The Law Commission

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FAMILY LAW

THE FINANCIAL CONSEQUENCES OF DIVORCE: THE BASIC POLICY

A DISCUSSION PAPER

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of the Law Commissions Act 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

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A DISCUSSION PAPER

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

Origins and purpose of the paper

1. The law governing the financial consequences of divorce[1] was comprehensively reviewed by the Law Commission in its Report, published in 1969, on *Financial Provision in Matrimonial Proceedings*;[2] the Matrimonial Proceedings and Property Act 1970[3] gave effect to most of the recommendations in that Report. It has been said that that Act "revolutionised"[4] and "drastically reformed"[5] the law; yet, only ten years after this reform, the law is the object of serious and sustained criticism. As we said in our Fourteenth Annual Report[6] we receive a large number of letters from members of the public urging reform;[7] we also know that Members of Parliament and your Department receive many such letters.[8]

2. Under Item XIX of our Second Programme of Law Reform we are required comprehensively to examine family law with a view to its systematic reform and eventual codification. In our Fourteenth Annual Report[9] we expressed the view that, notwithstanding the criticisms which have been levelled against the present law dealing with the financial consequences of divorce, it was not then appropriate for us to take any action on the matter. It remains our view that it would not be appropriate for us to undertake a

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[1] This paper deals exclusively with the law of England and Wales; the law of Scotland differs in many important respects. In 1976 the Scottish Law Commission published a consultative document, Memorandum No. 22, on the subject of Aliment and Financial Provision; we understand that they hope to complete their report later this year: see *Hansard* (H.C.) 2 July 1980, vol. 987, col. *577*.

[2] (1969) Law Com. No. 25.

[3] This Act, and the Divorce Reform Act 1969, were consolidated in the Matrimonial Causes Act 1973.

[4] *Trippas* v. *Trippas* [1973] Fam. 134, 140, *per* Lord Denning M.R.

[5] *Griffiths* v. *Griffiths* [1974] 1 W.L.R. 1350, 1359, *per* Roskill L.J., referring specifically to the property adjustment powers (see para. 19, below) conferred by this Act.

[6] (1980) Law Com. No. 97, para. 2.25.

[7] Including a helpful memorandum from the Campaign for Justice in Divorce.

[8] See your speeches in the debates on the Law Commission's Third Report on Family Property: *Hansard* (H.L.), 18 July 1979, vol. 401, col. 1458–9 and *Hansard* (H.L.), 12 February 1980, vol. 405, col. 148.

[9] (1980) Law Com. No. 97, para. 2.25.

comprehensive review of this area of the law along the lines of our customary procedure. This would involve our first publishing, for comment and criticism, a working paper containing a full analysis of the existing law together with tentative proposals for reform; and finally submitting a report with draft legislation.

3. We are influenced in this view by a number of factors. For example, many of the reform proposals which would have to be considered in any comprehensive review of the financial consequences of divorce would involve a major shift away from reliance on private law for the enforcement of financial obligations against individuals and towards a system under which social security benefits would be acknowledged as, and indeed become, the primary method of making proper financial provision for broken families.[10] Such a shift would, of course, have considerable implications for public expenditure[11] and there would at the present time seem to be little point in going over once more the ground already so comprehensively covered by the Finer Report.[12]

4. Moreover, if we have interpreted the tenor of the present public debate correctly, it seems that our usual methods of consultation might well not reveal any sufficient consensus of the fundamental principle upon which the law governing the financial consequences of divorce between the parties should be based. At present, the basic principle of our law[13] is that, notwithstanding divorce,[14] each party to a marriage is in principle entitled to look to the other for financial support sufficient to preserve the standard of life which he or she[15] would have enjoyed if the marriage had not broken down. In practice it is of

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[10] See e.g. Report of the Committee on One-Parent Families (1974), Cmnd. 5629; Gray, *Reallocation of Property on Divorce* (1977), pp. 302, *et seq*; Harper, *Divorce and Your Money* (1979), p. 166, *et seq.*

[11] Supplementary Benefit and other social family benefits are the primary source of support for many one-parent families: Report of the Committee on One-Parent Families (1974), Cmnd. 5629; Supplementary Benefits Commission Annual Report (1978), Cmnd. 7725, Ch. 12. It should however also be noted that the tax system, and particularly the treatment of periodical payments made after divorce by one party to a marriage to the other or to the children of the family, often provides a significant measure of relief to many families affected by divorce, since the overall fiscal burden may well be substantially less after the breakdown than it had been before: see Income and Corporation Taxes Act 1970, s. 14 (as amended) (relief for single parents) and s. 457(1)(*c*) (treatment of periodical payments). It is therefore sometimes argued that the tax system in effect provides a substantial subsidy to some families and that exclusive concentration on the cost of social security provision as a measure of the financial implications of divorce for public expenditure would be misleading.

[12] Report of the Committee on One-Parent Families (1974), Cmnd. 5629. This made extensive proposals for reform of the law, including a proposal to introduce a "guaranteed maintenance allowance" which was intended to be a substitute for maintenance payments in the hands of lone parents.

[13] See paras. 19–22, below.

[14] Section 25 of the Matrimonial Causes Act 1973 which sets out the principles to be applied in determining the financial consequences of divorce applies equally to nullity. There are comparatively few nullity decrees (810 in 1979) compared with the number of divorce decrees (139,503 in 1979) (see Judicial Statistics 1979 (1980), Cmnd. 7977, Table D.8(*c*)), and there is no fully reported case discussing the principles applicable to the exercise of the court's discretion in relation to financial matters where a marriage is annulled. For these reasons we do not deal specifically with nullity in this paper.

[15] Unless the context otherwise requires, we generally refer for convenience to the common situation of husbands having to make financial provision for wives on divorce, without explaining on each occasion that the law applies equally for and against both spouses.

course rarely possible for this objective to be achieved (as a valuable research project[16] into the working of the law has demonstrated). However its very existence clearly remains of fundamental importance as a statement of the objective which the law seeks to attain, since it is based on the assumption that the parties to a marriage remain bound to provide for one another even after the marriage has been dissolved. To decide whether or not such a principle should be preserved manifestly raises difficult problems about the nature of marriage, and about the respective functions of husband and wife. On these, sharply differing views are held. For some, the fact that the principle was embodied in an Act of Parliament only ten years ago will itself be a matter of significance.

5. In these circumstances we do not think that it would be appropriate for us at this stage to advance even tentative proposals for reform. However, we believe that we may be able to make a contribution to the present debate by trying to focus attention on what we believe to be the fundamental problems at issue. To this end, you asked us[17] to prepare this paper in the hope that the reaction to its publication might enable a clearer picture to be formed both of the different views which are held and of the likelihood of reaching a reasonable degree of consensus on whether the law is in need of reform and if so in what direction reform should go.

The scope of the paper

6. We should however point out at the outset that this paper is only intended to highlight the issues arising on divorce between husband and wife. We intend to discuss the fundamental ideas which underlie the present law, and to examine some of the principles which might govern the formulation of any future law, but we have not attempted to provide any comprehensive analysis of the existing law either in this country[18] or in other countries. Moreover, as already mentioned, we have confined our attention to the implications of the current controversy in the field of private law.[19] In addition we would specifically point to the following questions as being excluded from our area of enquiry:

(i) *The financial obligations of the parties toward children of the family*[20]

In something approaching 60% of all divorce cases, children under the age of 16 are involved.[21] In such cases it may well be thought that the primary concern

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[16] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), p. 28.

[17] Pursuant to our duty under s. 3(1)(*e*) of the Law Commissions Act 1965 ". . . to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law."

[18] Reference might be made in this respect to *Rayden on Divorce*, 13th ed., (1979), pp. 724–830; Bromley, *Family Law*, 5th ed., (1976), pp. 543–557; Cretney, *Principles of Family Law*, 3rd ed., (1979), pp. 283–335.

[19] We shall however also point out the inevitable implications for public expenditure and public law obligations of some of the possible models for reform. See e.g. paras. 72 and 76, below.

[20] "Children of the family" is widely defined by s. 52(1) of the Matrimonial Causes Act 1973.

[21] See Central Statistical Office, *Social Trends* (1980) Table 2.13. In 1977, there were in England and Wales 77,501 cases out of a total of 129,053 in which one or more children under the age of 16 was involved: Office of Population Censuses and Surveys, *Marriage and Divorce Statistics 1977* (1979), Table 4.5.

must be for a broken family rather than a broken marriage; and that the welfare of the children, social, psychological, and economic, should take precedence over the adjustment of the financial rights and duties of the former spouses towards each other. In the great majority of cases, the children will be brought up by one of their parents, usually the mother, and more often than not in the former matrimonial home. The law places both parties under a duty to support children of the family;[22] but in practice the mother will usually be the recipient of periodical payments on behalf of the children, and there may well be some difficulty in distinguishing her financial position as a former wife from that as custodian of the children.[23] We do not however think that the principle of the present law, which is that in resolving questions affecting custody or upbringing the welfare of the child is to be regarded as the first and paramount consideration,[24] is seriously questioned; and we therefore do not propose in this paper to discuss further the basis for assessing the provision to be made for children of the family.

(ii) *Possible reforms in the law which would depend on a decision on the fundamental policy*

The purpose of this paper is to focus attention on the basic policy options, rather than on detailed problems whose solution necessarily depends on the principle which is finally adopted to govern the financial consequences of divorce. For example, we are aware that the question of occupational pensions gives rise to particular difficulties under the present law. Under most pension schemes, in the event of the pensioner's death, entitlement to a widow's pension is restricted to the person to whom the deceased was married at the time of his death. The effect is thus to exclude divorced wives from any entitlement. In consequence, in order to put the wife in the financial position in which she would have been had the marriage not broken down, the husband may have to make alternative arrangements, perhaps at very heavy cost. It might well be that there is a case to be made for giving the court power to direct that the wife's contingent pension expectations be preserved;[25] but whether or not this would be desirable must inevitably be influenced by the approach which the law adopts to the whole question of obligations between husband and wife. Hence further consideration would be inappropriate given the limited

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[22] Guidelines to assist the court in exercising its powers to make financial orders for children are contained in Matrimonial Causes Act 1973, s. 25(2). The court is directed to consider "all the circumstances of the case" (including certain specified circumstances) "and so to exercise [its] powers as to place the child, so far as it is practicable [and, having regard to the spouses' financial resources and obligations] just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him".

[23] The more so since some registrars will in practice make smaller orders for a wife and increase the sums which would otherwise be ordered in favour of the children because they believe that "many husbands after the breakdown of the marriage are very willing to continue to support their children but are often less willing to pay for their wives and are more likely to default on this part of the payment" see Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), p. 32. There may also be tax advantages to this method of payment: see n. 11 above.

[24] Guardianship of Minors Act 1971, s. 1.

[25] See further Equal Status for Men and Women in Occupational Pensions Schemes (1976), Cmnd. 6599, Ch. 13.

scope of this paper.[26] If a decision were to be reached on the basic policy it would then be possible for this and other issues to be examined further either by ourselves or by some other body.

(iii) *Financial obligations arising between husband and wife during the subsistence of a marriage*

The present debate is, we believe, exclusively concerned with the question of the obligations arising on the breakdown of a marriage. We have therefore restricted our discussion to this situation and have not considered the rules which at present require the parties to a marriage to support each other during its subsistence.[27]

Arrangement of the paper

7. This paper is divided into four further Parts as follows:

PART II: THE PRESENT LAW AND ITS BACKGROUND

In this Part we first trace the background to the present law, and in particular seek to explain the basis of the law governing financial obligations prior to 1971, and the impact of the changes in the divorce law which were effected by the Divorce Reform Act 1969[28] on the formulation of the present law concerning financial relief. We then give a short account of the present law contained in the Matrimonial Causes Act 1973. As we have said above, this account is not intended to be a comprehensive summary of the law as it has been interpreted by the courts, but we hope that it will be sufficient to indicate its main characteristics and to make more readily comprehensible the discussion of policy which follows.

PART III: IS THERE ANYTHING WRONG WITH THE POLICY OF THE PRESENT LAW?

In this Part we first give a brief summary of the more important complaints known to us about the working of the law. We then seek to analyse the principal arguments which can be advanced against continued acceptance of the principle upon which the present law is based, namely that marriage may involve a life-long obligation of support even though the status of marriage has been ended by divorce.

PART IV: MODELS FOR A LAW GOVERNING THE FINANCIAL CONSEQUENCES OF DIVORCE

In this Part we discuss some of the principles which might, either by themselves or in combination, be considered in formulating a law to govern the financial aspects of divorce. We also point to some of the

[26] Another such problem is the erosion by inflation of periodical payments orders to which we refer in para. 28, below.

[27] See e.g. Matrimonial Causes Act 1973, s. 27. Accordingly the substance of our discussion is inapplicable to the financial orders that a court might make in cases of judicial separation, although the courts' powers in such cases are broadly similar to those available in cases of divorce: Matrimonial Causes Act 1973, ss. 21–24.

[28] Which came into force on 1 January 1971: Divorce Reform Act 1969, s. 11(3).

problems to which the adoption of such principles might give rise and to some of the further issues which need to be discussed.

PART V: CONCLUSION AND SUMMARY

PART II

THE PRESENT LAW AND ITS BACKGROUND

Introduction

8. The policies underlying the present law cannot be fully understood without some understanding of the historical development of the law. In this Part we therefore first explain the principles governing the financial consequences of divorce under the law based on the commission of a matrimonial offence which was in force prior to 1971. We then discuss the impact of the reformed divorce law introduced by the Divorce Reform Act 1969 (henceforth referred to simply as "the 1969 Act") on the development of the law concerning financial provision. We conclude this Part by examining in outline the financial consequences of divorce under the present law.

The basis of the law governing the financial consequences of divorce under the divorce law prior to 1971

9. Until the 1969 Act came into force the divorce law in this country was based on the matrimonial offence principle.[29] No divorce could be obtained unless the petitioner could establish that the respondent had been guilty of adultery, cruelty or desertion;[30] in principle a petitioner only had an unqualified right to divorce if he or she were an aggrieved and innocent victim.[31]

10. On marriage a wife acquired a common law right to be supported by her husband, although the methods available to her for enforcing this right were extremely limited.[32] A divorce decree terminated the husband's common law duty to maintain the wife; but statute[33] conferred on a divorced wife a right to apply to the High Court for an order for periodical payments and certain

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[29] Exceptionally, by an amendment to the law made in 1937, divorce was also available, subject to certain restrictions, if the respondent was incurably of unsound mind: Matrimonial Causes Act 1965, s. 1(1)(*a*)(iv).

[30] A wife could also obtain a divorce if her husband had been guilty of rape, sodomy or bestiality since the celebration of the marriage: Matrimonial Causes Act 1965, s. 1(1)(*b*).

[31] This principle, which found expression in the bars of connivance, condonation, and collusion, and in the bar on granting relief to a petitioner guilty of adultery, was in practice much eroded over the years: see Cretney, *Principles of Family Law*, 3rd ed., (1979), pp. 88–89.

[32] See Bromley, *Family Law*, 5th ed., (1976), pp. 496–8; and, for a full historical account, see J. L. Barton in Graveson and Crane (eds.), *A Century of Family Law* (1957), pp. 352–373.

[33] Matrimonial Causes Act 1965, s. 16.

other kinds of financial relief.[34] By marriage, therefore, a wife acquired a right to be supported by her husband for the rest of her life, and the object of the legislature in giving a wife a right to apply to the court for financial provision after divorce was to provide a substitute for the support to which she would have been entitled had the marriage continued.[35] Because a husband could only be divorced if he were a wrongdoer, it seemed reasonable for the courts to exercise their powers to award maintenance after divorce in such a way as to keep the injured wife in the position in which she would have been had her husband properly discharged his marital obligations toward her.[36] The principle which applied can be summarised by asking: why should a wronged wife become financially worse off because she exercised her right to divorce a husband who had repudiated the obligations of matrimony? Particularly in the early days of their divorce jurisdiction, the courts were concerned to uphold the principle that marriage involved life-long obligations. It therefore followed that if a husband's outrageous behaviour drove his wife to divorce him, this should not enable him to shake off the obligations of marriage. This policy was forcibly enunciated in a case decided in 1865. Although the argument is expressed in language which today seems old-fashioned, the underlying principles are perhaps still relevant. If, it was said,[37] a man—

> "can part with his wife at the door of the Divorce Court without any obligation to support her, and with full liberty to form a new connection, his triumph over the sacred permanence of marriage will have been complete. To him marriage will have been a mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden. To such a man the Court may truly say with propriety, 'According to your ability you must still support the woman you have first chosen and then discarded. If you are relieved from your matrimonial vows it is for the protection of the woman you have injured, and not for your own sake. And so much of the duty of a husband as consists in the maintenance of his wife may be justly kept alive and enforced upon you in favour of her whom you have driven to relinquish your name and home.' "

According to this view, the fact that there was to be no escape from the financial ties created by marriage would operate as an important buttress to the institution of marriage, and as a powerful deterrent:

> "It is the foremost duty of this Court in dispensing the remedy of divorce to uphold the institution of marriage. The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved is, that it loosens the bonds of so many others. The powers of this Court will be turned to good account if, while meting out justice to the parties, such order should be taken in the matter as to stay and quench this desire and

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[34] The courts' powers over the parties' capital were however very limited. Under the law as it stood before the reforms of 1969/70, these were: power to order a lump sum payment (Matrimonial Causes Act 1965, s. 16(1)(*c*)) and to order the variation of nuptial settlements (s. 17). In certain cases the wife could be ordered to settle property for the benefit of the husband or children (s. 17(2)).

[35] The legislature was also concerned that a divorced wife should not be thrown for support on the community: *Hyman* v. *Hyman* [1929] A.C. 601, 629.

[36] *N.* v. *N.* (1928) 44 T.L.R. 324, 328, *per* Lord Merrivale P.

[37] *Sidney* v. *Sidney* (1865) 4 Sw. & Tr. 178, 181, *per* Sir James Wilde (later Lord Penzance).

repress this evil. Those for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money; and I wish it to be understood that, so far as the powers conferred by the section go, no man should, in my judgment, be permitted to rid himself of his wife by ill-treatment, and at the same time escape the obligation of supporting her."[38]

11. The fundamental principle upon which the financial consequences of divorce were based remained more or less constant over the years. Consequently where cohabitation was disrupted by a matrimonial offence on the part of the husband, the court would seek to assess maintenance on the basis that the wife's standard of living should not suffer more than was inherent in the circumstances of separation.[39] The principle applied was very similar to that governing liability for breach of contract: a man who breaks a contract is liable to compensate the other party who is entitled to be put into the same position as if the contract had been carried out.[40]

12. A strict application of this contractual analogy would of course mean that if a husband divorced his wife (necessarily on the ground of her wrongdoing) she would obtain no maintenance. At one time this was indeed the attitude of the law; a wife who had deserted her husband or committed adultery would receive no maintenance or at most "a compassionate allowance to save her from utter destitution".[41] However over the years the courts developed the doctrine that a "guilty" wife should not forfeit all right to maintenance unless her misconduct was of a really serious nature, disruptive, intolerable, and unforgiveable.[42] In practice, however, the

"notion that a 'guilty' wife is virtually disqualified from obtaining an order for maintenance . . . persisted in the face of strong authority to the contrary . . . [T]his . . . led to bitterly contested divorce cases in which the only real issue has been maintenance . . ."[43]

13. Prior to 1971, therefore, the main features of the law governing the financial consequences of divorce were based on the assumption that (subject perhaps to the exception that a wife who was technically "guilty" might nevertheless expect some financial provision) the function of divorce was to

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[38] *Ibid.*, at pp. 181–2.

