

Keynote Speech

Resolution's 30th National Conference, Bristol

Lady Hale, President of The Supreme Court

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I am delighted to be back in Bristol, having spent 13 happy years as Chancellor of the University of Bristol, and equally delighted to be back among the family lawyers – it is 19 years since I left the Family Division and day to day involvement with life on the ground. Much has changed since then. But I am not as lonely as once I was in the UK Supreme Court. Now four out of the 12 Justices began their full time judicial life in the Family Division and three of us have always specialised in family law – that's more than we have commercial lawyers and more than we have chancery lawyers. The down side is that I can't get my own way as easily as I could when I was the only one. You may think that the up side is that I can't get my own way as easily as once I could. But that we have so many is a great tribute to the intellectual quality of the family judiciary and to the other qualities required of family lawyers – amongst which I would count empathy and social awareness.

We see plenty of cases involving family life in the Supreme Court – but usually in areas of law such as immigration, housing or welfare benefits. We don't see many cases involving conventional Family Law. Most of those that we do see involve child abduction or some other international aspect of family life, usually arising out of the Brussels IIA regulation. It is amazing how many points of law such a small area of practice can generate. Nor have we seen many domestic child law cases recently, despite the turmoil going on in the care system. We do have a judgment currently outstanding in a case which should clarify the law on accommodating children under section 20 of the Children Act 1989, but whether that will help or hinder the crisis in the care system is harder to say.¹

So given my distance from the real world which you inhabit, I thought that I might reflect a little on possible future reforms of private family law – with apologies to those of you who were at the Four Jurisdictions Family Law Conference in Dublin in January and the Manchester Family Law Conference in March who will have heard much of this before.

¹ *Williams v London Borough of Hackney* [2017] EWCA Civ 26, [2016] 2 FLR 1216.

You will all know that *The Times* newspaper launched a Family Matters campaign recently, promoting a five point plan for change. They insist that they support marriage, but argue that ‘a reform of laws in England and Wales is needed to bolster family stability, end financial injustice and remove acrimony from divorce’.² Their five points are:

- (1) Scrapping fault based divorce laws, allowing divorce within a year where both parties agree and two where they do not – as in Scotland.
- (2) Ending the outdated and patronising ‘meal ticket for life’ that can result from present laws on splitting assets and awarding maintenance after divorce, except where hardship would be caused (they might have added ‘as in Scotland’ but did not).
- (3) Giving pre-nuptial contracts the backing and force of statute. At present they are non-statutory, which leads to further uncertainty and bitterness when marriages fail.
- (4) Extending civil partnerships to heterosexuals so that they can have the same security as married couples should they wish.
- (5) Creating rights for long term unmarried couples. This would remove injustices that occur when one partner is left without any right to financial award or maintenance if they break up, possibly after many years of living together. (Again, they might have added ‘as in Scotland’ but did not.)

None of these is new – four of them feature in Resolution’s own *Manifesto for Family Law*³ but not in the same form and not in the more holistic context of your Manifesto, which looks to the processes and support which families need as well as the laws. Does this five point plan add up to a coherent programme of law reform? To what extent can it be said to ‘bolster family stability’? Are we in fact concerned to bolster family *stability* or rather family *responsibility* – that is, a responsible approach to the consequences of family life? It seems to me that, paradoxical as it may seem to others, (1) (the ground for divorce), (4) (civil partnerships for opposite sex couples)

² ‘Family Matters: Overhaul divorce to protect children, say MPs and peers’, *The Times*, 17 November 2017.

³ Resolution, *Manifesto for Family Law*, 2015.

and (5) (rights for unmarried couples) are about strengthening family responsibility and thereby indirectly family stability; but (2) (restricting financial remedies) and (3) (making pre-nuptial agreements binding), whatever their other merits, are about neither.

I therefore propose to take a look first at (1), (4) and (5), and then turn to (2) and (3).

No fault divorce

Ireland is fortunate in that it has had no fault divorce ever since it has had divorce. Scotland is fortunate in that the periods of separation required to prove irretrievable breakdown are only one year with consent and two years without, compared with the two and five years required in England and Wales and in Northern Ireland. This means that there is less incentive to use adultery or behaviour to get a quick decree: in 2016, 56% divorces in England and Wales were based on adultery or behaviour – mostly on behaviour - but only 6% in Scotland.⁴ It may seem paradoxical to suggest that no-fault divorce is aimed at strengthening family responsibility, but I believe that it is.

