday, today, and tomorrow – a view from south of

research has demonstrated convincingly that the time for reform is overdue: Professor Trinder and her colleagues published the results of their extensive empirical research into how the public use and misuse the English divorce provisions, concerns of the profession, and evidence of the damage it causes, in their 2017 paper “*Finding Fault? Divorce Law and Practice in England and Wales.*” And matters arguably came most forcefully to the fore in with *Owens v Owens*,<sup>6</sup> wherein Mrs Owens was denied a divorce on the basis that she could not meet the statutory test, despite the evidence indicating that her marriage had indeed irretrievably broken down. In its July 2018 decision, the Supreme Court described this as a troubling case,<sup>7</sup> but were powerless to intervene in the face of the statute.<sup>8</sup> The Government launched a consultation on the reform of divorce law, which closed in December 2018.<sup>9</sup> This has culminated in the announcement, on 9 April 2019, by the Justice Secretary David Gauke that the Government would bring forward legislation for no fault divorce in the next session of Parliament.<sup>10</sup> There is clearly much to be said about removing fault from divorce law, and I will draw on such evidence where relevant – yet the primary focus of this article will be on the privacy rationale for reform.

Secondly, although disclosure of financial information is often part and parcel of a divorce hearing to allow the judge to make an award regarding financial provision, and child contact issues may also raise their head, the focus here is exclusively on the mechanics of obtaining a divorce, and the personal information required to be disclosed to secure that. Financial provision and child contact are secondary issues (albeit often of equal or greater concern to the parties), which are not directly relevant to the decree of divorce, and are therefore excluded from this analysis. Any information which is required to be disclosed in pursuit of financial provision or child contact is separate from the question of what should be disclosed to obtain the divorce itself.

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the Border” (2018), available at: <https://www.judiciary.uk/wp-content/uploads/2018/03/speech-pfd-changing-families-edinburgh.pdf> at 15.

<sup>6</sup> [2018] UKSC 41.

<sup>7</sup> [2018] UKSC 41, para [46] per Lady Hale.

<sup>8</sup> [2018] UKSC 41, para [45] per Lord Wilson (with whom Lord Hodge and Lady Black agreed) and para [46] per Lady Hale.

<sup>9</sup> <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/> (accessed 2 April 2019).

<sup>10</sup> <https://www.gov.uk/government/news/new-divorce-law-to-end-the-blame-game> (accessed 9 April 2019). While this is a clear step towards no fault divorce in England and Wales, the legislation has not even been introduced to Parliament, let alone debated or enacted. This article will therefore refer to the current divorce law in England and Wales where relevant.

My third and final preliminary point is to emphasise that the privacy arguments advanced here are not intended to encourage a culture of marital secrecy or to require abusive and harmful behaviour to stay behind closed doors. For too long, the legal emphasis on privacy in family life led to a refusal on the part of the Government to recognise domestic abuse, child abuse, or marital rape: respect for family privacy resulted in non-intervention and enabled abuse to continue.<sup>11</sup> The work done to bring these abuses into the open, to recognise them, and to provide legal responses to them, must not be undone. Respecting the privacy of the parties by not compelling them to disclose personal and private information (about themselves or each other) in the context of divorce is, however, very different from failing to respond to such disclosures in the context of abuse. Only this latter should be a matter for law. Moreover, the fact that the law currently facilitates disclosure of personal information in divorce could in itself be used as a tool for domestic abuse, with threats by one spouse to reveal details of an affair or particular behaviour, in order to control or manipulate the other spouse. Removing this from private law removes one possibility for coercive control.<sup>12</sup>

## **B. THE GROUNDS FOR DIVORCE**

There are two grounds for divorce in Scotland: the irretrievable breakdown of the marriage, and the issue of an interim gender recognition certificate.<sup>13</sup> In England, the sole ground of divorce at present is that the marriage has broken down irretrievably.<sup>14</sup> This article examines the irretrievable breakdown of marriage, and the evidence required to prove it. While the opening section of the Divorce (Scotland) Act 1976 (“1976 Act”) and the Matrimonial Causes Act 1973 (“1973 Act”) both state that the ground for divorce is the irretrievable breakdown of marriage, this can in fact only be fulfilled by proving that the breakdown has resulted from one of four (in Scotland) or five (in England and Wales) specified “sub-grounds”. There is some confusion over whether these sub-grounds are in fact “grounds” for divorce, or whether the only relevant ground (in this context) is the irretrievable breakdown, and these listed categories are “facts”. In a recent Scottish Sheriff Court decision, Sheriff Mann classed the sub-categories as “grounds”, with reference to wording in the Scottish

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<sup>11</sup> For example, Elizabeth Schneider’s analysis of “the dark and violent side of privacy” in “The Violence of Privacy” (1991) 23 Conn. Law Rev. 973.

<sup>12</sup> As most recently legislated for in the Domestic Abuse (Scotland) Act 2018.

<sup>13</sup> Divorce (Scotland) Act 1976, s1(1)(a) and (b).

<sup>14</sup> Matrimonial Causes Act 1973, s1(1). Where an interim gender recognition certificate is issued, the marriage is voidable in terms of the Matrimonial Causes Act 1973, s12(1)(g).

legislation. Having referred to the phrasing of section 12 of the Family Law (Scotland) Act 2006, which stated that desertion was no longer to be a ground, he concluded: “That is a clear indication that the legislature considered desertion to be a separate ground upon which irretrievable breakdown of marriage could be established. If desertion was a separate ground then so too were, and are, adultery, unreasonable behaviour and the periods of non-cohabitation.”<sup>15</sup> In contrast, the English legislation refers to the five “facts” by which irretrievable breakdown can be established. The terminology adopted in this article will reflect these positions, referring to any of the four or five bases for establishing irretrievable breakdown being referred to as “grounds” or “facts”. Thus, in Scotland, the four grounds for irretrievable breakdown set out in the 1976 Act are:

- 1(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—
- (a) since the date of the marriage the defender has committed adultery; or
  - (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
  - (c) . . . . . [desertion – now repealed]
  - (d) there has been no cohabitation between the parties at any time during a continuous period of one year after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
  - (e) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action.

In England and Wales, the five facts are:

- 1(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—
- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
  - (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
  - (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
  - (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as “two years’ separation”) and the respondent consents to a decree being granted;

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<sup>15</sup> *Ray v Ray* [2017] SC BAN 60 at [8]; see also [7].

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as “five years’ separation”).

The critical difference<sup>16</sup> between jurisdictions is in relation to the non-cohabitation grounds. In Scotland, the 1976 Act was revised in 2006, to reduce the periods of non-cohabitation from 2 years to 1 year with consent, and from 5 years to 2 years without.<sup>17</sup>

One interesting point of contrast between the jurisdictions is the use made by couples of these different bases for divorce. The figures for Scotland for 2015-16 and those from England and Wales from 2017 show a clear divergence in approach:<sup>18</sup>

	<b>England &amp; Wales: 2017</b>		<b>Scotland: 2015-16</b>	
<b>Adultery</b>	10,611	<b>10.44%</b>	32	<b>0.36%</b>
<b>Behaviour</b>	47,135	<b>46.36%</b>	417	<b>4.7%</b>
<b>Desertion</b>	472	<b>0.46%</b>	n/a	<b>n/a</b>
<b>Shorter Non-cohabitation + consent (2 years/ 1 year)</b>	27,012	<b>26.57%</b>	2287	<b>25.77%</b>

<sup>16</sup> A minor difference exists in relation to adultery, whereby in Scotland, only the bare fact of adultery need be established, whereas in England and Wales, the petitioner must also demonstrate that it is intolerable to live with the respondent. The practical impact of this is limited.