[39] *Attwood* v. *Attwood* [1968] P. 591, 595, *per* Sir J. Simon P.

[40] *Cheshire and Fifoot's Law of Contract*, 9th ed., (1976), ed. Furmston, pp. 583–627.

[41] *Dailey* v. *Dailey* [1947] 1 All E.R. 847, 851 *per* Willmer J. For an example of the practice of awarding a compassionate allowance see *Ashcroft* v. *Ashcroft and Roberts* [1902] P.270 (Husband obtained a decree on the grounds of wife's adultery. Marriage had lasted 23 years. 5 children. Wife in bad health, had no means and was unable to earn a living or obtain any support. Husband ordered to "provide a small maintenance for her, so that she may not be turned out destitute on the streets," *per* Gorell Barnes J. at p. 273). As recently as 1956, six members of the Royal Commission on Marriage and Divorce took the view that a spouse who had had a decree or order made against him or her based on the commission of a matrimonial offence should not have a right even to apply to the court for maintenance. However, this view was not accepted by the majority of the Commission or by the legislature. (1956), Cmd. 9678, para. 503.

[42] *Ackerman* v. *Ackerman* [1972] Fam. 1, 6. This case was reversed on appeal but not so as to affect this part of the court's decision.

[43] *Wachtel* v. *Wachtel* [1973] Fam. 72, 78, *per* Ormrod J.

give relief where a wrong had been done.[44] The right and duty of maintenance was related to the performance of reciprocal matrimonial obligations; a husband who was at fault should continue to support his wife, but conversely it would be unjust to require a husband who had "performed substantially all his matrimonial obligations to continue to provide maintenance for a wife who had substantially repudiated hers."[45] The concept of a life-long right to and duty of support was thus inextricably linked with the concept of divorce as a relief for wrongdoing.

Reform of the divorce law: the impact of the Divorce Reform Act 1969 on the financial consequences of divorce

14. For some years before the 1969 Act this theoretical basis of the divorce law had been somewhat eroded, for reasons which have been summarised[46] as follows:

> "21. Serious inroads have been made into this basic principle of the matrimonial offence. In certain circumstances a divorce can be granted on the ground of the incurable insanity of the respondent (which, of course, is no offence at all but a tragic misfortune for both spouses) and a marriage may be dissolved on the ground that one spouse can be presumed to be dead. Only very rarely to-day is a divorce refused because the petitioner also has committed a matrimonial offence. The most important situation where this is theoretically a bar is where the petitioner's offence is adultery, but, if he fully discloses this in his discretion statement, the court will nearly always exercise its discretion in his favour.[47] Refusal is normally due not to the petitioner's adultery but because it is discovered that he has failed fully to disclose it; and even such non-disclosure is often overlooked if the court is satisfied that a full disclosure has finally been made. Obviously the undisclosed adultery of the petitioner is unlikely to be discovered unless it is still continuing or is very recent.[48] Despite this, discretion is asked for and some acts of adultery are disclosed in about 30 per cent of all cases. Furthermore, since the decision of the House of Lords in *Blunt* v. *Blunt*[49] it has been clear that where there are cross-petitions the courts have power to grant decrees on both petitions; in recent years, therefore, cross-petitions have been far more common than before (the original respondent often petitioning on the basis of the adultery disclosed in the original petitioner's discretion statement) and, in consequence, the guilty/innocent dichotomy has been blurred. Since 1963 collusion has

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[44] See e.g. Royal Commission on Marriage and Divorce (1956), Cmd. 9678, para. 69.

[45] Sir J. Simon, "Seven Pillars of Divorce Reform", (1965) 62 Law Soc. Gaz. 344, 348.

[46] Reform of the Grounds of Divorce. The Field of Choice (1966), Cmnd. 3123, paras. 21 and 22. The footnotes to the quotation have been omitted save in so far as they are essential to an understanding of the present text.

[47] In 1965, out of a total number of 11,221 divorces and judicial separations granted in cases dealt with in the Principal Registry in London, discretion was exercised in 3,850 and refused in only 3.

[48] The number of interventions by the Queen's Proctor (the normal source of discovery) is normally less than 50 per annum and, even when the intervention is successful, the court more often than not still exercises its discretion in the petitioner's favour. In 1965, 54 interventions by the Queen's Proctor were heard and allowed, but discretion was exercised in 34 of these.

[49] [1943] A.C. 517.

become a discretionary, and no longer an absolute, bar and "arranged divorces" are no longer banned so long as the arrangements are disclosed and the court is satisfied that they will not lead to the granting of relief for an offence which has not occurred, or to a party who would not have received it if the case had been fought out. The ambit of condonation has also been reduced. Delay is very rarely regarded now as a ground for refusing relief.

22. A further departure from the principle that no divorce should be granted without proof of fault on the part of the husband or wife has been brought about by two recent decisions of the House of Lords.[50] These have established that a divorce can be obtained on the ground of cruelty even though the respondent did not intend to be cruel in any sense of that word as understood by a non-lawyer, but simply because his conduct, e.g. owing to insanity, has produced an intolerable situation for the petitioner."

15. It was not, however, until the enactment of the 1969 Act that the matrimonial offence principle was finally rejected as the basis on which divorce was to be available. In its place, the Act introduced the principle that there should be one ground, and one ground only,[51] on which the court has power to dissolve a marriage, namely that the marriage has broken down irretrievably. However, the Act provides that the court shall not hold that the marriage has broken down irretrievably unless the petitioner satisfies the court of one or more of certain "facts"; but on proof of any such fact the court must grant a decree unless it is satisfied that the marriage has not broken down. These "facts" are:

"(*a*) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(*b*) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(*c*) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(*d*) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition ... and the respondent consents to a decree being granted;
(*e*) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition ...".[52]

The effect of the Act is far reaching. Divorce, in practice if not in theory is available simply on proof of any of these "facts", and although the first three "facts" are similar to the matrimonial offences of adultery, cruelty and desertion, the remaining two are based solely on the neutral fact that the parties have

[50] *Gollins* v. *Gollins* [1964] A.C. 644, and *Williams* v. *Williams* [1964] A.C. 698.
[51] *Grenfell* v. *Grenfell* [1978] Fam. 128, 140, *per* Ormrod L.J. Section 1 of the 1969 Act provided that "the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably".
[52] Now consolidated in the Matrimonial Causes Act 1973, s. 1(2).

lived apart for a stipulated period.[53] The Act thus entirely alters the conceptual basis of divorce; it also has a considerable significance for the whole juristic basis of marriage. Whereas before 1971 a valid marriage could not be dissolved against the will of an "innocent spouse", the effect of the 1969 Act is that any marriage can be dissolved at the instance of either party, whether or not the other agrees, after they have lived apart for five years. Consequently it can be argued that the concept of the indissoluble marriage no longer exists in English law: if either party wants a divorce, sooner or later he will be able to obtain one.[54]

16. In the next Part of this paper[55] we shall be considering the question how far the fundamental change in the nature of divorce effected by the 1969 Act might necessarily have implications for the law governing the financial consequences of divorce. Our present concern is merely to note the indirect influence which the movement for divorce reform[56] had on the law governing the financial aspects of divorce. In particular it was urged that the Act would prove to be a "Casanova's Charter" whereby blameless wives would be repudiated by their husbands and left in economic difficulties.[57] For instance in the Second Reading debate in the House of Commons Mr. Bruce Campbell, M.P. said[58] that:

> "It is said that there will be safeguards for these innocent, deserted and abandoned wives. My reply is to say that it is nonsense. We know that the proposed safeguards will be quite inadequate. In the present state of the law, if a man leaves his wife and lives with another woman, that other woman has no legal claim upon him. The only woman who has a legal claim upon him is his lawful wife. She can go to the court and the court will award her a reasonable slice of the man's income.
>
> But once that man is allowed to marry the other woman, he will become legally liable to maintain her as well and that, of course, is impossible. We are not talking about millionaires. We are talking about the millions of ordinary men and women who live in those rows and rows of terraced houses in our constituencies. They all live on a tight budget. Most people live on a tight budget, and those tight budgets simply do not permit maintaining two households."

17. The result of such opposition was two-fold. In the first place, provisions specifically designed to protect the respondent in cases where divorce was

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[53] Five years, or two years if the respondent consents: Matrimonial Causes Act 1973, s. 1(2)(*d*) and (*e*).

[54] In exceptional cases a divorce may be refused: Matrimonial Causes Act 1973, s. 5. See further n. 59, below.

[55] See paras. 35 to 41, below.

[56] For an account of the campaign leading up to the enactment of the Divorce Reform Act see Lee, *Divorce Law Reform in England* (1974).

[57] Cf. the observation of Finer J. in *Reiterbund* v. *Reiterbund* [1974] 1 W.L.R. 788, 798 that ... "the Civil Judicial Statistics for 1972 (Table 10) show that of the 19,270 petitions for dissolution filed that year based on five years' separation, 10,003 were by husbands and 9,267 by wives; so that the fear, to which section 5 was largely a response, that the five years' separation rule constituted, as it was said, a Casanova's charter, might with roughly equal ineptitude have been expressed by a reference to Messalina".

[58] *Hansard* (H.C.), 6 Dec. 1968, vol. 774, col. 2046.

sought on either of the living apart "facts", were included in the 1969 Act.[59] Secondly, the movement to secure maximum financial protection for divorced women by means of new financial provision legislation received a considerable stimulus. It was increasingly urged that the contribution which wives make towards the acquisition of family assets (such as the matrimonial home) "by performing the domestic chores, thereby releasing their husbands for gainful employment"[60] was wholly ignored in determining their rights. Indeed, in 1969 a Private Member's Bill designed to remedy this injustice by a system of community of property (under which both parties to a marriage would have a right to property acquired during the marriage) was given a Second Reading in the House of Commons against Government advice. Although discussions subsequently resulted in the withdrawal of the Bill the then Lord Chancellor undertook not to bring the 1969 Act into force before introducing legislation to deal comprehensively with the financial consequences of divorce.[61]

18. In July 1969, three months before the 1969 Act received the Royal Assent, and over a year before it was due to be brought into operation, the Law Commission reported on *Financial Provision in Matrimonial Proceedings*.[62] The Matrimonial Proceedings and Property Act 1970, the relevant provisions of which came into force on 1 January 1971[63] gave effect to such of the Report's recommendations as required legislation.[64] We now turn to give a short account of the main features of the law embodied in that Act.

The financial consequences of divorce under the present law

19. The Matrimonial Proceedings and Property Act 1970 was a comprehensive codification of the law governing the financial consequences of divorce, which also made a number of important changes in the law. In the first place it permitted all financial orders to be made in favour of either the husband or the

[59] See now Matrimonial Causes Act 1973, ss. 5, 10. Under the former provision the court may refuse a decree based on five years' living apart if divorce would cause grave financial or other hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage; under the latter provision the court may, where the petition is based on either s. 1(2)(*d*) or s. 1(2)(*e*), refuse to make a decree absolute unless it is satisfied about the financial arrangements that have been made.

[60] (1969) Law Com. No. 25, para. 69.

[61] See *Hansard* (H.L.), 28 January 1970, vol. 794, col. 1560 (the Solicitor General) and cols. 1597–8 (Mr. Edward Bishop M.P. quoting from a letter dated 21 February 1969 from the Lord Chancellor stating the Government's proposals). For the strength of the feeling of injustice caused to women by the then law, see the Second Reading debate on the 1969 Matrimonial Property Bill, *Hansard* (H.C.), 24 January 1969, vol. 776, col. 801 *et seq.*

[62] (1969) Law Com. No. 25. The Report was produced pursuant to Item X of the Law Commission's First Programme of Law Reform and Item XIX of its Second Programme and had been preceded by the Commission's Working Paper No. 9, Family Law: Matrimonial and Related Proceedings: Financial Relief, published in 1967.

[63] Matrimonial Proceedings and Property Act 1970, s. 43(2).

[64] The legislation is now largely embodied in the consolidating Matrimonial Causes Act 1973. Parliamentary debate on the Matrimonial Proceedings and Property Bill in 1970 in the House of Commons was much shortened by the decision to dissolve Parliament. Seven and a half hours were spent in Standing Committee J discussing the first five clauses of the Bill; after the announcement of the dissolution, the Committee and other stages of the Bill were completed in less than two and a half hours, with the consequence that many important amendments were not debated.

wife.[65] The practical effects of this shift in emphasis have been limited, but the provision undoubtedly marks an important change of principle. Of much greater practical significance, however, are the rationalised and greatly extended powers which the Act conferred on the court. In particular the Act enabled the court[66] not only to make orders for periodical payments[67] (which might be secured or unsecured) but also to make wide ranging lump sum and property adjustment orders[68] which can in effect redistribute all the property owned by either of the spouses between themselves and their children.[69] Finally the Act set out detailed guidelines designed to assist the court in the exercise of this wide discretion.

20. These guidelines, which are now to be found in section 25 of the Matrimonial Causes Act 1973, have been described as an attempt to "structure" the courts' choice "within a framework of specified standards".[70] Because they are so crucial to the issues under discussion in this paper, we set them out in full. Section 25 provides that it shall be the duty of the court in deciding whether to exercise its powers of ordering financial provision and property adjustment in relation to a party to a marriage

> "to have regard to all the circumstances of the case including the following matters, that is to say—
>
> (*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

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[65] Nowadays "husbands and wives come to the judgment seat . . . upon a basis of complete equality", *Calderbank* v. *Calderbank* [1976] Fam. 93, 103, *per* Scarman L.J. However economic factors mean that successful applications by husbands are exceptional: *ibid.*, at p. 103, *per* Cairns L.J.; *P.* v. *P.* (*Financial Provision*: *Lump Sum*) [1978] 1 W.L.R. 483, 490, *per* Ormrod L.J.

[66] The courts had previously had only limited powers to make orders affecting the parties' capital assets (see n. 34 above), and seemed reluctant to exercise even those limited powers: *Davis* v. *Davis* [1967] P.185, 192, *per* Willmer L.J.; *Hakluytt* v. *Hakluytt* [1968] 1 W.L.R. 1145, 1149, *per* Willmer L.J.

[67] The legislation distinguishes between "financial provision orders" (see now Matrimonial Causes Act 1973, s. 23) i.e. periodical payment orders and lump sum orders, and "property adjustment orders" (see now Matrimonial Causes Act 1973, s. 24) i.e. transfers and settlements of property and variations of settlements.

[68] "The court takes the rights and obligations of the parties all together, and puts the pieces into a mixed bag. Such pieces are the right to occupy the matrimonial home or have a share in it, the obligation to maintain the wife and children, and so forth. The court then takes out the pieces and hands them to the two parties, some to one party and some to the other, so that each can provide for the future with the pieces allotted to him or to her. The court hands them out without paying any too nice a regard to their legal or equitable rights but simply according to what is the fairest provision for the future, for mother and father and the children", *Hanlon* v. *The Law Society* [1980] 2 W.L.R. 756, 776, *per* Lord Denning M.R. (C.A.). These powers do not however extend to an express power to order a sale of the matrimonial home although this end can in practice be achieved: see now *Ward* v. *Ward and Greene* [1980] 1 W.L.R. 4, and see also the Law Commission's Report on Orders for Sale of Property under the Matrimonial Causes Act 1973 (1980), Law Com. No. 99.

[69] *Harnett* v. *Harnett* [1973] Fam. 156, 160–1, *per* Bagnall J. It has been said that the courts now effectively possess "a special power of appointment over any economic resource available to either party . . . ": Gray, *Reallocation of Property on Divorce* (1977), p. 323.

[70] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), p. 3.

(*c*) the standard of living enjoyed by the family before the breakdown of the marriage;
(*d*) the age of each party to the marriage and the duration of the marriage;
(*e*) any physical or mental disability of either of the parties to the marriage;
(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
(*g*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".

21. Section 25 therefore involves a two-stage process. First, the court must consider "all the circumstances" including those specifically enumerated in sub-sections (*a*) to (*g*), set out above. Secondly, in the light of those facts, the court is given a specific "target"[71] or objective, namely, to put the parties in the financial position in which they would have been had the marriage not broken down. However the court may depart from this objective if, either, it is not practicable to place the parties in the financial position in which they would have been had the marriage not broken down (as will usually be the case), or if having regard to the parties' conduct it is not "just to do so".

22. One point which is immediately apparent on reading section 25 is that it gives no indication as to the relationship between these two aspects of the process, that is to say between the court's duty to "have regard to" all the circumstances of the case and its duty "so to exercise [its] powers as to place the parties . . . in the financial position in which they would have been if the marriage had not broken down . . .". How far, for instance, should the court allow the fact that the marriage has been of only short duration, or the fact that the wife has some earning capacity, to affect the orders which it would otherwise have made?[72] The structure of the section appears to envisage that although the court may regard the specified and other relevant circumstances as being of such weight as to override the general direction to place the parties in the financial position in which they would have been had their marriage not broken down, nevertheless the primary objective is that the financial position of the parties should so far as possible be unaffected by their divorce. In short, although divorce terminates the legal status of marriage it will usually not terminate the financial ties of marriage which may remain life-long. This, we believe, lies at the heart of the present controversy.

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[71] *Harnett* v. *Harnett* [1973] Fam. 156, 161, *per* Bagnall J.

[72] Some guidance on this matter can be derived from case law and we have attempted to analyse some of the cases on the subject later in this paper. See e.g. paras. 61–65, below. However our approach has been highly selective; for more detailed analyses, see *Rayden on Divorce*, 13th ed., (1979), pp. 723–830; Bromley, *Family Law*, 5th ed., (1976), pp. 543–557; Cretney, *Principles of Family Law*, 3rd ed., (1979), pp. 283–335.

PART III

IS ANYTHING WRONG WITH THE POLICY OF THE PRESENT LAW?

Introduction

23. The present law dealing with the financial consequences of divorce is, as we have said, under sustained attack. In this Part we first attempt to catalogue some of the main complaints about the present law which are known to us, and then to develop and analyse the principal themes which underlie these complaints. It should, however, be remembered that we have not come to any conclusion about the merits or demerits of the present law. It should therefore not be assumed that by summarising and analysing these complaints any agreement or disagreement on our part is implied.

Specific complaints

(*a*) *Inconsistency with the modern law of divorce*

24. A fundamental complaint is, we think, that the underlying principle of the law governing the financial consequences of divorce is inconsistent with the modern divorce law. The law (it is said) now permits either party to a marriage to insist on a divorce, possibly against the will of the other party, regardless of the fact that the other party may have honoured every conceivable marital commitment. Why (it is asked), if the status of marriage can be dissolved in this way, should the financial obligations of marriage nevertheless survive—particularly in cases where divorce has been forced on an unwilling partner, or where a wholly innocent partner is required to support one whose conduct has caused the breakdown? Instead (it is argued), divorce ought to provide a "clean break"[73] with the past in economic terms as well as in terms of status, and, so far as possible, encourage the parties to look to the future rather than to dwell in the past.

(*b*) *Hardship for divorced husbands*

25. We have been told that the continuing financial obligations imposed by divorce often cause severe economic hardship for those who are ordered to pay, normally of course the husband. It is not uncommon for a man to be ordered to pay as much as one-third[74] of his gross income to his ex-wife until she either remarries or dies, and to be deprived of the matrimonial home (which may well represent his only capital asset) at least during the minority of the children.[75] Unless she remarries[76] this obligation to maintain an ex-wife can put divorced husbands under financial strain not only over a very long period of years but even into retirement.[77] The obligation to maintain an ex-wife is particularly resented if the husband feels that it is his wife who is really

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[73] See *Minton* v. *Minton* [1979] A.C. 593.

