ENGLAND AND WALES. A JURISDICTION WITHOUT A MATRIMONIAL PROPERTY REGIME*

INGLATERRA Y GALES: UNA JURISDICCIÓN SIN UN RÉGIMEN DE PROPIEDAD MATRIMONIAL

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RESUMEN: In most jurisdictions, couples through getting married automatically become subject to a matrimonial property regime (unless they opt out by marital agreement). This regime in many jurisdictions regulates the property relations between the spouses (and third parties) during marriage, and in all jurisdictions when the marriage comes to an end. However, the jurisdiction of England and Wales does not have a statutory matrimonial property system. During marriage, normal property law rules apply. On divorce, the courts have considerable discretion under the Matrimonial Causes Act 1973: they can, among other things, order transfer of property, payment of a lump sum and periodical payments. The provisions of Part II of the Matrimonial Causes Act 1973 offer only limited guidance and are supplemented by case law. While this provides little in terms of legal certainty, it – at least in theory – ensures fairness in individual cases. However, the application of the discretion by the courts changed very significantly at the beginning of the century, arguably bringing England and Wales closer to having a matrimonial property regime.

PALABRAS CLAVE: Matrimonial property; matrimonial property regime; maintenance; certainty; discretion; needs; compensation; equal sharing.

ABSTRACT: *En la mayoría de las jurisdicciones, las parejas al contraer matrimonio pasan automáticamente a estar sujetas a un régimen de bienes matrimoniales (a menos que opten por no participar por acuerdo matrimonial). Este régimen en muchas jurisdicciones regula las relaciones de propiedad entre los cónyuges (y terceros) durante el matrimonio, y en todas las jurisdicciones cuando el matrimonio llega a su fin. Sin embargo, la jurisdicción de Inglaterra y Gales no tiene un sistema legal de bienes matrimoniales. Durante el matrimonio, se aplican las reglas normales de la ley de propiedad. En caso de divorcio, los tribunales tienen considerable discrecionalidad en virtud de la Ley de Causas Matrimoniales de 1973: pueden, entre otras cosas, ordenar la transferencia de bienes, el pago de una suma global y pagos periódicos. Las disposiciones de la Parte II de la Ley de Causas Matrimoniales de 1973 ofrecen solo una orientación limitada y se complementan con la jurisprudencia. Si bien esto proporciona poca seguridad jurídica –al menos en teoría— garantiza la equidad en los casos individuales. Sin embargo, la aplicación de la discrecionalidad por parte de los tribunales cambió de manera muy significativa a principios de siglo, posiblemente acercando a Inglaterra y Gales a tener un régimen económico matrimonial.*

KEY WORDS: *Bienes matrimoniales; régimen económico matrimonial; alimentos; certeza; discrecionalidad; necesidades; compensación; reparto igualitario.*

I. INTRODUCTION.

Continental European family lawyers often are rather surprised to learn that England and Wales[1] does not have what they perceive as an integral part of family law; namely, a matrimonial property regime[2]. Consequently they are rather sceptical as to whether a family law system can actually work without such a regime and, more importantly, whether the issues arising out of marriage and marriage dissolution can be dealt with adequately. The comparative lawyer notices (with some amusement) that their English counterparts voice similar concerns about the continental European jurisdictions *becaus*e they have a matrimonial property regime.

The aim of this contribution is to make accessible the way England and Wales deals with the issues that elsewhere are dealt with by matrimonial property regimes (and indeed additional mechanisms such as maintenance, pension splitting etc.). It hopes to counter some of the misconceptions of the system in England and Wales and show that, in the end, the common law and the civil law approaches to this issue may not be that different after all. For this the historical background is explained first (II. below) before the principles of the current law are described (III. below). This contribution then looks at the current law reform discussion in England and Wales (IV. below) and concludes that in the foreseeable future England and Wales will remain a jurisdiction without a matrimonial property regime.

1 Neither do the other common law jurisdictions of Europe, Northern Ireland and the Republic of Ireland, or outside of Europe, Australia.

2 On this generally (and the lack of mandatory portions in inheritance) see Roethel, A.: "Familiäre Vermögensteilhabe im englischen Recht: Entwicklung und Erklärungsversuche", *RabelsZ* 76(2012) p. 131 ff. p. 131 ff. and Roethel, A.: "Englische family provision und ordre public", in Kronke, H. and Thorn K. (eds): *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70*, Geburtstag, Gieseking, 2011, p. 348 ff. See also Scherpe, J.M.: "Towards a Matrimonial Property Regime for England and Wales?", in Probert and Barton (eds), *Fifty Years in Family Law. Essays for Stephen Cretney*, Intersentia Publishing, Cambridge, 2012, pp. 129-142

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II. HISTORICAL BACKGROUND.