<sup>17</sup> Family Law (Scotland) Act 2006, s11. One obvious consequence was that the ground of desertion was repealed (s12), as being no longer relevant given the new timeframes.

<sup>18</sup> Figures taken from “Divorces and Dissolutions”, National Records for Scotland available at: <https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/> . Scottish statistics for 2016-18 and 2017-18 are limited to indicating whether the divorce was granted using the simplified procedure or not. In 2017-18 61% of the 6,873 divorces were granted using the simplified procedure, which indicates that these at least were based on one of the periods of non-cohabitation *and* there were no children under 16. There were presumably other divorces granted in this period based on non-cohabitation, where there were children under 16. (Interestingly, the total number of divorces in 2017-2018 shows a marked decrease from the 2016-2017 figure of 7,938.) The statistics for England and Wales are published at “Divorces for England and Wales 2017”, the Office for National Statistics for England and Wales, available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017> .

<b>Longer Non-cohabitation, no consent (5 years/ 2years)</b>	15,619	<b>15.36%</b>	6068	<b>68.37%</b>
<b>Total</b>	101,669		8,974	

As these statistics seem to show, the shorter periods of non-cohabitation in Scotland have proved attractive to divorcing couples, allowing 94% of them to finalise their divorces in one or two years, based solely on non-cohabitation. The longer periods required south of the border appear to have resulted in more couples using adultery or behaviour, in order to exit the marriage in much shorter timeframes, and certainly long before the five year non-cohabitation (without consent) option is available. Adultery and behaviour are thus more relevant in England and Wales than in Scotland: as the most recent figures show, 56.8% of couples in England and Wales rely on adultery or behaviour to found their divorce, compared with just 5.1% in Scotland.

As Trinder *et al* observe in *Finding Fault?*, however, this difference in choice of ground or fact cannot be explained solely by the shorter timescales – and there is nothing to suggest that it arises from different marital habits concerning adultery and behaviour in Scotland.<sup>19</sup> Instead, as she argues, the different procedural incentives in Scotland, such as the Simplified Procedure, coupled with the availability of aliment and a different structure of financial provision,<sup>20</sup> all unite to mean couples in Scotland are often not under such time pressures or financial need to finalise the divorce as quickly as possible. Taking one or two years to negotiate financial provision (and child contact, where relevant) is fairly standard, and consequently allows couples to rely on the non-cohabitation grounds for divorce while suffering no particular inconvenience. This approach gains support from looking at the

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<sup>19</sup> Trinder *et al*, *Finding Fault?*, para 11.3.

<sup>20</sup> Itself the subject of debate between jurisdictions, as to whether the Scottish system provides much-needed certainty and a clean-break or is too rigid, and whether the English system provides much needed-flexibility, or is a permanent drain on one party, while providing a “meal ticket for life” for the other. See for example “Family Matters: ‘Meal ticket for life’ divorce deals must be stopped, urge law chiefs”, Frances Gibb, Legal Editor, The Times, 20 November 2017.



Scottish statistics from 2002, prior to the divorce law reform of 2006.<sup>21</sup> These show that even when longer periods of non-cohabitation were required, Scots couples still tended to rely more heavily on these grounds: whereas 19.25% of divorces were granted for adultery or behaviour, 56.18% were founded on two years' non-cohabitation with consent, and 24% on five years' non-cohabitation without consent.<sup>22</sup>

Moreover, something even more interesting emerges from the Scottish statistics, which is the very clear preference for the two years' non-cohabitation ground (68.4%), over the one year with consent option (25.8%). This indicates that not only will couples opt to avoid the more contentious fault-finding grounds of adultery and behaviour (accounting for only 5.1% of Scottish divorces), but also that the pursuer will, where possible, opt for the ground which gives maximum control and requires minimum input from the other spouse. Rather than exiting as quickly as possible, after one year of non-cohabitation, and thereby requiring the consent and cooperation of the spouse, pursuers seem to prefer the two years' non-cohabitation ground which does *not* require consent. It seems likely that waiting two years does not in fact add very much to the length of process for most couples: the time taken to negotiate and agree financial provision and child contact will often take couples well over a year: by which time, the action for divorce can be amended from one of adultery/behaviour/one year's non-cohabitation, to the most straightforward two-years' non-cohabitation route.<sup>23</sup> Yet this route, which minimises finger-pointing and blame and the need for any cooperation, is used only by the most patient spouses in England and Wales, where only 15.36% of couples use the five years' non-cohabitation without consent fact.

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<sup>21</sup> These were the latest available statistics provided, prior to 2006: <https://www2.gov.scot/Publications/2004/02/18897/33085> (accessed 24 January 2019).

<sup>22</sup> The figures are: 10,826 divorces, with 428 (3.95%) on adultery; 1656 (15.3%) on behaviour; 42 (0.39%) on desertion; 6082 (56.18%) on non-cohabitation with consent; and 2598 (24%) on non-cohabitation without consent.

<sup>23</sup> Evidence from reported cases shows that a minute of amendment may often be lodged, seeking to delete the original crave (on grounds of adultery or behaviour) and substitute therefor a crave based on non-cohabitation. This indicates that at the time of raising the action, such a plea will not usually be available as a result of insufficient time having passed – but that, by the time the action is heard (usually following extensive negotiation regarding financial provision), the parties have been separated for the requisite period, and can therefore move to proceed on a less contentious basis. There has been judicial debate about the correctness of this approach: see, on the one hand Sheriff Mann in *Ray v Ray* [2017] SC BAN 60 (following Lord Murray in *Duncan v Duncan* 1986 SLT 17) and, on the other, Sheriff Collins in *McNulty v McNulty* 2016 Fam LR 145 and again in *Douglas v Douglas* [2019] SC PER 4. See also Jane Mair, “Divorce Law in Scotland: Not Entirely without Fault: *LV v IV, X v Y*, and *Douglas v Douglas*” (2019) 23(2) *Edinburgh Law Review* 236.

Antokolskaia has noted that “Empirical data suggest that spouses, assisted by their lawyers, are always able to choose the shortest route to divorce, just as water will always find its way to the lowest point”.<sup>24</sup> However, timescales are only part of the picture: where there is no significant additional social cost, in terms of time, divorcing couples in Scotland seek the smoothest route, with greater control and certainty, and less fault.

The importance of being able to rely on a ground, or fact, which leaves control in the hands of the party seeking the divorce, is also reflected in the English experience. Adultery and two years’ non-cohabitation both carry the need for the other spouse to cooperate, by admitting or consenting.<sup>25</sup> The behaviour fact has therefore been by far the most popular in England and Wales (used by over 46% of couples in 2017), not least because it removes the need for any admission of fault, or consent.<sup>26</sup> The only other ground which does this is the five years’ non-cohabitation ground, which involves a very lengthy delay before the parties are free to move on. With behaviour, however, there is no need for any minimum period or for any positive contribution from the other spouse: the defendant needs to agree to the action, but can do so even while rebutting the facts stated in the petition.<sup>27</sup> While the extensive downsides of the fault ground are made clear in *Finding Fault?*, it does at least enable one party to petition without active cooperation from the other.