[74] This fraction of the joint incomes of husband and wife has become the conventional starting point in the assessment of periodical payments: see para. 81, below. In addition, he may well be ordered to make payments for any children of the family.

[75] See further paras. 19 above, and 79, below.

[76] Section 28 of the Matrimonial Causes Act 1973 provides that unsecured periodical payments shall cease on the death of either party or on the remarriage of the payee.

[77] There is, however, provision in s. 31 of the Matrimonial Causes Act 1973 for variation of periodical payments orders. See further para. 28, below.

responsible for the breakdown of the marriage; and such feelings are further exacerbated where he believes that his ex-wife has either chosen not to contribute toward her maintenance by working, or has elected to co-habit with another man, who might be in a position to support her but whom she has decided not to marry so as not to be deprived of her right to maintenance from her first husband.[78] Finally it should be remembered that many more wives than husbands receive legal aid.[79] The cost of legal proceedings therefore frequently weighs upon a husband as an additional financial burden and may even effectively prevent him from pursuing his case before the courts. For many husbands the effect of divorce may seem to involve not only the end of their marriage, but also the loss of home, children[80] and money.

(*c*) *Hardship for second families*

26. The complaints which we have summarised so far apply primarily to husbands, whether or not they have taken advantage of the freedom to remarry conferred by divorce. However, particular resentment seems to be felt by men who have remarried after a divorce, and by their second wives. The burden of continuing to provide for a first wife can involve financial deprivation for a man who does not remarry, but the burden may well be acute if he remarries and has a second family. In such cases the impoverishment caused by the first wife's continuing claim upon her husband may well fall on all the members of his new family, and we have even been told of cases where husbands have had themselves sterilised because they feel that their continuing financial commitments to a former wife make it impossible for them to afford children in their second marriage. In particular the effect on a man's second wife is a frequent source of comment. It is claimed that she is invariably forced to accept a reduced standard of living by reason of the fact that part of her husband's income is being diverted to support his first wife; it is also claimed that a second wife may be forced, notwithstanding family commitments, to work, even although her husband's first wife, who possibly has no family commitments, chooses not to do so. Indeed some second wives have told us that they feel that they are being required personally to support their husband's first wife because the courts take a second wife's resources into account when assessing a husband's financial circumstances and his capacity to make periodical payments to a former spouse.[81] Not surprisingly this feeling is a cause of particular

[78] See n. 76 above. If it could be established that the former wife was receiving financial support from another man, the court might well regard this as a relevant factor on an application to vary (or extinguish) a periodical payments order in her favour; see *Jessel* v. *Jessel* [1979] 1 W.L.R. 1148, 1154, *per* Lord Denning M.R.

[79] Legal aid is generally no longer available to finance undefended divorce proceedings, but it remains available to those whose means are within the appropriate financial limits in relation to injunctions, financial or property matters, contested applications relating to children, and also for applications for leave to present a petition within three years of marriage: The Legal Aid (Matrimonial Proceedings) Regulations 1977, S.I. 1977, No. 447.

[80] As we have said in para. 6, above, we are not in this paper dealing with the consequences of divorce in relation to children. In practice, a wife usually obtains physical custody of the children, and divorced husbands often feel that the arrangements that are made for access are unsatisfactory.

[81] There is no doubt that the means of a second wife or mistress are relevant when considering the financial position of the spouses under the Matrimonial Causes Act 1973, s. 25. The court has no power to order a mistress (or, it would seem, a second wife) to swear an affidavit of means under the Matrimonial Causes Rules 1977, r. 77(5) (*W.* v. *W.*, *The Times* 22 May 1980); but general statements on information and belief by a wife seeking ancillary relief as to the means and resources of the other woman may effectively force the husband either to make the full frank and clear disclosure required of him or let the assertions go uncontradicted.

bitterness where either the first wife has no children or has school-age children and does not herself work, or where she appears to enjoy a higher standard of living than the husband's present family. Even after a husband's death the existence of a former marriage can, we are told, threaten the financial security of a second family because under the Inheritance (Provision for Family and Dependants) Act 1975 a first wife can make a claim for reasonable financial provision out of her former husband's estate.[82] From the point of view of a husband's second family the freedom which he is given to remarry on divorce (which he might himself not then have wanted) might appear to be nothing more than a "snare and a delusion".

(d) Hardship suffered by divorced wives

27. The complaints which we have summarised so far suggest that the present law operates unfairly in relation to divorced husbands. We have already seen how the law governing the financial consequences of divorce was significantly influenced by the need to ensure that proper financial provision was made for wives who might (as a result of the reformed divorce law) find themselves put aside after many years of marriage. Notwithstanding this policy and the complaints that the legislation bears harshly on divorced husbands and second wives, there is no doubt that many divorced wives feel that the law still fails to make adequate provision for them. Not only is the starting point for assessing the provision to be made for a divorced wife only one-third (as opposed to one-half) of the parties' joint resources,[83] but in practice divorced wives often face great difficulty in enforcing any order which the court has made. The law, it is true, requires that so far as practicable, the wife should be kept in the position she would have been in had the marriage not broken down, but, as the Finer Committee remarked in 1974, private law is not capable of providing the "method of extracting more than a pint from a pint pot".[84] We have seen that economic realities often make it difficult for a husband to provide for his second family. The same economic factors also make it difficult for him to provide for his former wife. Obviously an income which has been adequate to support one family is often totally inadequate to support two. In these circumstances, where an order for periodical payments has been made against a husband or where he fails to comply with the terms of an order, the State, through the medium of the supplementary benefit scheme, already accepts a substantial burden of the support of divorced wives, albeit only at a subsistence level.[85] Moreover first wives will often have recourse to supplementary benefit[86] as a means of underwriting any orders made in their favour

[82] But note that section 15(1) of the Act provides that "On granting a decree of divorce . . . or at any time thereafter, the court may, if the court considers it just to do so *and the parties to the marriage agree*, order that either party to the marriage shall not be entitled on the death of the other party to apply for an order under section 2 of this Act" (emphasis added). See e.g. *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 69.

[83] *Wachtel* v. *Wachtel* [1973] Fam. 72. See further para. 81, below.

[84] Report of the Committee on One-Parent Families (1974), Cmnd. 5629, Vol. 1, para. 4.59.

[85] See generally the Report of the Committee on One-Parent Families (1974), Cmnd. 5629, Vol. 1, paras. 4.173–4.215. In November 1979 there were 322,000 single-parent families involving 567,000 children in receipt of supplementary benefits: *Hansard* (H.C.) 7 July 1980, vol. 988, col. *63*.

[86] Under the so-called "diversion" procedure whereby, if a woman qualifies for supplementary benefit, and has a maintenance order not exceeding the scale rate, the Supplementary Benefits Commission will pay her the full scale rate of benefit in return for her authorising the court to pay over to the Commission any sums in fact paid under the order by the husband.

against their former husbands. Many such wives resent their dependence on what seems to them to be an inadequate level of State support and the drop in their living standards following the breakdown of the marriage, and this is particularly so where their husbands have remarried, and seem able to enjoy a high standard of living. As we shall see later in this paper[87] it is often suggested that wives in this position should avoid dependence on supplementary benefit by obtaining paid employment; but this may well be very difficult. They may have children to look after and, if they do, they may well experience difficulty in assimilating their working hours with the school hours and holidays of their children.[88] Moreover some childless wives have told us that they find it hard to accept that their former husbands should now suggest that they obtain paid employment, when they may well only have stopped working because of the exigencies of their husband's career, or because of his attitude to his wife taking paid employment.

28. There is a further problem which is said increasingly to affect divorced women. Not only is difficulty often found in enforcing payments due under a court order, but in a period of high inflation the real value of an order is rapidly eroded. It is true that a wife who feels that circumstances have changed[89] has a right[90] to apply to the court for variation of a periodical payments order; but this is not a wholly satisfactory solution. First, it seems that in practice, even in times of high inflation, an application for variation is more likely to result in a decrease rather than an increase in the sum ordered to be paid.[91] Secondly an application to the court will often serve to recall the distress of the original breakdown. One possible, and at first sight attractive, way of mitigating this problem might be to provide machinery for the indexation or inflation-proofing of periodical payments orders. However, there would be formidable technical and other difficulties[92] in providing such machinery; and it might well be the case that indexation would exacerbate rather than reduce the problem. Often the root of the difficulty is simply that there "is not enough money to go round";[93] and it is thus reasonable to suppose that any automatic up-lifting, taking effect without regard to the husband's means and commitments, would result in many more applications being made by husbands for reduction, and

[87] See e.g. para. 46, below.

[88] See para. 54, below.

[89] As in *Jessel* v. *Jessel* [1979] 1 W.L.R. 1148, 1153, *per* Lord Denning M.R. There will be no such right if the court has achieved a "clean break" on the divorce by making a once and for all order not containing any continuing financial provision: see *Minton* v. *Minton* [1979] A.C. 593, 608, *per* Lord Scarman.

[90] Matrimonial Causes Act 1973, s. 31(1).

[91] See the Report of the Committee on Statutory Maintenance Limits (1968), Cmnd. 3587, paras. 141–5; and the Report of the Committee on One-Parent Families (1974), Cmnd. 5629, paras. 4.91–5. (Para. 4.95 concludes that the procedure for variation, one of the main purposes of which should be to keep orders in step with the cost of living, is demonstrated to be virtually useless for that purpose.)

[92] An attempt was made in the Child Maintenance Orders (Annual Up-rating and Exemption) Bill 1980 (formerly called the Affiliation Orders and Aliments (Annual Up-rating Bill) to provide machinery for annual up-rating of the amounts payable under maintenance orders for children. The problems inherent in such a scheme were discussed in the House of Commons at the time of the Bill's Second Reading (see *Hansard* (H.C.) 9 November 1979, vol. 973, cols. 767–788) and in Standing Committee C (see *Hansard* (H.C.) Standing Committee C, 20 February 1980). The Bill made no further progress and has now been withdrawn.

[93] Report of the Committee on One-Parent Families (1974), Cmnd. 5629, Vol. 1, para. 4.90.

perhaps by even more refusals to pay. In either case, the volume of litigation would be increased and bitterness, distress and humiliation[94] engendered.

Analysis of objections to the policy of the present law

Introduction

29. We have attempted in the preceding paragraphs to summarise the major complaints which are known to us about the working of the present law. We now turn to analyse the underlying principle of legal policy which is involved. This seems to be that (i) notwithstanding divorce, the parties to a marriage continue to owe to one another the same life-long duty of support after divorce as they did when married,[95] and that (ii) so far as it is practicable and just to do so, the quantum of such support is to be measured by the standard of living which the parties could have expected to enjoy had they remained married. It is true, of course, that the courts may, by reference to one of the specified or other circumstances, or by having regard to the direction in section 25 to do "justice", mitigate the rigour of this principle. But so long as the principle features in the wording of the Act, it would be unrealistic to suppose that it does not influence the courts' approach to the assessment of financial relief. We have already seen that it is on this issue that much of the criticism of the present law, particularly from the point of view of husbands and their second families, is focussed. The bitterness and resentment surrounding the enforcement of financial remedies can perhaps be most vividly illustrated by the fact that in 1978 there were no fewer than 2,439 cases where men went to prison for wilful refusal or culpable neglect to pay maintenance.[96] In the words of one observer, such men "often claimed that their default was a matter of principle ... in fact they simply hated their wives and were stubbornly prepared to undergo an infinite number of prison sentences rather than pay a penny".[97] The question whether imprisonment should be retained as the ultimate sanction for the enforcement of financial orders is of course a controversial one,[98] and not one within the scope of this paper. The background of bitterness and resentment should however be borne in mind, and it would be unrealistic to expect that such feelings, which are often implicit in the distress which accompanies divorce, could ever wholly be eradicated.

30. We think that the arguments against the retention of a principle of life-long support at the standard enjoyed during the marriage can most easily be analysed and considered under four heads:

(i) A duty of life-long support is now out of date because it is rooted in the concept of marriage as a life-time union. If marriage were indeed

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[94] See Reform of the Grounds of Divorce: The Field of Choice (1966), Cmnd. 3123, para. 15.

[95] See para. 22, above.

[96] Prison statistics: England and Wales 1978 (1979), Cmnd. 7626, Table 6:1. Under the Magistrates' Courts Act 1952, s. 74(6) as amended, imprisonment is still the final sanction for wilful refusal or culpable neglect to pay a maintenance order. See also *Hansard* (H.C.), 30 June 1980, vol. 987, col. *395* where it was said on behalf of the Secretary of State for the Home Department that the Government was not satisfied that "there is an adequate alternative to the courts having the power in the last resort to use the threat of imprisonment as a means of enforcing the payment of maintenance".

[97] P. Morris, *Prisoners and their Families* (1965), p. 234–5.

[98] Note the division of opinion amongst the members of the Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909; cf. the Report of the Committee on One-Parent Families (1974), Cmnd. 5629.

still a life-long institution, it might perhaps be reasonable that the parties should expect that the benefits and burdens incident to the status of marriage would not be affected by divorce; but (it is said) in modern conditions it is unrealistic for married couples not to accept that there is a very real possibility that their marriage will break down. It is thus correspondingly unrealistic for them to suppose that if this should happen their financial position will remain unaffected.

(ii) The change in the juristic basis of divorce from matrimonial offence to irretrievable breakdown has fundamentally altered the validity of the law's approach to support obligations. On this argument the obligation to provide life-long support is based on the analogy between marriage and contract, under which compensation would be available for its breach. Consequently, it is argued that now that divorce is available whenever the marriage has broken down, irrespective of whether one or other of the parties is in breach of his or her matrimonial obligations, it is inappropriate for the law to continue to found the parties' respective financial obligations after divorce on the now largely irrelevant notion of breach of duty; and it is unjust to do so since the present law may require a man to maintain his wife when she has herself been entirely responsible for the breakdown.

(iii) The objective of life-long support is almost invariably impossible to attain because in most cases one man's resources are insufficient to support two households.

(iv) The concept of a life-long support obligation is based on wholly out of date views of the division of function between husband and wife as well as of the economic status of women.

We examine these arguments in turn.

(i) *The argument that marriage can no longer be regarded as a life-time union; and that the financial consequences of divorce should no longer be based on the assumption that it is*

31. The classic definition of the concept of marriage in English law is that marriage is the "voluntary union for life of one man and one woman to the exclusion of all others".[99] This definition dates from 1866, only eight years after the enactment of the Matrimonial Causes Act 1857 which first permitted divorce by judicial process in this country. At that time the statement that marriage was in law a union for life was wholly consistent with the facts, for in 1866 there were only 215 petitions for divorce.[100] Since that time, however, the demand for divorce has increased inexorably: in 1914 for the first time the number of divorce petitions exceeded 1,000; in 1942 for the first time it rose above 10,000;[101] in 1971 (the first year in which the Divorce Reform Act 1969 was effective) there were 110,017 petitions;[102] and by 1979 the figure had risen

[99] *Hyde* v. *Hyde and Woodmansee* (1866) L.R.1 P. & D.130, 133, *per* Lord Penzance. The extent to which this definition still accurately reflects modern English law is comprehensively examined by Poulter, "The Definition of Marriage in English Law" (1979) 42 M.L.R. 409.

[100] Royal Commission on Marriage and Divorce (1956) Cmd. 9678, Appendix II, Table 1.

[101] *Ibid.*

[102] Civil Judicial Statistics 1971, (1972) Cmnd. 4982, Table 10.

to 162,867.[103] Divorce is thus no longer exceptional; on the contrary it has been calculated that nearly one in five of those married in 1972 will have been divorced after 15 years; and over one in four after 25 years of marriage.[104] Further evidence suggests that this increase in the rate of divorce particularly affects young people who divorce after only a short experience of marriage. For instance, since 1970 the divorce rate has approximately doubled in respect of ages above 25, but it has more than trebled for those under that age.[105] Moreover statistics indicate that the rate of divorce is at its highest amongst the 25 to 29 age group.[106] Such figures, it is argued, clearly demonstrate that, not only is marriage for an ever increasing number of people no longer a life-long union, but also that nowadays divorce is most likely to occur relatively soon after marriage and at a time when the parties are still young,[107] and able to readjust their lives.

32. The statistical evidence thus casts doubt on the validity of the concept of a single marriage as a life-long union. However, even more striking is the evidence that, for many, divorce is a prelude to remarriage. There has in recent years been a remarkable increase in the number of divorced persons who remarry. For instance, in 1970 there were 75,614 marriages in which at least one party had been previously married, but in 1977 there were 118,993 such marriages.[108] Indeed it has been estimated[109] that 55·5% of men and 48% of women involved in divorce remarry within $4\frac{1}{2}$ years of their divorce. This trend is perhaps the more remarkable in a period which has seen a general decline in the number of marriages.[110]

33. We agree that this evidence makes it impossible to argue that the policy concerning the financial consequences of divorce should be determined on the basis that divorce is exceptionally rare. However, we do not think that it follows from the fact that an increasing number of marriages break down that the expectations and intentions with which parties nowadays enter matrimony have necessarily changed. It might well be said that the evidence summarised above is not necessarily inconsistent with the view that the underlying intention of marriage is still that it should be life-long. Instead of being regarded as the

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[103] Judicial Statistics 1979, (1980) Cmnd. 7977, Table D.8(*b*). This figure, and the figure for 1978 (162,450), was slightly less than the number of petitions (167,074) in 1977 but it is too early to say whether it marks any significant trend: Judicial Statistics 1977 Table C.13(*k*).

[104] Leete, *Changing patterns of family formation and dissolution in England and Wales 1964–76* (1979), OPCS, p. 82.

[105] Office of Population Censuses and Surveys, *Population Trends 18* (1979), p. 4.

[106] Leete, *Changing patterns of family formation and dissolution in England and Wales 1964–76* (1979), OPCS, p. 71.

[107] In 1977 the median age for divorce was 35·4 for men and 33 for women, and the mean duration of marriages which ended in divorce was 12·8 years: Office of Population Censuses and Surveys, *Marriage and Divorce Statistics 1977* (1979), Tables 4.1 and 4.3.

[108] These figures are extracted from Office of Population Censuses and Surveys, *Marriage and Divorce Statistics 1977* (1979), Table 2.1. (The figures include remarriages of widows and widowers, but the increase is entirely due to remarriage of divorced persons: Office of Population Censuses and Surveys, *Population Trends 18* (1979), p. 4.)

[109] On the basis of a sample of 1,000 divorces granted in 1973; see Leete and Anthony, "Divorce and remarriage: a record linkage study", Population Trends 16 (1979), OPCS, p. 8.

[110] Between 1972 and 1977 there was a continuous decline in the number of marriages, but this trend may have halted in 1978: see Office of Population Censuses and Surveys, *Population Trends 18* (1979), Table 23, and p. 4.

result of a change in attitude to the permanence of marriage, the increased rate of divorce might be explained simply by reference to the fact that people nowadays are more ready to recognise that their intentions of life-long union have been frustrated, and then to look to divorce, and possibly remarriage, as a means of attaining personal happiness.[111]

34. The view that the concept of marriage, as a permanent union, is not necessarily out of date can, we think, be supported by reference to the commitment to marriage as a life-long union[112] amongst the many divorced people who choose to remarry[113] rather than merely to co-habit with a new partner. It may perhaps also be noteworthy that, notwithstanding the fact that in nearly half of the marriages celebrated in Register Offices in 1976 one or both of the parties had been divorced,[114] it is the practice of registrars solemnising a marriage in a Register Office to remind the parties:[115]

> "of the solemn and binding character of the vows you are about to undertake. Marriage according to the laws of this country is the union of one man with one woman, voluntarily entered into, for life, to the exclusion of all others".

