

The right to 'unlove': The constitutional case for no-fault divorce in Uganda

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Summary: *This article examines the constitutionality of the requirement to establish certain grounds – adultery, cruelty, desertion, bigamy and others – as a condition for the grant of divorce in Uganda. It begins with an examination of the existing legal framework, including reforms already achieved through public interest litigation, and certain changes sought to be effected via judicial activism. The article then proceeds to an analysis of the human rights issues implicated by a fault-based framework, and a consideration as to whether the public interest-based limitations in this regard pass constitutional muster. Ultimately, it is proposed that the only means of aligning this area of domestic relations law with the Constitution is through the elimination of fault as a requirement for dissolving marital bonds. Such reform would also be consistent with critical public policy concerns, including the welfare of children and the sanctity of marriage itself.*

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Key words: *no-fault divorce; right to unlove; constitutionality; legislative reform; judicial activism; law and society*

1 Introduction

(M)aybe we too busy being flowers or fairies or strawberries instead of something honest and worthy of respect ... you know ... like being people.

Toni Cade Bambara, *Raymond's run*

Love is a beautiful thing. In its purest form, it brings out the best in us and smoothens our rougher edges. Its importance in human relations is self-evident. If this needed any demonstration, it would be found in the sheer volume of artistic and other work dedicated to the exploration of love's various forms and expressions.

Yet, it seems that this powerful emotion finds scant attention in legal imagination. The 1995 Constitution of Uganda, for instance, does not even mention it once,¹ and one would be hard-pressed to locate serious legal work dealing with the subject.² In this neglected landscape, therefore, the articulation by Oloka-Onyango of a 'right to love' is a most welcome exception. As he rightly notes:³

While the 'right' to love appears in no known legal document – national, regional or global – there is no doubt that it is a universal human sentiment. If one was to perform a dissection of the right to love, it would be found implicit in several human rights principles – freedom of association and expression, the right to health, the right to privacy and especially in the right to human dignity. Despite the absence of the right in a normative form, it is a central feature of human existence, especially within the context of sexual expression. To deny its existence is to deny the very essence of our humanity.

To the 'building blocks' of the right to love identified by Oloka-Onyango, we would add another: the right to marry and to found a family. While love need not culminate in marriage, and while,

1 The 1995 Constitution of Uganda acknowledges, in art 45, that the enumeration of rights under ch four (the Bill of Rights) is not exhaustive. This critical provision logically follows from the recognition, under art 20(1) of the same document, that human rights are inherent and not granted by the state.

2 The law, in the main, seems to be drawn towards addressing or solving 'big' and 'public' questions: war, peace, security and others. However, as Herring has intimated, this comes at the cost of attention to some of the more critical aspects of human existence: love, death, bereavement and others. In describing his own work, he identifies a 'focus on how the law interacts with the important things in life: not money, companies or insurance; but love, friendship and intimacy' – see <https://www.law.ox.ac.uk/people/jonathan-herring> (accessed 25 June 2021).

3 J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 29.

indeed, several great loves historically chose not to commit formally in that regard, for many, marriage indeed is an expression of love and affection. At the same time, we would suggest that just as the right to love is inextricably linked to the fact of being human, the right to ‘unlove’ is similarly tightly woven into the tapestry of the human experience.

This article seeks to outline the contours of the right to ‘unlove’ in the context of the legal framework for undoing matrimonial bonds. It starts with an analysis of current Ugandan law relating to divorce, before continuing on to a consideration of the constitutionality of the predominantly fault-based legal regime. Ultimately, the article contends that the recognition of the right to ‘unlove’ – as manifested through providing for a ‘no-fault’ divorce regime – is the only means by which the legal framework for divorce in Uganda can be made consistent with the letter and spirit of the 1995 Constitution.

2 The largely fault-based Ugandan divorce regime

There are five kinds of marriage that can be contracted in Uganda, namely, (i) civil; (ii) Christian; (iii) Hindu; (iv) customary; and (v) Islamic. The divorce regime under the first three and, to an extent, the fourth, is mainly governed by the Divorce Act,⁴ while Islamic divorce is largely informed by the tenets of Shari’a law. In this part I briefly outline the grounds for divorce under each of these marriages.

2.1 Civil, Christian and Hindu marriage

Section 4 of the Divorce Act originally provided that a husband could petition for divorce on the single ground of adultery.⁵ A wife, however, had to couple adultery with another ground such as incest; bigamy; ‘marriage with another woman’; rape, ‘sodomy’ or bestiality; cruelty; and desertion ‘without reasonable excuse’ for two years or more.⁶ A wife could also obtain a divorce where the husband had changed religion from Christianity to another, or where he had ‘gone through a form of marriage with another woman’.⁷

4 Ch 249 Laws of Uganda. This Act was first enacted in 1904 under British colonial rule.

5 Sec 4(1) Divorce Act.

6 Sec 4(2) Divorce Act.

7 As above.

These provisions were successfully challenged in *Uganda Association of women Lawyers (FIDA) & 5 Others v Attorney-General*,⁸ the Constitutional Court finding the provisions to constitute sex-based discrimination, contrary to article 21 of the Constitution.⁹ Some confusion followed the *FIDA* case, that is to say, whether both parties were now required to couple adultery with a second ground, or whether adultery on its own would suffice for either party. In the end, case law appears to have settled on the position that either spouse is entitled to invoke any one ground under section 4 for the purposes of a divorce petition.¹⁰ These grounds must be established to a relatively high standard,¹¹ and the Court must also satisfy itself that there has been no connivance, collusion or condonation (the so-called 3 Cs).¹²

8 Constitutional Petition 2 of 2003.

9 Incidentally, this position had already received judicial disapprobation by the time the *FIDA* case was filed. In *Annette Nakalema Kironde v Apollo Kaddu Mukasa Kironde & Another* Divorce Cause 6 of 2001, eg, Rwamisazi-Kagaba J had noted that secs 5 and 6 of the Divorce Act were inconsistent with arts 2(1) and (2), 31(1), 33(1)(4) and (6) of the Constitution, in so far as they created 'different sets of rights, opportunities and treatment for men and women to the same institution of marriage'; and that the provision, under sec 23 of the Divorce Act, for payment of damages for adultery to a husband by a co-respondent was archaic, discriminatory and inconsistent with the Constitution. Similarly, in *Thakkar v Thakkar* (Divorce Cause 3 of 2002), Kibuuka-Musoke J, citing *Nakalema Kironde*, found sec 5 of the Divorce Act to be inconsistent with arts 21, 31(1) and 33 of the Constitution, and observed that it had to be read with necessary modification, as required by art 273 of the Constitution.

10 See, eg, *Dr Specioza Wandira Naigaga Kazibwe v Eng Charles Nsubuga Kazibwe* Divorce Cause 3 of 2003; *Sarah Kiyemba v Robert Batte* Divorce Cause 127 of 2018 and *Namuyimbwa Proscovia v David Ralph Pace* Divorce Cause 14 of 2017.