Factors which can influence the choice of ground or fact include the timescales involved, plus the need for consent or cooperation from the other spouse. Yet regardless of which ground/fact is used, the pursuer/petitioner will need to disclose personal information in order to demonstrate the irretrievable breakdown of the marriage.

## **C. PROVING IRRETRIEVABLE BREAKDOWN OF MARRIAGE**

### **(1) The need for evidence**

A spouse wishing to raise an action or petition for decree of divorce must consider what evidence is required to prove one of the four or five bases of irretrievable breakdown. In England and Wales, an undefended divorce (on any of the five facts) can be sought by

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<sup>24</sup> Masha Antokolskaia, “Divorce law in a European Perspective”, in Jens M Scherpe (Ed) *European Family Law Vol III* (E Elgar 2016), at 72.

<sup>25</sup> Trinder *et al*, *Finding Fault?*, 44 (para 3.6).

<sup>26</sup> Except in rare cases (such as *Owens v Owens*) where it is defended: Trinder *et al*, *Finding Fault?*, 44 (para 3.6).

<sup>27</sup> Trinder *et al*, *Finding Fault?*, 47, quoting evidence from an interviewee who adopted this approach; and 121 (“Options available to respondents”).

completing the appropriate form and submitting it to court. The petition will be reviewed by a judge (or legally qualified assistant, where this is delegated).<sup>28</sup> The 1973 Act specifically enjoins the court to seek evidence: “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.”<sup>29</sup> Research has shown, however, that Regional Divorce Centres do not usually require corroborating evidence: in 2015, no RDCs required evidence.<sup>30</sup>

In Scots law, it is possible for the parties to use the Simplified/Do it Yourself Procedure where (i) there are no children under 16 and (ii) the divorce is sought on the basis of non-cohabitation (whether for one or two years). The Simplified Procedure is a “cheap and simple method”,<sup>31</sup> which does not require the involvement of a solicitor. Either party can download and complete the appropriate form and affidavit and lodge them, together with the marriage certificate (and fee), at the relevant Sheriff Court. In all other cases, for example because of the ground relied upon (ie adultery or behaviour) or because the action is defended, the parties will be required to raise an action and bring evidence of the basis on which their marriage has irretrievably broken down. In terms of s1(6) of the 1976 Act, this must be established on the balance of probability. The pursuer will require to submit an affidavit on his/her own behalf together with one from a corroborating witness. The solicitor acting should ensure there is adequate evidence to put before the court. If the action is defended, the pursuer and witness will usually require to give evidence in court, which will of course be subject to the rigours of cross-examination. Where the action proceeds undefended, the pursuer’s solicitor must lodge the affidavits with the court, and affirm that the evidence establishes that the marriage has irretrievably broken down. Thus, an external party (either the judge or the solicitor) will require to see and weigh sufficient evidence that the marriage has irretrievably broken down, on the basis of adultery, behaviour, or non-cohabitation.

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<sup>28</sup> For an account of the divorce process in England and Wales, and the use of legally qualified Assistant Justices’ Clerks to process undefended decree nisi applications, see Trinder *et al*, *Finding Fault?*, Ch 4 “The court’s inquiries: just administrative rubber stamping?”

<sup>29</sup> 1973 Act, section 1(3). Sir James Munby has, however, noted that the duty on the court is “qualified by the crucial words ‘so far as it reasonably can’”: *Owens v Owens* [2017] EWCA Civ 182, para 93. See further Trinder *et al*, *Finding Fault?*, Ch 4.

<sup>30</sup> Trinder *et al*, *Finding Fault?*, 76.

<sup>31</sup> Scottish Courts and Tribunals Service, “A Guide to the Simplified Divorce/ Dissolution of Civil Partnership Procedure in Scotland”, December 2014, p1. (Available at: <https://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/simplified-divorce-and-dissolution-of-civil-partnership-guidance-notes> - accessed 2 April 2019.)

What evidence will be required to demonstrate the irretrievable breakdown? The exact material will depend on the specific ground pled although inevitably it will be personal and private information. Each of the four grounds will be examined in turn: since desertion does not exist in Scots law and is used in less than 1% of cases in England and Wales, it will not be included in this assessment.

## **(2) Adultery**

In cases of adultery, there must be proof that the defender had sexual intercourse with someone of the opposite sex<sup>32</sup> – or at least, evidence of the inclination and opportunity to do so.<sup>33</sup> If no direct evidence is available to corroborate the pursuer's claim, then recourse may be had to a private investigator, to follow the defender and produce photographs and a statement that the defender had the opportunity to commit adultery. Other evidence may come from electronic evidence, such as photos or videos of the act. These may be supplemented by additional evidence, such as emails, texts, other photos, or diary entries.<sup>34</sup> All such evidence will constitute highly personal and intimate information relating to the defender and to the paramour. There may also be very private information concerning the pursuer, to substantiate the claim, such as that the pursuer contracted an STI as a result of the spouse's affair. The evidence may also involve children, for example where one spouse brings evidence that the child was conceived as a result of the affair.

## **(3) Behaviour**

Where the ground pled is behaviour, this will necessitate the disclosure of conduct by the defender which has been intolerable to the pursuer. While this will often focus primarily on the defender's behaviour, the full statutory test involves a subjective element: that is, the behaviour is such that *this* spouse cannot reasonably be expected to cohabit with the defender. If the pursuer has some specific character trait which renders him/her more vulnerable, this will be relevant – perhaps a health condition or very difficult personal

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<sup>32</sup> Eric Clive, *The Law of Husband and Wife in Scotland*, SULI (4<sup>th</sup> ed, 1997), paras 21.004 and 21.007. Any other sexual activity, not amounting to sexual intercourse, is not adultery, but may well meet the second base of irretrievable breakdown, behaviour, as too would sexual intercourse with someone of the same sex.

<sup>33</sup> Eric Clive, *The Law of Husband and Wife in Scotland*, SULI (4<sup>th</sup> ed, 1997), para 23.032; Jonathan Herring, *Family Law*, 8<sup>th</sup> ed (Pearson, 2017), at 146.

<sup>34</sup> The admissibility of such evidence is a separate issue. If admissible, it may nevertheless be an invasion of privacy.

circumstances. Again, we see that the evidence required will impact on *both* parties to the marriage: establishing the behaviour of one, and the impact it has had on the other. And again, this may well involve other parties, including children who have suffered from the conduct, or someone with whom the defender has had a liaison, albeit one which fell short of adultery. The evidence may often include medical details, as to the physical or mental health of one or both parties, either as the cause of the behaviour in question (which is not a defence<sup>35</sup>) or as a reason for why this particular spouse cannot tolerate the behaviour. Reported cases demonstrate a wide range of conduct which has satisfied this test, including physical assaults; threatened physical assaults; sexual behaviour; neglectful behaviour; obsessive behaviour; drunkenness or drug abuse; or exposure to risk of disease.<sup>36</sup>

Although there is no empirical evidence of a similar trend in Scotland, the clear evidence in England and Wales is that the type of conduct required (in undefended actions at least) is considerably lower than most parties initially presume, and certainly no longer requires physical assault.<sup>37</sup> As the *Finding Fault?* report concludes, the evidence is that the behaviour fact in England and Wales in undefended petitions can be established on the basis of anodyne and largely generalised allegations, so long as there is at least something attributed to the fault of the defendant.<sup>38</sup> While this may not require the disclosure of deeply personal information, petitioners are nonetheless required to make statements attributing fault in relation to the personal behaviour and conduct of their spouse and include a statement about the effect this has had on them (for example that they felt “greatly saddened” or “serious distress”<sup>39</sup>). Trinder’s research also demonstrates that even if the lawyers and judges preparing and scrutinising these petitions view them very much as a “means to an end”, the individual parties involved will often (understandably) take them personally:<sup>40</sup> a statement which might seem relatively anodyne to the profession may still touch on a distressing private and personal matter to one or both parties.<sup>41</sup>

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<sup>35</sup> 1976 Act, s1(2)(b) states “whether or not as a result of mental abnormality”.