(ii) *The argument that the change to irretrievable breakdown as the basis for divorce requires a new approach to its financial consequences*

35. As we have seen, maintenance originally developed on the analogy of damages for breach of contract.[116] Consequently where a woman entered into the marriage contract she was regarded as undertaking obligations towards her husband[117] in exchange for a right to life-long support. If her husband broke any of his obligations, he was liable to compensate her; conversely, if she were the guilty party she would not be eligible for compensation. It is urged[118] that since the law has now rejected breach of obligation as the basis of the divorce law, and accepts the principle that divorce should be available, irrespective of the fault of either party, in any circumstances in which the marriage has broken

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[111] On what has been described as the shift from "institutional" to "companionship" marriage, see Rheinstein, *Marriage stability, Divorce and the Law* (1972), particularly at pp. 273–5. See also Stone, *The Family, Sex and Marriage in England 1500–1800* (1977); Westermarck, *A Short History of Marriage* (1926); Eekelaar, *Family Law and Social Policy* (1978) pp. 5–13; Glendon, *State, Law and Family* (1977) Ch. 7; Dominian, *Marital Breakdown* (1968); Fletcher, *The Family and Marriage in Britain* (1966).

[112] See Burgoyne and Clark, "Why get married again?" New Society, 3 April 1980, p. 12.

[113] Although many of these marriages also end in divorce. See e.g. Office of Population Censuses and Surveys, *Marriage and Divorce Statistics 1977* (1979), Table 4.6; Dominian, *Marriage in Britain 1945–80* (1980), an occasional paper published by the Study Commission on the Family, p. 18.

[114] The figures are calculated from data in Leete, *Changing patterns of family formation and dissolution 1964–76* (1979), OPCS, Table 28.

[115] The practice is not statutory but follows a recommendation made by the Committee on Procedure in Matrimonial Causes (1947), Cmd. 7024, para. 29 (xiii). For an account of the different approaches adopted by registrars in following this recommendation see Poulter, "The Definition of Marriage in English Law" (1979) 42 M.L.R. 409, 426–7.

[116] See paras. 11–13, above.

[117] Who would also in the absence of special provision become entitled to the bulk of the wife's property: see e.g. Graveson and Crane (eds.) *A Century of Family Law* (1957), pp. 197 *et seq.*

[118] See e.g. Gray, *Reallocation of Property on Divorce* (1977).

down irretrievably, it should equally follow that the mere fact of divorce should no longer give an entitlement to maintenance. It has been said that the present legislation is "caught in a massive contradiction, for it has eviscerated itself of the doctrine of the matrimonial offence while attempting simultaneously to retain the objective of support which was integrally bound up [with] that doctrine".[119] Since it no longer necessarily follows that the party who is divorced is guilty of any breach of obligation, it is argued that the appropriate analogy to be derived from the law of contract is now that of frustration, where any loss would be apportioned equitably between the parties.[120]

36. It is true, as we have already pointed out,[121] that the grant of a decree to one party or the other no longer provides any indication of responsibility for the breakdown of the marriage. However, it is important in evaluating this argument to remember that it is still possible for the court to consider the question of responsibility for the breakdown of the marriage as a separate issue in deciding whether or not any financial order should be made. Indeed, it is quite clear that it was not, in fact, the intention of those who framed the Matrimonial Proceedings and Property Act 1970 that the question of conduct should be wholly excluded from the assessment of financial provision. On the contrary, the Act[122] specifically requires the court to have regard to the parties' conduct in determining how far it is just to place them in the financial position in which they would have been had it not been for the breakdown. A literal interpretation of this particular provision would therefore mean that issues of conduct would remain highly relevant to the assessment of any financial provision, even if such issues were irrelevant to the question of whether or not a divorce should be granted.[123]

37. The view that it was intended that conduct should remain relevant to the assessment of financial provision can be supported, not only by reference to the words of the statute, but also by reference to the relevant Law Commission reports on which the legislation is based. In the Commission's Report in 1966 on *Reform of the Grounds of Divorce: The Field of Choice*,[124] the Commission accepted that the determination of fault could not be "wholly eliminated" from the divorce process. Conduct, the Report said,[125] "must remain an important element in the courts' decisions about financial matters".[126] Again, in 1967 the Commission said in its Working Paper, *Matrimonial and Related Proceedings—Financial Relief*,[127] that "few would suggest that in awarding maintenance the

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[119] *Ibid.*, p. 308.

[120] Law Reform (Frustrated Contracts) Act 1943. But see paras. 36 and 87–90, below in relation to the role which conduct does, and might, play in proceedings for financial relief.

[121] See para. 15, above.

[122] Now Matrimonial Causes Act 1973, s. 25.

[123] At first this was the attitude of the courts. See *Harnett* v. *Harnett* [1973] Fam. 156, 161–2: "if a wife's conduct was found to a given extent to be worse than her husband's she would be placed in a financial position, compared with the hypothetical position, to that extent lower than his position, similarly compared," *per* Bagnall J. See also *Ackerman* v. *Ackerman* [1972] Fam. 225, 235. For subsequent developments on the relevance of conduct, see n. 139, below.

[124] (1966) Cmnd. 3123, para. 27.

[125] *Ibid.*

[126] The same view was expressed by the Archbishop's Group in *Putting Asunder*, para. 91, and Appendix C, para. 32 at p. 127.

[127] Working Paper No. 9.

conduct of the parties should not be an important consideration".[128] It is true that in the Report[129] which followed the Working Paper there is no extended discussion of the part which considerations of conduct should play in the assessment of financial provision; but in formulating its recommendation, the Commission stated that the guidelines proposed were intended to put a spouse in "the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation".[130]

38. Finally, the Parliamentary debates[131] on the Bill, which passed into law as the Matrimonial Proceedings and Property Act 1970, also support the view that it was assumed that conduct would continue to be relevant to the assessment of financial provision. For instance the then Solicitor General stated[132] that

> "the Bill, in its present form, requires the court to have regard to the conduct of the parties. There is no doubt about that: it is there as one of the factors which is to receive consideration".

39. After the enactment of the 1970 legislation the courts found some difficulty in deciding how far questions of the parties' conduct remained relevant to the assessment of their financial obligations. There were two principal objections to the court seeking to engage in the assessment of conduct. The first was that the issues involved were frequently unjusticiable. As Ormrod J. said in *Wachtel* v. *Wachtel*[133] (at first instance):

> "... the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality".

The second objection was that to allow detailed examination of matrimonial misconduct would in most cases subvert the policy of the divorce reform legislation. Lord Denning put this view forcefully in the leading Court of

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[128] *Ibid.*, para. 21. The statement occurs in a passage dealing with applications for maintenance during the continuance of the marriage; but it does not appear that it was intended that different considerations should apply after divorce: see para. 226(1).

[129] Report on Financial Provision in Matrimonial Proceedings (1969), Law Com. No. 25.

[130] *Ibid.*, explanatory notes on Clause 5 of the draft Bill, para. 2. This was a reference to a dictum of Lord Merrivale P. in *N.* v. *N.* (1928) 44 T.L.R. 324, 328; the note goes on to say that some "elaboration of that formula is necessary when it is translated into legislation to cover the possibility that, for example, *both parties may have failed to discharge their marital obligations: see the final words of the sub-section*". (Emphasis supplied). In the draft Bill the final words of the sub-section in question contained a direction to the court "so to exercise those powers in relation to that party as to place him or her, so far as it is practicable and, having regard to the conduct and needs of the parties, just to do so, in the same financial position as that part would or (where the other party failed to discharge his or her financial obligations to that party) ought to have been in had the marriage not broken down".

[131] *Hansard* (H.C.) Standing Committee J, 6 May 1970, cols. 57–74.

[132] *Ibid.*, col. 66.

[133] [1973] Fam. 72, 79.

Appeal decision of *Wachtel* v. *Wachtel*,[134] in a passage which is so important for the development of the law that we set it out in full. Under the heading "The Conduct of the Parties" he said:

> "When Parliament in 1857 introduced divorce by the courts of law, it based it on the doctrine of the matrimonial offence. This affected all that followed. If a person was the guilty party in a divorce suit, it went hard with him or her. It affected so many things. The custody of the children depended on it. So did the award of maintenance. To say nothing of the standing in society. So serious were the consequences that divorce suits were contested at great length and at much cost.
>
> All that is altered. Parliament has decreed: 'If the marriage has broken down irretrievably, let there be a divorce'. It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them. They divide up the furniture. They arrange the custody of the children, the financial provision for the wife, and the future of the matrimonial home. If they cannot agree, the matters are referred to a judge in chambers.
>
> When the judge comes to decide these questions, what place has conduct in it? Parliament still says that the court has to have 'regard to their conduct': see s. 5 (1) of the Act of 1970. Does this mean that the judge in chambers is to hear their mutual recriminations and to go into their petty squabbles for days on end, as he used to do in the old days? Does it mean that, after a marriage has been dissolved, there is to be a post mortem to find out what killed it? We do not think so. In most cases both parties are to blame—or, as we would prefer to say—both parties have contributed to the breakdown.
>
> It has been suggested that there should be a 'discount' or 'reduction' in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the Act of 1969. There will be many cases in which a wife (though once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by section 5(1)(*f*) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words . . . 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life. [Counsel for the husband] disputed this and claimed that it was but justice that a wife should suffer for her

[134] *Ibid.*, at pp. 89–90.

supposed misbehaviour. We do not agree. Criminal justice often requires the imposition of financial and indeed custodial penalties. But in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place".

40. It should, we think, be noted that in *Wachtel*[135] itself the Court of Appeal stated[136] that the trial judge's "crucial finding of fact is that the responsibility for the breakdown of the marriage rested equally on both parties". This would seem still to leave open the argument that parties should be free to lead evidence of conduct to show that the responsibility for the breakdown of the marriage rested entirely, or largely, on one party rather than the other; and this approach has been adopted by Lawton L.J. in one recent case in the Court of Appeal.[137] On the other hand, it has been accepted in a line of cases in the Court of Appeal that considerations of conduct will now rarely be admissible[138] in the assessment of financial provision. There has been some difference of emphasis in describing the category of cases in which, exceptionally, considerations of conduct remain relevant, but it would appear that the most recent trend is to permit conduct to be taken into account where to do otherwise would offend a reasonable person's sense of justice.[139] In practice

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[135] [1973] Fam. 72.

[136] *Ibid.*, at pp. 81, 87.

[137] *Blezard* v. *Blezard* (1979) 9 Fam. Law 249, 251. "The idea has . . . got around amongst some lawyers, but not perhaps amongst right-thinking members of the public, that nowadays leaving one's spouse to set up home with another was a mere accident of life, which should be borne by the wife without fuss and which should not be taken into account when the court exercised its jurisdiction to rearrange the finances of the broken family. In his Lordship's judgment, that was not the law. Such conduct may be of the greatest importance when the court came to make a property disposition order under s. 24 of the Matrimonial Causes Act 1973. His Lordship said 'may be' because each case must depend upon its own facts. When, as in this case, the husband's conduct had brought about his first wife's present situation and he had not alleged that she was responsible in any way for the breakdown of the marriage, his Lordship could see no reason why her living standards should be reduced to the same level as his . . . . What counsel for the husband was suggesting was that, when the court was faced with admitted facts, unless there was a specific request by the wife that those admitted facts should be taken into consideration, the court ought to turn its gaze from them and, ostrich-like, give judgment. His Lordship found that impossible to accept, particularly because the statute itself says that the court shall have regard to the circumstances specified in s. 25(1) and (2)"; see also *Cuzner* v. *Underdown* [1974] 1 W.L.R. 641.

[138] *Harnett* v. *Harnett* [1974] 1 W.L.R. 219.

[139] *Armstrong* v. *Armstrong* [1974] Court of Appeal Transcript 137, *per* Stephenson L.J., cited in *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 66, *per* Wood J. See also: *Harnett* v. *Harnett* [1974] 1 W.L.R. 219, *per* Cairns L.J., conduct "which would make it quite inequitable to leave that out of account having regard to the conduct of the other party as well in the course of the marriage" at p. 224, and *per* Roskill L.J. "conduct of a party . . . such that common justice requires that that party shall not receive financial support to the same extent as would be the case had that conduct not been so obvious or gross" at p. 227; *Cuzner* v. *Underdown* [1974] 1 W.L.R. 641, 645, *per* Davies L.J. "I cannot see any justice in such an order as is asked for . . ."; *H.* v. *H.* (*Family Provision: Remarriage*) [1975] Fam. 9, 16, *per* Sir George Baker P., "I think most people would find it distasteful and unjust that a lump sum should be given to a wife for the probable benefit of the new family"; *M.* v. *M.* (1976) 6 Fam. Law 243, 244; *W.* v. *W.* (*Financial Provision: Lump Sum*) [1976] Fam. 107, 110, *per* Sir George Baker P., "conduct . . . of the kind that would cause the ordinary mortal to throw up his hands and say, 'Surely that woman is not going to be given any money' . . ."; *Jones* (*M.A.*) v. *Jones* (*W.*) [1976] Fam. 8, 15, *per* Orr L.J., conduct "of such a gross kind that it would be offensive to a sense of justice that it should not be taken into account"; *Bateman* v. *Bateman* [1979] Fam. 25, 29, *per* Purchas J., conduct of such a kind "that it cannot be

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this means that there are formidable difficulties confronting a spouse who seeks a reduction[140] in financial provision by reason of the other's conduct.

41. In conclusion we would summarise the issue posed by this argument as follows. Since the 1969 Act questions of responsibility for the breakdown of a marriage have been largely irrelevant to the availability of divorce, and since 1973[141] the trend in practice has been toward ignoring questions of conduct in the assessment of the financial aspects of divorce in all but exceptional cases. If therefore the essence of the obligation of life-long support on divorce is that it represents compensation for a wrong done to the financially weaker party, yet the courts no longer investigate the question of blame, how (it is asked) can the obligation to support still be justified?

(iii) *The argument that the objective of life-long support is impossible to attain in most cases*

42. We have already seen that one of the chief criticisms of the life-long support obligation inherent in section 25 is the economic hardship which it is said to cause for those (chiefly husbands) who have to pay and for any second family which might have been established.[142] On the other hand, the statistics show that many divorced wives depend upon supplementary benefit,[143] either because the court orders payments to be made to them by their husbands which fall short of the supplementary benefits level,[144] or because their husbands make the payments which are ordered in short measure, irregularly, or not at all.[145] It is therefore argued that the objective of life-long support is impracticable in all but exceptional cases, and that it has an undesirable influence on the courts which may sometimes seek to apply it in cases where to do so will cause hardship.

43. Particularly striking evidence of the difficulty of translating the statutory requirement to put the parties in the position in which they would have been had the marriage not broken down is furnished by a study, conducted between 1973 and 1975, into the attitudes of registrars, who, in most cases, are

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ignored without doing a grave injustice"; *J. (H.D.)* v. *J. (A.M.) (Financial Provision: Variation)* [1980] 1 W.L.R. 124, 133, *per* Sheldon J., "behaviour . . . of such a nature that it would be repugnant to anyone's sense of justice to ignore it". See further Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), pp. 23–27.

[140] It is sometimes said that conduct is only relevant for the purpose of reducing a claim by a wife. However, such a construction of s. 25 has been rejected in a number of cases: see e.g. *Jones (M.A.)* v. *Jones (W.)* [1976] Fam. 8, 15, *per* Orr L. J.; *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 67, *per* Wood J.

[141] *Wachtel* v. *Wachtel* [1973] Fam. 72.

[142] See paras. 25 and 26, above.

[143] See Supplementary Benefits Commission Annual Report 1978 (1979) Cmnd. 7725, Ch. 12. See also para. 27, above.

[144] For an examination of the way in which the courts will regard the availability of supplementary benefit as a relevant factor in assessing a claim for financial relief, see: Cretney, *Principles of Family Law*, 3rd ed., (1979), pp. 290–292; *Rayden on Divorce*, 13th ed., (1979), pp. 759–60. See also Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), pp. 11–14.

[145] For this reason many women choose to adopt the "diversion" procedure: see n. 86, above.

the persons in practice responsible for administering the law relating to financial provision. The survey[146] stated:

> "The views of the registrars were emphatic:
>
> You cannot place them in the same position. One tries to give weight to all the matters but it is often a question of the cake not being big enough.
>
> (Another) It is an ideal to strive towards but not to attain.
>
> (A third) One can never put them back but should go some way towards this if possible. I take a general picture and try to put them on parity.
>
> The fact is that the husband may now be responsible for a second family, and that two separate households are more expensive to run than a single family unit, especially where the matrimonial home is kept for the wife and children and there are probably outstanding mortgage commitments".

44. On this argument, therefore, the direction in section 25 that the court should seek to place the parties in the financial position in which they would have been had their marriage not broken down serves little useful purpose, is constantly nullified in practice by the qualification that the court should only do so "so far as it is practicable", and should therefore be abandoned. However, it can be argued that although the statutory objective of life-long support is no doubt impossible of attainment in many cases, that fact is irrelevant to an evaluation of its merits as a guiding principle; and, indeed, in some cases it not only can be, but is, applied.[147]

(iv) *The argument that the changed economic role of women has rendered the principle of life-long support out of date*

(*a*) Introduction

45. It has been argued that until comparatively recently a husband's liability to support his wife involved a "contractual exchange of the husband's support for the wife's services, the consideration offered to the wife being life-long provision by the husband of the necessaries of a comfortable existence".[148] It has also been suggested that even in modern times a husband and wife still have entirely different if complementary functions. "The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part, the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it".[149] However it is being increasingly urged[150] that these traditional views are out of

[146] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), p. 28. See also *Wachtel* v. *Wachtel* [1973] Fam. 72, 77, *per* Ormrod J. and *Scott* v. *Scott* [1978] 1 W.L.R. 723, 727.

[147] See e.g., *Trippas* v. *Trippas* [1973] Fam. 134; *O'D* v. *O'D* [1976] Fam. 83. Cf. *S.* v. *S. The Times* 10 May 1980, where the court ordered the payment of a lump sum of £375,000 to the wife. (Balcombe J. observed that "It was considerably more than was necessary for the wife's needs, but it did recognise the wife's contribution in assisting to build up the husband's assets".)

[148] Gray, *Reallocation of Property on Divorce* (1977), p. 282.

[149] Simon, "*With all my worldly goods*..." (1964) p. 14.

[150] See for instance Gray, *Reallocation of Property on Divorce* (1977); Deech (1972) 122 New L.J. 742; (1977) 7 Fam. Law 229; *The Times*, 14 February 1980; Harper, *Divorce and Your Money* (1979). But cf. O'Donovan, "The Principles of Maintenance: an Alternative View" (1978) 8 Fam. Law 180.

date, and that any law which might be said to reflect them is unjust. Emphasis is placed on the move in recent years towards equality of opportunity for men and women, and on the fact that most women are employed outside the home for at least some period during their married lives; and the question is then asked whether married women are really justified in looking primarily to their husbands for support if their marriages break down.

46. The argument that the present law dealing with the financial consequences of divorce is unjust because it insufficiently reflects present day economic realities can take a number of forms. For instance it is argued that:

(*a*) It is unfair to require a man to support (possibly for the rest of her life) a woman who is capable of supporting herself if there is no subsisting relationship between them.

