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London – The Divorce Capital of the World

The Rt. Hon. Lord Justice Thorpe*

A. Introduction: The 1973 Act

The society last discussed the financial consequences of the breakdown of family relationship in, I think, 1983. My aim therefore is to trace the statutory evolution, or more accurately the absence of statutory evolution, in this area of the law of England and Wales. My focus will be on the financial consequences of divorce for the spouses. There have, during the past generation, been radical statutory innovations, mostly with very poor outcome, for child maintenance but I exclude them from my territory. Similarly I exclude statutory innovation for same sex couples. Nor will I consider the efforts of the Law Commission, so far unavailing, to introduce some semblance of justice for heterosexual cohabitants who experience relationship breakdown.

To make good my primary point that we have suffered, and are suffering, from legislative drift I need to establish the origins of the dominant statutory provisions, section 21-25 of the Matrimonial Causes Act 1973 (hereinafter the 1973 Act). The reform of the law of divorce has always aroused passions and factions in parliament. The Divorce Reform Act 1969 was no exception. Its proposal that no divorce could be granted without proof of the irretrievable breakdown of the marriage was broadly supported, provided it was accompanied by strong safeguards. One was that irretrievable breakdown could only be proved by one of five routes, generally either plucked from the old catalogue of matrimonial offences or, if consensual, earned by a substantial period of separation. The other safeguard was financial protection for the weaker party. Essentially the 1973 Act was the expression of that protection.

In Parliament stronger protection had been sought in the form of a Community of Property Bill, which passed its second reading but was withdrawn by its sponsors on the understanding that the Government would meet their demands. However what the Government enacted (the Matrimonial Proceedings and Property Act 1970: subsequently consolidated into the 1973 Act) was not Community of Property but the judicial duty on or after the grant of divorce to fix maintenance obligations and to redistribute assets in the exercise of a discretion lightly directed by a checklist contained in the focal section 25. Furthermore the judge was given an overarching objective which Parliament thus expressed:

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> to place the parties in the financial position in which they would have been if the marriage had not broken down.

The sponsors of the Community of Property Bill had been out-manoeuvred by questionable tactics.

How did the judges of that now distant day interpret the new duty? Sensibly they focussed in the majority of cases in the middle range on securing the home or, at least a home, for all the parties, or at least one of them, whether or not there were children of the family. But the concepts of sharing or equality were undreamt of. In rebuffing a Community of Property amendment to the Bill that became the 1970 Act the Lord Chancellor posed the rhetorical question:

> Are half (the husband's) business assets to be taken away from the business and given to a woman who knows nothing about business?

In like vein Lord Denning, the great judge of the day, in rejecting a wife's claim for a share in approximately £2,000,000 at modern monetary values resulting from the sale of the husband's family business ruled:

> (the wife) did not work in (the business) herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty she would encourage him to keep going.

That did not give her any right to a share in the proceeds.

This judicial interpretation of its duty fully accorded with social and popular expectations. Indeed the popular reaction to the outcomes that resulted from the application of the 1973 Act was the conviction that judicial reluctance to investigate marital history resulted in injustice to payers when the payees contribution to the breakdown of the marriage went unreflected in the order.

B. The 1984 Act Amendments

In 1980 the Law Commission published its discussion paper: the Financial Consequences of Divorce: the Basic Policy, and in 1981 published recommendations based on the responses to its paper. These recommendations passed into law by incorporation into the Matrimonial and Family Proceedings Act 1984.

What were the effects of this reform? First the structure and text of the 1973 Act was largely confirmed. But Parliament intended major changes.

First, the overriding objective was sensibly removed, since it had proved quite impossible of practical attainment. However, I emphasise that no alternative objective was substituted.

Second, the Act imposed a new duty on the judge to terminate financial relationships between the parties as soon after the divorce as was just and reasonable. This in ordinary legal language was the duty to achieve a clean break. To achieve this end the judge was given the additional power to dismiss a claim for periodical payments without the consent of the recipient either at the outset, or on a later variation application, provided so to do would not cause financial hardship.

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Third, and no doubt to the disappointment of many litigants spoiling for a fight, the Act restricted the consideration of marital or other misconduct to "such that it would be inequitable to disregard."