Of course, I would say that, wouldn't I, because it was my team which produced the Law Commission's *Report on the Ground for Divorce* in 1990.⁵ This made several criticisms of the current law, which are thoroughly familiar to this audience but worth repeating:

- (i) *It is confusing and misleading.* It says that the only ground for divorce is that the marriage is irretrievably broken down but then says this can only be proved in one of five ways, three of which look as if they involve fault. The fact used as the peg on which to hang the divorce petition may not bear any relationship to the real reason why the marriage broke down. The law also pretends that the court is conducting an inquiry into whether and why the marriage has broken down when in fact it does no such thing. Even if the petition is defended, it will inquire only into whether the fact is proven.

⁴ ONS, Divorces in England and Wales, October 2017; Civil Justice Statistics for Scotland 2015/16.

⁵ Law Com No 192.

- (ii) *It is discriminatory.* It favours those who can afford to live apart for two years before seeking divorce and the remedies which go with it. Many poorer parties, including many who are the victims of domestic violence or abuse, cannot afford to separate unless and until they can get the orders which are only obtainable on divorce.⁶ Matrimonial home orders under Part IV of the Family Law Act 1996 were originally intended to provide a sensible interim housing solution, but the persistence of the view that it is ‘draconian’ to exclude an entitled party has reduced their scope.
- (iii) *It is unjust.* The ‘adultery’ and ‘behaviour’ facts suggest that one party is more to blame than the other. But many of the technical bars under the old law (such as connivance or conduct conducing) were abolished. There is little or nothing to stop the more blameworthy one relying on the conduct of the less blameworthy one. It is difficult, expensive and may be counter-productive to defend or cross-petition to try to put matters right. And in any event, which of us is qualified accurately to assess the blame for any relationship breakdown? Indeed, is it always a matter of blame?
- (iv) *It may distort the parties’ bargaining positions.* Negotiations about property, finance and children may be distorted by whoever has got in first or is in the stronger position to get a decree.
- (v) *It provokes unnecessary hostility and bitterness.* Because it is arbitrary and unjust and the respondent is unable to put his own side of the story, it adds needlessly to the anger, pain, grief and guilt felt by many – perhaps most – when their marriage breaks down, especially the one who was not expecting it.
- (vi) *It does nothing to help save the marriage.* Indeed, it can make it more difficult for them to reconcile.
- (vii) *It can make things worse for children.* Evidence differs about how much children suffer from marital breakdown as such – for some it may be a disaster, for some it may be a relief, and for some it may somewhere in between. But the evidence is quite clear that

⁶ Ibid, para 2.12.

children suffer most from parental conflict. The present law does nothing to damp down conflict and can exacerbate it.

The Law Commission said all this in 1990, based on research and consultations then. Last year saw the publication of a large scale research study by Liz Trinder and her colleagues – *Finding Fault? Divorce Law and Practice in England and Wales*.⁷ This not only supported these criticisms but said that, if anything, later developments had made matters worse. ‘Divorce petitions are best viewed as a narrative produced to secure a legal divorce’.⁸ The court’s scrutiny is thorough but primarily an administrative process, not a judicial inquiry into the truth, and is no longer done by judges. The threshold of what will be accepted as behaviour if the petition is not defended has dropped. The courts take the pragmatic stance that if one party has decided that the marriage over then that is the reality. But unrepresented parties may not be let into the secret. Even lawyers may not know how low the threshold is in practice – and it may vary from place to place. The contents of the petition can trigger or exacerbate family conflict entirely unnecessarily. Respondents are encouraged by their lawyers to ‘suck it up’ even though the allegations are unfair. There is no evidence at all that having to give a reason for the breakdown makes people think twice. The decision to divorce is not taken lightly, but this is not because of need to give prove one of the five facts.

These things are not known to the general public unless they have had some personal experience of the system. So it is not surprising that the researchers found a mismatch between the results of their general public opinion survey, which supported fault, and their more detailed study of people who had experienced divorce, who did not support it.⁹

In 1990 the Law Commission recommended that irretrievable breakdown be proved by a waiting period of one year. One or both spouses could file a statement that they believed that their marriage had broken down. One year later, one or both could file a statement confirming that it had.¹⁰ Resolution’s *Manifesto* proposes something similar, but reducing the waiting period to six months. Trinder and her colleagues canvassed four options. Two of them were rejected: no change because it was not sustainable and a stricter interpretation of the current law because it

⁷ Nuffield Foundation, 2017.