(*b*) The present law is economically and psychologically damaging both to women themselves and to the cause of women's emancipation. The prospect of life-long support is particularly susceptible to abuse by what an American judge[151] has called "physically and mentally competent women" who become "alimony drones". Moreover, it can foster a backward-looking attitude toward broken marriages, even to the extent that a woman might deliberately refuse to enter a second marriage because it would terminate her right to support arising out of the first.[152]

(*c*) By supporting the view that marriage "is a secure life-long career for a woman" the present law encourages women to remain economically dependent upon their husbands. They are thus caught up within a "vicious circle of dependence followed by work-handicap".[153]

In order to evaluate the substance of these arguments it is necessary briefly to examine the extent to which the economic position of women has in fact changed over recent years, and it is to this that we now turn.

(*b*) The changing economic role of women

(1) *Women in the labour market*

47. Between 1911 and 1979, the number of women as a proportion of the total work force rose from 30% to 39·3%.[154] The most important single factor in this increase is the growth in the economic activity of married women.[155] Whereas in 1911 only 9·6% of married women could be classified as economically active,[156] the figure had risen to 21·7% by 1951, and by 1979 it

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[151] *Doyle* v. *Doyle* 158 N.Y.S. 2d 909, 912, (1957) *per* Hofstadter J.

[152] See Cretney, "The Maintenance Quagmire" (1970) 33 M.L.R. 662, 666. See also para. 25, above.

[153] Deech, *The Times*, 14 February 1980.

[154] Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), p. 70; Report of the Committee on One-Parent Families (1974), Cmnd. 5629, Vol. 1, p. 35. The figure hardly varied between 1851 and 1951 but has been rising since 1961.

[155] Doubtless part of this increase might be accounted for by an increase in the proportion of women who are married. In 1901 49% of females of marriageable age were actually married but by 1971 this figure had risen to 61·5%: Creighton, *Working Women and the Law* (1979), p. 6.

[156] Throughout this section the expression "economically active" is intended to refer to both full and part-time workers. It also includes persons who are available for work but are currently unemployed.

was estimated to be 51·3%.[157] It is predicted that by 1991 married women alone will make up some 28·7% of the total labour force.[158] The increasing participation of married women in the labour market is particularly apparent in relation to those aged 35 and over. However, there has also been a significant growth in the numbers of women with dependent children who work either full or part-time.[159]

(2) *Moves against sex discrimination in employment*

48. Recent legislation has itself marked an important development in traditional attitudes and policies towards women's employment. Thus, both the Equal Pay Act 1970 and the Sex Discrimination Act 1975 are designed to ensure that women today enjoy the same pay and terms of employment as a man for "like" work[160] and the same opportunities as a man in the fields of education, training and employment.[161] Likewise there are specific legislative provisions[162] designed both to prevent discrimination arising out of the fact of pregnancy and to assist women who wish to return to work after having a child.[163] Moreover, in addition to this country's own legislation, Article 119 of the Treaty of Rome, which requires that men and women should receive equal pay for equal work, may be invoked by an individual in the English courts.[164]

49. In addition to these specific legislative moves against sex discrimination in employment, the 1970s witnessed a number of individual initiatives aimed at facilitating the employment of women, particularly married women and women with children. Amongst the most significant are the increased opportunities for flexi-time and part-time work, special training, re-entry and retainer schemes for older women,[165] and an expansion in the day-care, crêche and playgroup facilities afforded both by employers and by private organisations.[166]

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[157] Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), p. 70. These figures relate to married women of all ages. Consequently, whilst the figure drops for married women aged between 25 and 34, amongst the 35–54 age group it is estimated that some 69·9% are economically active. For graphs illustrating this position, see Appendix at p. 57, below.

[158] *Ibid.* The proportion of women in employment immediately after marriage has also been increasing—from 77% of a sample of those married in 1956–60 to 86% of those married in 1971–5. It is suggested that much of this change is due to a lengthening of the interval between marriage and the first birth: Dunnell, *Family Formation 1976* (1979), OPCS, p. 33.

[159] See Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), p. 86 and Fig. 4.5 which calculated that in 1977 as many as 52% of such women were in paid employment.

[160] Or work "rated as equivalent" (as defined by the Act): Equal Pay Act 1970, s. 1.

[161] Sex Discrimination Act 1975. The Act applies equally to discrimination against men and against married people.

[162] Employment Protection (Consolidation) Act 1978, Part III.

[163] The Sex Discrimination Act 1975, Part VI, also established the Equal Opportunities Commission which is charged with keeping the relevant legislation under review and working toward the elimination of discrimination.

[164] *Defrenne* v. *SABENA* [1976] E.C.R. 455. See further *O'Brien* v. *Sim-Chem Ltd.* [1980] 1 W.L.R. 734. On occasion these provisions have been found to provide more extensive rights than their domestic counterparts: see *McCarthys Ltd.* v. *Smith, The Times* 18 April 1980.

[165] e.g. The Government's Training Opportunities Scheme (TOPS) by which the State will pay course fees and a training allowance for attendance at vocational training programmes for individuals who meet certain requirements.

[166] See e.g. "*I want to work . . . but what about the kids*?", a report prepared by the Equal Opportunities Commission in 1978.

(*c*) The continuance of inequality

50. Despite the fact that there has undoubtedly been a striking development, particularly over the last fifteen years, in the role played by women in the labour market, there is a considerable body of evidence which suggests that for many women, and especially for married women, opportunities are still largely non-existent and equality a myth. This evidence presents itself in different, though frequently related forms, and it suggests that many women face serious disadvantages, when compared with men, both in finding jobs and in the type of work that they finally obtain. We summarise some of the more important of these disadvantages below:

(1) *Low pay*

51. Recent figures show that, despite the equal pay legislation, a woman's average hourly earnings are still only 73·0% of a man's.[167] Although there was some narrowing of the gap between men's and women's earnings in the early and mid 1970s, the most recent evidence[168] suggests that this progress has now halted and that the gap is in fact widening. It should also be borne in mind that in practice the difference is even greater than the figures suggest because the calculation takes no account of the effects of overtime which is done by fewer women than men. As well as the fact that women receive a lower average wage than men, there is evidence to suggest that the majority of women in employment are, in the absolute sense, "low-paid". In 1976 for instance it is estimated that 68·9% of women in full time employment fell into the category of the "low-paid".[169]

52. In addition to the general observations that can be made about women's rates of pay, a number of studies indicate that it is married women who are most likely to be in receipt of low pay. Sometimes this may be accounted for by the fact that the only jobs which enable such women to reconcile employment with their family commitments are those which are traditionally low paid.[170] However a recent survey amongst teachers reveals that even when adjustments are made to take account of breaks in employment for child bearing, married women teachers earn less than single teachers with comparable service records.[171]

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[167] *New Earnings Survey 1979*, quoted in Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), pp. 79–80.

[168] *Ibid.*, Table 4(3).

[169] As compared with 18·3% of men; cf. the fact that in the same period 1·7% of women earned more than £100 per week as compared with 12·4% of men: Department of Employment Gazette, October 1976, p. 1123, quoted in Creighton, *Working Women and the Law* (1979), p. 10. It is also important to remember that lower-paid jobs often carry hidden disadvantages attracting fewer fringe benefits and less generous entitlements to sick and holiday pay and to pensions: see e.g. Hunt, *Management Attitudes and Practices towards Women at Work* (1975), pp. 15–16.

[170] E.g. part-time work. See further para. 55, below.

[171] Turnbull and Williams "Sex Differentials in Teachers' Pay" (1974) Journal of The Royal Statistical Society, Series A 137, 2, 245–58, quoted in a National Union of Teachers Research Project paper, *Promotion and the Woman Teacher* (1980), p. 11. The authors of the 1974 survey advanced a number of tentative theories to explain this fact, for instance that employers regard married women as a "bad risk", and that the ability of married women to seek promotion is curtailed by the need to look for jobs in areas dictated by their husband's place of employment. However no firm evidence in support of either of these theories could be adduced. We have drawn extensively on the evidence of the latter paper in our present discussion because teaching is one of the few areas of employment where the number of women employed compares favourably with that of men.

(2) *"Women's work"*

53. The depression in women's earnings as compared with men's is to a large extent accounted for by the fact that the majority of women work in comparatively low-paid jobs (such as clerical and domestic work) which are still popularly regarded as "women's work".[172] Since there are few men doing the same sort of work, the provisions of the equal pay legislation which depend upon the performance of "like work" or work rated as equivalent[173] have had little or no impact.[174] Although the most recent evidence suggests some slight shift in emphasis away from the "horizontal" segregation of employment (whereby men and women work in different occupations), it would seem that it is effectively being replaced by another form of inequality, namely by a "vertical" segregation of employment by which men and women are both engaged in the same field of work but whereby women are disproportionately concentrated in the lower grades.[175] As in the case of pay, these figures also suggest that occupational segregation has a particular significance for married women who are less likely than single women to be found in professional, managerial or intermediate non-manual jobs by the time they reach middle age.[176]

(3) *Family responsibilities and their effects*

54. Although there is some evidence to suggest that many couples now share the work of caring for the home and for the family, most studies indicate that the chief burden of this role still falls upon the wife.[177] It is therefore arguable that the question of family commitments may dominate, to a greater or lesser extent, the work pattern of all married women,[178] placing them at a peculiar disadvantage vis-à-vis men and single women in the labour market. In particular a married woman's employment prospects and earning capacity might suffer by reason of any of the following factors:

(i) Many women are prevented from taking any employment at all by the need to care for young children or elderly relatives.[179] For many this is a reluctant choice and there is evidence, for instance, to suggest that

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[172] Department of Employment, *New Earnings Survey 1979*, Part E, Table 135, quoted in Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), p. 73.

[173] Equal Pay Act 1970, s. 1.

[174] See further, Bowers and Clarke, "Four Years of the Equal Pay Act" (1980) 130 New L.J. 304.

[175] Hakim, *Occupational Segregation*, Department of Employment Research Paper No. 9 (1979). Although this type of segregation might at first sight appear to be caught by the sex discrimination legislation it is important to remember that women may be regarded as less experienced or qualified than the men engaged in the same enterprise. For instance, in a survey conducted in 1973 it was found that those responsible for the recruitment of staff frequently believed that women were less well qualified in those respects considered most important e.g. previous experience and training: Hunt, *Management Attitudes and Practices towards Women at Work* (1975), p. 12.

[176] Dunnell, *Family Formation 1976* (1979), OPCS, Table 6.8.

[177] e.g. Hunt, *Management Attitudes and Practices towards Women at Work* (1975), pp. 11 and 38–9. See also, *The Part-time Trap* (1978), Low Pay Unit Pamphlet No. 9, p. 12.

[178] See e.g. sub-para. iv, below.

[179] The need to care for elderly relatives is not, of course, a problem which is confined to married women. In a study conducted in 1967 it was estimated that amongst a sample of housewives roughly half their number could expect between the ages of 35 and 64 to look after an elderly or infirm person: Hunt, *The Home Help Service in England and Wales* (1970), p. 424.

as many as 34% of those mothers prevented from working by the need to look after children, would try to find employment if adequate child care facilities were available.[180]

(ii) It is not uncommon for a woman to take a break from any, or from full time, employment whilst she has a family.[181] However, on returning to work after an absence of a number of years,[182] she will frequently find that she has lost not only valuable experience, but also pension rights and seniority.[183] Moreover, her age on return can also stand in the way of any further promotion.[184]

(iii) The need to reconcile family commitments with work outside the home will often result in a woman taking a part-time job. This type of work carries its own special disadvantages which are further discussed at paragraph 55 below.

(iv) Finally, it is arguable that the fact that women are more likely than their husbands to be responsible for the domestic well-being of the family is reflected in management attitudes towards the recruitment and employment of all married women irrespective of whether they have such responsibilities. Surveys of management attitudes suggest that many of those responsible for recruitment and employment are less favourably disposed towards married female than male employees because they believe that such women's family commitments make them unreliable, lacking in career commitment, uninterested in promotion and interested in their work only as a source of "pin money".[185]

(4) *Part-time work*

55. The statistics which demonstrate women's increased rate of economic activity frequently obscure the fact that many of them,[186] particularly married

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[180] Equal Opportunities Commission, *Fourth Annual Report 1979* (1980) p. 87 quoting Office of Population Censuses and Surveys, *General Household Survey 1976*, Table 6.26. See also McNay and Pond, *Low Pay and Family Poverty* (1980) an occasional paper prepared by the Study Commission on the Family, p. 10. In 1974 even taking into account the numbers at playgroups, only one-third of children under five received any form of organised day care outside their families: Land, "Who cares for the family?" (1978) 7 Jo. of Soc. Pol. 257, 270. For the impact of current restraints on public expenditure on the provision of such facilities see: *Hansard* (H.C.) 1 July 1980, vol. 987, col. *545*.

[181] Women generally, and married women in particular, show a "bi-modal" pattern of work with peaks of economic activity in the years before 25 and after 34–the decline between those ages corresponding with the time at which a woman is most likely to be having and bringing up children. See Appendix at p. 57, below.

[182] The statutory protection afforded by section 45 of the Employment Protection (Consolidation) Act 1978 only applies if a woman returns within 29 weeks of her confinement.

[183] National Union of Teachers Research Project paper, *Promotion and the Woman Teacher* (1980), p. 53.

[184] But note the case of *Price* v. *The Civil Service Commision* [1978] I.C.R. 27, in which it was held to be unlawful discrimination to attach an age barrier ($17\frac{1}{2}$–28) to a particular job when it was certain that the imposition of such a barrier would mean that many fewer women than men could comply because during the relevant years many of them would be having children.

[185] Hunt, *Management Attitudes and Practices towards Women at Work* (1975), p. 55; National Union of Teachers Research Project paper, *Promotion and the Woman Teacher* (1980), Table 34.

[186] In 1975, of $4\frac{1}{4}$ million part-time employees, 84% were women, many of whom were married: Land, "Who cares for the Family?" (1978) 7 Jo. of Soc. Pol. 257, 280. See also *General Household Survey 1978* (1980), OPCS, Tables 5.3 and 5.5.

women, only work part-time. As we saw above such employment is frequently the only means by which a woman can reconcile her family commitments with her desire to work. However it is rare for part-time employment to offer the same advantages and opportunities as attach to full time employment. It goes without saying that most part-time pay will be insufficient to enable a woman to support herself or her family fully. More particularly, part-time work can, if it involves less than 16 hours work a week, attract a lower degree of statutory protection against redundancy and unfair dismissal,[187] and it will also often give rise to only limited prospects of promotion,[188] no pension rights, and no fringe benefits.[189]

(5) *Unemployment and under-employment*

56. Two more difficulties encountered by women in seeking employment ought to be mentioned. Unemployment is obviously not a problem faced exclusively by women and on recent figures the number of women registered as unemployed is still less than half the number of men.[190] However the number of women becoming unemployed in recent years has increased dramatically, by 177% between June 1975 and June 1980, as compared with 44·59% over the same period for men.[191] Whilst some of this increase may be accounted for by a rise in the numbers of women claiming unemployment benefit, it would appear that at least a part of it might be explained by the disappearance, in the face of economic recession, of many of the part-time and less secure jobs traditionally done by women.[192] Moreover, under-employment, whereby a person who possesses a particular work skill or qualification is unable to find employment commensurate with those qualities, also appears to be a problem that more commonly affects women than men. Recent surveys would seem to suggest that it is a particularly common problem amongst married women who, on returning to work after an absence of a number of years, find that the posts for which they are qualified are given to younger men or to single women.[193]

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[187] Statutory protection under the Employment Protection (Consolidation) Act 1978 only extends to those who work for 16 hours or more per week: ss. 64 and 81 and Schedule 13.

[188] National Union of Teachers Research Project paper, *Promotion and the Woman Teacher* (1980), pp. 47–9. See also Hunt, *Management Attitudes and Practices towards Women at Work* (1975), pp. 18–19.

[189] See generally *The Part-time Trap* (1978), Low Pay Unit Pamphlet No. 9.

[190] In June 1980 the seasonally adjusted figure for unemployed men was 1,021,100 and 446,900 for women: Employment Gazette, July 1980, Table 105.

[191] According to the Department of Employment the seasonally adjusted figure for unemployed men rose from 706,100 to 1,021,100 between June 1975 and June 1980. The equivalent figure for women rose from 161,300 to 446,900: Department of Employment Gazette (1978) vol. 86(12) Table 105; Employment Gazette July 1980, Table 105. See also Equal Opportunities Commission, *Fourth Annual Report 1979* (1980), pp. 1 and 78.

[192] See e.g. National Union of Teachers Research Project paper, *Promotion and the Woman Teacher* (1980) p. 48. See also McNay and Pond, *Low Pay and Family Poverty* (1980), pp. 12–14, an occasional paper prepared by the Study Commission on the Family, which suggests that this trend is likely to continue.

[193] See National Union of Teachers Research Project paper, *Promotion and The Woman Teacher* (1980), pp. 48–49, confirming the pattern revealed in Hunt, *A Survey of Women's Employment* Vol. 1, p. 167, and Vol. 2, Table J10b (which showed that in 1965, of the sample of employed women, only 8% of those without family responsibilities felt that they had not had an opportunity to use past training in current jobs as compared with 19% of women with children.)

(*d*) Conclusion on the changing economic role of women

57. Notwithstanding the development in recent years of the role which women play in the labour market, it seems doubtful whether such progress has been so great as completely to undermine the principle of life-long support on which the present legislation dealing with the financial consequences of divorce is based. The available evidence suggests that not only do women still encounter many special disadvantages in finding and keeping suitable employment but also that these difficulties are accentuated if a woman is married, whether or not she has children.[194] Indeed it might even be argued that the very prospect of marriage, coupled with the domestic commitments which it often entails for a wife, can serve to influence a young woman's choice of career and accordingly her economic prospects.[195] It is therefore arguable that the result of the many difficulties that married women still face in employment is a measure of continuing economic dependence upon their husbands, and, although it has been pointed out that a woman's wage might often mean the difference between subsistence and poverty for her family,[196] it is her husband's salary that still plays the dominant role in the family budget.[197] We conclude this section by quoting the words of the Finer Committee[198] which would appear to be as valid today as when they were published six years ago:

> "Since the early days of industrialisation, women have constituted both a significant proportion of the country's labour force and a main source of cheap labour. An inescapable conclusion from the many recent studies of women's experience in trying to reconcile the claims of marriage, motherhood and work is the existence of a traditional and firmly rooted double standard of occupational morality. As a society we pay lip service to the ideal of equality for women whilst practising discrimination in the very area where it hurts most. The substantial study of Sex, Career and Family by a Political and Economic Planning group observes that women:
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> 'tend not to be offered the same chances of training for skilled work or promotion as men nor to be motivated by their education or work environment to take them; that they tend to be segregated into 'women's work', devalued by unequal pay, treated as lacking in commitment to their work and as unsuitable to be in authority over men, and trained and encouraged not merely to accept these conditions but to think them right; and that husbands, the community . . . and employers have only half-heartedly adapted to the change in the women's labour market due to the increased share taken in it by married women.' "

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[194] See paras. 52 and 54, above.

[195] E.g. Fogarty and Rapaport, *Sex, Career and Family* (1971), p. 25 and p. 186 *et seq.*

[196] McNay and Pond, *Low Pay and Family Poverty* (1980), an occasional paper prepared by the Study Commission on the Family, p. 11.

[197] In 1978 it was estimated that, on average, a wife's income accounted for only 15.5% of the total household income from all sources. A man's on the other hand, accounted for 72·1%: Department of Employment, *Family Expenditure Survey 1978* (1979), Table 39.

[198] Report of the Committee on One-Parent Families (1974), Cmnd. 5629, Vol. 1, para. 7.41.