As in the history of most family laws, in the beginning there was the man. Or, as Sir William Blackstone (1723-1780) put it:

"By marriage, the husband and the wife are one person in the law: that is, the very being and legal existence of the woman is suspended during the marriage, or at least is incorporated into that of her husband under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage"[3].

Because of this so-called doctrine of unity[4] married women could not own any property. As a result of the marriage all her property was transferred to her husband, and any property acquired during the marriage, even property acquired through inheritance, automatically became property of the man. It was only through the use of trusts that it became possible for married women to retain some property. But that possibility was in reality only open to the upper classes and even then the husband still had full legal access to wife's property[5]. But when more and more women began to earn significant sums of money and more and more cases became public in which the husband took the wife's money and disappeared permanently (usually to one of the colonies), even hard-nosed conservatives had to concede that the state of the law which gave the husband full authority over the entirety of the wife's property was no longer tenable[6]. The calls for reform became louder and louder[7] and, after a few tentative legislative steps[8], culminated in the Married Women's Property Act 1882. This Act for its time (and

3 Sir William Blackstone: "Commentaries on the Laws of England", 1765-1769, v. 1, chapter 15, III, accessible at *http://www.gutenberg.org/ebooks/30802*.

4 On this see e.g. Williams: "The Legal Unity of Husband and Wife", (1947) 10 Modern Law Review 1947, p. 16 ff.; Lowe, N. and Douglas, G.: *Bromley's Family Law*, 10 ed., Oxford, 2007, p. 106 ff.; *Law Commission*, Marital Property Agreements – A Consultation Paper No. 198, accessible at *http://lawcommission.justice.gov.uk/consultations/marital-property-agreements.htm*, p. 19 ff. and in particular the magisterial work by Cretney, S.: *Family Law in the Twentieth Century*, Oxford University Press, 2003, p. 90 ff.
As a matter of fact the *doctrine of unity* still had a significant influence until the end of the last century (cf. Cretney, this n., p. 112 ff.), so that, for example, it was only in 1991 in *R. v. R.* (1992) 1 AC 599, HL that the husband's rape of the wife became included in the criminal offence of rape! And even today the consummation of a marriage is required by law (Section 12 Matrimonial Causes Act 1973) with failure to do so rendering the marriage voidable.

5 Cretney, S.: *Family Law*, cit., p. 92 f.; Lowe, N. and Douglas, G.: *Bromley's*, cit., p. 128 f.

6 Cretney, S.: *Family Law*, cit., p. 92 f.; Lowe, N. and Douglas, G.: *Bromley's*, cit., p. 128 f

7 On the reform movement see e.g. Lyndon Shanley, M.: Feminism, *Marriage, and the Law in Victorian England*, 1850-1895, (Princeton University Press, 1989); Staves, S.: *Married Women's Separate Property in England*, 1660-1833 (Harvard University Press, 1990); Stetson, D.: *A Woman's Issue: The Politics of Family Law Reform in England*, Greenwood Press, 1982.

8 The Matrimonial Causes Act 1857 and the Married Women's Property Act 1870.

place) was nothing short of a revolution. The radical novelty could be found in Section 1(1) of the Act:

"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee."

Section 2 then further stipulated:

"Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill".

Whilst these provisions seem absolutely self-evident today, they were at the time a gargantuan leap forward for women's rights. Wives suddenly were no longer relegated to be appendices of their husbands but individuals with independent rights and duties. Obviously it was (and indeed still is) a long way from achieving true equality between men and women, yet the main features of this enactment remain the basis for English[9] law and also explain the absence of a matrimonial property regime. The idea underlying the Married Women's Property Act 1882 which was supported by the women's movement at the time was that marriage should no longer have an impact on the property relations of the spouses or, indeed, their property at all. This was the cornerstone of the reform and, given its historical context, it was a massive step towards equality of men and women.

But the new regulation of the property relations of the spouses also brought with it significant problems[10]. Most importantly, the actual situation, socially and financially, of men and women was far from being equal. In the vast majority of marriages the husband was the sole earner and breadwinner and the wife the homemaker. In the case of separation or divorce, the new separation of property could bring with it significant hardship for the wife as all the income generated (and especially the matrimonial home) usually was held in the husband's name and the

9 References to 'English law' are to be read as references to the law of England and Wales; the shorthand is merely used for ease of exposition.