⁸ At p 12.

⁹ At p 169.

¹⁰ Ibid, para 7.61.

was not achievable. The Scottish solution – reducing the separation periods to one and two years respectively - was rejected as unlikely to reduce the use of fault. This is because of the speed with which an adultery or behaviour decree can be got south of border and because of the culture here which has got so used to using adultery or behaviour. Thus they proposed a notification system along the same lines as the Law Commission’s scheme but, as does Resolution, with a waiting period of only six months.

A large part of the rationale for the Law Commission’s scheme was that under the present law parties can get a decree very quickly, but it can then take a long time to sort out the practical consequences – the arrangements for property, finance and above all children. This is made worse in our system by the fragmentation of procedures, so that each issue is dealt with separately, with different pieces of paper and often before different judges. One family may have to engage in (i) applications for short term arrangements about the matrimonial home or domestic abuse; (ii) the divorce petition; (iii) financial remedies proceedings; (iv) proceedings about the arrangements for the children; and (v) child support ‘proceedings’. The Commission did not want to make getting the divorce conditional on having sorted out the future arrangements, but did want to make it possible to do so before the divorce became final, so that everyone would then know where they stood. Unfortunately, our propaganda was too good – and this aspect of the matter was taken up with enthusiasm, as a pre-divorce requirement, thus distorting the simplicity of the scheme. I am not surprised that Part II of the Family Law Act 1996 was never brought into force and has now been repealed. At least it leaves those who are now involved with the reform of the law with a blank canvas.

The Supreme Court is emphatically *not* amongst those who are involved with the reform of the law. This coming term, we shall be considering the wife’s appeal in *Owens v Owens*,¹¹ a rare example of the court rejecting a behaviour petition on the ground that the husband’s behaviour was not objectively bad enough to make it unreasonable for the wife to live with him. It is not the job of the courts to legislate – only Parliament can do that. Our job is to interpret law that Parliament has given us. This is definitely not a vehicle for introducing the sort of reforms proposed by Law Commission, by Resolution, or by Liz Trinder and her team. For that reason, we have refused applications to intervene by well-meaning organisations who wanted to explain what was wrong with the present law. It may well be that the existing case law on the meaning of

¹¹ [2017] EWCA Civ 182, [2017] 4 WLR 74.

‘behaved in such a way that petitioner cannot reasonably be expected to live with him’ is correct and sufficient. But it has never been considered at Supreme Court level before and there is a persistent tendency to fall into the ‘linguistic trap’ and label this ‘unreasonable behaviour’ for short, which may distort the approach. We shall have to wait to read and listen to the arguments – we have given Resolution permission to intervene with written submissions because they concentrated on the legal rather than the policy arguments. What the current law is and what the law ought to be are quite separate matters.

Extending civil partnerships to opposite sex couples

There is one place in the United Kingdom and Islands where opposite sex couples can choose between marriage and civil partnership, that is the Isle of Man, but it is not possible in England and Wales, Scotland or Northern Ireland.

This too is subject of litigation shortly to come before the Supreme Court. In *Steinfeld and Keidan v Secretary of State for Education*¹² a hetero-sexual couple in a stable long-term relationship with genuine and deeply held objections to marriage complained that the non-availability of civil partnership discriminated against them, on grounds of their sexual orientation, in the enjoyment of their right to respect for private and family life. It was one thing when civil partnership was deliberately introduced as a way of giving legal recognition, rights and remedies to same sex couples because they couldn’t marry. It was another thing once same sex couples were allowed to marry, because they now have a choice between the two institutions. Opposite sex couples do not. The couple sought a declaration that sections 1(1) and 3(1)(a) of the Civil Partnership Act 2004, limiting civil partnership to same sex relationships and excluding people who are not of the same sex, are incompatible with their Convention rights.

The case failed in both the High Court and the Court of Appeal, though for different reasons. In the High Court,¹³ Andrews J held (i) that the complaint was not within ambit of article 8 because the couple could marry to gain legal recognition for their family life and any impact on their private life was minimal, but (ii) if she was wrong about that, the discrimination had the

¹² [2017] EWCA Civ 81, [2017] 2 FLR 324.

¹³ [2016] EWHC 128 Admin, [2016] 4 WLR 41.

legitimate aim of avoiding unnecessary disruption and waste of resources and was justified until more data were available.