11 Eg, in *Habyarimana v Habyarimana* Divorce Cause 1 of 1974, HCB [1980] 139 Odoki J (as he then was) noted that an allegation of adultery had to be proved to the satisfaction of the court, which required proof 'beyond reasonable doubt', especially given that adultery was also a criminal offence. However, since this *dictum* the criminal offence of adultery has been declared unconstitutional, in *Law and Advocacy for Women in Uganda v Attorney-General* Constitutional Petitions 13 of 2005 and 5 of 2006. According to Nassali, this development means that adultery should now be established on a 'balance of probabilities' standard rather than on the basis of proof 'to the satisfaction of the court'. See M Nassali 'Unfaithful love: A critical analysis of adultery and divorce law in Uganda' in M Nassali (ed) *The politics of putting asunder: The family, law and divorce in Uganda* (2017) 82. Nonetheless, where certain grounds for divorce are admitted, no additional proof appears to be required – *Lub v Lub* Divorce Cause 47 of 1997; *Musisi v Musisi* Divorce Cause 14 of 2007; *Kazibwe v Kazibwe* Divorce Cause 3 of 2003; and *Doreen Kirungi v Ronald Mugabe* Divorce Cause 48 of 2013.

12 Secs 6 and 7 Divorce Act. Under sec 9 adultery may not be deemed to have been condoned unless 'conjugal cohabitation' has been continued or subsequently resumed. In practice, however, courts do not appear to seriously enquire into the 3 Cs. In *Annette Nakalema Kironde v Apollo Kaddu Mukasa Kironde & Another* Divorce Cause 6 of 2001, eg, notwithstanding the admissions of adultery by both the petitioner and respondent, Rwamisazi-Kagaba J found, in a brief and perfunctory paragraph, that none of the 3 Cs were present. Similarly, in *Susan Annet Kayegi v Innocent Martin Wadamba* Divorce Cause 19 of 2010, despite remarking upon various agreements reached by the parties regarding both the divorce and related matters as to custody and maintenance of the children, Kainamura J felt that, from the evidence on record, there had been no connivance, collusion or condonation.

Under section 8(1) of the Hindu Marriage and Divorce Act,¹³ subject to that section, the Divorce Act is applicable to Hindu marriages.¹⁴

2.2 Islamic marriage

Under section 2 of the Marriage and Divorce of Mohammedans Act (MDMA),¹⁵ all divorces from marriages between Muslims, which are given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the divorce takes place, shall be valid and registered as provided in that Act.¹⁶

There are four main types of divorce under Islamic law, namely, (i) divorce at the instance of the husband (*Talaq*); (ii) divorce by the consent of the spouses (*Khula*); (iii) divorce by judicial order at the instance of either spouse (*Fask*); and (iv) divorce through oath (*Lian*).¹⁷ Of these, the *Talaq* and *Khula* divorces are essentially based on the no-fault principle.¹⁸

In terms of section 18 of the MDMA, nothing in the Divorce Act shall authorise the grant of any relief under that Act where the

¹³ Cap 250, Laws of Uganda.

¹⁴ Under sec 8(2) of the Act, in addition to the grounds for divorce mentioned in the Divorce Act, a petition for divorce may be presented by either party to the marriage on the ground that the respondent has ceased to be a Hindu by reason of conversion to another religion; or that they have 'renounced the world by entering a religious order and [have] remained in that order apart from the world for at least three years immediately preceding the presentation of the petition'. A wife may also present a divorce, in the case of a marriage contracted before the commencement of the Act, on the ground that the husband was already married at the time of the marriage; or that he married again before the commencement of the Act, the other wife in either case being alive at the time the petition is presented.

¹⁵ Cap 252, Laws of Uganda. As Sewaya has noted, the term 'Mohammedan' is 'now obsolete' – M Sewaya 'State of Muslim family justice: A critical examination of the law governing Muslim marriages and divorce in Uganda' in Nassali (n 11) 288.

¹⁶ Islamic law in Uganda generally follows the *Sunni* rather than the *Shia* school. Of the four orthodox schools under the *Sunni* group – *Malik*, *Hanbali*, *Hanafi* and *Shafi* – the Ugandan Muslim community largely adopts the tenets of the *Shafi* school; Sewaya (n 15) 292-293.

¹⁷ Sewaya (n 15) 316.

¹⁸ See *The King v The Superintendent Registrar of Marriages, Hammersmith (Ex Parte Mir-ariwaruda)* (1917) 1 KB 634 636 ('Under Mohammedan law, a Mohammedan ... can dissolve any of his marriages by a mere declaration of his will and pleasure, to that effect. This declaration is called "Talaq" ... [I]t may be made verbally and in the absence of the wife and without any reason being assigned. It does not require the intervention of a court of law, it takes effect from the moment of pronouncement') and *Salum v Asuman* (1969) EA 255 257 (Seaton J observing that 'from the authorities of Mohammedan law the Khula divorce is obtainable at the initiation of the wife. It is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital obligations').

marriage of the parties has been declared valid under the MDMA; but nothing in that section shall prevent any competent court from granting relief under Mohammedan law, and the High Court and any court to which jurisdiction is specially given by the minister by statutory instrument shall have jurisdiction for granting that relief.¹⁹

2.3 Customary marriage

The Customary Marriage (Registration) Act²⁰ is silent both as to the applicability of the Divorce Act to such marriages, and with respect to the broader question as to how divorce under customary law may be effected.²¹

Nonetheless, the formal courts have jurisdiction to dissolve customary marriages²² and it appears that, in this regard, the parties are entitled to invoke any of the grounds under the Divorce Act. In addition, the parties may rely upon any other grounds applicable under the relevant custom.²³

3 Tentative movements from a fault-based regime

It is clear from the preceding part that, with the limited exception of the *Talaq* and *Khula* divorces under Islamic law, the Ugandan divorce regime predominantly is fault-based. However, an analysis of case law reveals that there are some windows for obtaining no-fault divorces, based on certain judicial interpretations of the current legal framework.

19 The Constitution envisaged, under art 129(1)(d), that Parliament would establish Qadhis' courts to handle, among others, Islamic divorce. Unfortunately, this provision is yet to be implemented, more than 25 years since the promulgation of the Constitution. The above position notwithstanding, in *Sumaya Nabawanuka v Med Makumbi* Divorce Cause 39 of 2011 Kainamura J noted that while the Qadhis' courts had not yet been established, Shari'a courts such as that of the Uganda Muslim Supreme Council, were not extra-legal, given the provisions of sec 2 of the MDMA, and were competent to handle divorce cases. He also found the instant petition to be incompetent, under sec 18 of the MDMA, in so far as it sought relief under the Divorce Act even though the marriage in question had been conducted in accordance with Islamic law. See also *Jamila Kinawa & Another v Asuman Bakali* (Miscellaneous Application 427 of 2014), in which Luswata J granted an order allowing the execution of the judgment and orders of a Shari'a court at Iganga, finding, arguably *per incuriam*, that a Shari'a court was 'one recognised under Article 129(1)(d) of the Constitution'.