<sup>36</sup> For an account of these, see Eric Clive, *The Law of Husband and Wife in Scotland* (4<sup>th</sup> ed, SULI, 1997), paras 21.024 – 21.034; and Jonathan Herring, *Family Law*, 8<sup>th</sup> ed (Pearson, 2017), at 146-148; Trinder *et al*, *Finding Fault?*, 73-76.

<sup>37</sup> Trinder *et al*, *Finding Fault?*, Ch 5 “Finding the floor; what is a ‘Fact’ in practice?”

<sup>38</sup> Trinder *et al*, *Finding Fault?*, 45-47 (para 3.6).

<sup>39</sup> Trinder *et al*, *Finding Fault?*, 79, examples from interviews.

<sup>40</sup> Trinder *et al*, *Finding Fault?*, 119-121 (“Being on the receiving end”).

<sup>41</sup> Trinder *et al*, *Finding Fault?*, 115-116. While accepting that the facts pled in a fault petition were a means to an end, and not inherently “personal” one lawyer stated: “When you’ve got it in black and white in a court document it rings a bit hollow” [ie about it being a process/ means to an end].

#### **(4) Non-cohabitation**

Divorce actions brought on the grounds of non-cohabitation appear at first sight to require far less personal or intrusive evidence: all that is required is evidence that the couple stopped cohabiting on a certain date. This could be evidenced by the date of a new lease in one party's name, for example. Yet cohabitation is not a spatial concept, so it is possible for a couple to no longer be cohabiting, even where they still live under the same roof.<sup>42</sup> For financial reasons, such a situation is often inevitable, at least in the short term. Once again, we can see that there is scope for very invasive and personal information to be used to substantiate the claim, especially when the couple are still sharing a house. In that case, the court will require evidence that they were no longer living together as husband and wife. The everyday minutiae of their lives, from the mundane to the intimate, will become relevant to the court, to establish the date on which they stopped cohabiting.<sup>43</sup> Scrutiny may extend to details of their finances, food shopping, cooking, cleaning, washing, and, of course, sex – or its absence. While presenting evidence in public of a sexual relationship is clearly intrusive, it is contended that evidence of the *lack* of a sexual relationship can be equally intrusive. Given that the norm in society is for a married couple to have marital relations, the public disclosure that sex has been absent from their lives, possibly for an extended period, has the potential to be just as invasive and distressing for them.<sup>44</sup>

#### **(5) Questioning the disclosure of private information in divorce actions**

Two initial concerns can be raised about the merits of requiring this sort of private information to be disclosed, whether to prove adultery, behaviour or non-cohabitation. In the first place, the need to establish the irretrievable breakdown of the marriage through reliance on evidence is arguably somewhat self-defeating. Either the judicial scrutiny establishes that the case is made out, and decree is therefore granted, or that there is insufficient evidence of adultery, behaviour, or non-cohabitation, such that the initial action was unmerited. In the latter case, it is at least arguable that the action of the pursuer in raising the unmerited action

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<sup>42</sup> Divorce (Scotland) Act 1976, section 13(2).

<sup>43</sup> In England and Wales, the case of *Mouncer v Mouncer* [1972] 1 All ER 290 requires the parties to be living strictly separated lives under the same roof – although there is evidence that such rigid separation would not be insisted upon today. See Trinder *et al*, *Finding Fault?*, 48-49.

<sup>44</sup> The parties themselves may be more than happy with this state of affairs: what is being challenged here is the public disclosure of it, in divorce proceedings.

in the first place – and possibly lying to the court – then justifies a new action by the former defender, now pursuer, on behaviour grounds, such that he/she cannot reasonably be expected to continue to cohabit. The judicial examination of the most personal details of the couple's private lives is thus arguably pointless; either the facts are proved and decree granted, or they are not proved, thus giving rise to a second and, almost by definition, valid ground for divorce (should the defender/respondent choose to avail themselves of it).

Further, *Finding Fault?* makes it clear that the reasons stated in the petition need not be an accurate reflection of the reason(s) that the marriage has broken down.<sup>45</sup> Thus, one spouse's adultery might have been the catalyst for the irretrievable breakdown of the marriage, but the divorce petition might be framed in terms of the behaviour of the other spouse.<sup>46</sup> While this practice in England and Wales does allow the parties to keep certain information private if they wish, it does indicate that (i) the literal truth is not important to the state when granting divorces and (ii) the information which is presented is not really relevant: any (truthful) information would suffice, albeit that information will be recorded for all time coming in a court document. Both these points are important when we consider in part D below whether such disclosure is required at all for the purposes of granting a divorce.

These raise important concerns in their own right: the damage done to an already fractured relationship has been long-recognised, caused by “the humiliating accusational procedure [which] increased aversion and bitterness between the spouses and made their intimate life the subject of public scrutiny.”<sup>47</sup> Yet leaving aside the question of whether it is helpful to require such disclosure in any of these situations, and whether it in any way contributes positively to the marital relationship and its termination, we can ask whether such disclosure breaches article 8. This requires an analysis of (i) whether it is private information; and (ii) if so, whether its disclosure is justified.

#### **D. ARTICLE 8: PRIVACY CONSIDERATIONS**

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<sup>45</sup> Trinder *et al*, *Finding Fault?*, 41-42 (para 3.5) regarding “pragmatic approaches” to Fact selection.

<sup>46</sup> Trinder *et al*, *Finding Fault?*, 48, quoting from an interviewee in this position.

<sup>47</sup> M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia* (Intersentia, 2006), p314. Evidence from *Finding Fault?* suggests that making personal allegations of fault against one spouse can be highly counter-productive in terms of the parties' longer-term relationship, not least re child care and finances: Trinder *et al*, *Finding Fault?*, Ch 7 “Fanning the flames: does fault increase conflict?”. There was also evidence of fear of recrimination: 50; 53-54.

Article 8 ECHR, long known to family lawyers for protecting and advancing family relationships in all shapes and sizes, according to function rather than form, has also played a critical role in the sphere of privacy. Since 2000, the English courts have recognised a tort of misuse of private information, arising from the Human Rights Act 1998 and the need to respect article 8 in domestic courts. This requires three elements: whether there is a reasonable expectation of privacy in the information; whether it is disclosed in accordance with law; and whether its disclosure is necessary in a democratic society. Of these, the third element is the one which is of greatest concern here. The first two can be dealt with briefly, as follows.