PART IV

SOME MODELS FOR A LAW GOVERNING THE FINANCIAL CONSEQUENCES OF DIVORCE

Introduction

58. We have so far in this paper attempted to analyse the policy and the historical evolution of the present law governing the financial consequences of divorce, the complaints to which the law gives rise and the fundamental issues which underlie some of these complaints. We think that we have already said enough to indicate that there are no easy solutions to the many difficult and conflicting problems which are involved. The paragraphs that follow are therefore not intended to represent a comprehensive "field of choice" for reform, much less to indicate any conclusion on the part of the Law Commission; we merely outline some of the different models that have been put forward to govern the basic policy of the law relating to the financial consequences of divorce as between husband and wife. Most of these models involve the adoption of some new principle of law, but we think that we should begin by considering the case for retaining the present law contained in section 25 of the Matrimonial Causes Act 1973.

Possible models

Model 1: *Retention of section 25 of the Matrimonial Causes Act 1973*

59. So far in our analysis of the law we have concentrated almost exclusively on the concluding direction to the court, that is that it should, having considered all the circumstances, so exercise its powers as to place the parties, so far as it is practicable and, having regard to their conduct just to do so, in the financial position in which they would have been if the marriage had not broken down; and we have considered at some length the objections to the principle of life-long obligation to which this direction seems to give effect. In one view of the matter, however, this way of looking at the problem is seriously misleading, both because it wrongly suggests that the general objective referred to above has a "pre-eminent status"[199] and because it gives no attention to the weight which in practice the court would give to the circumstances of each case in exercising its powers. Taken by itself, the direction to place the parties in the financial position they would have been in had the marriage not broken down would "seem to require the court to place a young woman who marries a millionaire and who is deserted by him three weeks later in the financial position in which she would have been if the marriage had not broken down, even if she is not pregnant and has not interrupted her career".[200] However actual practice is very different because the direction does not stand by itself, but is preceded by a requirement that the court consider "all the circumstances" including a lengthy list of specified factors.[201] Accordingly in a case

[199] Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 255.

[200] Scottish Law Commission, Aliment and Financial Provision (1976), Memorandum No. 22, vol. 2, para. 3.4. For further reference to this work, see n. 1, above, and n. 261, below.

[201] See para. 20, above.

such as that just mentioned the court would avoid any result which seems absurd[202] by taking into account, for instance, not only the duration of the marriage,[203] but also the wife's earning capacity.[204] Whilst it is true that the failure of the Act to give any indication of the weight to be attached to any particular circumstance, or indeed to "the circumstances" as a whole, can make it difficult for practitioners to advise clients on how a case is likely to be decided,[205] it is claimed that any such disadvantage is more than outweighed by the advantage to be gained from the court having a discretion which can not only be adapted to the infinitely varied facts of each case (which can be foreseen neither by a judge[206] nor by the legislature) but also to changing social circumstances.[207] Moreover, in this view it is not only inevitable, but indeed desirable, that it should be left to case law to provide the coherent but evolving guidance on how to deal with such specific problems as the difficulties arising from shortage of housing,[208] the effects of the availability of supplementary benefit,[209] pensions and other welfare benefits, and the policy to be adopted in relation to short marriages[210] and the wife's earning capacity.[211]

60. We see the advantage of this approach but there may nevertheless be thought to be force in the criticism that the section fails to give adequate guidance to the courts as to how to exercise the extensive discretion which Parliament has conferred upon them, and that because of this failure, discrepancies[212] occur in practice. Thus, even the appellate decisions perhaps suggest that the courts in practice apply somewhat different principles from those laid down by the Act, for example, by attaching overriding importance to ensuring that the children of the marriage are adequately supported and housed, and the needs of each spouse are met.[213]

61. We think that the argument that the section fails to give adequate guidance to the courts can best be illustrated by reference to the case law on the extent to which financial orders should be affected by the short duration of a marriage.[214] Here the case law, it has been said,[215] indicates in fact that "where

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[202] *Ibid.*, and see *S.* v. *S.* [1977] Fam. 127, 134 *per* Ormrod L.J., "... there is no question of putting [the wife, whose marriage had lasted for two years] back into the position in which she was before the marriage, or performing any hypothetical task of that kind." The "primary requirement" of the legislation is to make an order which is "just".

[203] Matrimonial Causes Act 1973, s. 25(1)(*d*).

[204] *Ibid.*, s. 25(1)(*a*).

[205] *Martin* (*B.H.*) v. *Martin* (*D.*) [1978] Fam. 12, 20, *per* Ormrod L.J.

[206] *Kokosinski* v. *Kokosinksi* [1980] 3 W.L.R. 55, 64–5, *per* Wood J.

[207] *Martin* (*B.H.*) v. *Martin* (*D.*) [1978] Fam. 12, 20.

[208] See e.g. *Hanlon* v. *Hanlon* [1978] 1 W.L.R. 592.

[209] See e.g. *Barnes* (*R.M.*) v. *Barnes* (*G.W.*) [1972] 1 W.L.R. 1381; *Shallow* v. *Shallow* [1979] Fam. 1.

[210] See paras. 61–65, below.

[211] See e.g. *Bateman* v. *Bateman* [1979] Fam. 25, 37.

[212] See Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), pp. 3–4.

[213] Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 256: see also *Hanlon* v. *The Law Society* [1980] 2 W.L.R. 756, 787 (C.A.) *per* Sir John Arnold P.; *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 64, *per* Wood J.

[214] There have been somewhat conflicting views on whether a period of cohabitation prior to the marriage should be taken into account in determining the "duration of the marriage" for this purpose: cf. *Campbell* v. *Campbell* [1976] Fam. 347, 352 (wife's argument that three and a half

continued on page 38

the marriage is of short duration, the principle that the parties should be placed in the financial position in which they would have been had the marriage not broken down . . . will not be made the basis of the decision." Hence (it might be said) the courts in such cases effectively disregard the final words of the section; and there is indeed a line of authority which suggests that the courts will not usually make a "full"[216] order in favour of a young wife with no children. Thus in *Brady* v. *Brady*[217] Sir George Baker P. said there was "no reason why a wife whose marriage has not lasted long, and who has no child, should have a 'bread-ticket' for life," and refused to make an order which would have required the husband to keep his wife in perpetuity. In *Krystman* v. *Krystman*[218] (where the parties had only lived together for a fortnight after a "shot-gun marriage") the Court of Appeal held that there had been only a "shell of a marriage", and that consequently the husband should not be required to make any financial provision at all for the wife. Similarly in *Taylor* v. *Taylor*[219] (where the parties had only slept under the same roof for 20 days) the court held that the wife should expect no financial provision, and extinguished her interest in the matrimonial home which had been bought by the husband in their joint names.

62. On the other hand, there is nothing in the statute to suggest that where the marriage has been short a wife is disqualified from obtaining financial relief: the shortness of the marriage is a relevant factor, but it will be taken into account as a matter of degree rather than principle.[220] Consequently, if a wife can show that the marriage has caused her loss, or that she or the children of whom she has the care are in need, an appropriate order will be made. Thus in *Cumbers* v. *Cumbers*,[221] although the marriage had lasted only some 18 months, the wife had played a part in it which deserved compensation. In *Abdureman* v. *Abdureman*[222] the parties only lived together for some 12 weeks, but the wife (a widow aged 45) had given up her employment to look after the husband and had not been able to find another job. She had also lost pension rights and her rights to a widow's pension. Since the three months' marriage had been disastrous to her in monetary terms an order that the husband should pay her £20 weekly out of gross earnings of £85 was held not to

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years pre-marital cohabitation should be taken into account said to reflect "an entirely misconceived outlook. It is the ceremony of marriage and the sanctity of marriage which count; rights, duties and obligations, begin on the marriage and not before," *per* Sir George Baker P.) and *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55 (court took account of 25 years pre-marital cohabitation since failure do to so would otherwise produce an unjust result).

[215] Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 255.

[216] i.e. of the same amount as would have been made in the case of a longer marriage (perhaps based on the "one-third starting point"—see para. 81, below) and which would, unless varied on a subsequent application, continue for the parties' joint lives.

[217] (1973) 3 Fam. Law 78; see also *Graves* v. *Graves* (1973) 117 S.J. 679 (a case founded on wilful neglect to maintain) where it was said that only a nominal order should be made if the marriage has been short, and the parties are young, unless there are children or the wife is handicapped and unable to work.

[218] [1973] 1 W.L.R. 927.

[219] (1975) 119 S.J. 30.

[220] *McGrady* v. *McGrady* (1978) 8 Fam. Law 15.

[221] [1974] 1 W.L.R. 1331.

[222] (1978) 122 S.J. 663 (a case where the marriage was in fact still subsisting; it could not be dissolved until three years from its formation: Matrimonial Causes Act 1973, s. 3).

be wrong in principle. In *Warder* v. *Warder*[223] the marriage between a comparatively well off 61 year old widower and a divorced woman of 51 lasted less than four months. Since the wife had given up the tenancy of a council house to marry, the court awarded her a lump sum of £1000 in full and final settlement of her claim for financial relief. Finally, in *West* v. *West*,[224] even though the parties had cohabited only intermittently and for little more than six weeks in all, an order for periodical payments was made. However, it was intended only to be sufficient to enable the wife to keep a home for the two children,[225] and it was very considerably less[226] than it would have been had the marriage lasted longer.

63. It might thus be argued that on the basis of the reported appellate decisions the courts have developed an entirely coherent approach to the problem of the short marriage; in essence they look at the effect that the marriage has had on the parties, and on their resultant needs[227] and in the light of all the circumstances they then seek to do broad justice between the parties.[228] However valid this approach may be in principle, it is not entirely easy to reconcile with the wording of the Act, except by attaching very little weight to the direction to seek to place the parties in the financial position in which they would have been had the marriage continued. On this basis one might argue that if the principle embodied in the statute is not going to be applied in practice it would be better to repeal or replace it, especially if the present position means that the true principle can only be extracted "from the complex language of appeal court judgments where the court is often paying lip-service to the statutory guidelines while in effect evolving rather different principles."[229]

64. It might also be argued that the law dealing with the relevant circumstances to which the court must have regard is, in reality, neither so clear nor so settled as has been suggested. First, the cases on short marriages to some extent stand by themselves; there is no comparable evidence that the courts do not attempt to put the parties in the position they would have been in had the marriage not broken down in cases of medium-term marriages where the wife has no children and might have an earning capacity. Secondly, it might be argued that, even in relation to short marriages, the policy which has evolved might not survive detailed scrutiny by an appellate court. In this connection reference might be made to the case of *Brett* v. *Brett*,[230] decided in 1969, where the marriage effectively lasted only five and a half months. There, notwithstanding the fact that the wife was young (23), and childless, and had significant earning capacity as a solicitor, the Court of Appeal held that she was entitled to compensation for the loss of the benefits which she could reasonably have expected to enjoy as the wife of a wealthy man, and made substantial orders for

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[223] (1978) 122 S.J. 713.
[224] [1978] Fam. 1.
[225] *Ibid.*, at p. 9 *per* Sir John Pennycuick.
[226] i.e. approximately one-eighth of the joint incomes, rather than the conventional starting point of one-third (see further para. 81, below).
[227] *S.* v. *S.* [1977] Fam. 127, 133, 134 *per* Ormrod L.J.
[228] *Ibid.*
[229] Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 256.
[230] [1969] 1 W.L.R. 487.

periodical payments (£2,250 per annum) and a lump sum (£25,000).[231] Although *Brett* was decided before the new legislation dealing with the financial consequences of divorce came into effect, it has been held since the new law took effect, albeit *obiter*,[232] that if a case involving substantially the same facts as *Brett* were to come before the courts again it would today be decided in the same way. Moreover this view might seem to be supported by the fact that *Brett* was avowedly based on the principle, enunciated by Lord Merrivale P., in *N.* v. *N.*,[233] that the court's order should seek to put the wife in "the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation", and that it was this same principle which it was intended should be embodied in what is now section 25 of the Matrimonial Causes Act 1973.

65. Finally we would point to the research that has been done into the matrimonial jurisdiction of registrars which may also be thought to support the view that the guidelines of the law as it now stands cause difficulty for those who administer it. In practice the courts' jurisdiction to grant financial relief following divorce is often exercised by registrars (subject to a right of appeal), and a survey of their attitudes conducted between 1973 and 1975 revealed significant divergences of approach.[234] Thus, although the majority of registrars interviewed would make no order (or only a nominal order)[235] in cases of a short childless marriage, a significant minority (19%) said that they would be prepared to make a full order in such circumstances. It is perhaps interesting to note that the survey also revealed contrasting views on whether an order in favour of a wife with children aged about ten should be based on the assumption that the wife should seek employment[236]; and also about the extent to which the parties' conduct should be allowed to influence awards.[237] However in using this survey as evidence of discrepancies in the courts' application of the present law it should perhaps be borne in mind that it was carried out more than five years ago, and thus before many of the important judicial decisions, referred to in the course of this discussion, which have since clarified the meaning of, and the weight to be attached to, the circumstances to which the court must have regard under section 25.

Model 2: Repeal of the direction to the court in section 25 to seek to put the parties in the financial position in which they would have been had the marriage not broken down

66. We have already said[238] that we consider the most fundamental issue raised by the present controversy over section 25 to be whether or not it is

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[231] Perhaps some £9,000 and £100,000 respectively in 1980 values. The latter sum was to be increased if the husband failed to grant his wife a gett (a divorce which would be recognised as effective according to the wife's religious beliefs).

[232] *Whyte-Smith* v. *Whyte-Smith* (1975) 119 S.J. 46.

[233] (1928) 44 T.L.R. 324, 328. See also para. 10 and n. 130, above.

[234] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977).

[235] So that the position could be kept "open and allow for a change in circumstances" (*ibid.*, p. 22). Such an order (which has the effect that a husband remains under a contingent liability to provide full support for the wife should conditions change) was made in 56% of the cases: Table 6.

[236] *Ibid.*, pp. 20–21 and Table 5.

[237] *Ibid.*, pp. 23–27.

[238] See paras. 22 and 29, above.

desirable to retain the principle of life-long support which that section seems to embody. It might therefore be argued that the simplest solution to the criticisms of the present law would be for Parliament to repeal the specific direction at the end of section 25(1), but otherwise to leave the section intact; the court would simply be directed to make whatever order it considered appropriate in the light of all the circumstances, including the circumstances listed in sub-sections (*a*) to (*g*) of section 25(1). This would enable the courts to adopt a flexible approach, taking into account not only all the relevant individual circumstances of the parties, but also changing economic factors such as the availability of housing and changing attitudes to the proper purpose of financial provision.

67. There might also be a number of further arguments in favour of this approach. First it would to a large extent reflect the current practice in the appellate courts which appears to concentrate on achieving a result which is "just in all the circumstances"[239] by taking into account the needs of the parties and of their children,[240] rather than seeking to attain the elusive[241] objective which is laid down by the statute; it would thus enable the courts to develop fresh principles in the same way as they have already done in relation to short marriages,[242] without the constrictions imposed by the need to pay lip-service to the section. In practice, therefore, the courts could be expected to give more emphasis to the circumstances of individual cases than they do at the moment. Secondly it would overcome the difficulty, mentioned above,[243] that the present statutory objective is impossible to attain because of the insufficiency of one income to support two households. Thirdly it might be argued that because section 3 of the Domestic Proceedings and Magistrates' Courts Act 1978[244] directs the courts' attention to specified circumstances which are similar to those set out in sub-sections (*a*) to (*f*) of section 25(1) of the 1973 Act but

[239] *S.* v. *S.* [1977] Fam. 127, 134, *per* Ormrod L.J. (the "primary requirement of the Act of 1973").

[240] See Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 256.

[241] *Harnett* v. *Harnett* [1973] Fam. 156, 161, *per* Bagnall J.

[242] See paras. 61–63, above.

[243] See paras. 42–44, above. See also Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977) p. 28.

[244] The section provides as follows:

"(1) Where an application is made for an order under section 2 of this Act, the court, in deciding whether to exercise its powers under subsection (1) (*a*) or (*b*) of that section, and, if so, in what manner, shall have regard to the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*c*) the standard of living enjoyed by the parties to the marriage before the occurrence of the conduct which is alleged as the ground of the application;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage."

Its enactment followed a recommendation made by the Law Commission in its Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, paras. 2.17–2.29.

omits the direction to the court to seek to put the parties in the position in which they would have been had their marriage not broken down, a change along the lines of this model would not only further harmonise the law administered in the higher and lower courts but would also give effect to the parliamentary preference that might be said to have been manifested in the enactment of the 1978 Act. In this view, Parliament in 1978 adopted this model as the policy to govern the exercise of the courts' discretion in resolving financial disputes in the magistrates' courts between husband and wife, and it would therefore be reasonable for the divorce law to be reformulated accordingly.

68. There is perhaps some force in the first two of these arguments, but we are unconvinced by the third. The 1978 Act was intended merely to "reproduce, as far as possible, the guide-lines for the divorce court contained in section 25 of the Matrimonial Causes Act 1973 with only such modifications as are necessary to reflect the different circumstances of matrimonial disputes in the magistrates' court."[245] There was little discussion of the fundamental principle of a discretion controlled by specific guidelines in either House[246] and accordingly we do not think that it is possible to infer any implicit parliamentary sanction for such an approach. This view that it would be inappropriate to place reliance on the precedent of the 1978 Act is, we think, reinforced by two further considerations. First, in an application to a magistrates' court, the marriage, in theory at least, may not have broken down irretrievably; in such a case it would be inappropriate for the court to make orders on the footing that the partnership which had been created by the marriage had been dissolved. Secondly it must be remembered that magistrates have only limited powers[247] in the exercise of their matrimonial jurisdiction; in particular, apart from a power to order a limited lump sum, they have no powers over capital. There would thus have been no point in formulating the 1978 Act so as to direct magistrates to seek to place the parties in the financial position in which they would have been had the marriage not broken down, since magistrates lack the necessary powers to achieve this objective, which would often necessitate orders relating to the occupation or ownership of the matrimonial home. Consequently, we do not consider that the precedent of the 1978 Act as such can usefully be invoked in deciding one way or the other whether or not the court on divorce should be directed to seek to put the parties in the position in which they would have been had the marriage not broken down.

69. Furthermore, although, as we have said, there might be advantages in a reform on this model, there are also serious disadvantages to be taken into account. Essentially, it may be said, such a change in the law would involve an abdication of responsibility by Parliament in favour of the judiciary. Individual judges would be left to achieve whatever they subjectively regarded as "just" without any guidance as to the principles by which the justice of the case should be determined. It is arguable that such an uncontrolled (and perhaps uncontrollable) discretion would inevitably exacerbate the divergence of practices between different tribunals, as well as leaving individual judges and registrars with no real guidance about the important issues of policy involved.

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[245] (1976) Law Com. No. 77, explanatory notes on clause 3, para. 1.
[246] See however *Hansard* (H.C.) Standing Committee B, 25 April 1978, cols. 28–31.
[247] These are set out in the Domestic Proceedings and Magistrates' Courts Act 1978, s. 2.