20 Cap 248, Laws of Uganda.

21 Nassali (n 11) 63.

22 See *Dr Josephine Nakakande v Joseph Balikuddembe* Divorce Cause 60 of 2017 per Tuhaise J, citing *Aiiya v Aiiya* Divorce Cause 8/1973 and *Negulu Milly Eva v Dr Seruga Solomon* Civil Appeal 103/2013.

23 In *Josephine Nakakande*, eg, Tuhaise J noted that 'the dissolution of a customary marriage is negotiable in accordance with the customs and rites observed among the ethnic group of one of both parties to the marriage'.

The possibility of a judicial route to a no-fault divorce seems to have first been raised in the 2004 appellate case of *Mbabazi v Bazira*.²⁴ In those proceedings counsel faulted the trial judge for having failed to find that the requirement for fault-based divorce was unconstitutional. She argued that where two adults had entered into a marriage union by free will, they ought also by free will to be able to dissolve the same without requiring proof of guilt of either party. Although the Court of Appeal noted that this was ‘probably ... a valid argument which could be properly referred to the Constitutional Court’, no such reference was made on that occasion.

3.1 Emergence of ‘irretrievable breakdown’ as a basis for divorce

Since *Mbabazi*, however, some judges have innovated the ‘irretrievable breakdown’ of marriage principle as a basis for divorce, premised on a particular interpretation of the implications of the *FIDA* case. In *Julius Chama v Specioza Rwalinda Mbabazi*,²⁵ for instance, Kainamura J noted that following *FIDA*, where several provisions of the Divorce Act had been nullified, and in view of the failure of legislative intervention following that case, a gap in the law was evident. To bridge this gap, courts had opted to ‘look at the totality of the facts’ before them in each case and to ‘determine whether the facts [led] to the finding that the marriage [had] irretrievably broken down’.²⁶

At the same time, it appears that this basis for divorce still requires the establishment of some fault on the part of either party – although not strictly confined to the traditional grounds envisaged under the Divorce Act. In *Julius Rwabinumi v Hope Bahimbisomwe*,²⁷ for example, Twinomujuni J observed that marriage was taken as having irretrievably broken down when the conduct of a party to the marriage toward the other made it intolerable for the parties to live together. He noted that from an observation of the two parties in that case, the two could ‘hardly reconcile’, each one’s feelings towards the other being ‘antagonistic and deep rooted’. This seems

24 Civil Appeal 44 of 2004.

25 Divorce Cause 25 of 2011.

26 Citing *Gershom Masiko v Florence Masiko* Civil Appeal 8 of 2011. Similarly, in *Joweria Namukasa v Livingstone Kakondere* Divorce Cause 30 of 2010 Eva Luswata J observed that absent legislative reform following the *FIDA* case, the practice of courts had been to adopt either the view that all grounds were equally available to spouses who sought divorce, or that the provisions of sec 4 had been expunged altogether. In support of this view, she also cited *Gershom Masiko v Florence Masiko*.

27 Civil Appeal Divorce Cause 30 of 2007.

to suggest a requirement for blameworthy conduct on the part of at least one of the parties to the marriage.

Similarly, in *Susan Annet Kayegi v Innocent Martin Wadamba*²⁸ Kainamura J observed that one of the agreed facts was that the union was 'strained and had irretrievably broken down' and that 'both parties wanted the marriage dissolved'. However, he also noted that the Court '[did] not have to look far to satisfy itself on this matter' since the petitioner admitted to having a four months-old baby who was 'clearly not an issue of the marriage'. According to the judge, this meant that both parties had chosen to move on, and he thus was convinced that the marriage had 'irretrievably broken down' and had to be dissolved.

A slight variation in this regard is presented by *Anne Musisi v Herbert Musisi and Another*.²⁹ In this case the fact of adultery had been admitted by both the respondent and the co-respondent. Mwangusya J (as he then was) noted that while this ground was 'sufficient for dissolution of the marriage' in terms of section 4 of the Divorce Act, the parties were also 'agreed that their marriage had irretrievably broken down because of the long separation and the fact that all attempts to reconcile them had failed'. In consideration of these 'two factors', the judge proceeded to dissolve the marriage. It appears that Mwangusya J viewed 'irretrievable breakdown' as not necessarily requiring fault, but rather being premised on the actual prospects for meaningful reconciliation. However, this seems to be a minority – even if persuasive – judicial interpretation of the concept.

3.2 Judicially-sanctioned divorce-by-consent

In addition to the rather nebulous 'irretrievable breakdown' principle as a foundation for dissolution, there are instances where judges have granted divorce based on no other reason than the *consent* of the parties to the marriages. In *Jane Basheija v Geoffrey Basheija & Another*,³⁰ for instance, Kainamura J noted that 'instead of pursuing a lengthy litigation' the parties had reached a 'partial consent' upon which basis the court had entered a decree *nisi* dissolving the marriage. Under the terms of the consent, the sharing of property was to be determined by Court, which necessitated the present proceedings.

28 Divorce Cause 19 of 2010.

29 Divorce Cause 14 of 2007.

30 Divorce Cause 12 of 2005.

Similarly, in *Chris Bakiza v Esther Nafuna*³¹ Tuhaise J noted that the marriage had been dissolved in a ‘consent judgment’, in which the parties agreed to place the issue of distribution of the matrimonial home before an arbitrator. However, the arbitrator had not determined the substantive issue of the distribution of the matrimonial home, hence the subsequent litigation.

Likewise, in *Julian Galton Fenzi v Natasha Marie Nabbosa*³² the applicant sought orders for maintenance of the parties’ two children or, in the alternative, a redistribution of certain properties. In dismissing the application, Kainamura J observed that when the substantive case first came up for hearing, the parties had ‘opted not to pursue a lengthy litigation’ and, based on mutual consent, a decree *nisi* had been entered and subsequently made absolute. The applicant ought to have exercised due diligence to litigate on all issues pertaining to the divorce, including maintenance of the children. In the circumstances, the consent judgment between the parties represented a resolution of disputes as between the parties and was final and binding on all parties.

In addition to these explicit examples of judicially-sanctioned divorce-by-consent, a reading of Ugandan case law suggests that there are many more instances where parties have effectively been granted such divorces without this being expressly stipulated. This is strongly implied by the large number of ‘uncontested’ petitions in which dissolution has been granted after only the most cursory reference to the grounds under the Divorce Act and, in particular, scant inquiry into the existence of connivance, collusion or condonation.³³ While these are not, strictly speaking, no-fault divorces, they present further indications of socio-legal responses to a decidedly antiquated divorce regime.

