Recent Reforms in Family Law: Progress or Backlash?

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My qualifications for delivering this lecture in honour of the late Horace E. Read are questionable. As an English academic family lawyer, I cannot claim an interest in the substantive areas of law which most interested him. As a member of the English Law Commission, however, I can claim an interest in legislation and the legislative process and Horace Read is perhaps best known outside North America for his pioneering work on the teaching of methods of making and applying legislation, including of course his *Cases and Materials on Legislation*. I should like, therefore, to offer him some thoughts on the process of legislating for reform in family law, with particular reference to recent events in England. They may, I fear, be somewhat uncomfortable thoughts, as they are prompted by the expectations apparently engendered in some quarters by my appointment as the first woman Law Commissioner for England and Wales.1 If the law were indeed a rational science, operating against the background of some generally approved and coherent theory of justice, then the sex of a law reformer should make no difference to her consideration of whether a particular law is unjust and how it should be changed. But of course the law is not rational in that way and to some it may seem self-evident that a woman will have a different perspective upon law reform, perhaps particularly in the field of family law.2

Mary Ann Glendon has described the transition taking place in family law throughout the developed Western world.3 Theoretically it is little short of a revolution: the law no longer seeks to define and enforce a particular concept of marriage and the family, but rather to tolerate a wide diversity of living arrangements, and then to offer protection and adjustment when things go wrong.4 In England, much of that revolution

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1. See comments in e.g. the *Daily Star* 15.2.84.
4. I have described the evolution of English family law in “Families and the Law” in R.N.
is the work of the Law Commission. The Commission was established in 1965 with the ostensible function of keeping under review "all the law . . . with a view to its systematic development and reform" but with the actual expectation that it would concentrate upon "lawyers' law". Its architects assumed that it would keep out of the law administered by Government Departments, while the White Paper preceding the Law Commissions Act did not envisage that it would do everything itself. In particular "where important social questions may arise" it might be more appropriate to refer them to a Departmental Committee or Royal Commission. The Commission's first programme of law reform proposed a preliminary examination of three areas: (a) "matrimonial law" in the light of the mixed reactions to the Report of the Royal Commission on Marriage and Divorce — this was the "code" for reform of the grounds for divorce; (b) family inheritance and property law; and (c) jurisdiction in family matters. This examination was intended to lead to proposals as to the agencies to which these topics should be referred. In fact, the Commission undertook the first two itself and thus plunged immediately into questions of enormous social importance. In 1968 its second programme expanded them into "a comprehensive examination of family law . . . with a view to its systematic reform and eventual codification". This was approved by the then Lord Chancellor and the Commission has been working on it ever since. In that time it has produced 20 Working Papers and 24 Reports on family law matters. Of the latter, 18 have been implemented in full, two are accepted and awaiting legislation, two did not call for legislation, and only two have been rejected or forgotten. Indeed, although codification may still be a long way off, the Commission has probably had more success in family law than in any other field.

The Law Commission reports to the Lord Chancellor, but the decision on whether to implement any particular report is made by the Government Department responsible for that area of law. It so happens that family law (apart from child care law) is the responsibility of the

5. Law Commissions Act 1965, s. 3(1).
11. Lord Gardiner.
Lord Chancellor's Department and the Lord Chancellor has a commendable record of accepting and implementing the Commission's Reports in this area. From his point of view, the standing and independence of the Law Commission are important factors in gaining Parliamentary approval for proposals with which he agrees. It enables him, quite correctly, to say that the matter has been exhaustively investigated by an eminent body which is independent both of Government and of party politics and thus that our recommendations may fairly be presented as non-controversial (or at least non-deserving of controversy). This technique was markedly successful with the recent Matrimonial and Family Proceedings Act 198413 which implemented three Law Commission Reports.14 Two of these were in fact highly controversial in certain quarters: permitting divorce after one rather than three years of marriage proved unpopular with the Bishops in the House of Lords, while amending the law on financial provision and property adjustment after divorce had provoked enormous controversy outside Parliament. Yet both emerged virtually unscathed.