10 Cretney, S.: *Family Law*, p. 98 ff.

use of trusts could not deal with these issues satisfactorily[11]. Sir Jocelyn Simon quite aptly described the situation as follows:

"(…) the cock bird can feather the nest precisely because he does not have to spend most of his time sitting on it"[12].

Despite the problems arising as a result of the new law, it was really only through the Matrimonial Proceedings and Property Act 1970 that these issues were finally addressed. This Act introduced fundamental reforms, which in their basic structure still form the basis of the law today (now embodied in the Matrimonial Causes Act 1973, on which see below).

III. THE FINANCIAL CONSEQUENCES OF DIVORCE IN ENGLAND AND WALES TODAY.

1. The statutory provisions.

The starting point for the financial relations of the spouses today is that marriage as such has no effect on their proprietary or other financial relationships. As tempting as it is to conclude that England and Wales must therefore have a matrimonial property regime based on a separation of property such a conclusion would be fundamentally wrong. English law does not even know the concept of a matrimonial property regime[13]. Sir Mark Potter, who at the time was President of the Family Division of the English Courts, has addressed this expressly in one of the seminal Court of Appeal decisions, *Charman v. Charman*:

"Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce"[14].

No one in England and Wales really disagrees with this, so continental European lawyers will to have free their minds of the concepts and preconceptions they

11 Cretney, S.: *Family Law*, p. 114 ff.

12 Sir Jocelyn Simon: *With all my worldly goods...*, Holdsworth Club of the University of Birmingham, 1964, p. 14.

13 Cf. Dicey, A.V.: *Lectures on the Relations between Law and Public Opinion in England during the Nineteenth Century*, 2nd ed. Reprint, Macmillan, 1962, p. 387: "radically opposed to English habits". See also Masson, J., Bailey-Harris, R. and Probert, R. and Cretney, S.: *Principles of Family Law*, 8th ed., Sweet & Maxwell, 2008, p. 115. This also explains certain difficulties in the enforcement of English ancillary relief decisions on the continent (on which see e.g. *Bundesgerichtshof*, FamRZ 2009, 1659=MDR 2009, 1225=NJW-RR 2010, 1 and Scherpe, J.M. and Dutta, A.: "Cross-border enforcement of English ancillary relief orders-Fog in the channel, Europe cut off?", *Family Law*, 2010, p. 385 ff.

14 *Charman v. Charman* [2007] EWCA Civ 503, Paragraph 124.

may have and simply accept that the English approach (although not necessarily the principles guiding the outcomes) is fundamentally different. No matrimonial property regime, no *regime primaire* or *secondaire*, and also, crucially, no clearly prescribed statutory remedies.

So English law is silent on the property relations of the spouses during marriage, hence the general law of property applies. However, there is legislation dealing with the financial consequences of divorce[15]. The relevant statutory provisions today can be found in Part II of the Matrimonial Causes Act 1973. The basic principle, following the recommendations of the Law Commission[16], is that the financial consequences in their entirety are to be determined at the court's discretion. This may seem absurd to continental European lawyers, as in their jurisdictions the law usually[17] stipulates quite precisely how the division of property is to be undertaken without room for discretion. But the underlying reason for the English approach, going back to the original enactment of the Matrimonial Proceedings and Property Act 1970, is that fairness and justice cannot be achieved by a system based on fixed rules or a fixed apportionment of 'matrimonial property'. Every family and thus every family law case is different and only a flexible approach, and thus an approach by necessity based on discretion, can accommodate the infinite multitude of different lived realities[18]. Of course, English lawyers are fully aware that this brings with it significant legal uncertainty, but this is willingly accepted as the price to pay in order to achieve, at least in theory, fairness and justice in each case[19]. Hence the overarching aim, the overarching principle guiding the courts in their decisions on the financial consequences of divorce is to achieve fairness for all the parties (and indeed the children) involved.

As already mentioned above, the competences of courts here are surprisingly (particularly to continental European lawyers) wide-ranging. According to their almost unfettered discretion, the courts can order periodical and lump sum payments (secured or unsecured), transfer of property from one spouse to the other and can even order the sale of specific assets; in addition, the courts can also make orders with regard to pensions. All of this does not merely apply to

15 Which applies equally in case of divorce as well as an annulment of a marriage.

16 *Law Commission*, Report No. 25 on Financial Provision in Matrimonial Proceedings (1969); see also Cretney, S.: "The Maintenance Quagmire", (1970) 33 *Modern Law Review*, p. 662. On the historical development see *Cretney* (above n. 4) 123 ff. und Law Commission (above n. 4) 19 ff

17 Although there are exceptions, e.g. in Austria and the Nordic Countries, cf. Ferrari, S.: "Marital Agreements und Private Autonomy in Austria", and Jänterä-Jareborg, M.: "Marital Agreements und Private Autonomy in Sweden", both in Scherpe, J.M. (ed): *Marital Agreements und Private Autonomy in Comparative Perspective*, Hart Publishing, 2012, p. 17 ff. and p. 370 ff.