I will now consider how the judges interpreted these statutory reforms. First the removal of an overriding objective without any replacement had the obvious consequence of enlarging yet further the ambit of the judges' discretion. However, the judges reasonably inferred that Parliament must have intended them to craft outcomes that were seen to be fair to each party, even if Parliament had not so stated. But that provided only an elastic aid. Not only did the judge lack an over-arching objective he also lacked a statutorily defined starting point. He might have been left to pluck figures from the air were it not for a judicial aid provided by the dominant family judge of his generation, Ormrod LJ. In *O'Donnell v O'Donnell*[1] in 1975, and in other cases, he introduced the yardstick of the applicant wife's "reasonable requirements." This concept engendered a science and a professional industry that quantified the cost of the applicant's reasonable requirements by positing the required home or homes, the required chattels and the required future annual expenditure capitalised by a computer programme approved by the Court of Appeal in *Duxbury v Duxbury*.[2] You will observe that this was the product of judicial necessity and creativity in the absence of clear statutory rules. The Ormrod mechanism survived a generation and I will later come to its demise in 2000 in the case of *White v White*.[3]

I will take the other two innovations out of turn because there is little to say about the Parliamentary restriction on reflecting conduct in financial awards. That it remained unpopular can be seen from a section of the Family Law Act 1996 which enlarged the judges discretion to have regard to misconduct. However, since that section is within Part II of the Act it remains dead on the statute book because this Government declined to ordain a commencement date for Part II, a neat way of achieving its repeal.

It is upon the judicial interpretation of the second innovation of the 1984 Act that I intend to dwell at greater length. The purpose and objective of the innovation is clear from the Law Commission's 1981 report from which I have selected the following quotations:

> There was, however, a wide-spread feeling amongst those who commented on the Discussion Paper that greater weight should be given to the importance of each party doing everything possible to become self-sufficient, so far as this is consistent with the interests of the children; and we believe that the statutory provisions should contain a positive assertion of this principle.
>
> The court has, under the existing law, power to make orders for a limited term, and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not or should not expect to rely on continuing support from her husband. We think that it would be desirable to require the courts specifically to consider whether an order for a

1 [1976] Fam 83.
2 [1987] 1 FLR 7.
3 [2001] 1 AC 596.

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> limited term would not be appropriate in all the circumstances of the case, given the increased weight which we believe should be attached to the desirability of the parties becoming self sufficient.
>
> Nevertheless, the response to the Discussion Paper showed strong support for the view (with which we agree) that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between the husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division.
>
> The response to the Discussion Paper indicated wide support for the view that the court should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of the divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit – as distinct from periodical payments made to her to enable her to care for the children – should be primarily directed to secure wherever possible a smooth transition from marriage to the status of independence. We believe that this general objective should be embodied in the legislation.

The judgments in the Court of Appeal in the early wake of the reform fully recognised this objective. Waite LJ in the 1986 appeal of *Tandy v Tandy*[4] said:

> The effect of the legislation, as now amended, is thus to give effect, whether on the making of the original order or on a subsequent application to vary it, to what has become loosely known as the “clean break”, a term which is perhaps now used in a wider context than when it first appeared. The legislative purpose, that is to say, is to enabled the parties to a failed marriage, wherever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute. For better-off families that can and will normally be achieved by a capital lump sum paid in satisfaction or commutation of the right to be maintained on a periodic basis. The legislation clearly contemplates, however (and there is no dispute as to this) that there will be circumstances in which fairness to one side demands, and to the other side permits, a severance of the maintenance tie in cases where no capital resources are available.

However, the law governing financial provision for the applicant wife has from its statutory inception in 1857 been strongly marked by paternalism. Adult autonomy is overshadowed by the court’s concern to make the applicant financially secure. In families of substantial worth the judges were comfortable to opt for the route of ‘clean break’, where financial security for the wife could be immediately achieved from the outset. But where the route to ‘clean break’ involved an assessment of future probabilities expressed in an order for periodical payments only for a term of years, the paternalistic instincts inhibited the judge from confining the applicant’s support to such a fixed term. Still more inhibited was the judge in imposing a fixed term declared to be absolute in that it was incapable of extension

[4] [1988] FCR 561.