In reflecting on this, we must bear in mind the characteristics of the Law Commission. It usually consists of a High Court Judge, a Q.C. from practice, a solicitor from practice and two academic lawyers. Until my appointment, all were men. Its staff are lawyers (not all men). It has no capacity to conduct or finance large-scale empirical research, although it may occasionally stimulate others to do so and can encourage or conduct smaller projects.15 It consults as widely as it can, but often much more successfully within the legal profession and formal bodies such as the Building Societies Association than elsewhere. There may also be a tendency both in the Law Commission and in the Lord Chancellor's Department to pay more attention to lawyers' views than to some others. This is perfectly understandable in any Government Department which depends upon cooperation with certain professions or occupational groups for the smooth running of whatever it has to run. The Lord Chancellor's Department cannot manage the courts without maintaining reasonable relations with the judges and the legal professions, just as the Department of Health and Social Security cannot mastermind the social services without the cooperation of local government, directors of social services and even the social workers on the ground. The conservatism of

15. The only large scale research relevant to family law and undertaken at the instance of the Commission is J. Todd and L. Jones (O.P.C.S.), Matrimonial Property (1972).
the legal profession has been identified by our present Lord Chancellor as one of the “obstacles to law reform”.\textsuperscript{16} He has also been known to quote Lord Campbell’s aphorism that “law reform is only by consent or not at all”.\textsuperscript{17} It is fair, I think, to ask “by whose consent?”

The obvious answer is that, whatever else may be required, the support of a substantial body of legal opinion has been essential for any change in family law over the past two decades and probably for much longer. Indeed, it is curious that the Law Commission has been allowed to play such a large part in shaping reform of an area raising such important social, moral and micro-political issues that non-lawyers would not normally term it “lawyers’ law”. But for present purposes the interesting question is how far the fact that these issues have been defined and discussed by lawyers, usually male lawyers, has influenced the outcome. The question could probably be answered by reference to any branch of family law, but space does not permit me to cover the whole field. Instead, I shall consider the rise and fall of the concept of marital partnership in English law.

Carol Smart has remarked how “during the 1950's there was a belief that full legal equality had almost been achieved”\textsuperscript{18} between the sexes. She cites Lord Justice Denning’s address to the National Marriage Guidance Council in 1950, in which he commented that “the fact that women have gained equality with men has tremendous potentialities for civilisation, but whether it is for good or bad is yet to be seen”. He went on to suggest that a wife was now the “spoilt darling” of the law and her husband the “patient packhorse”.\textsuperscript{19} Similarly, the first edition of Bromley's \textit{Family Law}, like the current one, asserted that “during the past century the wife's position has steadily changed from something in many respects inferior to that of a servant (who could at least quit her master's service by giving notice) to that of the joint, co-equal head of the family”.\textsuperscript{20} As Smart comments, it is difficult to understand how lawyers could possibly have arrived at this conclusion, save in the light of the dismantling of the grossly discriminatory provisions of the common law of marriage. They seem to have been unaware of the extent of the remaining legal, social and especially economic disadvantages suffered by women and assumed that formal equality of opportunity to own property was the same as substantive equality.

\textsuperscript{17} Id. at 281; see also Hansard (H.L.), vol.462. col.604, 16 April 1985.
\textsuperscript{18} The Ties that Bind — Law, Marriage and the Reproduction of Patriarchal Relations (1984), p. 29.
\textsuperscript{19} As reported in \textit{The Times} for 13.5.1950.
However, that view changed quite substantially during the 1950’s and 1960’s. Three men may be singled out as particularly influential in bringing this about, but their reasons for doing so are instructive.