3.3 Re-assertions of the fault-based regime

The trends highlighted above – of divorce based on ‘irretrievable breakdown’ of marriage or the consent of the parties (including ‘uncontested’ petitions) – perhaps predictably, have been strongly resisted in certain judicial quarters.

31 Divorce Cause 22 of 2011.

32 Miscellaneous Cause 6 of 2012.

33 See, eg, *Dr Joseph Erume v Deborah Kyomugisha* Divorce Cause 9 of 2014; *Proscovia Namuyimbwa v David Ralph Pace* Divorce Cause 14 of 2017; and *Bishop David Kiganda v Hadija Naseje Kiganda* Divorce Cause 42 of 2011.

A good example of this pushback is presented by the *dictum* in *Ayiko Mawa Solomon v Lekuru Annet Ayiko*.³⁴ In that 2015 case Mubiru J noted that marriage continued to ‘serve valuable social, legal, economic, and institutional functions’ and that, as such, ‘the underlying public policy’ continued to ‘promote marriage and discourage divorce’ except where the parties strictly complied with the set statutory requirements for the grant of divorce. He further observed that although there were attitudes expressed in modern times ‘that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, and desertion’ and that divorce should also be permitted in circumstances such as ‘parties’ incompatibility and irreconcilable differences’, this was not permissible in view of the prevailing statutory regime. He added that even where the respondent did not oppose the petition for divorce, that was not in itself sufficient to justify its grant by the court.

Mubiru J’s commitment to this strict reading and application of the provisions of the Divorce Act would be further demonstrated in the 2016 case of *Richard Kana v Agnes Ezatiru*.³⁵ In 2012 the applicant had petitioned for divorce before the chief magistrate’s court in Arua, citing desertion and cruelty. The chief magistrate did not take any formal evidence from the parties regarding the grounds alleged. However, he did grant a decree *nisi*, noting that ‘sentiments [were] high’ and that ‘there [was] no opposition to the dissolution of the marriage’. On appeal to the High Court – on a question of division of property rather than the divorce itself – the resident judge criticised the procedure adopted by the chief magistrate, but nevertheless upheld the divorce decree and proceeded to resolve the residual property dispute. In the present matter, the applicant now alleged that the respondent had not rendered a fair account of the rental proceeds, as required by the resident judge’s order. Significantly, neither of the parties challenged the grant of divorce. Nonetheless, invoking the inherent power of the court under section 98 of the Civil Procedure Act, Mubiru J stressed that evidence in civil trials had to be taken upon oath or affirmation. The failure to do this at the chief magistrate’s court had rendered the proceedings in question so flawed as not to in fact constitute a trial. In the event, he set aside the decrees *nisi* and absolute as well as the orders regarding the allocation of the matrimonial property; and ordered that the file be remitted to the chief magistrate’s court with directions that the entire petition be heard afresh. The effect of Mubiru J’s 2016 decision was to basically return the parties to the position in which they had

34 Divorce Cause 1 of 2015.

35 Miscellaneous Cause 59 of 2016, arising from High Court Civil Appeal 22 of 2013.

been back in 2012, when the divorce petition was initially filed. The parties who went to the court believing themselves to be divorced – and no doubt living their separate and individual lives as free individuals – now suddenly found themselves essentially declared to, legally, remain husband and wife.³⁶

A similarly emphatic defence of the *status quo* – above any wishes of the parties in question, over any attempts at judicial activism, and in spite of any developments in other parts of the world³⁷ – is presented by the 2020 appellate case of *Rebecca Nagidde v Charles Mwasa*.³⁸ The appellant petitioned for divorce before the High Court in 2017, on grounds of adultery and cruelty. At the hearing, Matovu J concluded that the marriage had irretrievably broken down and asked counsel for the parties to prepare a decree *nisi* for his signature. He then proceeded to determine the issues relating to custody and the distribution of property. The appellant challenged the determinations relating to custody and property but, notably, not the divorce itself. On appeal, however, Egonda-Ntende JA (with Musota and Kasule JJA concurring) concluded that the decree *nisi* had been wrongly entered, and emphasised that before granting such decree, the Court had to be satisfied that the petitioner's grounds as presented had been proven; that there was no connivance or condonation or collusion between the parties in presenting the petition; and that the petitioner had not themselves been guilty of adultery, or of an unreasonable delay in presenting the petition, or cruelty to the respondent, or desertion or separation or other misconduct. He went

36 The parallels between the *Kana* case and the (in)famous *Rex v Amkeyo* (1917) 7 EALR 14 case are rather striking. In the former, the parties believed themselves to be divorced and had presumably conducted their lives as such for close to four years, before receiving a judicial decision to the contrary. In the latter, the parties believed themselves to be married before being informed otherwise by judicial decision. In both cases, however, the disconnect between the judicial decision, on the one hand, and the lived reality – and evident wishes – of the parties, on the other, is apparent.

37 A number of jurisdictions now permit some version of a no-fault divorce. These include South Africa (1979 Divorce Act); Tanzania (sec 99 of the Law of Marriage Act); Sweden (1973 Marriage Code); Spain (Law 15 of 2005, amending the Civil Code and the Civil Procedural Act); France (Law 75-617 of 11 July 1975); Australia (1975 Family Law Act); China (1980 Marriage Law); Canada (1968 Divorce Act); Venezuela (decision by the constitutional chamber of the Supreme Tribunal of Justice 6 June 2015); Ireland (sec 5 of the Family Law (Divorce) Act); and the United Kingdom (Divorce, Dissolution and Separation Act of 2020, scheduled to enter into force on 6 April 2022; itself partly informed by the long-standing litigation in *Owens v Owens* [2018] UKSC 41 in which, although the Supreme Court noted that the marriage in question was 'unhappy' and 'wretched', it nevertheless denied the petitioner's request for a divorce). Additionally, in the USA, each of the individual states now offers some kind of no-fault divorce – See E Horowitz 'The "holey" bonds of matrimony: A constitutional challenge to burdensome divorce laws' (2006) *Journal of Constitutional Law* 887, citing M Butler 'Grounds for divorce: A survey' (1999) 11 *Journal of Contemporary Legal Issues* 164.

38 Civil Appeal 160 of 2018.

on to observe that while these conditions might 'be or appear to be archaic' they still represented the law on divorce as it stood, and courts were not permitted to ignore them and establish their own grounds for divorce such as 'irreconcilable differences'. While this particular ground might exist in many other jurisdictions, absent an amendment to the Divorce Act or the passing of a new law providing for it, this ground 'however attractive it might be' was unavailable in Uganda.³⁹

It is important to note that none of the key decisions supporting the more conservative, fault-based approach to divorce – *Ayiko, Kana* and *Nagidde* – made any reference to the provisions of the 1995 Constitution in this regard. Although they emphasised the requirements of statutory law, in particular the Divorce Act, they did not address the compatibility of this regime with a number of relevant constitutional standards. Evidently, in light of article 2 of the Constitution (the supremacy clause) these positions require reconsideration. It is to this enquiry – the constitutionality of the fault-based regime – that we now turn.