### **(1) A Reasonable Expectation of Privacy**

Personal information will only benefit from protection under article 8 where there is a reasonable expectation of privacy in relation to it. Relevant factors in determining this are:

1. The nature of the information;<sup>48</sup>
2. The nature of the relationship between the parties;<sup>49</sup>
3. The way in which the information is proposed to be disclosed;<sup>50</sup>
4. Whether any of the information includes photographs – with photographs tending to attract a higher degree of protection than written information;<sup>51</sup>
5. Where the private act took place – even something taking place in public can have an expectation of privacy, in some cases, if the proposed dissemination is far wider than the party would have foreseen;<sup>52</sup>
6. Whether the information is already in the public domain to any extent;<sup>53</sup>
7. Whether the information concerns children, who enjoy a higher expectation of privacy.<sup>54</sup>

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<sup>48</sup> The sensitivity and intimacy of the information are relevant to the balancing process: Helen Fenwick and Gavin Phillipson, *Media Freedom*, at 779.

<sup>49</sup> Of course, there may also be a duty of confidence between the parties, in which case the doctrine of breach of confidence will also come into play, as per *McKennitt v Ash* [2008] QB 73.

<sup>50</sup> Disclosure in the media is likely to attract less protection than disclosure to the courts, for example.

<sup>51</sup> *Campbell v MGN* [2004] UKHL 22.

<sup>52</sup> *Peck v The United Kingdom* (App No 44647/98) 28 January 2003, (2003) 35 EHRR 41; *Von Hannover* (App No 59320) 24 June 2004; (2005) 40 EHRR 1.

<sup>53</sup> *Mosley v News Group Newspapers* [2008] EWHC 687 (QB); cf *Douglas v Hello!* [2007] UKHL 21, and in the High Court [2003] EWHC (Ch) 786.

<sup>54</sup> *Murray v Big Pictures UK Ltd* [2008] EWCA Civ 446.



It is clear that the type of information disclosed in divorce actions is frequently private information, concerning intimate details of the parties' lives, including sexual relationships and physical and mental health. Sexual relations in particular have been the subject of much litigation in this area, and as Nicol J has observed: “[s]exual behaviour in private is part of the core aspects of individual autonomy which Article 8 is intended to protect”.<sup>55</sup> This of course applies to sexual behaviour between married persons and also to extra-marital affairs: this strikes at the heart of much of the evidence required to establish the irretrievable breakdown of marriage. Whether the action or petition is raised based on adultery, behaviour, or non-cohabitation, sex – or the absence of sex – is highly likely to play a part in establishing the breakdown. Given the nature of the evidence, examined above, it seems clear that there will usually be a reasonable expectation of privacy in relation to it, especially where part of the information comprises photographs, or information concerning children.

If one party has chosen to disclose the information more widely, for example through social media, then it may lose the necessary quality of privacy. English cases such as *McKennitt v Ash*<sup>56</sup> have however held that information may still maintain its quality as “private” even if it concerns one of the parties. Thus, there can be a reasonable expectation of privacy even where a party is seeking to disclose information which relates to him/herself, if it also concerns other parties. The classic situation (although not the one in *McKennitt v Ash*), is where the would-be discloser has had an affair with a celebrity, and now wishes to sell the story to a tabloid. Even though the discloser is seeking to telling his/her *own* story in the “kiss and tell”, it can amount to an invasion of the privacy of the other party, as per *Ferdinand v MGN*<sup>57</sup> and indeed third parties, such as spouses or children. It may be thought that there can be no reasonable expectation of privacy in information that one party had an affair, but the High Court has held that this can be protected in some circumstances at least:

there can be no rule of "generality" that an adulterer can *never* obtain an injunction to restrain the publication of matters relating to his adulterous relationship; or, to put it another way, even an adulterous relationship may attract, at least in certain respects, a legitimate expectation of privacy.<sup>58</sup>

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<sup>55</sup> *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

<sup>56</sup> *McKennitt v Ash* [2008] QB 73

<sup>57</sup> *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). See also Gillian Black, “Privacy considered and jurisprudence consolidated: *Ferdinand v MGN Ltd*” (2012) EIPR 64.

<sup>58</sup> *CC v AB* [2006] EWHC 3083 (QB) at 30.

Only where there is some other factor justifying disclosure could information regarding an affair be legitimately published (or potentially disclosed at all) – an example being the need to correct lies or “set the record straight”.<sup>59</sup>

While information can lose the necessary quality of privacy if it is disclosed more widely, nevertheless, individuals can be prevented from disclosing information about themselves, where it would also involve disclosing private information concerning another party. Moreover, the mere fact of adultery will not strip the information of that quality, without more, such as the need to correct lies. Most of the details required to be disclosed to establish one of the bases of irretrievable breakdown are therefore likely to be subject to a reasonable expectation of privacy. Any third parties involved, typically children or a paramour, may well have a reasonable expectation of privacy, even if the other spouse does not.

So, the first element is whether there is a reasonable expectation of privacy, as regards the private information – and it seems likely that information regarding a person’s marriage, health, sexual conduct, and finances would typically constitute information in which there is a reasonable expectation of privacy.

## **(2) In Accordance with Law**

The second element of article 8 requires that any disclosure be made in accordance with law. Where the disclosure is to the state, represented by the courts, in terms of the 1976 Act or the 1973 Act, then it will certainly be in accordance with law.<sup>60</sup>

## **(3) Necessary in a Democratic Society**

Where the debate arises is whether it is *necessary in a democratic society* to legislate for this disclosure. This is where a careful examination of divorce law is required: is disclosure of adultery, behaviour, or non-cohabitation *necessary* for the state to grant a divorce?

There is plenty of evidence from jurisdictions across Europe that divorce can be facilitated without the need for any such inquiry by the state, or any presentation of evidence

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<sup>59</sup> Discussed in the context of drug abuse in *Campbell v MGN* [2004] UKHL 22; and re infidelity in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

<sup>60</sup> Disclosure more widely, for example in the media or on social media, will not be in accordance with the relevant divorce legislation, although may otherwise be in accordance with law, but that is a separate issue.

of the personal lives of spouses.<sup>61</sup> By providing for divorce by mutual consent or divorce on demand, states can remove the need for any enquiry into, or evidence of, the condition of the marriage or the personal and private lives involved.<sup>62</sup> Thus, Spain, Sweden and Finland, for example, have exclusively consent or demand systems, with no opportunity for either spouse to raise fault grounds – as does Ireland, albeit with a prior requirement for an extensive period of four years’ separation.<sup>63</sup> France, Norway and Denmark have systems which are primarily based on consent or demand, but which do recognise fault based grounds in exceptional circumstances, such as attempted murder of the spouse or children, forced marriage, or domestic violence. Germany also relies primarily on consent or demand, following periods of separation (one year with consent or three years without), but with the addition of the right to dissolve the marriage with less than one year’s separation “if the continuation of the marriage would be an unreasonable hardship for the petitioner for reasons that lie in the person of the other spouse.”<sup>64</sup> It is abundantly clear from practice across Europe that, while fault-based grounds may exist, there is no necessary requirement for state-sanctioned disclosure of private information in order to obtain a divorce.

There must therefore be a cogent reason why the state demands such disclosure. On what basis is such disclosure “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”? Only where the disclosure meets this test of “necessary in a democratic society” will it fall outwith the scope of protection under article 8. Of these grounds, the protection of health or morals or of the rights and freedoms of others seem the most likely upon which to justify any invasion of privacy. There may thus be policy arguments in favour of the current divorce law, with its state-mandated disclosure of private information, based on religious or cultural or philosophical beliefs.