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by subsequent application. This inhibition is well illustrated by a long series of appeals in the 1990's culminating in the judgments of Ward LJ in *C v C*[5] and *G v G*.[6]

My own conviction is that the social policy that underlined the Law Commission's recommendation was wise. The time had come to move at least gently away from paternalism and to encourage financial independence post divorce. The continuing monthly credit to one bank account and debit to the other sustains an emotional and psychological relationship and interdependence inconsistent with the dissolution of the marriage. The 1984 amendment introduced the question: should the applicant achieve financial independence at the end of a fair term and not the question will the applicant achieve it. Without the spur of a fairly judged terminus the recipient might be either tempted to avoid the challenge or inhibited by psychological dependence from establishing or re-establishing an earning power. Thus when the case of *McFarlane* reached the Court of Appeal consolidated with the case of *Parlour*,[7] in each the applicant's obligation to achieve financial independence, and the courts duty to order periodical payments only for such term as would enable the recipient "to adjust without undue hardship," led to judgments that expressly required the recipients to achieve financial independence by means of periodical payments for a limited term of years that far exceeded their needs in those years. In the case of Mrs McFarlane we restored an order of £250,000 per annum, reduced by the High Court Judge on first appeal, but limited to an extendable five year term. That put the onus on the recipient to apply for an extension before the end of the term if circumstances had prevented her from achieving the goal which we had set for her.

Mrs McFarlane appealed to the House of Lords where her case was consolidated with the appeal of Mr Miller, who challenged an award of £5,000,000 to his wife at the end of a brief marriage, an award which we had upheld in the Court of Appeal. It will be seen that whereas the consolidated appeals in the Court of Appeal raised the same issue the consolidated appeals in the House of Lords raised very different points.

Mrs McFarlane succeeded in her appeal, in that the House of Lords removed the five year term expressing the annual payment of £250,000 to be during joint lives or until her remarriage. Thus effectively the onus to initiate a further application, and to achieve a clean break, was transposed to the husband who retained the right to apply for the termination of her order with or without further capital payment.

The consolidation of appeals raising separate points has resulted in House of Lords judgments that do not consider in any depth the essential difference of view as to the construction and application of Section 25A of the 1973 Act. I would say, as you might expect, that the solution preferred by the House of Lords insufficiently reflects the reform of the 1984 Act and the objective so clearly stated in the Law Commission's recommendations.

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[5] [1997] 2 FLR26.
[6] [1997] 1 FLR368.
[7] [2005] Fam 171.

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Having analysed the judicial response to the amendments introduced by the 1984 Act I return to my principal theme: Parliaments attempts to modernise the law in the last decade of the twentieth century and the first decade of the twenty-first century.

C. Subsequent Legislative Inertia

The need for modernisation can be traced to:

i) the growing sense that the paternalistic approach was increasingly inappropriate in a world in which 50% of marriages ending in divorce have lasted for only nine years.
ii) the allied sense that the parties to a marriage should have the contractual freedom to provide for the financial consequences of divorce.
iii) judicial and practitioner frustration at the enormous and disproportionate costs bills in contested applications.

This reality could undoubtedly be partially ascribed to the width of the judicial discretion and the consequent impediment to negotiated settlements. It was often said that a specialist practitioner, asked by his client what she might expect to be awarded by the court, would reply: it depends which judge we get on the day.

The problem of costs bills disproportionate to the sum in dispute could be partially traced to lax and antiquated procedures largely uncontrolled by the court. Accordingly in 1992 a committee of judges and practitioners came into spontaneous being to seek procedural reforms. I chaired the committee which was, after much initial suspicion, embraced by the Ministry of Justice (then the Lord Chancellor's Department) and officially adopted as the Lord Chancellor's Ancillary Relief Working Group (hereinafter the Working Group) its proposed reforms were initially piloted in trial courts and then in 2000 universally applied. They have been an unqualified success, introducing firm judicial case management throughout the process, complimented by a full blown financial dispute resolution appointment before any trial is directed.

In February 1998 the responsible Minister announced the Government's intention to modernise the law "to deliver a greater sense of certainty for the parties … ." Thereafter the Working Group was asked to deliver urgent advice to the Lord Chancellor as to the course of modernisation, having particular regard to the formulaic approach introduced in Scotland by the Family Law (Scotland) Act 1985. The report, and subsequent discussions with the Ministry's Family Policy Division, led to the publication of the Ministry's proposals in a Home Office White Paper: Supporting Families – October 1998. In sum, the first proposal was for the introduction of rational rules for the division of family assets in limitation of judicial discretion and the second was to give legislative force to pre-nuptial contracts.

In 1999 the Government published the responses to the two major proposals in the White Paper with which this paper is concerned. Those responses were relatively few but broadly supportive. The next step would surely be the drafting

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of a bill, given the Governments stated priority. The cynic might have preferred to forecast that the Government would shy away from reform in any area traditionally emotive and unlikely to advance the Government's popularity. The cynic would have been right. The reform was abandoned. Why and in consequence of what debate we may not know since the Government has maintained silence and vouchsafed no information whenever taxed.