18 Cf. Thorpe LJ in *Dart v. Dart* [1996] 2 Family Law Reports 286, 294: "Parliament might have opted for a community of property system or some fraction approach. It opted instead for a wide judicial discretion that would produce a bespoke solution to fit the infinite variety of individual cases."

19 Cf. Bailey-Harris, R.: "The paradoxes of principle and pragmatism: ancillary relief in England and Wales", (2005) 19 *International Journal of Law, Policy and the Family*, p. 229 and Miles, J.: "Principle or pragmatism in ancillary relief?", (2005) 19 *International Journal of Law, Policy and the Family*, p. 242.

what continental European lawyers would see as 'matrimonial property' but, in principle, *all* assets and property of both spouses, irrespective of when and how it was acquired[20]. The statute does not distinguish between different groups of property, but recent case law arguably has introduced such distinction (on which see 2.3. below).

Hence a 'classification' of the financial consequences of divorce with clearly defined and distinctly different remedies for the division of matrimonial property, maintenance and pension sharing cannot be found in English law. There simply are not separate or separable 'pillars' on which the financial consequence of divorce rest[21]; instead the court takes a 'holistic view' of the financial consequences of divorce in order to come to a fair outcome[22]. Hence there only is the possibility for the court to make any or all of the orders mentioned above, but certainly no duty for it to do so. For example, it is not unusual in cases where the means of the couple are limited for the mother who was the primary carer of the children during the marriage and will continue to be the primary carer after the divorce to have the matrimonial home (even if it is the only relevant asset of the couple) transferred in full to her without any additional order for maintenance or pensions being made[23].

The discretion of the court is, in principle, not subject to any relevant restrictions[24], and as Lord Nicholls has put it, 'the courts are largely left to get on with it for themselves'[25]. This becomes apparent even in the title of the central provision for this in the Matrimonial Causes Act 1973, section 25: 'Matters to which the court *is to have regard* in deciding how to exercise its power (…)' (emphasis added). In section 25(2) there then is a long list of criteria which the court is to consider 'in particular', meaning that the court is free to consider other facts as well:

Section 25(2): As regards the exercise of the powers of the court (…) in relation to a party to the marriage, the court shall in particular have regard to the following matters

20 Cf. Matrimonial Causes Act 1983, sections 21, 23 and 24.

21 As mentioned already, this can lead to significant problems when English orders are to be enforced elsewhere, see e.g. the decision by the German *Bundesgerichtshof* (above n. 13), and the commentary by Scherpe, J.M. and Dutta, A.: "Cross-border", cit., p. 385 ff.

22 Scherpe, J.M.: "Marital Agreements und Private Autonomy in Comparative Perspective", in Scherpe J.M. (ed): *Marital Agreements und Private Autonomy in Comparative Perspective*, Hart Publishing, 2012, p. 476 ff.; Roethel, A.: "Familiäre Vermögensteilhabe", cit., p. 131 ff., and Scherpe, J.M. and Dutta, A.: "Cross-border", cit., p. 385 ff.

23 See below for the details of the exercise of the courts' discretion.

24 See e.g. Waite LJ in *Thomas v. Thomas* [1996] 2 Family Court Reports 544, 546: "almost limitless".

25 *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24, paragraph 5.

(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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(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 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 which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

There also is no hierarchy among the criteria listed, and the court therefore is free to decide in each case which of the criteria carries greater weight than others[26]. The only exception to this is that section 25(1) sees one criterion elevated above all others, namely that the welfare of the children of the family[27] is to be the 'first consideration'. While not worded as strongly as in other English statutes where the welfare of the child is the 'paramount' consideration[28], the welfare of the children nevertheless – as is explained below – in practice is *the* focal point for the court's considerations and often will have decisive influence on the ultimate decision.

26 *Piglowska v. Piglowski* [1999] 1 WLR 1360, 1370.

27 This expressly includes children who are not the joint children of the spouses, see s. 105 Matrimonial Causes Act 1973; see Lowe, N. and Douglas, G.: *Bromley's*, cit., pp. 338 ff. for further explanation of the concept and its difficulties.