The first was Lord Denning himself. As is well known, it was he who invented the “deserted wife’s equity” and who interpreted the Married Women’s Property Act 1882, which had established the principle of separate property, so as to give the courts a wide discretion to interfere in the rights which separate property would otherwise have entailed. Both inventions were ultimately denied patents by the House of Lords, but they undoubtedly alerted legal opinion to the problems faced by wives in keeping their homes when their marriages broke up. It has, for example, been suggested that one cause of the great increase in joint legal ownership of the matrimonial home is the advice of solicitors wishing to guard against such litigation. Yet Lord Denning’s championship was clearly designed for the traditionally “good wife” who stayed at home, looked after the family, and committed no misconduct. As he said in Gurasz v. Gurasz: “Some features of family life are elemental in our society. One is that it is the husband’s duty to provide his wife with a roof over her head, and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home. The husband is not at liberty to turn her out of it, neither by virtue of his command, nor by force of his conduct.”

The second was Professor Sir Otto Kahn-Freund, who spent a long academic life advocating some form of community of property in English law. He was, of course, influenced by his background in the civil law. His arguments relied heavily upon the notion that “the inequality of the sexes dictated by nature imposes a necessary inequality” in economic terms. If, therefore, the law was to live up to the rhetoric of equality which was then being voiced, it would have to do something to redress that “natural inequality”. The notion that this was natural was shared by sociologists of the time. Most notably, of course, Talcott Parsons developed the theory that the separation between the activities of the male breadwinner and of the female homemaker was highly functional in meeting the needs

24. Todd and Jones, op. cit., at p. 83.
both of the world of work and of the family members. The occupational structure in modern industrialised societies requires mobile workers who are able to compete as individuals untrammelled by personal considerations, but from a secure and comfortable home base with the warm emotional climate required by all, including the children.

The view that this division of roles is not only natural but also useful could be developed into a rather different sort of argument for community of property. The third and in many ways most influential English lawyer on this subject is Lord Simon of Glaisdale, who while at the Bar submitted evidence to the Royal Commission on Marriage and Divorce, as President of the Family Division delivered lectures on the subject, and in the House of Lords has promoted legislation about it. He has been the most articulate supporter of the view that the wife's domestic efforts make a positive economic contribution to the acquisition of the family's property. That contribution is usually seen in Parsonian terms, as freeing the man to go out and get the property in. In Simon's well known phrase, "the cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it".

This concept can be developed in several ways — from the simple point that an efficient worker needs to be comfortably housed and fed, through the more positive contribution made by the wife's encouragement and support, including such tangible efforts as entertaining business associates or superiors, to the yet more obvious and extensive participation, for example of vicars' wives and those who help their husbands in farms and small businesses.

There cannot be much doubt that the perception of housework as having a true economic value, pioneered in the United Kingdom by Lord Simon, was crucially important in persuading lawyers of the justice of a concept of sharing or partnership in family assets. A good illustration is

28. Minutes of Evidence, Paper No. 22; for the Commission's Report, see Cmd. 9678 (1956); the discussion of matrimonial property is at paras. 625 et seq.; 12 members of the Commission were against community of property but 7 (including 4 out of the 5 female members) were in favour; all fully endorsed the "concept of partnership" in which the wife's contribution to the undertaking was "just as valuable" as that of the husband (para.644). Simon's advocacy was based, not only on "inherent equity" and "the economic value of the housewife", but also on the belief that advancing her economic status would indirectly facilitate the introduction of equal pay.
32. Whose work was eventually recognised as a contribution in money or money's worth; see *Nixon v. Nixon* [1969] 3 All E.R. 1133.
the judgement of Woodhouse J. in the New Zealand case of Aitken v. Aitken\(^3\): the wife had made “consistent and important contributions to the acquisition of the various assets ... by complementing (her husband's) capacities with her own. She gave him the essential support he needed ... by her success in managing their home as an efficient and provident housewife and mother ... and by providing the base that left him free to win the family income ... and attend to the investment of their substantial savings.” Significantly, New Zealand has since legislated for the sharing of family assets in a way which relies heavily on this notion of contributions.\(^3\)