Model 3: The relief of need[248]

70. Under this model, the economically weaker party would be eligible to receive financial assistance from the economically stronger party if, and so long as, he or she could show that, taking into account his or her particular social and economic conditions, there is actual need of such assistance. The principle adopted would thus be one of individual self-reliance: after a marriage had broken down neither of the parties would have any automatic right to support, but rather only a qualified right insofar as it could be justified by special circumstances. In practice, the adoption of such a principle would entail placing an onus on the applicant to show that he was unable to support himself adequately. Thus in Australia[249] it is provided that:

> "A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75(2)."[250]

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[248] It has been argued that this approach is already implicit in the practice of the present law. See e.g. Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 256, 258 *et seq*; Gray, *Reallocation of Property on Divorce* (1977) pp. 313–5; Harper, *Divorce and Your Money* (1979), p. 160. See also generally the Scottish Law Commission, Memorandum No. 22, Aliment and Financial Provision, paras. 3.2–3.8, which reached the provisional conclusion that a model along these lines was probably the most acceptable model for reform. Their report, based on consultation, is expected to be published later this year: *Hansard* (H.C.), 2 July 1980, vol. 987, col. *577*. For an analysis of some of the recent cases on this point, see further para. 71, below.

[249] Family Law Act 1975 s. 72. For a recent consideration of this legislation see Bailey, "Principles of Property Distribution on Divorce—Compensation, Need or Community" (1980) 54 A.L.J. 190.

[250] The "relevant matters" referred to in sub-section 75(2) are:

"(*a*) the age and state of health of each of the parties;
(*b*) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(*c*) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
(*d*) the financial needs and obligations of each of the parties;
(*e*) the responsibilities of either party to support any other person;
(*f*) the eligibility of either party for a pension, allowance or benefit under any law of Australia or of a State or Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party;
(*g*) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
(*h*) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
(*j*) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
(*k*) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
(*l*) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;

continued on page 44

71. Some might argue that,[251] in the exercise of the wide discretion[252] which is conferred upon them by section 25, the courts are already adopting a variant of the "needs approach". In *S* v. *S.*[253], for instance, Ormrod L.J. said that "the primary consideration is to look at the needs of the wife first of all; and, having made some assessment of the need, then to check the resulting figure that emerges against the resources of the husband, and at that stage see what the ratio of the one to the other is . . .". Such an approach has been found to be appropriate in a number of circumstances, but especially in relation to the matrimonial home where the court's prime concern is to secure that, if possible, both parties, but particularly the party having the care of the children, should have a roof over their heads.[254] In practice this will often result in the wife having exclusive use of the matrimonial home. However the "needs approach" might also be said to have played a key role in shaping a number of other decisions, for instance on how much to award by way of capital provision[255], and how much to award by means of periodical payments.[256]

72. Nevertheless, a number of problems would have to be faced if such a principle were to form the main basis of the law.

(i) First of all, how is need to be quantified, or (to adopt the vocabulary of the Australian statute) what is an adequate level of support? Is it to be supposed that a wife will be in need if she cannot preserve her former standard of living,[257] or (at the other extreme) is she only to be regarded as being in need if she is in danger of falling below a subsistence level?

(*m*) if the party whose maintenance is under consideration is cohabiting with another person—the financial circumstances relating to the cohabitation;

(*n*) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties; and

(*o*) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account."

[251] See e.g. n. 248, above.

[252] E.g. Matrimonial Causes Act 1973, s. 25(1)(b).

[253] [1977] Fam. 127, 133.

[254] See e.g. *Mesher* v. *Mesher and Hall* (1973) [1980] 1 All E.R. 126; *Hanlon* v. *Hanlon* [1978] 1 W.L.R. 592; *Martin* v. *Martin* [1978] Fam. 12; and generally, Cretney, *Principles of Family Law*, 3rd ed., (1979), pp. 320–325.

[255] See e.g. *Bryant* v. *Bryant* (1973) 117 S.J. 911; *S.* v. *S.* [1977] Fam. 127; but cf. *S.* v. *S. The Times*, 10 May 1980 (Wife applied for a lump sum of one-third of the joint capital of £2,000,000. The court awarded £375,000 which "was considerably more than what was necessary for the wife's needs, but it did recognize the wife's contribution in assisting to build up the husband's assets".)

[256] See e.g. *S.* v. *S.* [1977] Fam. 127; and also Eekelaar, *Family Law and Social Policy* (1978), p. 182.

[257] The German Marriage Law Reform of 1976, which to some extent adopts the "needs" philosophy, provides that a divorced spouse can claim maintenance "if and so long as he or she cannot be expected to work for other substantial reasons, and if it would be grossly inequitable to refuse him or her maintenance" (BGB. s. 1576). It further provides that a divorced spouse need take "only such employment as is appropriate for him or her" (BGB. s. 1574) and that the level of maintenance after divorce is to be determined according to the marital standard of life at the time of divorce (BGB. s. 1578). It has thus been suggested that whilst from a non-economic point of view divorce "seems to be more easily obtainable under the present law than under the former law . . . for all those who are not totally without means, the heavy economic consequences of divorce, including those relating to pensions and tax, may serve as an important deterrent to applications for dissolution of marriages under the new law": W. Müller-Freienfels, "The Marriage Law Reform of 1976 in the Federal Republic of Germany" (1979) 28 I.C.L.Q. 184, 198.

(ii) Secondly, if the effect of the "needs approach" is to impose an obligation on both spouses to seek gainful employment, what sort of reasons will suffice to justify a failure to find employment? For instance is the ex-wife of a medical practitioner, lawyer or businessman after 20 years of marriage to return to her former job as an office clerk or a medical technician?[258] Will a wife, who has children of school age, but who could take part-time or casual work so as to be able to look after them outside school hours, be deemed to be capable of supporting herself? It was presumably this latter factor which weighed with the Australian legislature when it provided in the Family Law Act 1975 that the court should take into account in deciding whether a spouse is capable of finding employment not only "whether either party has the care and control of a child of the marriage who has not attained the age of 18 years"[259] but also the "need to protect the position of a woman who wishes only to continue her role as wife and mother."[260]

(iii) Thirdly, if this model were to be adopted it would, we think, be necessary to decide whether the "need" for which one party would remain under an obligation to the other should be confined to such need as arises as a consequence of the marriage and its breakdown, or whether need should carry a right to maintenance however it arises. If the former view were adopted[261], a spouse might perhaps have a claim for support if he or she were caring for a child of the marriage, or if the marriage could be shown to have specifically damaged his or her employment prospects. However there would be no obligation to provide for a spouse whose needs arose from circumstances outside the marriage such as age, disability or sickness. Such an approach therefore also raises the important question of who should support such people. On the latter view the economically stronger spouse is obliged to meet the need of the weaker irrespective of how that need has arisen. Consequently it is open to some of the same objections as are levelled at the present law, since it would involve a contingent liability to provide life-long support, especially in relation to age or infirmity, and would thereby preclude any possibility of a "clean break" with the past.[262]

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[258] *Ibid.*, at pp. 199–200.

[259] Family Law Act 1975, s. 75(2)(*c*).

[260] *Ibid.*, s. 75(2)(*l*).

[261] A solution along these lines was tentatively proposed by the Scottish Law Commission in 1976 in their Memorandum No. 22, Aliment and Financial Provision, para. 3.7: "Our preliminary view is that *financial provision on divorce should not be based on the principle that there is a continuing alimentary relationship between the parties. Rather, its purpose should be to adjust equitably the economic advantages and disadvantages arising from the marriage, in so far as this adjustment is not made by other branches of the law.* (Proposition 64). Thus, financial provision could be used to provide support for the spouse who has to look after the children of the marriage and for the older spouse who has interrupted, or never taken up, a career because of the marriage. It could also be used to adjust the spouses' rights in property acquired during the marriage, in so far as this is not catered for by matrimonial property law. But on this view, it could *not* be used to provide support for a spouse unburdened by children and unprejudiced by the marriage, who is, for some reason unconnected with the marriage, incapable of self-support. The old, the infirm and the unemployed are, on this view, the responsibility of society as a whole and not of a former spouse alone. If there is no question of child custody, a man who has worked throughout his marriage, but who happens to become unemployed just before, or just after, the divorce, should on this view have no claim for support against his wife, however wealthy she may be. Similar considerations should apply if the sex roles are reversed."

[262] See paras. 24 above and 77–79 below. Cf. *Minton* v. *Minton* [1979] A.C. 593, 608 *per* Lord Scarman.

Model 4: Rehabilitation[263]

73. Another approach, not dissimilar in many ways to the "needs approach" just mentioned, would be to provide that continuing financial support (as opposed to capital provision)[264] should be available on a purely rehabilitative basis. The concept of rehabilitative financial provision has been explained in a recent American case as:[265]

> "sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining, and for the further purpose of preventing financial hardship on society or the individual during the rehabilitative process".

The onus is therefore firmly placed on the spouse in receipt of a rehabilitative award to take steps to become self-sufficient, and in this respect we think that such an approach might often result in the wife having to accept a significantly lower standard of living after divorce than that which she enjoyed before. She would be given an opportunity to develop such skills as she possessed, but ultimately she would be expected to fend for herself.

74. Although section 25 does not expressly refer to the possibility of rehabilitation as a factor to be considered by the courts, it seems probable that they have, on occasion, adopted such an approach, for instance in relation to short marriages,[266] and, more specifically, where they have made an order for periodical payments to be made for a definite term (such as one year).[267] The research carried out into the matrimonial jurisdiction of registrars also suggests that "a few registrars make a limited time order to enable the wife to readjust and find a job while others considered that a lump sum order provided a suitable solution."[268]

75. Arguably there are important advantages to be gained from the adoption of a rehabilitative approach. Most important, in the light of the criticisms of the present law, it would permit a "clean break" with the past. The rehabilitative period might be limited by statute,[269] to a maximum of two or three years or to the duration of some course of training, or it might lie in the discretion of the court. Either way the result is that at an ascertainable date the

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[263] For two different approaches to this solution see Deech, "The Principles of Maintenance" (1977) 7 Fam. Law 229 and O'Donovan, "The Principles of Maintenance: an Alternative View" (1978) 8 Fam. Law. 180.

[264] As to which see further paras. 77–79, below.

[265] *Mertz* v. *Mertz* 287 So. 2d 691, 692 (1973) and see generally Eekelaar, *Family Law and Social Policy* (1978), pp. 171–7.

[266] See paras. 61–63, above.

[267] Cf. *Khan* v. *Khan* [1980] 1 W.L.R. 355, where under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 the husband was ordered to pay the wife £18 per week for the period of 12 months; thereafter the sum was to be reduced to £5 per week on the basis that she would by then have been able to find adequate employment but would nevertheless still be earning less than "she might otherwise have earned if she had been more experienced" *per* Sir John Arnold P. at p. 359.

[268] Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), p. 22.

[269] As it is for example in East Germany where, if maintenance is granted at all it is usually limited to a "transitional period of no longer than two years after the dissolution of the marriage": para. 29(1) FGB, as cited in Gray, *Reallocation of Property on Divorce* (1977) pp. 288–9.

parties will be able to treat their marriage and its financial ties as ended. Moreover such an approach might also avoid the abuses which are said to occur under the present law whereby some divorced wives refuse even to seek employment when there is nothing otherwise to prevent them from doing so.[270]

76. However the rehabilitative approach also presents problems. The most obvious is, of course, what should be done with those who are, for some reason, incapable of rehabilitation? Should there continue to be an enforceable private law obligation to maintain such a spouse and, if so, what of the justice to the party who is called upon to continue his or her support even although he or she might never have wished for the divorce? Or should the responsibility for providing for the spouse who cannot rehabilitate him or herself fall upon the State? Clearly the latter suggestion would involve public expenditure and would also raise important policy issues concerning whether such liability for the support of the casualties of marriage should be transferred to the State. A further problem that merits consideration is whether rehabilitation would be possible in practice. Affording the financially weaker spouse, who is usually the woman, an opportunity to rehabilitate herself, presupposes that the opportunity for her to do so is available. Our limited researches into the economic position of married women do not reveal a particularly hopeful picture of the opportunities currently available for women, particularly those with any form of family commitment.[271] Moreover if current projections are accepted, such opportunities seem unlikely to improve in the near future.[272] A final difficulty also arises in relation to rehabilitating spouses who have the care of children; it would, for instance, be necessary to consider whether the rehabilitative approach should be modified in the case of spouses who have the care of very young children or who deliberately limit their availability for work to suit their children's school hours.

Model 5: The division of property—the "clean break"

77. The essence of this model is the analogy of partnership. Where a partnership is dissolved, the partnership property is divided amongst the partners and that is the end of the matter. This, it is said, should also be the case where a marriage is dissolved.[273] The principle might be adopted in one of a number of forms. At the one extreme it would involve no continuing financial relationship between ex-spouses: their rights and duties *inter se* would be resolved at the time of the divorce by dividing the matrimonial property between them. Such division might involve using a fractional approach (e.g. both parties would be entitled to half of the property available for distribution) or it might reflect some other principle such as the "rehabilitative" or "needs" models suggested above. Alternatively, the division might be effected solely on the basis of the court's discretion in each individual case. However, other variations on the basic theme that the financial consequences of divorce ought to be resolved by means of a division of the matrimonial property might also be

[270] See paras. 25 and 26, above.
[271] See paras. 45–57, above.
[272] See e.g. McNay and Pond, *Low Pay and Family Poverty*, an occasional paper produced in 1980 by the Study Commission on the Family.
[273] See generally Gray, *Reallocation of Property on Divorce* (1977).

possible. Thus a law based on this model might provide, for instance, for a delay in the division where the matrimonial home is needed to accommodate a growing family,[274] or for additional payments of maintenance on a rehabilitative[275] or needs basis.[276] In the United States for instance[277] it has been proposed that the law should

> "encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered."

78. The courts already possess very extensive powers to deal with matrimonial property on divorce[278] and to some extent this principle has found favour in this country under the present law. In particular there are a number of cases which emphasise the advantages to be gained by a "clean break", and a "once and for all" division of the matrimonial property.[279] In *Minton* v. *Minton*[280] for instance Lord Scarman observed "There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other—of equal importance—is the principle of 'the clean break'. The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."

79. However, there are undoubtedly serious difficulties in the acceptance of this model, certainly if it were to be taken by itself. A number of these difficulties can be illustrated by reference to decided cases which have found the "clean break" principle inappropriate. In *Moore* v. *Moore*,[281] for instance, it was held that the principle was "not applicable where the financial resources of the parties were insufficient. It was nonsense to talk about a 'clean break' where there were young children. . . . Moreover it did not apply where one party was earning and the other could not earn. The effect of a 'clean break' in such cases would mean people living on social security." Frequently also the matrimonial home and its contents are the only real capital resource of the parties and, if sold, the sum raised will be insufficient to provide housing for them both and for any children. The courts' resolution of this dilemma has

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[274] *Ibid.*, p. 346.
[275] *Ibid.*, p. 348.
[276] E.g. Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 269.
[277] See e.g. the comments of the National Conference of Commissioners on Uniform Laws on the Uniform Marriage and Divorce Act, ss. 307–8: *Uniform Laws Annotated* (1979) p. 161.
[278] See Matrimonial Causes Act 1973, s. 24; see also para. 19, above.
[279] E.g. *Minton* v. *Minton* [1979] A.C. 593; *Dunford* v. *Dunford* [1980] 1 W.L.R. 5; *L.* v. *L.* (1980) 124 S.J. 203. Cf. *Jessel* v. *Jessel* [1979] 1 W.L.R. 1148; *Carter* v. *Carter* [1980] 1 W.L.R. 390; *Dipper* v. *Dipper* [1980] 2 All E.R. 722.
[280] [1979] A.C. 593, 608.
[281] *The Times*, 10 May 1980.

varied from case to case,[282] but it has often resulted in the deferment of any final break for a number of years.[283] Moreover the problem of housing perhaps also illustrates another major difficulty with the "clean break" approach. This is that in very many cases there is not even a "matrimonial" home (in the sense of a capital asset) to divide, because the parties live in rented or tied accommodation.[284] Consequently often the only asset which is available for distribution in such cases is the "household wage" (and perhaps ultimately the deferred household wage represented by the parties' pensions).[285] Conversely, it should be remembered that where one or both of the parties has very extensive capital resources which are, for instance, tied up in a business, the effect of an order dividing such capital might also cause such hardship as to make an outright division of capital inappropriate.[286]

Model 6: A mathematical approach

80. It has been said that the present law dealing with the financial consequences of divorce consists of "a series of generalized, incompatible, qualitative propositions", and that "the conventional practices . . . in this field are totally inadequate, and the need for a detailed and—as far as possible—mathematically precise code should be apparent".[287] On this approach the spouses' financial rights and duties *inter se* on divorce would be resolved by reference to fixed mathematical formulae which might then be adjusted to take into account particular factors such as the care of children or the length of the marriage. The result, it is said, would be two-fold. First, the parties and their legal advisers would in most cases be able to save time and money by negotiating a settlement in the knowledge that it accurately reflected current practice. Secondly, adjudicators would be able to decide cases in an entirely consistent fashion.

81. The obvious attractions of such an approach have on occasion commended it to the courts, and the so-called "one-third approach" by which a court starts its assessment by assuming that a wife will be entitled to one-third

[282] See e.g. *Mesher* v. *Mesher and Hall* (1973) [1980] 1 All E.R. 126 (see n. 283, below); *Martin (B.H.)* v. *Martin (D.)* [1978] Fam. 12 (home settled in equal shares subject to a trust for wife for life or until remarriage or she moved); *Hanlon* v. *Hanlon* [1978] 1 W.L.R. 592 (see n. 283, below). See also Cretney, *Principles of Family Law*, 3rd. ed., (1979), pp. 320–5.

[283] See e.g. *Mesher* v. *Mesher and Hall* (1973) [1980] 1 All E.R. 126 (matrimonial home to be held by parties in equal shares on trust for sale and not to be sold until child reaches 17 or court otherwise orders); *Hanlon* v. *Hanlon* [1978] 1 W.L.R. 592 (home transferred to wife who would only receive nominal periodical payments).

[284] In 1977 it was estimated that 44% of households in England were not owner occupied: *National Dwelling and Housing Survey* (1978), p. 10. For a full survey of matrimonial property and the opinions of married couples on the fundamental concepts of matrimonial property, see Todd and Jones, *Matrimonial Property* (1972), a survey undertaken on behalf of the Law Commission by the Office of Population Censuses and Surveys.

[285] See further O'Donovan, "The Principles of Maintenance: an Alternative View" (1978) 8 Fam. Law, p. 180.

[286] See e.g. *O'D.* v. *O'D.* [1976] Fam. 83.

[287] Green, "Fresh thoughts on ironing out the maintenance muddle" in *The Times*, 12 May 1980, and "Solving the arguments over who gets what" in *The Times* 28 May 1980. See also Harper, *Divorce and Your Money* (1979) pp. 64–87 and 144–155.

of the parties' joint gross income has been widely followed[288] both by the courts and by the parties and their advisers in negotiating out-of-court settlements. However it has been consistently emphasised that this approach should be regarded as no more than a starting point. In *Wachtel* v. *Wachtel*,[289] the decision of the Court of Appeal which is often regarded as the leading modern authority on the point, it was said for instance that such an approach "will serve in cases where the marriage has lasted for many years and the wife has been in the home bringing up the children. It may not be applicable when the marriage has lasted only a short time, or where there are no children and she can go out to work". It has since been held to be also inapplicable where the application for financial relief is made by the husband,[290] where the parties fall into the lower income groups[291] and possibly also where the parties are exceptionally wealthy.[292]

82. The desirability of certainty, which is clearly one of the chief merits of a mathematical approach, must therefore be balanced carefully against the need for flexibility which the courts have often emphasised in relation to the "one-third approach". It might of course be argued that most individual variations of circumstance could be provided for within the framework of a mathematical formula; but against this must be weighed the possibility that such formulae would thereby become so unwieldy and complicated that they could only be interpreted by specialists and the initial attractions of simplicity and certainty would be lost.