One such argument, looking to both the protection of morals and the rights and freedoms of others, is that the existing law is justified in order to uphold the sanctity of

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<sup>61</sup> Country information taken from the Commission on European Family Law reports at <http://ceflonline.net/divorce-maintenance-reports-by-jurisdiction/>; Trinder *et al*, *Finding Fault?*, 152-154; and Masha Antokolskaia, “Divorce law in a European Perspective”, in Jens M Scherpe (Ed) *European Family Law Vol III* (E Elgar, 2016).

<sup>62</sup> Divorce and Maintenance Reports by Jurisdiction, Commission on European Family Law, at <http://ceflonline.net/divorce-maintenance-reports-by-jurisdiction/>.

<sup>63</sup> Family Law (Divorce) Act 1996, section 5.

<sup>64</sup> BGB, Sections 1564-1567.

marriage. This argument is predicated on the idea that maintaining the state-mandated disclosure of private information (and, typically, an element of fault divorce) achieves one or both of two things: (i) it makes divorce harder, which deters people from seeking a divorce, thus promoting marriage: the couple may choose to stay married rather than going through divorce and disclosure; (ii) it emphasises that one person is to blame for the marriage failing, and that person should take responsibility, or be punished, for the divorce.

In the first place, any argument based on protecting the rights and freedoms of the other spouse carries no weight when *both* spouses wish to divorce: in such a case, any obstacles to divorce interfere with the rights and freedoms of both. Secondly, the idea that making divorce harder upholds the sanctity of marriage has been convincingly challenged. Restrictive divorce laws do not save a failed marriage: it has long been recognised that “preventing a divorce was not the same as preventing a marriage from breaking down.”<sup>65</sup> Making the exit route harder may deter some couples from divorcing, but whether such couples thereafter enjoy a meaningful and fulfilling marriage is open to question. Consigning unhappy couples to remain trapped in a loveless marriage hardly seems to uphold the sanctity of marriage, or to respect their health and morals or rights and freedoms.

*Finding Fault?* also demonstrates the fallacy of equating harder divorce with upholding marriage, by showing that the current divorce law has little, if any impact, on promoting marriage: “It is likely that the grounds for divorce may influence the timings of the divorce proceedings, but it would appear to overstate the influence of the law in people’s lives to suggest that the law might influence whether the personal relationship does or does not break down.”<sup>66</sup> The legal mechanism for divorce is highly unlikely to operate to protect the “innocent” spouse from the breakdown of the relationship, however much it might control the legal exit routes from that relationship. Moreover, as also illustrated in *Finding Fault?*, the state in England and Wales at least does not require disclosure of the literal truth of the breakdown. This supports, rather than undermines, the call to move to a system of divorce which does not require intrusive inquiry into the spouses’ personal lives and private information. As Trinder *et al* observe: “if the petition is not a broadly accurate reflection of the reasons for the marriage breakdown, it is open to question what purpose fault is serving and what value the parties or the state accrue from what can be the ritualistic production of

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<sup>65</sup> Jonathan Herring, Rebecca Probert, Stephen Gilmore, *Great Debates in Family Law*, 2<sup>nd</sup> ed (Palgrave, 2015), 195.

<sup>66</sup> Trinder *et al*, *Finding Fault?*, 129, and Ch 9 “Does fault protect the institution of marriage/ deter divorce?”.

particulars.”<sup>67</sup> Although the state supposedly requires this information in order to grant the divorce, the rationale for requiring it is not supported by the practice, which sees a discrepancy between the reasons for the breakdown and the private information disclosed.

The second leg of this argument is also flawed, as it assumes that there will always be one party at fault. Yet in many cases, both parties will typically be partly to blame for the gradual breakdown of the relationship.<sup>68</sup> Moreover, as was shown above, the idea of ascribing blame is no longer reflected in the measures regarding financial provision or child care (contrary to the previous position): we have, deliberately, moved away from such a counter-productive approach. And of course, even if current divorce laws do attempt to “punish” one spouse, in part by requiring the disclosure of their faults and/or their private information in court, the foregoing analysis has demonstrated that in most cases, the innocent spouse will also be required to disclose highly personal information about themselves or children of the marriage – thereby punishing both spouses.

A further argument could be that the rights and freedoms of children of the marriage require a strict divorce law: would a divorce law that is too “easy” interfere with the family lives of children? There are a number of responses to this – not least to recognise that such an argument only holds where there are children of the marriage. Moreover, seeking to protect the rights and freedoms of the child to a family life has to be balanced against the rights and freedoms of the adults to exit a failed relationship. We should also question whether it is better for a child to be caught in the acrimony of their parents’ unhappy marriage or bitter divorce. In introducing the proposals for a reformed divorce law in England and Wales, the Justice Secretary specifically referred to the damage the current law can inflict on children: “Hostility and conflict between parents leave their mark on children and can damage their life chances. While we will always uphold the institution of marriage, it cannot be right that our outdated law creates or increases conflict between divorcing couples.”<sup>69</sup>

Could religion provide a basis for upholding the current law, under article 9 ECHR, which provides for the right to freedom of thought, conscience and religion? Again, the lack of any one accepted or protected religion makes it harder to uphold individual beliefs predicated on different religions. The ECtHR has demonstrated its willingness to protect

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<sup>67</sup> Trinder *et al*, *Finding Fault?*, 54.

<sup>68</sup> See the comment from Gaby Hinsliff, “It won’t undermine marriage to make divorce easier. It’s simple humanity.” *The Guardian*, 9 April 2019.

<sup>69</sup> <https://www.gov.uk/government/news/new-divorce-law-to-end-the-blame-game> (accessed 9 April 2019). Aidan Jones, Chief Executive at Relate, echoed these concerns in the same press release.

spouses in the face of specific religious beliefs where necessary, as for example in relation to the Jewish get, without which a Jewish woman cannot remarry.<sup>70</sup> Critically, while some religions may be opposed to divorce in principle, that is not the question at issue here: given that the UK does permit divorce, it is not clear what religious belief would require disclosure of private information to lie at the heart of divorce law. Accordingly, state-sanctioned disclosure is unlikely to be protected on religious grounds, even if the wider issue of access to divorce is challenged.

Arguably, the debate as to whether our current divorce law can be justified as necessary in a democratic society or on religious grounds, has largely been answered by the Government's April 2019 announcement of plans to introduce no fault divorce in England and Wales. The new process outlined in the press release emphasises the scope for a consensual approach by allowing for a joint application and also includes the removal of any right to oppose a divorce petition.<sup>71</sup> The need for divorce law in the UK to apportion blame or find fault and, with it, to disclose highly personal information, has been squarely overcome by this announcement.

On all these grounds, therefore, it is clear that the disclosure of private information in order to obtain a divorce cannot be justified by reference to health or morals, or the rights and freedoms of the other spouse. Divorce can be facilitated without the need for such invasive requirements, and there is no justification for the ongoing statutory invasion of privacy: it is not necessary in a democratic society. This is particularly the case when the importance of the individual's legal status is taken into account.

#### **(4) Change of Status: Form not Function**

The purpose of divorce is to enable both parties to change their legal status from married to single. Likewise, the purpose of marriage is to change status from single to married. This change of status is fundamental in a number of contexts: immigration; succession; tax; and, of course, the right to re-marry. Moreover, it is fundamental in and of itself: should a person be entitled to a legal status which reflects their true self? By putting an obstacle (the

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<sup>70</sup> *D v France*, Application No. 10180/82. Similar protection is now found in the Divorce (Scotland) Act 1976, section 3A.