Dissatisfaction with this outcome has been almost universal amongst specialist judges and practitioners. The judges have deplored the denial of clear statutory rules or principles. The practitioners have repeatedly presented their cogent arguments for legislative legitimacy for pre-nuptial contracts.

D. Judicial Reform

Into this legislative vacuum entered the House of Lords. The case of *White v White* involved a farming family. The High Court Judge awarded the wife a cash sum to exit the farming partnership which we substantially increased in the Court of Appeal. Both parties applied for permission to appeal to the House of Lords. The applications were granted, perhaps surprisingly, since the House had never previously entertained a quantum appeal in this field and there was then no family law specialist in the Court. The outcome was sterile for the family. Both appeals were dismissed. The appellants together had incurred costs totalling half a million pounds in procuring this negative outcome. They may have taken little consolation from the fact that the House of Lords revolutionised the way in which judges thereafter exercised their ample discretion. Gone forever was the practical mechanism of reasonable requirements, which by the turn of the century was seen to embody gender discrimination. In came the principle of equality. Or did it? In the leading speech of Lord Nicholls, equality was not a presumption (that would be to usurp the role of the legislature) nor a starting point but rather a cross check to ensure that the tentative outcome was fair. This formulation was, perhaps not surprisingly, critically received. It was a confusing formulation and not one that much advanced the quest for clear principles to limit the judicial discretion. It is to be noted that the only other speech was from Lord Cooke who would have made equality a principle, but the other three members of the Court preferred Lord Nicholls' approach.

The continuing need for statutory modernisation I articulated in my judgments in *Cowan v Cowan*[8] and in *Lambert v Lambert*.[9] In the latter case the Court took a stride along the road to equality which had been signposted in Supporting Families and articulated as I have described in *White v White*.

The House of Lords returned to the task of modernising the law governing the financial consequences of divorce in the appeals of *Miller* and *McFarlane* which I have already introduced.[10] By then the House had been strengthened by the elevation of the distinguished family lawyer, Baroness Hale of Richmond.

8 [2002] Fam 97.
9 [2003] 1FLR139.
10 [2006] 2AC618.

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Thus there were fully reasoned judgments from Lord Nicholls, Baroness Hale, Lord Mance, and Lord Hope.[11] Three principles emerged to limit the exercise of the trial judges discretion: equality (or sharing), needs and compensation. In needs there was nothing new but difficulties result from its inter relationship with compensation. Then much expert time has been spent in analysing differences of expression, particularly between the judgment of Lord Nicholls and that of Baroness Hale, in the definition of matrimonial assets. Again the judgments have been critically received by specialist practitioners who see more extension than restriction in manoeuvres that attend the negotiation and preparation of complex cases. For a fuller examination of these appeals I refer to the English chapter in the 2008 edition of the International Survey of Family Law by Mary Welsted at 61. I am in complete agreement with her conclusions, particularly:

> it is time for the Government to finally grapple with this unsatisfactory state of affairs. It is essential that English law is brought into line with those jurisdictions where married adults are treated as such, where they are permitted to make enforceable agreements and in default of such agreements, they have the certainty of knowing that matrimonial property, strictly defined as such, will be divided in a way clearly defined by statute.

We speak with the same voice. In the post *Miller* and *McFarlane* appeal of *Charman v Charman*, the Court of Appeal re-emphasised the case for statutory reform.[12] Whether we shall be heeded seems most doubtful.

In her final sentence Mary Welsted writes:

> the Law Commission should be requested to conduct a thorough review of the law and produce a draft bill for enactment by Parliament.

What was the Working Group is now the Money & Property Sub-Committee of the Family Justice Council. Throughout the last twelve months and more the Committee has urged the Law Commission to include this area of the law in its next work programme. The Law Commission has decided not to do so, no doubt mindful of the relationship between their labour and the prospects of Government commitment. However, at least it has decided to tackle the lesser, but still important, question of pre-nuptial contracts. That there is judicial support for a clear movement away from paternalism to adult autonomy is not in doubt. The Committee has fully supported the case presented by the specialist practitioners association, Resolution. In the recent appeal of *Crossley v Crossley*[13] I have shown my support.

E. Parliament and the Judges

That this Government has shirked the responsibility to modernise our laws governing maintenance and the property consequences of divorce can not be denied. More particularly it has failed to ensure Parliamentary debate and

[11] [Lord Hoffmann did not give a reasoned judgment].
[12] [2007] 1 FLR 1246 at 106.
[13] [2008] 1 FLR 1467.