All of these ideas concentrate upon the ways in which the wife helps her husband to earn or make money. They rely upon a notion of “separate but equal” contributions to a marital partnership which should be regarded as such in law as well as fact. They owe little to modern feminism. This is usually dated from Betty Friedan’s realisation in 1963 that women were not always happy or fulfilled in their so-called natural role,\(^3\) leading on to the expositions of the extent of male domination by authors such as Kate Millett\(^3\) and Germaine Greer in 1971.\(^3\) Still later came Ann Oakley’s work on housewives,\(^\) which attacks not only the Parsonian view but also the comfortable assumption that those sex roles were indeed breaking down as the family became more “symmetrical”.\(^3\)

Their work may, however, have contributed something to a rather different perception of the value of the wife’s work. Not only may she contribute to the husband’s earning power, but also to the accumulation of a surplus out of that earning power, and therefore to the acquisition of the property bought with that surplus. She may do so simply by efficient management and spending the money wisely; or she may do so by adding value to what is bought, whether through making her own curtains and clothes for the children or through wielding the sledgehammer or cement mixer.\(^4\) Alternatively, it can be pointed out that such services have a clear economic value if they are bought and sold in the market place and

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34. Matrimonial Property Act 1976, s.18.
40. Also now recognized as a contribution in money or money's worth; see *Cooke v. Head* [1972] 2 All E.R.38; *Eves v. Eves* [1975] 3 All E.R.768.
that, if she were not there to perform them free of charge, her husband would have to pay for them.\textsuperscript{41}

Some concept of marital partnership has gained wide recognition in the developed common law world. All the Canadian Provinces have, of course, legislated for the sharing of marital property on divorce, although the many differences between them may indicate the variety of rationales which have been advanced. In the United Kingdom, however, acceptance of the concept, and in particular its economic dimension, has been more limited and more fragile. By the end of the 1960's, Lord Denning's adventurous interpretation of the courts' powers under the Married Women's Property Act had been rejected by the House of Lords, with a return to the emphasis on contributions in money or money's worth, only a limited acceptance of the concept of an indirect contribution, and an insistence that contributions be quantified in place of the maxim "equality is equity".\textsuperscript{42} Further development was therefore dependent upon Parliament and the Law Commission.

In 1966, the Law Commission joined the Church\textsuperscript{43} in supporting divorce on the ground of irretrievable breakdown of the marriage. One argument was that dead marriages should be decently buried so that many "stable illicit unions" and their offspring could be regularised.\textsuperscript{44} This support was crucial in bringing about the so-called "no fault" Divorce Reform Act of 1969. Nevertheless, there was great concern about the prejudice to wives, especially those divorced against their will in later life. The House of Commons went so far as to give a Second Reading to Mr. Edward Bishop's Matrimonial Property Bill which would have introduced community of property during marriage. This may be seen as the high point of the idea of matrimonial partnership in English law. It was withdrawn in anticipation of the Law Commission's recommendations on the financial consequences of divorce.\textsuperscript{45}

The resulting legislation,\textsuperscript{46} of course, dealt only with the position where the marriage had irretrievably broken down and relied upon discretionary powers in the courts. Nevertheless, there were at least three

\textsuperscript{41} This has long been recognised in the husband's action \textit{per quod consortium amisit} (abolished in 1982) or under the Fatal Accidents Act 1976.
\textsuperscript{44} \textit{Reform of the Grounds of Divorce — The Field of Choice}, Law Com. No.6 (1966), paras.25(h) and 33-37.
\textsuperscript{46} Matrimonial Proceedings and Property Act 1970; since consolidated with divorce legislation as Matrimonial Causes Act 1973.
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important changes and these can undoubtedly be seen as the price which husbands (and others) had to pay for the acceptance of no-fault divorce. First, instead of the husband having to maintain his wife, all the court's powers were fully reciprocal, so that all the assets and income of each could be considered together and notionally "pooled". Second, the courts were given powers to adjust any of their property rights and to make substantial lump sum orders as well as periodical payments. Property adjustment and financial provision could be considered together as part of a global settlement. Third, they were specifically directed to take into account the parties' contributions to the welfare of a family, including those made by looking after the home or caring for the family. Interestingly, the concept was one of contribution to the family's welfare rather than to its assets. The objective given to the courts in exercising these powers was to place the parties in the positions in which they would have been had the marriage not broken down.