<sup>71</sup> <https://www.gov.uk/government/news/new-divorce-law-to-end-the-blame-game> (accessed 9 April 2019).

requirement to disclose personal and intimate information) in the way of this change of status the state is obstructing the fundamental right of individuals to change their status. More accurately, since denying divorce does not necessarily save the marriage,<sup>72</sup> any obstructions are in fact forcing individuals to live with a misleading and inaccurate status, of being married while not being in a functioning marriage. The consequences of living with a false status are serious and wide-ranging, extending from the very practical financial harms that can result if a (long-separated) spouse is nonetheless entitled to claim in succession, to the core principles of personal identity, autonomy and truth.

Marital status is a matter of form, not function: once a couple goes through a marriage ceremony and sign the register, they are legally married, regardless of whether they function as a married couple thereafter.<sup>73</sup> There is no minimum standard of conduct or “function” which is required either to become married or to maintain the marriage thereafter.<sup>74</sup> Likewise, divorce hinges entirely on satisfying the formal requirements of the statutory test of irretrievable breakdown of the marriage: it cannot be achieved by demonstrating a lack of functionality.<sup>75</sup> Since marriage and divorce – and therefore legal status – turn on form, the form taken to acquire or lose that status is critical. The law should not unnecessarily hinder individuals from changing their status. Yet current divorce law presents couples with an invidious choice: living with an inaccurate status, and all the legal and social consequences that flow therefrom, *or* securing the correct status through the state-mandated disclosure of intimate and (possibly deeply upsetting) personal information.

Thus, the need to respect and facilitate the correct legal status for the individual, coupled with the lack of a compelling argument to require disclosure to uphold the rights and freedoms of their spouse, combine to suggest that the current framing of divorce law is not necessary in a democratic society. Can any other defences be advanced to protect the current statutory regimes?

## **(5) The margin of appreciation**

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<sup>72</sup> Jonathan Herring, Rebecca Probert, Stephen Gilmore, *Great Debates in Family Law*, 2<sup>nd</sup> ed (Palgrave, 2015), 195; Trinder *et al*, *Finding Fault?*, 96.

<sup>73</sup> See the comments on the nature of marriage by Sir James Munby in *In the matter of X (A Child)* [2018] EWFC 15, paras 6-8.

<sup>74</sup> For example, non-consummation through wilful refusal is not (and never has been) a ground for rendering a marriage void or voidable: *consensus non concubitus facit matrimonium*. There is no minimum component of marriage.

<sup>75</sup> As markedly demonstrated in *Owens v Owens* [2018] UKSC 41.

Every state has the benefit of a margin of appreciation – a “space for manoeuvre”<sup>76</sup> – when fulfilling its ECHR obligations. This reflects the fact that the ECHR is seen as the lowest common denominator.<sup>77</sup> The extent of the margin is typically influenced by trends and majority views across Europe and, typically, convergence between states comes over time: the increasing acceptance of same sex marriage across Europe over the last two decades being a good example. Would the margin of appreciation justify a privacy-infringing divorce law in Scotland or England and Wales? In interpreting article 8, it is important to recognise that a distinct right to divorce is not a right protected by the ECHR.<sup>78</sup> Any right to divorce is therefore a matter for the individual state. Nonetheless, as with any provision, the right should be upheld by the state in accordance with the Convention principles. Thus, where divorce is recognised, it should be facilitated by the state in accordance with the ECHR, including the right to private life. Moreover, the decision of the ECtHR in *Johnston v Ireland*, which determined there was no Convention right to divorce in terms of article 8 or article 12, is now over 30 years old. There is no guarantee that the ECtHR would reach the same conclusion today, particularly in light of changing social norms throughout the Council of Europe states, whereby all states now recognise a right to divorce (which was emphatically not the case when *Johnston v Ireland* was decided).<sup>79</sup>

This greater cohesion across Europe also addresses the potential defence for the state by pointing to its margin of appreciation. With more European states – including our nearest neighbours in England and Wales – moving towards divorce by consent or on demand, then the margin for maintaining intrusive notions of blame and fault will continue to shrink. Accordingly, the right to end a marriage in as constructive and non-invasive a manner as possible may in future be seen as part of the article 8 canon of rights to respect for private and family life.

## **(6) The Privacy of Third Parties**

A final argument to demonstrate why existing divorce law is not article 8 compliant can be found in the potential for collateral damage. Current law may, in some cases, require

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<sup>76</sup> Council of Europe, “The margin of appreciation” published online at [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

<sup>77</sup> Council of Europe, “The margin of appreciation” published online at [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

<sup>78</sup> *Johnston v Ireland* (1986) 9 EHRR 203.

<sup>80</sup> *Campbell v MGN* [2004] UKHL 22; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).



disclosure of personal information in relation to third parties: children, a paramour, or other individuals caught up in the breakdown of the marriage. Where these parties have a reasonable expectation of privacy, the infringement of their privacy in a divorce action cannot be justified by pointing to the legal end achieved, since there is no change in status for them as a result of the divorce.

### **(7) Article 10 – Freedom of expression**

It is of course a defence to an invasion of privacy to demonstrate that the person disclosing is exercising his/her right to freedom of expression. Yet this again is defeated by the fact that disclosure to the state, to obtain a divorce, can be achieved without such disclosure: there is no need for the parties to “express” themselves in this way. If there is an alternative, non-infringing, way to achieve the same end, then it is suggested that there can be no claim in freedom of expression *at least for the purposes of the litigation in hand, or the exercise of legal rights*. There may of course be a separate right under article 10 to proclaim the infidelity from the roof tops, or to broadcast the behaviour and the impossibility of living with the spouse on social media, for example – typically to correct a lie.<sup>80</sup> But for the purposes of divorce, it is difficult to see that requiring spouses to disclose intimate and private information *to the state* in order to obtain a divorce is in fact justified on the grounds of enabling them to exercise their article 10 right to freedom of expression.

### **(8) Article 8: Conclusion**

My primary argument therefore is this: where the law could achieve the aim of granting divorce in another way, which does not infringe privacy, then it would need a cogent justification for continuing to pursue that aim in a non-compliant manner. Why should parties be required to disclose highly personal information – in breach of article 8 privacy rights – to secure a divorce? This section has demonstrated that there is no clear basis on which the invasion of privacy that occurs in every divorce action is justified as being “necessary in a democratic society”, nor can it be justified on grounds of freedom of expression. As other jurisdictions have shown, divorce can be achieved without the need to place before the state evidence of adultery, behaviour or non-cohabitation. And although the right to divorce is not in itself a recognised Convention right, divorce is inherently tied to state recognition of the spouses’ legal status. Failure to facilitate divorce leads to individuals being confined to their

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<sup>80</sup> *Campbell v MGN* [2004] UKHL 22; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

married status, and all that that entails, despite this no longer reflecting the truth of their lives. The invasion is compounded in cases which involve disclosure concerning third parties. Current divorce law in Scotland thus breaches individuals' rights to privacy in terms of article 8.

### E. PROPOSED LAW REFORM

While the parties, solicitors and judiciary can take steps to minimise the invasion of privacy under current law, by limiting the details disclosed, the only rigorous solution is statutory reform. What should such a reformed law look like? The most critical aspect would be to introduce a model which moves away from the need to establish any “irretrievable breakdown” of the marriage, with its consequent need for invasive evidence, and instead focus on respecting the wishes of the parties themselves.<sup>81</sup> While the courts would still be involved, the process and outcome would be primarily administrative in nature, with no scope or need for the judge to hear evidence to establish any breakdown of the marriage.