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determination of the principles that would thereafter govern the exercise of judicial discretion. This conclusion is fortified by the Government's readiness to modernise on purely practical levels. Over the past generation personal pension plans have become a major ingredient in the mixture of assets comprising the family fortune, particularly where the breadwinner generates a massive annual income. The 1973 Act conferred no power on the judge to invade that territory, which remained the sovereignty of the breadwinner. The case of *Brooks v Brooks*[14] allowed the judges to call for the enlargement of their powers so that part of the accumulated pension value could be diverted for the benefit of the applicant. The Government swiftly responded with the Welfare Reform and Pensions Act 1999, amending the 1973 Act to introduce first the power to earmark and then the power to split the breadwinners pension in to two separate funds, one for each.

An obvious consequence of the Government's failure to promote legislation has been the intervention of the House of Lords. It may be asked whether this intervention has been legitimate. The constitutional boundary between what is judicially permissible and judicially presumptuous is one that, as a family lawyer, I find hard to discern. In 2000 Lord Nicholls declared that to introduce a presumption of equality would go beyond the permissible bounds of statutory interpretation. Yet six years later he took the plunge. In *Bellinger v Bellinger*[15] the majority in the Court of Appeal and the judges of the House of Lords refused to extend judicially the legal definition of marriage, although declaring a refusal of a trans-sexual's right to marry a breach of the rights by the European Convention of Human Rights. Yet the distance travelled by the House of Lords by way of *White v White* and on to *Miller* and *McFarlane* has resulted in a fundamental change in our law. Concepts to determine outcome have been introduced that nowhere appear in the statute. As I have illustrated, those concepts would have been summarily rejected in the Parliament of 1969 that passed the statute. That the shift is not just conceptual is easily illustrated by the recent case of *Charman*. The judge, applying the House of Lords authorities, awarded the applicant wife £48,000,000. In our Court her Counsel, in responding successfully to the husband's appeal, conceded that under the former yardstick of reasonable requirements she would have received about £20,000,000. As families become increasingly bi-national and mobile the ambition of the wife, and the dread of the husband, is the assessment of her financial application by a London judge.

It may also be asked whether the intervention of the House of Lords has been beneficial in the sense that it has improved the quality of justice for those many couples that now experience divorce. The answer from the public at large would surely reveal a gender divide: affirmative from payees and negative from payers. Viewed more objectively the answer might be that, whilst the judicial elite have striven to improve the quality of justice, underlying their conclusions are social policy concepts. Whether they are shared by those who legislate, we do not know. We can assume that, at a point where the policy values of judges and legislators divide sufficiently sharply, Parliament will intervene with a reforming statute. The

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14 [1996] AC 375.
15 [2003] 2 AC 467.

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Law Lords are an assembly of the greatest legal intellects available in any age and are there to settle the law. Their qualification to settle issues of social policy is not so evident. However in so far as solutions emerge from, or are influenced by, innovation in broadly comparable jurisdictions the House of Lords is best placed for comparative study. It appears as if some of the concepts introduced in *Miller* and *McFarlane* derived from earlier legislation in New Zealand.

F. The European Dimension

Any judgement on the benefits of the reforms crafted by the House of Lords cannot be confined to their domestic impact, as would have been permissible in 1969 when the statute was born. Almost 40 years later England is no longer an island but a piece in a global jigsaw. London is perhaps the most cosmopolitan of all cities. Some harmony between the laws of states with broadly comparable economic and social conditions is obviously desirable. This is not simply aspirational for we are one of the twenty seven member states of Europe. There is, of course, wide divergence in the national laws of the member states but harmonisation of laws regulating marital property regimes and the property consequences of divorce is impeded by the singularity of our laws contrasted with the civil law states of Europe. Modernisation of our law should, I believe have regard to this dimension and to our responsibility to aid European harmonisation in this field, a field of ever increasing significance as the percentage of marriages between nationals of different states and as the mobility of couples within Europe increases. Article 3 of Regulation Brussels II bis provides that of the several states likely to hold jurisdiction to dissolve a marriage only that first seised exercises it. This provision, admirable in simplicity, becomes crucially significant if London awards are not only at a much higher level but also achieve that level by ignoring the marital property regime that the couple chose at the outset.