4 Analysing the constitutionality of fault-based divorce

The 1995 Constitution is a strange document – one that holds both the promise of Uganda, and reflects its critical failings. As a path towards, and guarantor of, a truly democratic dispensation, it has failed so many times, and at such critical stages, as to be effectively comatose. However, as a basis for the articulation and realisation of, especially, 'non-political' human rights, it continues to show many signs of life.

39 At 7 of the decision. Notably, about a decade before his lead judgment in *Nagidde*, Egonda-Ntende J (as he then was) had resisted a rather desperate attempt at divorce-by-arbitration, in the 2009 case of *Emily Susanne Dyk Wissanja v Zahid Asafali Wissanja* HCT-00-FD-MC-0008-2009. The parties, who had been married in Ottawa in 1999, sought to dissolve their marriage in 2006 through the Centre for Arbitration and Dispute Resolution (CADER), a body established under the Arbitration and Conciliation Act (Cap 4, Laws of Uganda). The Director of CADER, Mr Jimmy Muyanja, in his capacity as arbitrator, purported to issue a decree *nisi* in August 2006 and a decree absolute in July 2007. The applicant attempted to register the decree absolute with the High Court as a court award in 2008, an effort that was rejected by the court registrar. The applicant then formally applied to the High Court seeking registration of the award. In dismissing the application, Egonda-Ntende J stressed that the parties had no scope for 'constituting their own tribunal for the grant of divorce', and that any ante or post-nuptial agreement to that effect would be void for illegality and on grounds of public policy.

There now is a wealth of largely progressive jurisprudence elaborating and re-affirming almost all the provisions of the Bill of Rights. In the sub-sections below I identify a number of constitutional rights implicated by the fault-based divorce regime before proceeding to consider whether the public policy imperatives underlying the current legal framework justify the significant restrictions of the human rights identified.

4.1 Constitutional rights implicated

4.1.1 *Right to privacy*

One of the rights most critically affected by the fault-based regime is that to privacy.⁴⁰ The requirement of proving fault opens up some of the most intimate aspects of people's lives to scrutiny by not only the judicial officer(s) involved with the case but the public at large. For instance, to prove adultery a petitioner is required to provide various lurid details relating to sexual intercourse between their spouse and the co-adulterer. In addition, the law requires that a co-respondent be named in instances of adultery and it is immaterial, in this regard, whether they were aware of the married state of the respondent. These breaches of privacy have implications not only for the individuals in question, but for a whole range of other persons: their children, parents, siblings, and other relatives, friends, and in-laws.⁴¹

40 Art 27 1995 Constitution. The right is also enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) (art 17(1)) and the 1948 Universal Declaration of Human Rights (Universal Declaration) (art 12). The right to privacy is not expressly provided for under the 1986 African Charter on Human and Peoples' Rights (African Charter).

41 A good example in this regard is the *dictum* of the Court in *Emmanuel Kasingye v Genevieve Kasingye* Civil Appeal 96 of 2014, which dealt with proof of adultery. In discounting the respondent's testimony as uncorroborated, the Court felt that she should have adduced additional evidence or witnesses to validate her version of events. Although the Court acknowledged that she may have had 'good reason to protect her children from testifying', nevertheless the judge thought that she could have called officers from 'various police stations, church elders, and even her workmates' to corroborate her claims since the couple's long-term disagreements had allegedly been reported to these people.

4.1.2 *Rights to expression, association, liberty, freedom from torture and life*

The current legal regime also implicates the rights to expression,⁴² association,⁴³ liberty,⁴⁴ freedom from torture,⁴⁵ and life.⁴⁶ Given Uganda's history, these rights are often thought of in political terms, in the context of restraint or violation by the state and security agencies and in relation to the public sphere. However, they undoubtedly have powerful implications for, and resonance with, the ways in which individuals live and enjoy their private and intimate lives.⁴⁷

One of the ways in which love may be manifested and expressed is through marriage. At the same time, the end of love could also best be expressed through separation and divorce. Indeed, the right *to marry*⁴⁸ by necessary implication includes a right *to divorce*.⁴⁹ This right to divorce – implicit in the rights to expression, liberty and association – is diminished by a fault-based divorce regime, which

42 Art 29(1)(a) 1995 Constitution; art 19(2) ICCPR; art 19 Universal Declaration; and art 9(2) African Charter.

43 Art 29(1)(e) 1995 Constitution; art 22(1) ICCPR; art 20(1) Universal Declaration; and art 10(1) African Charter.

44 Art 23 1995 Constitution; art 9(1) ICCPR; art 3 Universal Declaration; and art 6 African Charter.

45 Art 24 1995 Constitution; art 7 ICCPR; art 5 Universal Declaration; and art 5 African Charter.

46 Art 22 1995 Constitution; art 6(1) ICCPR; art 3 Universal Declaration; and art 4 African Charter.

47 A good example in this respect is provided by the Kenyan case of *R V Kadhi, Kisumu, Ex Parte Nasreen* (1973) EA 153. The applicant had been married to the interested party under Islamic law. Her husband had applied to the Kadhi court for restitution of conjugal rights, which application had been granted. The applicant sought a writ of *certiorari* to set aside this order. In granting the writ, Harris J found that the order constituted a violation of the applicant's constitutional rights to personal liberty and to freedom of movement.

48 Art 31 1995 Constitution; art 23 ICCPR; and art 16 Universal Declaration. The African Charter does not contain an express provision guaranteeing the right to marry. Nonetheless, the Charter recognises the fundamental importance of the family, and obliges the state to support and protect it (art 18). Cf the US Supreme Court decisions in *Maynard v Hill* 125 US 190, 205 (1888) (marriage as 'creating the most important relation in life'); *Skinner v Oklahoma* 316 US 535, 541 (1942) (marriage and procreation as 'fundamental to the very existence and survival of the race'); *Loving v Virginia* 388 US 1 (1967) (the right to marry as having 'long been recognised as one of the vital personal rights essential to the orderly pursuit of happiness by free men' (12)); *Zablocki v Redhail* 434 US 374, 386 (1978) (the right to marry as being 'of fundamental importance' (383)).