In 1973, the leading case of *Wachtel v. Wachtel* turned these new powers into something remarkably like deferred community of property. First, Lord Simon's point about the cock feathering the nest was accepted; henceforth a wife should normally be entitled to share in the assets as well as the income, although these were limited to so-called "family assets". Second, the parties' conduct should not normally affect this; if there is a real partnership between them and their assets are notionally pooled, then these should be shared out equally and their conduct should only affect this if one is much more than 50% to blame. This was a significant advance upon the previous approach, for if the assets are regarded as the husband's alone, then the wife's claim to be maintained might be cut down by the extent to which she was less than 100% innocent. Third, however, if there was a claim for both capital and income, she should only have one third of each; she could not dissolve the partnership for the purposes of distributing the assets while continuing to make demands upon it for the purpose of future income.

This decision was regarded as a great advance for women, yet for some it did not go far enough. The statutory objective of placing them both in the positions in which they would have been had the marriage not broken down was of course unobtainable; but it might at least have secured an equal standard of living, on the footing that had the marriage not broken down they would have continued to share the same standard. A division

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47. A point put to the Commission by a distinguished judge specialising in family matters during the more recent consultation on financial consequences.
48. Matrimonial Causes Act 1973, s.25(2) (f) (as it now is).
50. See *Ackerman v. Ackerman* [1972] Fam.225.
which gives him twice as much capital and income as her is not on the face of it equal.\textsuperscript{51} In any event, in most cases the \textit{Wachtel} approach proved impracticable, as there was not enough money or property to achieve it, and the courts had to concentrate upon seeing that the basic housing and income needs of the parties and their children were met.\textsuperscript{52} The end result, save for very wealthy families, was that the courts did indeed attempt to achieve roughly equal standards of living for the parties at the point of initial distribution.\textsuperscript{53} The obvious effect of this, of course, was that husbands began to feel a sense of grievance. The division of roles within the family, coupled with the continuing disadvantages of women in the employment field, inevitably meant that if the court attempted to redress the balance at the end of the marriage it would have to take a great deal away from the husband. He, after all, still had his earning power unimpaired, would have better prospects of borrowing for housing, and could look forward to a State or occupational pension for as long as he lived. The wife, whether or not she still had the children to look after, would rarely have any of these things. Compensating her necessarily affected the husband's ability to start afresh with a new family. The price which had originally been paid for increasing the possibilities of re-marriage now came under attack for making it more expensive. The Campaign of Justice in Divorce was formed; two thirds of its members were divorced husbands and one-third were second wives.\textsuperscript{54}

Before turning to the outcome of this campaign we should notice the fate of proposals to redress the “natural inequality” during marriage. Apart from the intervention of the State, in the form of child benefit, the only mitigation of the strict separate property regime until the marriage ends by death or divorce is the Married Women’s Property Act 1964, giving the wife a half share in the savings from any housekeeping allowance. Following reform of the divorce law, the Law Commission turned its attention to family property. A Working Paper in 1971\textsuperscript{55} canvassed many ideas, including full and deferred community of property, co-ownership of the matrimonial home and protection for household goods, and fixed inheritance rights. In 1973, significantly the same year as the \textit{Wachtel} decision, the first Report on Family Property

\begin{thebibliography}{99}
\bibitem{51} Ormrod J. at first instance had awarded her roughly half of both capital and income.
\bibitem{55} \textit{Family Property Law}, P.W.P. No.42 (1971).
\end{thebibliography}
stated that "the principle of co-ownership of the matrimonial home is widely supported both as the best means of reforming the law relating to the home, and as the main principle of family property law. The great majority who supported co-ownership included legal practitioners, academic lawyers, women's organisations and members of the public. Those who oppose co-ownership were those who were opposed to any form of fixed property rights, and they were relatively few in number."\(^5\)