83. Although we have raised the question of a mathematical approach as a separate model for a law to determine the financial consequences of divorce, such a model would not, of course, by itself, solve some of the more fundamental issues raised by the present controversy. It might be applied for instance as the means of determining the amount owed in satisfaction of a life-long obligation to support, or it might be coupled with a merely rehabilitative obligation. The questions posed by these issues are therefore as relevant to the mathematical approach as they are to Models 1 and 4 above.

Model 7: Restoration of the parties to the position in which they would have been had their marriage never taken place

84. On this view[293] the court should seek to achieve "not the position which would have resulted if the marriage had continued, but the position which would have occurred if the marriage had never taken place at all". The

[288] See e.g. *Wachtel* v. *Wachtel* [1973] Fam. 72; *Watson* v. *Watson* (1976) 6 Fam. Law 18. See also Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977), pp. 41–5, which indicated that 61% of the registrars interviewed found it a useful starting point.

[289] [1973] Fam. 72, 95 *per* Lord Denning M.R. See also *S.* v. *S.* [1977] Fam. 127.

[290] *Calderbank* v. *Calderbank* [1976] Fam. 93, 103, *per* Cairns L.J., "there is no ordinary or usual case in which the wife is in the position to provide a lump sum for the husband." See also *P.* v. *P.* (*Financial Provision: Lump Sum*) [1978] 1 W.L.R. 483, 490.

[291] E.g. *Scott* v. *Scott* [1978] 1 W.L.R. 723, 728, *per* Cumming-Bruce J. See also *Cann* v. *Cann* [1977] 1 W.L.R. 938, 941, *per* Hollings J. (a case under the Matrimonial Proceedings (Magistrates' Courts) Act 1960).

[292] *O'D.* v. *O'D.* [1976] Fam. 83; *S.* v. *S. The Times* 10 May 1980.

[293] See e.g. Gray, *Reallocation of Property on Divorce* (1977), p. 320.

model is therefore a guiding principle, and might be carried into effect either by imposing an obligation to make periodical payments or by a once and for all division of the parties' capital (or a combination of both) which would be designed to compensate the financially weaker spouse for any loss incurred through marriage.

85. Although there is a certain attraction and logic in the view that "dissolution of marriage has the effect of returning the spouses to single status in civil law, and any process of economic readjustment on divorce which is not directed towards achieving, in financial terms, a similar *restitutio in integrum* is misconceived",[294] it clearly raises a number of difficult problems. In particular there is obviously the practical difficulty of speculating what would have been the position of the parties on the hypothesis that their marriage had never taken place—arguably an insoluble problem where the marriage had taken place many years previously.[295] How for instance would the court determine what would have been the career pattern of a woman who married immediately on graduating from a university ten or twelve years ago, and therafter devoted herself exclusively to bringing up her children? And how should the court resolve a case where the wife suffers from some disability perhaps arising from childbirth?

A combination of models

86. For ease of analysis we have, in the foregoing paragraphs, set out various models that might form the basis of a law to govern the financial consequences of divorce as if they were separate options. It might be argued however that many of the problems which could result if a particular model were to be adopted as the sole governing principle might be avoided if the law were to be based on a combination of these models. For instance, elements of the needs or rehabilitative approaches could be used to temper some of the difficulties that might arise if the division of property model were to be adopted by itself.[296] Alternatively it would no doubt be possible, whilst maintaining the main structure of the existing law, to amend the guidelines at present contained in section 25, so as to direct the court's attention more specifically to certain matters, for example the possibility that a wife should be expected to rehabilitate herself after divorce.[297] It has been suggested that the laws of other countries show an "increasing tendency towards the resolution of the economic relationship of divorced spouses by means of property adjustment, in conjunction with (at most) some form of limited or rehabilitative maintenance during the transitional period immediately following divorce"[298] and we have

[294] *Ibid.*, p. 321.

[295] See e.g. *Lombardi* v. *Lombardi* [1973] 1 W.L.R. 1276, 1282, where the marriage had broken down in 1956 and the husband had subsequently established a prosperous business with the assistance of "the woman who became not only his mistress but also his partner". The court declined to speculate on what the parties' financial position would have been had the marriage not broken down. See also *S.* v. *S.* [1977] Fam. 127, 134.

[296] See para. 77, above, and see also, Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 L.Q.R. 253, 269, where the author suggests "might it not, for example, be better to commence with an equal division of matrimonial assets and to modify this only in so far as necessary to safeguard the needs . . . of the children and the parties". See further Eekelaar, *Family Law and Social Policy* (1978) pp. 187–8.

[297] See, for instance, the Australian Family Law Act 1975, s. 75, quoted at n. 250, above.

[298] Gray, *Reallocation of Property on Divorce* (1977), p. 348.

drawn attention to instances where such a combined approach has in fact been followed.[299] Furthermore a mathematical approach might be combined with any of the other models in order to facilitate precision in quantifying the spouses' entitlement to financial relief.[300] However we consider that it would be premature in a paper of this type to attempt to investigate fully the range of "combined models" that might be adopted. Not only is the range of possibilities infinitely varied, but it could not sensibly be formulated without some consensus being reached on the basic issues discussed in this paper.

The impact of conduct

87. Another factor, which we have not so far mentioned in the present context,[301] is the relevance of the parties' conduct. Should it be allowed, for instance, to increase[302] or diminish[303] the sums to which the parties would otherwise be entitled under any of the above models? We are aware that strong and conflicting views are held on this subject and we have already summarised the view that the adoption of the "breakdown" principle of divorce (by the Divorce Reform Act 1969) should have prevented the court from giving effect to an obligation of life-long support unless it was prepared, as a separate issue, to consider and adjudicate on allegations of the parties' conduct, and in particular of their responsibility for the breakdown of the marriage.[304] Reported decisions (and notably the decision of the Court of Appeal in *Wachtel* v. *Wachtel*)[305] have suggested that the courts are at present reluctant to entertain allegations of misconduct adduced in an attempt to reduce the financial provision which one party would otherwise be expected to make for the other; it is only if the conduct of one of the parties is such that it would "really offend [a] reasonable person's sense of justice if no effect were given to it" in fixing the financial provision,[306] or that it would be "inequitable or unjust to disregard"[307] it, that the courts will take it into account.

88. We think that whichever model is considered (unless it involves merely an outright division of capital) it will be necessary to decide whether or not the

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[299] See e.g. para. 77, above.

[300] See para. 83, above.

[301] For a brief examination of the role of conduct under the present law, see paras. 39–40, above.

[302] *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55.

[303] Temporarily or permanently. See, e.g. *Ackerman* v. *Ackerman* [1972] Fam. 1, 6, where it was held at first instance that the court should reach and state a "maximum discount figure, that is to say the percentage by which, having regard to the conduct of the parties and the duration of the marriage, it would be just to reduce the wife's maintenance if, but only if, no other variable factor falls to be considered. The actual discount, if any, to be made at any particular time can then be decided in the circumstances which then prevail. It can never, of course, be more than the maximum unless the wife's subsequent conduct is relevant and that will rarely arise".

[304] See paras. 39–40, above.

[305] [1973] Fam. 72. It has been pointed out that the issue of "conduct" was not strictly before the court in that case: *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 65, *per* Wood J. However, even if the passages we have cited above (see para. 39) were technically *obiter*, it seems that they will be regarded as authoritative, at least in the Court of Appeal: *Harnett* v. *Harnett* [1974] 1 W.L.R. 219. Since the decisions in *Wachtel* v. *Wachtel* and *Harnett* v. *Harnett*, a right of appeal to the House of Lords on financial and other ancillary matters has been conferred by statute: Administration of Justice Act 1977, s. 9. It might therefore be that if the issue were to be tested in an appeal to the House of Lords, a different approach to the statute would be adopted.

[306] *Armstrong* v. *Armstrong* [1974] Court of Appeal Transcript No. 137 *per* Buckley L.J. as cited in *Kokosinski* v. *Kokosinski* [1980] 3 W.L.R. 55, 65–6.

[307] *Ibid.*, *per* Stephenson L.J.

courts' present approach to conduct is correct. For example if the law were to be based on Model 3 (the "needs" approach) it would be necessary to decide whether or not a man should be permitted to say: "I agree that my wife is in need. I agree that to some extent her needs arise from the fact of the marriage. However, she has brought her present plight upon herself, and I cannot accept that I should be responsible for meeting her needs any more. I am quite prepared to continue with the marriage but my wife has decided that she no longer wishes to, and has simply left me."

89. This obviously raises difficult issues. We believe that it would impose an impossible burden on the courts to require them to apportion blame for the breakdown of the marriage in each individual case. Accordingly we think that it would be inappropriate to encourage parties to rely on conduct in any save exceptional cases. In the words of Ormrod J. in *Wachtel* v. *Wachtel*[308] which we have already quoted—

> "the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality."

90. When this major practical difficulty is borne in mind we think that there are possibly three ways by which the question of conduct might be dealt with:

(i) First, the law regarding conduct could be left substantially as it is. Consequently the court would still be directed to have regard to conduct so far as it is just to do so, and it would be for them to continue to develop such guidelines as are necessary to determine both the extent to which conduct might affect awards, and the methods by which proof of conduct might be given.

(ii) Second, and at the other extreme, it could be provided (as it is for instance by the American Uniform Marriage and Divorce Act)[309] that the court should determine financial provision "without regard to marital misconduct".[310] The main objection to such an approach is that its adoption would undoubtedly shock many people's sense of justice, and it is arguable that a law which seems to be unjust is inherently unsatisfactory. In the words of the Scottish Law Commission:[311]

> "We doubt . . . whether public opinion in Scotland would think it just if the courts were to disregard conduct totally in determining entitlement or quantum. A young woman who 'marries for money', who contributes little or nothing to the success of the marriage, who cynically indulges in

[308] [1973] Fam. 72, 79.
[309] Which has been adopted in a small number of States.
[310] s. 308. See also the comments of the National Conference of Commissioners on Uniform Laws: *Uniform Laws Annotated* (1979), p. 161.
[311] (1976) Memorandum No. 22, para. 3.73.

misconduct to induce the husband to sue for divorce, and who then impudently claims financial provision, should not be able to profit from her misconduct. Such a result seems inconsistent with the objective which we have suggested . . . as the purpose of financial provision, namely to adjust *equitably* the advantages and disadvantages arising from the marriage".

(iii) Thirdly, it might be possible to provide expressly by statute that conduct should only be relevant in those circumstances in which the imposition of full liability to make financial provision would cause serious injustice. Against this proposal it can be said that it would be little different in effect from that contained in sub-paragraph (i) above and, moreover, it would be open to the same objections as that proposal, since different views would no doubt be held about what sufficed to constitute "serious injustice".[312]

PART V

CONCLUSION AND SUMMARY

91. It is the Law Commission's usual practice to conclude its working papers and reports with a summary of its recommendations. In this case, however, for reasons which we have outlined above[313] we do not consider it appropriate for us to advance even tentative proposals for reform. Accordingly, we do not propose to attempt to summarise Parts I to III of the paper, but it may be of some assistance if we conclude by summarising the different models considered in Part IV of the paper which might be adopted to govern the financial consequences of divorce.

92. Before doing so, it might perhaps be worth reiterating our understanding of the fundamental problem which lies at the heart of the matter. This is that we do not believe it to be possible to reach any clear conclusion on the policy of the law regulating the financial consequences of divorce without first forming a judgment on the nature of marriage, and in particular on the question how far marriage should involve legally enforceable life-long rights and duties. On this issue the law seems to be in a state of transition. Until comparatively recently the law gave clear expression to the view that it was properly concerned to enforce duties and responsibilities in marriage, and gave little weight to the emotional relationship between the parties.[314] However, the introduction of the "breakdown" principle as the basis for divorce is perhaps the most obvious manifestation of an increasing belief that marriage should be primarily

[312] Research has suggested that there are already divergences amongst registrars in the extent to which considerations of conduct are allowed to influence the level of awards: see Barrington Baker, Eekelaar, Gibson and Raikes, *The Matrimonial Jurisdiction of Registrars* (1977) pp. 20–27.

[313] See paras. 2–5, above.

[314] See e.g. *Price* v. *Price* [1951] P.413 (C.A.): husband obliged to accept an offer to return by his wife if she was genuinely prepared to live under his roof, even though the wife had unsuccessfully petitioned for divorce on the ground of his cruelty, had walked out on him, had rejected his attempts at reconciliation and said that she hated him.

concerned with personal happiness and fulfilment.[315] Such a belief seems inevitably to lead to the view that the law's intervention in family relationships should necessarily be limited. Nevertheless we doubt whether, in this country, there would yet be any significant support for a view of marriage which would see it as no more than "some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, that may be formed by consent of both parties and dissolved at the will of either".[316] Against such changing views about the very nature of marriage, the question whether the law, which no longer seeks to enforce many of the traditional obligations of marriage, should still continue to enforce an obligation of financial support, and if so on what basis, is clearly not an easy one to answer. We hope, however, that this paper provides an analysis of the main arguments and will be of some assistance in establishing a satisfactory and generally acceptable basis for the laws governing the financial consequences of divorce.

93. Before summarising the models considered in Part IV of the paper we would reiterate what was said at the end of that Part, namely that whichever model is adopted we think that it would be necessary to consider whether one spouse's entitlement to financial relief on divorce should be liable to be affected (usually by way of reduction) by his or her conduct. Under the present law conduct is, by judicial interpretation, regarded as relevant only in exceptional cases; and it is for consideration whether the law should be left substantially as it is now, or whether statute should lay down some more precise direction, for example to provide that financial matters should be settled "without regard to marital misconduct", or that the court should not allow conduct to influence orders unless serious injustice would be caused, or otherwise.

94. We conclude by summarising the models for a law to govern the financial consequences of divorce which we have considered in this paper:

(1) *Retention of the existing law*
[paras. 59–65]

(2) *Repeal of the direction to the court in section* 25 *to seek to put the parties in the financial position in which they would have been had the marriage not broken down*
[paras. 66–69]

(3) *The relief of need*
Under this model a divorced spouse would only be eligible for continuing support from the other if he or she could establish that, as a result of specific circumstances (such as bringing up children) he or she is in need of such assistance.
[paras. 70–72]

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[315] Cf. the view of Lord Hugh Cecil quoted by Ernest Thurtle M.P. in the debate on the Matrimonial Causes Act 1937: *Hansard* (H.C.) vol. 317, col. 2117. "The only argument for more divorce really is the hardship of indissoluble marriage, but this is not argument for it assumes a right of happiness. There is no such right. The path of virtue may often lead to unspeakable misery. It was hard in the War to stay in the front line places, it was hard to be wounded, mutilated and maimed for life, it was hard to be scourged and crucified. Is any unhappy marriage worse? If not the Christian must endure as his Lord endured."

[316] Clark, "The New Marriage" (1976) 12 Williamette L.J. 441, 450–1.

(4) *Rehabilitation*
Under this model a divorced spouse would in principle be obliged to become self-sufficient; and his or her partner would only be obliged to provide short-term support whilst he or she was undergoing appropriate training or retraining.
[paras. 73–76]

(5) *Division of property—the "clean break"*
This model is based on an analogy with partnership; the partnership (or marital) property is divided in the appropriate shares, but there is no continuing support obligation. Alternatively, division of property would be seen as the main form of financial relief after divorce, and a liability to pay maintenance would only be imposed if there were insufficient property available to meet the applicant's needs, or in other special cases (for example, where the applicant has the care of children).
[paras. 77–79]

(6) *A mathematical approach*
This model would seek to achieve predictability and certainty by introducing a mathematically precise code for assessing financial provision.
[paras. 80–83]

(7) *Restoration of the parties to the position in which they would have been had their marriage never taken place*
Under this model the court would ask, not what the parties' position would have been had the marriage continued, but what it would have been had it never taken place; and financial provision would be adapted to that objective.
[paras. 84–85]

(8) *A combination of models*
It should be noted that for ease of exposition, the models have been set out individually; but they might well be combined. For example the property division model could be linked with the rehabilitation model, and so on.
[para. 86]

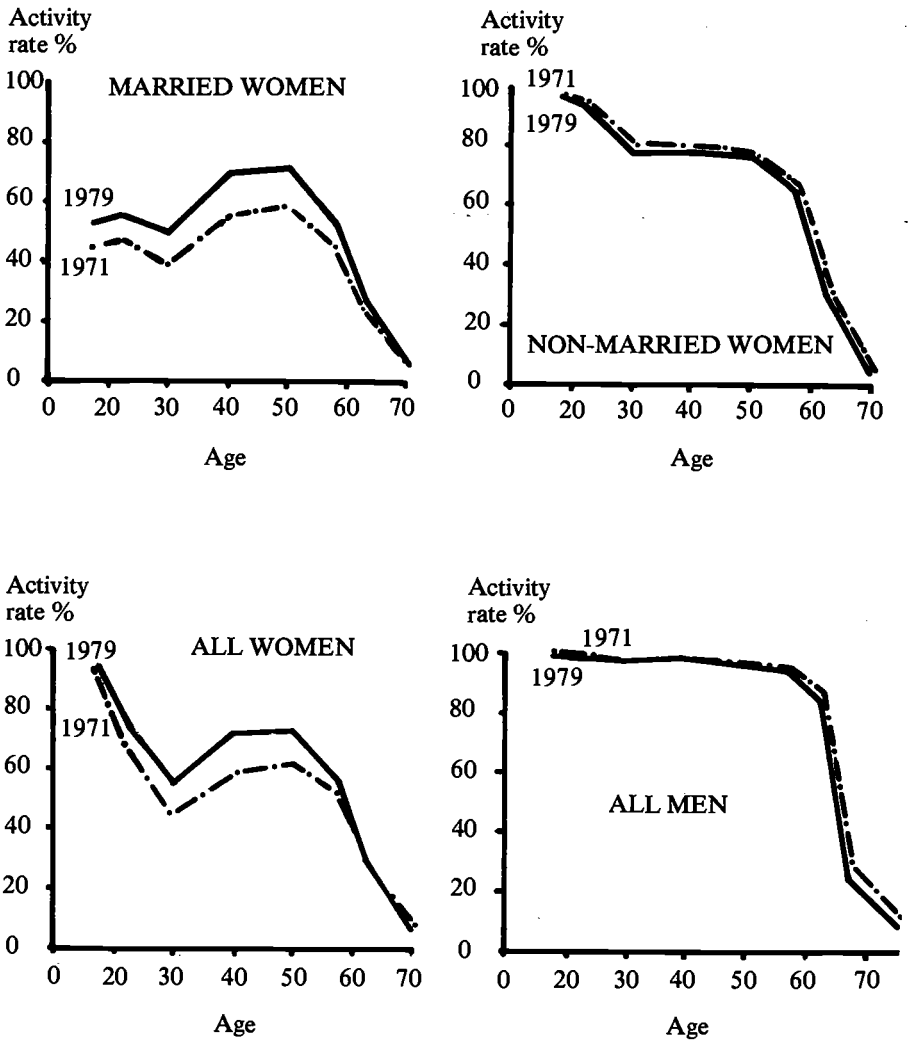
(*Signed*) MICHAEL KERR, *Chairman.*
STEPHEN M. CRETNEY.
STEPHEN EDELL.
W. A. B. FORBES.
PETER M. NORTH.

BRIAN O'BRIEN, *Secretary.*

11 *July* 1980.

APPENDIX

*ECONOMIC ACTIVITY RATES (INCLUDING STUDENTS) 1971–1979**



* See n.157 and n.181, above.

Source: Department of Employment Gazette, 86(4), April 1978, p.426, Table 1, as cited in the Equal Opportunities Commission, *Fourth Annual Report 1979* (1980)

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