Divorce laws which meet these criteria can be found in other jurisdictions, from the Commission on European Family Law Principles, and from the *Finding Fault?* report. After surveying the divorce provisions in 22 European jurisdictions, CEFL produced a model divorce law.<sup>82</sup> This proposed two routes to divorce: mutual consent, and divorce without consent.<sup>83</sup> Where both spouses consent, no period of separation would be required, but a period of reflection would be mandatory where there are children under 16,<sup>84</sup> or where the parties have not reached agreement on all consequences of the divorce.<sup>85</sup> However, these periods of reflection would not apply where the parties have already been separated for 6 months.<sup>86</sup> In cases where there is not mutual consent to the divorce, then a divorce shall be

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<sup>81</sup> The new English proposals appear to intend to keep “irretrievable breakdown” as the basis for divorce: <https://www.gov.uk/government/news/new-divorce-law-to-end-the-blame-game> (accessed 9 April 2019) How it will work in practice remains to be seen.

<sup>82</sup> <http://ceflonline.net/wp-content/uploads/Principles-English.pdf>.

<sup>83</sup> In either case, no minimum period of marriage is required: Principle 1:1(2).

<sup>84</sup> Where there are children under 16, there must be a period of reflection of 3 months where the parties have agreed all the consequences of the divorce; or 6 months if they have not reached such agreement: Principle 1:5(1).

<sup>85</sup> Principle 1:5(2).

<sup>86</sup> Principle 1:5(3).

granted where the parties have been separated for a year.<sup>87</sup> There is scope for one party to petition for a divorce before then “in cases of exceptional hardship”.<sup>88</sup>

This is similar to the approach in Sweden, which introduced a straightforward no fault divorce procedure in 1973.<sup>89</sup> Spouses can now seek in immediate divorce if they both agree to the divorce and do not have children under 16. In other cases – where there are children under 16, where one party does not agree, or where either party requests it – there will be a reconsideration period of 6 months, after which the divorce will be granted.<sup>90</sup> If the parties have lived apart for at least two years, they can seek an immediate divorce.<sup>91</sup>

No fault divorce based on a notification process was also the final option canvassed in *Finding Fault?*. Although the authors do not advance a detailed proposal of the shape of such a model, the evidence from their empirical research supports a no fault regime, with some element of a cooling off period of between 6 and 12 months.<sup>92</sup>

A two-step process has much to offer, by introducing a clear administrative procedure, and including a break period between the application and the award. A revised procedure in Scotland could therefore provide for one spouse to lodge a Notice of Intention to Divorce (NID). After a specified period (whether termed a cooling off period, or reflection period, or similar), the spouse could then apply for a decree of divorce, with reference to the earlier NID. In that period, the parties would remain married, and the person who lodged the NID could withdraw it, if so wished. However, if the spouse who lodged the NID did proceed to apply for a decree, there would be no judicial power to refuse decree, to request any evidence, or to scrutinise the reasons for seeking divorce. The key point is that, both at the point of lodging the NID and subsequently applying for decree of divorce, the spouse should be able to “demand” it. There should be no need to prove that the marriage has irretrievably broken down, or to establish that one party was at fault – and no need for any judicial enquiry or evidence of any conduct.

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<sup>87</sup> Principle 1:8.

<sup>88</sup> Principle 1:9.

<sup>89</sup> Maarit Jantera-Jareborg, “Grounds for Divorce and Maintenance between Former Spouses in Sweden”, CEFL Country Report (2002) available at: <http://ceflonline.net/wp-content/uploads/Sweden-Divorce.pdf>, at 3.

<sup>90</sup> Marriage Code of 1987, Chapter 5, sections 1 and 2; Maarit Jantera-Jareborg, “Grounds for Divorce and Maintenance between Former Spouses in Sweden”, CEFL Country Report (2002) available at: <http://ceflonline.net/wp-content/uploads/Sweden-Divorce.pdf>, at 4.

<sup>91</sup> Marriage Code of 1987, Chapter 5, section 4; Maarit Jantera-Jareborg, “Grounds for Divorce and Maintenance between Former Spouses in Sweden”, CEFL Country Report (2002) available at: <http://ceflonline.net/wp-content/uploads/Sweden-Divorce.pdf>, at 4.

<sup>92</sup> Trinder *et al*, *Finding Fault?*, para 12.5 and table 12.3.

In view of the need to ensure both parties have adequate time to address financial provision (especially in the absence of meaningful welfare state provision), and to protect either party from being bullied into the divorce with undue haste, it is proposed that the period between the NID and the application should be 12 months. This deliberately rejects the shorter time frames for divorce on demand seen in Sweden and proposed by the CEFL project. As reflected in experience in Scotland, and particularly the heavy use of the one and two years' non-cohabitation grounds, rushing through divorce in less than a year seems to neglect the need for spouses to take time to consider their financial position, and does not reflect the reality of this process of negotiation, in Scotland at least.

Such a system would also need to provide for a long-stop date. This would mean that the holder of the NID would need to apply for decree of divorce before a certain deadline, otherwise the NID would lapse. This would ensure that pragmatic spouses could not lodge a NID simply to hold in readiness against a far-off day when they may well wish to seek a divorce at short notice.

One consequence of an administrative process, which has a built-in minimum period of one year before the decree could be granted, is that there would be no possibility of ending a marriage in a shorter period. This may be of particular concern in cases of domestic abuse or any other criminal conduct by one spouse. Thus, in introducing a no-fault divorce procedure, to facilitate divorce which respects the spouses' article 8 rights, very serious consideration would need to be given to the need to protect spouses from harm. An additional legal procedure may be appropriate to allow the court to grant a divorce in cases of domestic abuse or upon the conviction of one spouse for a criminal offence. While the precise scope of a reformed divorce law remains to be determined, based on consultation and debate, it remains clear that it is possible to form a system which facilitates divorce without breaching the article 8 rights of the spouses or any other connected parties.

## F. CONCLUSION

[M]ost countries in Europe are still reluctant to recognise a simple, autonomous decision by spouses to end their marriage as a sufficient ground for divorce. In one way or another, the state continues to seek to protect spouses from their own 'ill-considered' decisions.<sup>93</sup>

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<sup>93</sup> Masha Antokolskaia, "Divorce law in a European Perspective", in Jens M Scherpe (Ed) *European Family Law Vol III* (E Elgar 2016), at 71.

While arguments in favour of divorce on demand or no fault divorce can be made at length, and compellingly,<sup>94</sup> this article has sought to show that current divorce law is in urgent need of reform for a different reason: it breaches the spouses' article 8 right to privacy. The current statutory requirement of demonstrating irretrievable breakdown threatens spouses' autonomy and dignity, by requiring them to choose between disclosing deeply personal and privacy information in court, or retaining a status which does not reflect the truth of their lives. There can be no justification for this ongoing state-mandated invasion of privacy when the outcome can be achieved through non-infringing means. As other European jurisdictions show, an administrative divorce based on the simple request of one party, with some cooling off period, can allow spouses to exit an unhappy marriage with the minimum acrimony and conflict, while still protecting their wider interests. It is to be hoped that law reform can ensure that Scotland meets its obligations under the ECHR and, in doing so, respects the privacy and autonomy of its citizens.

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<sup>94</sup> Trinder *et al*, *Finding Fault?*.