This approval was supported by the social survey of the attitudes of married couples, commissioned at the same time: 91% of husbands and 94% of wives agreed that the home and its contents should legally be jointly owned by husband and wife irrespective of who paid for them; 87% of both husbands and wives in couples where the home was owned by only one of them nevertheless regarded it as belonging to them both.\(^6\)

The Report accordingly recommended acceptance of the principle of co-ownership of the matrimonial home, though no further extension of community of property, and the staff went away to work out the conveyancing implications.

In the early 1970's, the climate of opinion was sympathetic to legislation on women's rights. The seminal literature of modern feminism dates mainly from then. The same period saw a spate of legislation, usually with all party support. The Equal Pay Act had been passed in 1970, the Sex Discrimination Act in 1975, and legislation to protect the victims of rape from publicity and irrelevant cross-examination\(^7\) and to improve the remedies for domestic violence\(^8\) in 1976. Interestingly, that last was not the work of the Law Commission, but of a back bench Member of Parliament who is a noted feminist. The last important advance was in maternity rights in 1978. But by the time the Commission produced its detailed Report on co-ownership, also in 1978,\(^9\) the climate of opinion was changing. A radical new Conservative Government (with a woman Prime Minister) was elected in 1979. In 1980, Lord Simon introduced the Law Commission's draft Bill in the House of Lords, supported by Lord Scarman, the Commission's first Chairman. It is interesting, however, that Lord Scarman's support was based, not on the concept of an economic partnership in marriage, but almost on the reverse: the need to protect "an absolutely darling person of great virtue" from "her own inexperience in the wiles of the world". The Bill represented "the law's safety net for the most vulnerable women in our

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57. Todd and Jones, op. cit., at pp. 11 and 38.
society, the devoted married women while the marriage relationship is a living relationship and she has her family duties hard upon her.”61 This is a far cry from giving economic effect to an equal contribution to the marital enterprise. In any event, the Lord Chancellor made it clear that the Bill would not receive Government support and the same happened more recently when the Law Commission reiterated these proposals in 1982.62

Meanwhile, attention had turned to an attack upon the principle of continuing spousal support following divorce. Of course, there is one strand of feminism which dislikes the whole idea of dependent women and sees the concept of maintenance both during and after the marriage as not only the reflection of that dependence but also a contributing factor to its cause. If women are to be truly equal they must take advantage of their opportunities in the world outside the home and cease to look upon men and marriage as their security and support.63 Other feminists, influenced by the extent of the continuing inequality both at home and at work, have argued that it is quite unrealistic and unjust to abandon the principle of support when so few women can reasonably be expected to support themselves.64 The latter school would not suggest that maintenance should be available for women who can support themselves; but it should not readily be assumed that this is practicable until there have been more positive attempts to redress the disadvantages which women suffer from in competing in the outside world. In the absence of these, any move to encourage “self-sufficiency” by withdrawal of such limited spousal support as there is is likely simply to increase the pressure on women to remarry, which in turn may increase pressure on their new partners to decrease their commitment to previous relationships, thus perpetuating a cycle of dependence.65

Both strands of feminism are largely concerned with how best to advance the position of women in the outside world. The political campaign owed little to either. An all-party Divorce Law Reform Group was formed, apparently more troubled by the rising divorce rate and the fate of the children involved, than by the alleged injustice of the financial consequences.66 In some quarters there may even be regret at divorce

61. Hansard (H.L.), vol.405, cols.130, 128.
65. See e.g. C. Smart, op.cit.
66. 206 M.Ps. signed a Motion on 21 July 1981 calling for action on children, conciliation and financial provision.
reforms which have made it rather easier for women to escape from relationships which they find intolerable\textsuperscript{67} and the financial consequences which can be part of that. The Campaign for Justice in Divorce, however, was largely responsible for building up the pressure for reform.