The Court of Appeal¹⁴ was unanimous in holding that it was within ambit of article 8, so that the discrimination on grounds of sexual orientation had to be justified. The majority held that the Secretary of State's policy of 'wait and see' was justified for the time being. It had the legitimate aim of enabling a proper assessment of the optimum way forward in the light of demand, although they accepted that in the long term it was unsustainable. Arden LJ dissented. The government's policy of 'wait and see' did not justify the discrimination. The Government was only looking at the numbers – the impact of the introduction of same sex marriage on the demand for civil partnerships. This did not address the wider social issues and was open-ended in time.

It is all very puzzling. Why do people have conscientious objections to marriage these days, when its patriarchal features have virtually disappeared from the law? It is a perfectly serviceable method of giving legal status, rights and responsibilities to couples. On the other hand, why were so many same sex couples so keen to marry, when they too had a perfectly serviceable method of giving legal status, rights and responsibilities in civil partnership? It shows that, in both directions, for and against, marriage has a social and psychological significance which has nothing to do with its legal consequences.

But it is quite difficult to understand what knowing the effect of making marriage available to same sex couples is on their uptake of civil partnership will tell us about what the effect of making civil partnership available to opposite sex couples would be. Is there a fear that it will reduce their willingness to marry? But why should it if they have such deep-rooted objections to the institution? And why should we mind which they do, as long as they do something? Shouldn't we actually welcome couples who want to enter into a legal commitment to one another, whatever it is?

But we must never forget that all a declaration of incompatibility does is draw attention to the violation of rights involved in the incompatible provision. There is (almost) always more than one solution to unjustified discrimination on suspect grounds – one can level up or level down.

¹⁴ [2017] EWCA Civ 81, [2017] 2 FLR 324.

The choice is between letting both have the option of marriage or civil partnership or insisting that both have only marriage (I cannot imagine that they are considering abolishing marriage and insisting that both have only civil partnership). It will be really interesting to hear the legal arguments when the case comes before us.

I was rather hoping that Parliament would solve matters for us. In the last (2015 to 2017) Parliament, Tim Loughton MP introduced a private member's bill to amend the Civil Partnership Act but it did not receive government support and made no progress. But he has reintroduced it in this Parliament and on 10 December 2017, the *Daily Mail* reported that it was likely to receive government support. The then Secretary of State for Education, Justine Greening, was in favour. Since then, of course, there has been a reshuffle and she is no longer Secretary of State. Nevertheless, the Bill received its second reading on 2 February and is now in committee. The Government has announced its support for the principles, but is wondering whether the inequality should be removed by abolishing civil partnerships for everyone rather than extending them to opposite sex couples. Tim Loughton has pointed out that the number of same sex civil partnerships went up last year. The symbolic difference means a great deal to some people – whether of homosexual or heterosexual orientation. Whatever the eventual outcome, the object of the campaign is clearly to strengthen rather than to undermine family responsibility.

Remedies for unmarried couples

This too is a way of strengthening family responsibilities. Courts have been urging it for decades – at least since *Burns v Burns*.¹⁵ Scotland introduced it in section 28 of the Family Law (Scotland) Act 2006. It is part of the Resolution Manifesto. The Scottish principles are clear. It is not the same as marriage. It is not a partnership where people are deemed to agree to share their worldly goods. It is not the assumption of responsibility for providing for one another's needs. But there should be compensation for economic disadvantage suffered by one, or economic advantage gained by the other, as a result of the relationship.

In *Gow v Grant*,¹⁶ the Supreme Court held that the section should be read broadly to correct imbalances arising out a relationship where the parties were quite likely to make contributions or

¹⁵ [1984] Ch 317.

¹⁶ [2012] UKSC 29, 2013 SC (UKSC) 1.

sacrifices without counting the cost or bargaining for a return. There should be fair compensation on a rough and ready valuation. The English members of the court were happy to agree with the Scots Justices' view of how Scots law should be interpreted and applied. We were also agreed that there was a need for a similar remedy in England and Wales. The Law Commission had proposed a scheme based on similar underlying principles, in Report rushed out at the Government's request, *Cohabitation: financial consequences of family breakdown*.¹⁷ This was rather more elaborate than the Scottish provisions and focussed expressly on the gains and losses as they stood at the end of the relationship rather on its history. But there was no draft Bill attached because of the speed with which the Commission had been asked to report.