49 As Katunguka J noted in *Sarah Kiyemba v Robert Batte Divorce Cause 127 of 2018*, 'a marriage without companionship and intimacy unless by consent of parties ... does not exist'. Similarly, Horowitz has observed that 'it is only logical that the decision to end a marriage is every bit as personal and intimate as the decision to enter one. To marry is to choose a person with whom to spend your life ... To divorce is to choose not to remain a life partner with that person.' Horowitz (n 37) 885. For additional work in this regard, see T Bosworth 'The federal constitutional right to divorce' (2004) 14 *Journal of Contemporary Legal Issues* 103; CJ Jones 'The rights to marry and divorce: A new look at some unanswered questions' (1985) 63 *Washington University Law Review* 577; and R Rivlin 'The right to divorce: Its direction, and why it matters' (2013) 4 *International Journal of the Jurisprudence of the Family* 133.

places unreasonable fetters in the path of adult persons who wish to consensually dissolve the bonds into which they in the first place consensually entered.

In addition, legal barriers to divorce might trap human beings in deeply toxic environments, inevitably endangering their right to freedom from torture and, in some instances, even to life. On the other hand, there appears to be a strong correlation between liberal divorce regimes and more positive welfare outcomes. For instance, studies conducted in the United States found statistically significant declines both in domestic violence and wives' suicides following the no-fault divorce reform in that jurisdiction.⁵⁰

4.1.3 *Freedom of (and from) religion, and the constitutional guarantee of a secular state*

The fault-based regime also has implications for the right to freedom of religion,⁵¹ as well as the constitutional guarantee of a secular state.⁵² The requirement for fault as a condition for the grant of divorce is rooted in the Judeo-Christian notion of the sanctity of marriage. The Divorce Act which was received in Uganda in 1904 reflected only a temporal phase in the secularisation of divorce law in the United Kingdom⁵³ – one which has since continued in that country,⁵⁴ but which seems to have been stultified in Uganda. The

50 Stanford Graduate School of Business 'No fault divorce laws may have improved women's well-being', <https://www.newswise.com/articles/no-fault-divorce-laws-may-have-improved-womens-well-being> (accessed 13 June 2021).

51 Art 29(1)(c) 1995 Constitution; art 18(1) ICCPR; art 18 Universal Declaration; and art 8 African Charter.

52 Art 7 1995 Constitution; art 27 ICCPR.

53 It is noteworthy that the very foundation of the Church of England in 1534 was triggered by the refusal by Pope Clement VII to sanction the annulment of King Henry VIII's marriage to Catherine of Aragon, which would have paved the way for his marriage to Anne Boleyn. Nonetheless, the new Church of England maintained such strict barriers to divorce that for a long time the only route to ending a marriage was either through an annulment (itself severely proscribed) or through divorce obtained by an Act of Parliament. Inevitably, the latter option was one open only to those with significant financial resources. Questions as to annulment were determined by Ecclesiastical courts, which administered canon law. Under this regime, marriage was considered to be a sacrament – sacred and indissoluble. Substantial reform to this framework only came by means of the Matrimonial Causes Act of 1857, which allowed divorce to be obtained through civil courts. The law leaned in favour of men who were allowed to obtain divorce on the single ground of adultery, while women had to prove both adultery and another ground such as incest or cruelty. See, generally, A Foreman 'The heartbreaking history of divorce' *Smithsonian Magazine* February 2014, <https://www.smithsonianmag.com/history/heartbreaking-history-of-divorce-180949439/> (accessed 27 June 2021) and GL Savage 'The operation of the 1857 Divorce Act, 1860-1910: A research note' (1983) 16 *Journal of Social History* 103.

54 The position under the 1857 Matrimonial Causes Act was reformed by the Matrimonial Causes Act of 1923, which allowed both men and women to petition for divorce on the ground of adultery, and further by the Matrimonial

result is that the current version of the Ugandan Divorce Act – and the fault-based regime in particular – continues to reflect the traditional Christian view of marriage as a sacrament,⁵⁵ sanctity and integrity of which must be preserved and protected almost at all costs.

For its part, the Constitution places primacy on the notion of the free and full consent of the parties to the union and lays emphasis on the equality of parties, in this and in all other aspects, at the start of the marriage, during its subsistence and at dissolution. The Constitution centres, foregrounds and protects the individual(s) contracting the marriage, rather than the institution of marriage *per se*. Marriage, as envisaged under the Constitution, therefore is primarily a contractual arrangement, founded upon individual consent and to be treated as such regardless of the kind of union – Christian, Islamic, Hindu or customary – into which one enters.⁵⁶

Indeed, as the 2009 *Rwabinumi* case emphasised, the choice to contract a religious marriage does not deprive parties of the ultimate protection of the Constitution.⁵⁷ One reflection of this fundamental

Causes Act of 1937, which allowed divorces to be obtained on the additional grounds of cruelty, desertion and ‘incurable insanity’. The law was additionally reformed by the Divorce Reform Act of 1969 (now consolidated under the Matrimonial Causes Act 1973), which allowed either spouse to obtain a divorce on the ground of the ‘irretrievable breakdown’ of the marriage provided that such breakdown was demonstrated by evidence of adultery, unreasonable behaviour, desertion, two years’ separation with the consent of the other spouse; or five years’ separation without such consent. An additional step was attempted by the Family Law Act of 1996 which would have allowed for an even simpler process to obtain a no-fault divorce. However, the Act’s provisions on divorce were never implemented and were eventually repealed. See, generally, AS Holmes ‘The double standard in the English divorce laws, 1857-1923’ (1995) 20 *Law and Social Inquiry* 601; R Probert ‘The controversy of equality and the Matrimonial Causes Act 1923’ (1999) 11 *Child and Family Law Quarterly* 33; J Levin ‘The Divorce Reform Act 1969’ (1970) 33 *Modern Law Review* 632 and E Hasson ‘Setting a standard or reflecting reality? The “role” of divorce law, and the case of the Family Law Act, 1996’ (2003) 17 *International Journal of Law, Policy and the Family* 338.

55 This is in some contrast to the position under Islamic law. As Sir Clement De Lestang J noted in *Ayoob v Ayoob* [1968] EA 72, ‘[u]nder Islamic law, marriage is a civil contract, not a sacrament’ (77).

56 Art 31 1995 Constitution. In *Julius Rwabinumi v Hope Bahimbisomwe* Supreme Court Civil Appeal 10 of 2009, eg, Kisaakye JSC referred to ‘persons who contract religious marriages under the Marriage Act’.

57 Kisaakye JSC emphasised the secular nature of the Ugandan state, noting that Uganda was not governed by Canon law, but by the Constitution, statutory law, case law and customary law. It had thus been improper for the justices of appeal to found their decision on religious marital vows to hold that those who contracted church marriages thereby entered into a communion of property. In so holding, Kisaakye JSC upheld Kavuma JA’s dissent in the Court of Appeal, in which he had observed that given the nature of Uganda as a secular state, as envisaged by art 7 of the Constitution, any questions relating to marital property rights had to be handled under the applicable law of the land ‘without resorting to invoking the holy scriptures’. To him, art 31(1) of the Constitution had been sufficient to settle the question before the Court, and did not ‘require any reinforcement from invoking divine authority’. Kisaakye JSC’s views also affirm the position reached by Tuhaise J in *Emmanuel Nyabayango v Margaret*

principle is to be found in the 2003 case of *Dr Specioza Wandira Naigaga Kazibwe v Eng Charles Nsubuga Kazibwe*,⁵⁸ which involved the judicial termination of a Catholic marriage – one ostensibly indissoluble under the doctrine of that church. In such a situation, the church might well be within its rights to continue to consider the individuals in question to be married and, for instance, to deny them the benefit of being remarried to other persons in church. However, for the purposes of the secular state, such individuals would be legally divorced, and would be at liberty to remarry, or remain single, as they deemed fit.