Interestingly, in view of the history of the 1969 reforms, a major part of their argument relied upon the concept of no-fault divorce. It was suggested that maintenance originally developed on the analogy of damages for breach of contract; in other words, that it was the price the husband had to pay for having broken his matrimonial obligations. Once the law had abandoned the concept of breach of matrimonial obligations for the purpose of granting a divorce, it was argued, it was illogical to retain it for the purpose of continuing support. This argument seems misconceived. The obligation to maintain stems from the marriage itself, not the divorce. Even at common law, it did not depend upon showing fault on the husband’s part, for it persisted in cases of separation which were the fault of neither,\textsuperscript{68} although it could be reduced or even extinguished by fault in the wife. Its continuation after divorce can be justified on the ground that the marriage has had lasting effects upon the ability of the recipient to support herself.\textsuperscript{69} Be that as it may, the view seems to have developed on both sides of the Atlantic\textsuperscript{70} that there is some sort of inevitable link between no-fault divorce and the so-called “clean break”.

However, the proponents of marital partnership may also support a clean break.\textsuperscript{71} The full partnership analogy could suggest that you cannot dissolve a partnership for one purpose and keep it alive for another. Elsewhere in the common law world\textsuperscript{72} there has been a growing trend to legislate for fair (not necessarily equal) division of family (not necessarily all) assets and to deal quite separately with future spousal support, which may only be awarded in limited circumstances, for example where there are dependent children or continuing need resulting from the marriage. The Scots have recently adopted a system along these lines.\textsuperscript{73} Interestingly they did not seek to justify their norm of “fair sharing of

\textsuperscript{67} See e.g. The Society of Conservative Lawyers, \textit{The Future of Marriage — A Report by a Research Sub-Committee} (1981).
\textsuperscript{68} \textit{Brannan v. Brannan} [1973] Fam.120.
\textsuperscript{69} This view was frequently expressed in response to the Law Commission’s Discussion Paper on the \textit{Financial Consequences of Divorce}, Law Com. No.103 (1980).
\textsuperscript{70} See L. Weitzman, \textit{The Divorce Revolution} (1985), ch.2.
\textsuperscript{71} See esp. Gray, op.cit., ch.6.
\textsuperscript{72} E.g. in New Zealand, Australia, Canada; other countries do not share the Canadian problem that divorce and attendant financial provision are federal and property division is provincial, but the approach in substance is similar; the approach in West Germany is also much the same as that outlined here.
\textsuperscript{73} Family Law (Scotland) Act 1985.
matrimonial property” on the basis of economic contributions, but rather on the idea of equality in marriage, for which there was considerable public support.74 They did, however, add the norm of “fair recognition of the economic contributions and disadvantages” flowing from the marriage, which will encompass the negative “contribution” made by the wife who compromises her job prospects and rewards for the sale of her husband and family. The notion of positive economic contributions is treated with some scepticism. For one thing, there is no link between the amount of work a housewife does and the extent of her husband’s enrichment; the richer he is, indeed, the less work she is likely to do.75 This looks like a return to the concepts of the 1950’s and 1960’s, but without the fall-back of continuing maintenance, which has always been alien to the Scottish tradition. At the same time, the Scots have recommended against co-ownership of the matrimonial home during marriage.76