The Government then dragged its feet. It was waiting for research into the costs and benefits of new Scottish law. In *Gow v Grant*, we pointed out that the situations were not comparable. There was already considerable litigation between unmarried couples in England and Wales because of the different state of our property law. It was arguable that introducing a new remedy would save rather than cost money. But in the event the only Scottish research concluded that the 2006 Act had 'achieved a lot' for Scottish cohabitants and their children and that introducing something similar in England and Wales would not place significant extra demands upon the family justice system.¹⁸ The Government continued to resist reform on the basis that the Scottish research did not provide sufficient support for its introduction south of the border. Law Commissioner Lizzie Cooke pointed out that the case had already been made – in courts over years and in Law Commission's criticisms of current law.

The real lesson from Scotland is that a simple scheme like theirs can work. There is no need for the elaborations proposed in English scheme. But it is not without its difficulties. I am a bit troubled that the Scottish Law Commission has recently announced that it is going to review the law.¹⁹ I hope that that is not because they disapprove of *Gow v Grant*. But I also fear that it will be used as an excuse for yet further delay south of the border.

Either way, these proposals are clearly about strengthening family responsibility – giving something akin to restitutionary remedies to those who suffer as a result of unmarried

¹⁷ (2007) Law Com No 307.

¹⁸ Centre for Research on Families and Relationships, *No longer living together: how does Scots Cohabitation Law work in practice?*, 2010.

¹⁹ *Tenth Programme of Law Reform*, Scot Law Com No 250 SG/2018/25.

cohabitation. The other two proposals in the five point plan are, at least on their face, pulling in the opposite direction – reducing the family responsibilities undertaken on marriage.

Marital agreements

It used to be contrary to public policy to provide in advance, whether before or after marriage, for the financial effects of a separation which might happen in the future. Providing for an existing separation was a different matter. The public policy rule has now gone for both pre-nuptial and post-nuptial agreements. But they are still not binding on the courts. Giving them statutory force might have the great advantage of clarity and certainty, avoiding the expense and uncertainty of sorting the arrangements out either by agreement or by court under our current discretionary system. It is understandable, even commendable, that Resolution supports this in principle. But we have to bear in mind that, unlike separation agreements, which might well make better provision than a recipient spouse could otherwise expect, the object of a pre-separation agreement is always (or almost always) to provide for a recipient spouse to receive less than he or she could otherwise expect, so as to preserve more for the better-off spouse. This is particularly advantageous for very rich people, or people with family businesses to protect, or people who are marrying for a second, third or further time who want to be able to leave something to the issue of their previous marriages.

It is certainly arguable that in England and Wales after *Radmacher v Granatino*,²⁰ we have the worst of all worlds. The common law public policy rule has gone. Theoretically, agreements are valid and enforceable by the parties, but without any of the safeguards which have invariably been introduced in other countries when legislating to abolish the common law rule: typically, full disclosure of assets and independent legal advice and a breathing space before the wedding. But at same time they are not binding on divorce court, so the parties cannot easily predict whether they will be regarded as ‘magnetic’ and dictate the result or whether they will be taken into account at all and if so to what extent. And presumably, if they are binding on the court, the court should have at least the same powers of variation as it has over separation agreements?

The Law Commission produced their Report on *Matrimonial Property, Needs and Agreements* in 2014.²¹ This concluded that ‘qualifying nuptial agreements’ should be enforceable and binding.

²⁰ [2010] UKSC 42, [2010] 1 AC 534.

²¹ (2014) Law Com No 343.

But there had to be safeguards - formal requirements, disclosure, independent legal advice, and an interval of not less than 28 days between agreement and marriage. Also and more fundamentally, a party could not contract out of the responsibility to provide for the other's future needs for housing, childcare, an income and any other aspect of financial needs. A Nuptial Agreements Bill was attached.

The Government said that it was unlikely to be able to decide to legislate before the (mandatory) 2015 election and so put off a final response until the next Parliament. In the 2015 – 2017 Parliament, Baroness Deech introduced a Bill and has re-introduced it in this Parliament, but it has not yet had a second reading. It is much simpler than the Law Commission's Bill but also contains fewer safeguards and puts the burden on the person wishing to challenge the agreement rather than on the person wishing to rely upon it – so the emphasis is on respecting it *unless* rather than respecting it *if* – and it makes no exception for provision for need.