In our jurisdiction the grant of the decree and the consequent financial award are not severable. The paternalistic root ensures that either party has the right to bring financial applications to judgment on or after the grant of divorce. This paternalism created the only exception to our rule that divorce and financial award are not severable. Under Part III of the 1984 Act a wife divorced in another jurisdiction may, under generous jurisdictional rules, bring ancillary relief applications here, if granted permission so to do. The provision was designed to meet hardship to a woman domiciled in England but divorced in a foreign state whose laws offered her little or no financial relief. In the European context the survival of this statutory provision must be questionable. Should the English wife who married a Belgian under a marital regime of separation be able to bring a claim in London when dissatisfied with the judicial award in Brussels?

The Common Law solution to these problems prior to the Brussels Regulation was the doctrine of forum conveniens. The classic illustration of the operation of the doctrine in the European context is the case of *de Dampierre v de Dampierre*.[16]

[16] [1988] AC 92.

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The judges in the Court of Appeal had allowed the French wife to bring her financial claims against the French husband in London. The House of Lords held that France was the more convenient forum. The husband therefore escaped the spectre of a London award. This doctrine is still applied where the other jurisdiction engaged is not a European member state and its continued application is vital to avoid injustice. The decision of the European Court of Justice in *Owusu*[17] must not be allowed to prevent the use of the doctrine, particularly where two common law jurisdictions are engaged.

The effect of the reforms introduced by the House of Lords could be said to amount to something close to community of property, rejected by Parliament in 1969 but cautiously advanced by the Law Commission in its 1973 report: First Report on Family Property – A New Approach. Were Parliament now to debate the desirability of introducing a marital property regime of community in some shape or form, the advantage to be gained by moving closer to our European partners would surely be weighed.

A less radical reform that would lessen the divide would be to give legislative effect to pre-nuptial contracts. This would involve some departure from another ancient root of our law, namely that parties may not by contract oust or limit the jurisdiction of the Court to grant financial relief on divorce. But this traditional principle, like paternalism, seems to have little remaining utility in the modern world. Adults should be free to contract at the point of marriage for the financial consequences of future divorce. This freedom, which would have been considered contrary to moral principle and to devalue the institution of marriage, seems to me to be urgently required, given the average duration of marriage in the modern world. The freedom would of course be subject to limits and safeguards which it would be for Parliament to set.

G. Conclusion

A stern prosecutor might accuse the judges of trespassing on to legislative territory and, where Parliament has pointed a way, of not always following the sign post. It is clear that in 1984 and again in 1996 Parliament signalled that misconduct should more often and more obviously be reflected in any fair outcome. Perhaps the judges have adopted the Nelsonian response. Arguably the judges have not given the emphasis to terminating financial interdependence that Parliament intended. Where Government has chosen not to introduce statutory reform, presumably for rational policy reasons albeit not expressed, the judges should not themselves have introduced such radical change without any evidence of underlying social policy such as would be available to the Law Commission and to Parliament. The prosecutor might also query the benefits of judicial intervention in fields of social rather than legal science. The intervention results in four separate speeches which specialist practitioners can mine for nuggets to suit their case or for inconsistencies. Similarly judges have to wrestle with the application of

[17] [Case C-128/01].

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law reformed in such un-parliamentary language. Undoubtedly the cases in the House of Lords have not produced greater certainty or predictability. Thus the negotiation of settlement is no more straightforward and it is the lawyers rather than the litigants who are the principal beneficiaries of these decisions.

In defence it can be said that the merits of the reasonable requirements mechanism had long outlived the values of the society for which it was created. Lord Nicholls, coming to the issues without the assumptions and traditions of a specialist in the field, in clear language and with farsighted vision crafted approaches and solutions for modern times. The process which he initiated, he and the other judges carried forward with great intellectual clarity some six years later. In a rapidly changing world perhaps evolution is necessary with that sort of frequency. Certain it is that Parliament will never be able to legislate with any regularity or frequency. Thus the judges are providing a vital function, ensuring that the law in a field of great social significance keeps pace with changing times.

I doubt that a jury composed of the eminent and diverse scholars of the ISFL would return an unanimous verdict of these issues.

H. Acknowledgements

I have already acknowledged the help that I received in drafting this paper from Mary Welsted's chapter in the 2008 Survey of International Family Law. However, I have not acknowledged the very great reliance that I have placed on the work of Doctor Stephen Cretney. In particular I have drawn on his Blackstone lecture of 10 May 2003 (*The Family and The Law – Status or Contract*, (2003) CFLQ 403) and on his Magnum Opus: Family Law in the Twentieth Century (2003: OUP). Finally, in considering the judges interpretation of the power to order a clean break introduced by the 1984 Act, I have drawn on the 2008 paper of Martin Pointer QC: *Meal Tickets for Life? 1984 and All That*.