It is this very co-existence – even in the face of opposed world views and beliefs – that is contemplated in and facilitated by articles 7 and 29 of the Constitution. It is this same co-existence, and the supremacy of the Constitution in a secular state, that mandate a movement away from the fault-based regime rooted in the Judeo-Christian conception of marriage.

4.1.4 *Rights of women and children, and the freedom from discrimination*

A fault-based regime has a particularly negative impact on the rights and welfare of women⁵⁹ and children,⁶⁰ and also contravenes the freedom from discrimination.⁶¹ Although facially neutral, the barriers to divorce continue to disproportionately affect women, and especially *poor* women.⁶² In effect, at a broader level, the requirement to prove fault as a condition for divorce constitutes class-based discrimination in so far as it might not effectively deter persons of means from dissolving their marriages when they so desire.⁶³ In fact, this troubling aspect of the fault-based framework resonates with more explicitly

Kabasinguzi and Prof Gilbert Bukonya High Court Civil Suit 121 of 2012 to the effect that one cannot contract out of certain rights.

58 Divorce Cause 3 of 2003.

59 Arts 31(1)(b), 32(2) and 33 1995 Constitution; art 16(1), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and arts 6 & 7 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

60 Arts 31(4) & (5) and 34 1995 Constitution; arts 3(1), 9 & 18 Convention on the Rights of the Child (CRC); arts 1(2), 4(1), 19 & 20 African Charter on the Rights and Welfare of the Child (African Children's Charter); and arts 14(1) & 23(4) ICCPR.

61 Art 21 1995 Constitution; art 26 ICCPR; art 7 Universal Declaration; and arts 18(3), 19 & 28 African Charter.

62 According to a 2020 HIIIL study, eg, '[p]oor, uneducated and rural women and their children are the most vulnerable when the family relationship is falling apart. As such, they are in greatest need for just and fair resolutions'; HIIIL 'Deep dive into divorce and separation in Uganda' 26, https://www.hiil.org/wp-content/uploads/2020/10/Hiil-Uganda-Deep-Dive-Divorce-and-separation_Online.pdf (accessed 23 April 2021).

63 See the discussion in part 3.

discriminatory parts of Ugandan divorce law as established in the racist colonial state.⁶⁴

Relatedly, the current legal framework for divorce treats children in a deeply problematic manner, often leaving them psychologically bruised for life. For instance, court documents usually refer to them not even as ‘children’ but ‘issues of the marriage’. On the other hand, studies have shown that where provision is made for no-fault divorce, children are better shielded from the more challenging aspects of what is an intrinsically difficult proceeding. It also provides a stronger basis for the continuation and promotion of wholesome family relations, the divorce notwithstanding. Indeed, in many situations the cohesion enjoyed by such family units – for they do remain as such – might be much stronger, and the bonds more genuine, than those subsisting in many marriages being sustained, or endured, for no other reason than the difficulty of the legal framework for divorce.

4.2 Between the state and the individual: Applying the article 43 test to fault-based divorce

Although a number of rights are affected by the fault-based divorce regime, it could be argued that the restrictions on these rights are reasonable and necessary, as envisaged under article 43(1) of the Constitution.⁶⁵ Indeed, no doubt there are many good reasons why, as a matter of public policy, the state might promote and perhaps even protect the institution of marriage. These include public morality and public health. That said, article 43(2) of the Constitution emphasises that ‘public interest’ shall not permit, among other things, ‘any limitation of the enjoyment of the rights and freedoms prescribed by

64 Eg, under sec 3 of the Divorce Act, while divorces by ‘non-Africans’ were to be handled by the High Court, ‘Africans’ could only access magistrate’s courts for this purpose. Strangely, this ancient injustice appears to have only been relatively recently brought to judicial attention, in *Frederick Kato v Anne Njoki* Divorce Cause 10 of 2007. In that case a question arose as to whether sec 3 was consistent with art 21 of the Constitution, which prohibits discrimination based on, among other things, race. Egonda-Ntende J (as he then was) noted that although the Divorce Act came into force on 1 October 1904, it had unfortunately never been reformed over a century later. He found that the differential racial treatment under sec 3 was inconsistent with the clear words of the Constitution and that, as required by art 292, it had to be read with such modifications, adaptations and qualifications as to bring it into conformity with the Constitution. He thus concluded that Africans could file their divorce petitions in the High Court, on the same basis with people of all other races. Nonetheless, pending legislative reform, he felt it prudent for all cases to ordinarily be filed in the magistrate’s court, with only those with matrimonial assets in excess of that court’s pecuniary jurisdiction (UGX 50 000 000) being filed in the High Court.

65 Art 43(1) of the Constitution stipulates that the rights expressed under this chapter may not ‘prejudice the fundamental or other human rights and freedoms of others or the public interest’.

this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society'.⁶⁶

A key element of the article 43 test is whether the restrictions in question constitute the least restrictive means of achieving the relevant public objectives. In my view it would be difficult to argue that the requirement to prove fault as a basis for the grant of divorce is the *least restrictive* means of promoting public morality or even public health. In the first place, there is little evidence to suggest that a fault-based divorce regime promotes public morality or public health. Indeed, all indications are there that forcing adult human beings to remain in a union in which they no longer are interested has exactly the opposite outcome. For instance, an increasing number of people might either opt not to marry in the first place or, if already married, choose to 'divorce in fact' without bothering to do so in law.⁶⁷

Second, even if the state were minded to promote the institution of marriage, there are a whole range of approaches that it could employ which might achieve the same objective, with less problematic implications for the range of human rights at issue. Indeed, it is worth noting that in many instances the state already extends a range of privileges and protections to married people. Under the Evidence Act, for instance, in criminal proceedings the spouse of an accused person may not be compelled to testify for the prosecution without the consent of the accused person.⁶⁸ Married people are also generally preferred in the context of adoption, are protected under land law and mortgage law, and enjoy certain advantages in the arena of contract law.⁶⁹

Third, and related to the second point above, any relief or protection that might be obtained through a fault-based divorce

66 In addition, under art 44 certain rights may not be derogated from under any circumstances. These are freedom from torture, cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair hearing; and the right to an order of *habeas corpus*.