The meal ticket for life

The Law Commission accepted that the responsibilities of marriage include the responsibility to meet one another's needs. In practice, they said, unless the couple are very rich, doing this takes up most of the resources, leaving little scope for the sharing or compensation principles adumbrated in *Miller*.²² The goal should be to do this without long term periodical payments. But people needed guidance about how needs should be assessed - especially these days when more and more litigants did not have access to legal advice and help to negotiate settlements. They recommended that the Family Justice Council produce guidance.²³

The Family Justice Council has produced two documents: *Guidance on Financial Needs on Divorce*,²⁴ aimed at professionals, and *Sorting out Finance on Divorce*.²⁵ The Council endorsed the following conclusion from the Law Commission:²⁶

[W]e conclude that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the

²² *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 681.

²³ *Ibid*, para 1.25.

²⁴ June, 2016.

²⁵ April 2016.

²⁶ Para 15.

marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, child care). We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage.'

The Council explained the justification for this:²⁷

- Marriage typically creates a relationship of interdependence.
- Dependence is commonly created by the presence of children.
- Potentially long term dependence can be created by decisions for one party to discharge family obligations at the expense of the development of employment potential.
- It is generally right and fair that relationship generated needs should be met by the other party if resources permit.

An alternative view is that marriage is a partnership which should be dissolved with equal sharing of assets accumulated during the marriage but no provision for future needs unless there would otherwise be grave hardship. This is more or less the law in Scotland and Baroness Deech's Bill would introduce something very similar for England and Wales. It is unsurprising in Scotland, for two reasons. There was no history there of long term periodical payments, whereas periodical payments were the typical form of provision south of the border. And the highly-respected Scottish Law Commissioner, Professor Eric Clive, who was responsible for most of the Commission's work in family law, had long held the view that there is 'something fundamentally repulsive about the whole idea of dependent women'.²⁸ Research by Mair, Mordaunt and Wasoff²⁹ has found widespread satisfaction with the Scottish law among lawyers and judges; but it is not able to tell us what the parties think or what happens in practice to discarded homemakers with little hope of returning to the job market on the same terms as when they left it.

²⁷ At p 15.

²⁸ 'Marriage: An Unnecessary Legal Concept?' in J M Eckelaar and SN Katz, *Marriage and Cohabitation in Contemporary Societies*, pp71-81, 73.

²⁹ Nuffield Foundation, *Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce*, 2016.

I agree entirely that it should not be assumed that the highest aspiration for a woman is to become dependent upon a man. It was that assumption which meant that my mother, a trained teacher, had to give up work when she married my father in 1936. But that assumption has long gone and women have the possibility of independence both during and after marriage. However, we cannot ignore the fact that marriage is a partnership in which the spouses (whatever their sex) often play different roles – and often varying over time - for their mutual benefit and that of their children and elderly parents. There are some men who happily undertake the housekeeping and child caring responsibilities traditionally undertaken by women. There are some women who pursue exactly the same working pattern as men have traditionally done. Most are probably somewhere in between. Research has clearly shown that a person who gives up work, even for a few years, in order to concentrate on child care or other family responsibilities will never make up what they have lost.³⁰ It is a dilemma for us all, but particular those in the professions who would dearly love to ‘have it all’.

My own view is that the goal of divorce settlements should be, as I said in *Miller*, ‘to give each party an equal start on the road to independent living’.³¹ But that equal start is bound to involve, for most couples, an element of compensation for the disadvantage, often the permanent disadvantage, resulting from the choices made by both parties during the marriage. Sometimes, but not always, the only way to do this is by open-ended periodical payments. To refer to this as a ‘meal ticket for life’ is indeed patronising and demeaning, but making an award for those reasons is not.

I wonder whether Scottish wives are sometimes worse off after divorce than Scottish cohabitants are after separation? Or whether we should prefer to add section 20(2)(g) of the Family Law (Divorce) Act 2006 in Ireland to the check-list in section 25(2): this requires the court to take into account ‘the effect on the earning capacity of each of the spouses of marital responsibilities assumed by each during the period when they lived with one another and in particular the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family’. One thing I am fairly sure of is that simply to adopt a Scottish style solution would not be a way to strengthen family responsibilities south of the border.

³⁰ For example, Institute for Fiscal Studies, *Wage progression and the gender wage gap: the causal impact of hours of work*, February 2018.

³¹ Para 144.

Conclusion

Hence my own five-point plan would include (1), (2) and (3) but only (4) on Law Commission terms. And I would probably refer (5) to the Law Commission for a much more in-depth study than they have yet done. But *my* fifth point would be to introduce a one stop shop in family cases – where instead of having to navigate possibly five different processes a separating party could file one form telling one story and asking for whichever relief they wanted at the time – and preferably available on-line.