South of the border, the inter-relationship between the abandonment of continuing spousal support claims (the meal-ticket for life) and the equal or at least fair distribution of family assets seems to have been completely lost from view. The Law Commission decided that there was so much concern that further work on the grounds for divorce should be postponed in favour of a discussion paper on the financial consequences of divorce.77 This was followed by a paper reporting on the response to that discussion paper, but without a draft Bill attached.78 Nevertheless, the proposals of the Commission were accepted and a Bill drafted.79 Clearly this whole debate was about maintenance and not about the sharing of family assets. The resulting changes appeared minor, in that they did away with some artificial restrictions upon the clean break and encouraged the courts to consider it wherever possible.80 Much concern was voiced on behalf of, especially, middle-aged women who might not be able to adjust to self-sufficiency and much reassurance was given that there was no real risk that the courts would alter their practice.81

Almost unnoticed was the possible effect of the new law upon the distribution of property. It was often assumed that, because the statutory objective (of placing the parties in the position in which they would have

75. Id. para. 3.93.
77. Law Com. No. 103 (1980).
79. Matrimonial and Family Proceedings Act 1984, Pt.II.
80. See Matrimonial Causes Act 1973, s.25A.
81. E.g. by the Lord Chancellor, Hansard (H.L.), vol. 445, col.34.
been had the marriage not broken down) was unattainable, it inevitably served no useful purpose. However, it did serve as an exhortation to produce equality of result, at least at the point when the marriage broke down, and that in itself was some encouragement towards an equal sharing of assets. The objective was repealed but nothing was put in its place, apart from the need to give first consideration to the welfare of the minor children of the family. The new principles apply to property adjustment just as much to periodical payments, so that there is now no principle of equality and nothing to encourage fair shares. Coupled with the rejection of any form of co-ownership it looks very much as though the concept of marital partnership has now been abandoned. Certainly, the results of our own consultations into possible extensions of the Married Women’s Property Act 1964 do not suggest that there is any longer widespread support within the legal community for even a limited extension of automatic sharing of property during marriage.

This is not to say that equal sharing coupled with restricted maintenance is itself the right answer. Women, especially those with dependent children, may fare better under our system than elsewhere. But it does reveal a very considerable retreat from the ideas underpinning the original legislation — indeed, in one respect those ideas have been stood on their heads to produce the opposite of what was originally intended. Whether or not it is progress, it is certainly a backlash.

What can have caused it? Perhaps it is that many in the legal community could be persuaded of the injustice to good wives and mothers when that was so very apparent, as it was during the 1950’s and 1960’s. Good wives and mothers are of benefit to their husbands as well as to their children. Their financial position is almost inevitably altered for the worse by marriage. Once, however, there is a real attempt to redress that injustice, enthusiasm wanes, as it becomes clear how much it will cost to do so.

Added to this is the increased visibility of those few women who have been able to take advantage of the growing equality of opportunity. The true extent of the remaining inequality of result can easily be forgotten unless there are frequent reminders. Women themselves have difficulty in identifying a single “women’s point of view” on these issues. While perhaps a minority would subscribe to the most extreme call for the abolition of maintenance, most would support its withdrawal where self-

82. Now Matrimonial Causes Act 1973, s.25(1).
84. cf. Weitzman, op.cit.; the Campaign for Justice in Divorce was not wholly delighted with the new legislation.
sufficiency can reasonably be expected, and a surprising number accept that wives should only be compensated for specific marriage-related disadvantage and not for the general disadvantage suffered by all women in the world outside the home. Leaving aside the difficulty of distinguishing the two, the latter is crucially related to the perceived need to enable men to work to support their families. Hence all women lose from the expectations engendered by traditional marriage just as all men gain from them.

A further difficulty is that those few women who have indeed gained equality of result not only exemplify the view that equality of opportunity is now enough but also tend to share it. For the last seven years, the political climate has been in favour of equality of opportunity and against equality of result. Women who have succeeded in gaining entry to the men's world, whether in the law or in politics, have usually done so by adopting a male career pattern and attitudes. It is not, therefore, necessarily to be expected that a woman Law Commissioner would make much difference. As with a man, it would all depend upon who she was.

85. I am drawing here on the responses of women's organisations to the Law Commission's discussion paper, Law Com. No.103.