67 As Naggita-Musoke has noted, the absence of legislative reform of the law has led to 'walk away' divorces, 'which arise in instances where society cannot run to the formal law for assistance, but instead devises its own law in action'; D Naggita-Musoke 'Time for family law to step into the 21st century' in Nassali (n 11) 375.

68 Sec 120(1)(a) Evidence Act, Cap 6. Indeed, it was this provision that was in issue in the *Amkeyo* case (n 36).

69 Under certain circumstances a spouse is permitted to pledge the credit of the other. See, eg, *David Oryem v Phillip Omony* High Court Civil Appeal 100 of 2018 in which Mubiru J observed that '[a] married woman living with her husband has implied authority to pledge his credit for necessities suitable to his degree and station in life' (para 33 of the decision, citing *Miss Gray Ltd v Earl of Cathcart* (1922) 38 TLR 562).

system is available to the parties through a number of other legal courses of action that do not have the deleterious effect of forcing adult human beings into toxic factual and legal proximity. These include court-based or mediated disputed resolution over property;⁷⁰ general civil proceedings, such as constitutional and tortious claims, for any wrongs or harm;⁷¹ and even criminal proceedings in the context of physical or sexual assault.

It may also be noted that, as a matter of public policy, providing for no-fault divorce does not constitute an attack on the sanctity of marriage. Indeed, in many ways it is a *defence* of it. The current legal system encourages discord rather than harmony, and disincentivises reconciliation and forgiveness.⁷² If spouses are not forced into an acrimonious duel performed before a humourless court and a scavenging public, often to the profit of no one other than the lawyers involved, it might very well be the case that they could find a way back to that most solid of human engagements – friendship – or even, in certain cases, back to the love that they once experienced. In any case, two adults who might now wish to amicably dissolve their union cannot be said to be intuitively against the institution of marriage, otherwise they would not have opted to join it in the first place. It is unreasonable, unfair and unjust to in effect punish such

⁷⁰ See, eg, *Olive Kigongo v Mosa Courts Apartments Ltd* Company Cause 1 of 2015. In this case the petitioner sought an order for the winding up of the respondent company, which she had incorporated with her husband, Hajji Moses Kigongo, in November 1997. At the time of the incorporation the petitioner had been allotted 15% shares, while her husband held the other 85%. They had both been involved in the running of the company until 2011, when Hajji Kigongo systematically excluded her from any involvement in the company's affairs. Musota J found that the petitioner had indeed been unfairly treated and that she was entitled to adequate compensation (in terms of the real value of the shares, and a 15% share of profits made since her exclusion in 2011) – although he declined to order the winding up of the company. Similarly, in *Robert Katuramu v Elizabeth Katuramu* High Court Miscellaneous Application 26 of 2017 the parties had been married in 1990, and had separated in 2000. In 2015, following suits filed by the respondent in 2011 and 2014, the parties reached a consent judgment in which particular property was designated as family land. The applicant now sought to have that judgment reviewed on the ground, among others, that land could not be deemed matrimonial property except in a divorce matrimonial cause. Masalu Musene J dismissed this argument, and upheld the validity of the consent.

⁷¹ In *Emmanuel Nyabayango v Margaret Kabasinguzi and Prof Gilbert Bukenya* High Court Civil Suit 121 of 2012), eg, the plaintiff sued claiming that the second defendant had had an extramarital affair with his wife (the first defendant) which had resulted in the birth of a child. The plaintiff alleged that these actions infringed several of his constitutional rights, including to family life as stipulated under art 31. At the hearing, counsel for the second defendant argued, among other things, that the claims alleging adultery should have been brought by way of divorce proceedings. Tuhaise J disagreed, noting that the fact that the petitioner could have initiated divorce proceedings did not limit his option to utilise other available forms of legal process such as the instant one.

⁷² Eg, as noted in part 2, the law does not allow a party to rely on adultery where such has been condoned, that is to say, forgiven. Similarly, the establishment of adultery requires a level of specificity and a kind of record keeping which is inconsistent with love and reconciliation.

persons to a life sentence – and in some cases even a death sentence – in such circumstances.

In sum, fault-based divorce, in my view, does not pass the article 43 test for the restriction of human rights based on public interest. In so far as it is not the least restrictive means for achieving any of the public policy ends that might inform it, it cannot be said to be acceptable or demonstrably justifiable in a free and democratic society, which is the high threshold set under the Constitution.

5 Conclusion

The right to ‘unlove’ is as critical as the right to love. It is a composite of, and a necessary corollary to, several rights stipulated under the Constitution. It is imperative to decisively reform the current legal system which traps adult human beings into a situation of forced proximity, thereby exacerbating and amplifying tensions that otherwise might have been alternatively resolved. Indeed, there can be no greater demonstration of the urgency for legislative reform in this regard than the fact that *all* efforts at amending the divorce regime since 1904 have included proposals for a no-fault divorce.⁷³

It also bears noting that the right to ‘unlove’ is not a licence to hate. If anything, it is an invitation – and a permission – towards the transformation of love from one form (*eros*) to another (*philia*). As Lomas has observed:⁷⁴

Few experiences are as cherished as love, with surveys consistently reporting it to be among the most sought-after and valorised of human emotions ... At the same time though, few concepts are as contested, with the label encompassing a vast range of phenomena – spanning

73 Eg, the Report of the Commission on Marriage, Divorce and the Status of Women (established in 1964) recommended that ‘[n]o specific grounds for divorce should be laid down’. See HF Morris ‘Uganda: Report of the Commission on Marriage, Divorce and the Status of Women’ (1966) 10 *Journal of African Law* 3-7. Similarly, clause 5 of the Memorandum to the 2003 version of the Domestic Relations Bill (DRB) provided that the Bill sought, among other things, to deal with ‘divorce prescribing no fault divorce otherwise known as irretrievable break down of marriage, to apply to all forms of marriage’; Government of Uganda *Domestic Relations Bill* (2003), <https://mifumi.org/wp-content/uploads/2017/01/Domestic-Relations-Bill-2003.pdf> (accessed 15 March 2021). Sec 145 of the 2009 Marriage and Divorce Bill also provided for ‘irretrievable breakdown’ of marriage as the only ground for divorce, <https://landwise.resourceequity.org/documents/1362> (accessed 27 June 2021). This position (irretrievable breakdown as sole ground for divorce) was reiterated in sec 26 of the 2017 Marriage Bill; see <https://www.ulrc.go.ug/content/marriage-bill-2017> (accessed 27 June 2021).

74 T Lomas ‘The flavours of love: A cross-cultural lexical analysis’ (2018) 48 *Journal for the Theory of Social Behaviour* 134.

diverse spectra of intensity, valence, and temporal duration, and being used in relation to a panoply of relationships, objects and experiences.

Love, marriage, family, intimacy are things far too important to be subjected to pretence or compulsion. The law should allow human beings to live, and let live – to love, and to unlove. Simply said, the law should let human beings be human.