28 See e.g. section 1(1) Children Act 1989; section 1(2) Adoption and Children Act 2002. On this see the detailed discussion by George, R.: "The Child's Welfare in European Perspective", in Scherpe J.M. (ed): *European Family Law*, vol. III – *Family Law in European Perspective*, Edward Elgar Publishing, 2016, pp. 209-231..

As the statute does not give much concrete guidance on how the courts are to exercise their discretion and, more specifically, how they are to achieve the overarching aim of fairness such guidance had to be developed by the case law.

2. The exercise of judicial discretion.

In 1981, Lord Denning, one of the true icons (despite being a controversial figure) among the English judiciary[29], summarised the task of the court in determining the financial consequences of divorce:

"The Family 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"[30].

But what actually is 'the fairest provision' has been changing dramatically over the decades. Without a doubt, the most fundamental change was brought in by the House of Lords decision in *White v. White* in 2000[31]. But in order to understand the magnitude of the change that this decision meant for English law, it is necessary to examine the law as it stood before the decision.

2.1. The exercise of judicial discretion *before* the House of Lords decision in *White v. White*.

Based on the fundamental premise of the legislation that marriage does not change the property relations of the spouses, the fundamental rationale of most continental European jurisdictions that 'matrimonial property' was to be shared equally in the case of divorce[32] was unknown in English law until the decision in *White v. White* (as indeed was the concept of matrimonial property as that what the parties acquired through joint labour during the marriage) [33]. Equal sharing of

29 On Lord Denning see e.g. Heward, E.: *Lord Denning: A Biography*, Weidenfeld & Nicolson, 1990, and Freeman, I.: *Lord Denning: A Life*, Hutchinson, 1993. See also Denning, A.: *The Due Process of Law*, Butterworths, 1980.

30 *Hanlon v. Law Society* [1981] AC 124 (HL), 147.

31 *White v.White* [2001] 1 AC 596.

32 Cf. Pintens, W.: "Matrimonial Property Law in Europe", in Boele-Woelki, K., Miles, J. and Scherpe L.M. (eds): *The Future of Family Property in Europe*, Intersentia Publishing, Cambridge, 2011, pp. 19-46; Scherpe, J.M.: "Marital", cit., p. 476 f.

33 Arguably that was the case until the decision in *Miller v. Miller; McFarlane v. McFarlane* (2006) UKHL 24 and even at the time of writing the English understanding of what might constitute such a thing as 'matrimonial

assets as such was not even a consideration that guided the courts in the exercise of their discretion. Rather the courts took the only express priority listed in the statute, the welfare of the children as first consideration according to section 25(1) Matrimonial Causes Act 1973 as their starting point. And, it is fair to say, the welfare of the children continues to be the focal point of the court's discretion, leading in practice to the courts first and foremost trying to ensure that the primary carer and the children are housed adequately and are financially safe generally. In light of exorbitant real estate prices, particularly in southern England, the rather precarious position that families renting rather than owning their family home and the general tendency (and perhaps tradition) to buy rather than rent[34], this in a large number of cases means that the courts will allocate the matrimonial home to the children and their primary carer. This usually will be done by a transfer of the property[35] rather than mere allocation of the right to use the property, even when the matrimonial home was in fact the primary (or even the only relevant) asset of the family. The primary aim of the courts therefore was to satisfy the 'reasonable requirements' of the children and the primary carer – not more but certainly not less[36]. But importantly, the criterion of 'reasonable requirements' was also used by the courts to effectively limit any further claims of the spouses for a participation in the property or other assets of the other spouses, irrespective of whether they were acquired during the marriage or not. So in cases where the assets of the spouses (and in practice this usually mean the assets of the husband) exceeded the 'reasonable requirements' of the spouses and the children, this criterion functioned as a 'glass ceiling' curtailing any claims by the spouses. The complete separation of property introduced by the 1882 legislation therefore remained – provided that, and this of course is the crucial difference to a matrimonial property regime based on a separation of property, the needs/requirements of the children and the primary carer (or in the absence of children those of the other spouse) were met[37].

As has been noted correctly by the Law Commission[38], this led to divorced women being *better* off than their continental European counterparts if the assets of the family were limited. This was because the court had the power to allocate – and often did so – more than half of the assets (or even all of them) to the primary carer which at the time were (and presumably still are) very predominantly women.

property' is quite different from its continental counterparts; on this see Scherpe, J.M.: "Towards", cit, p. 129 f.

34 Cf. Miles, J. and Scherpe J.M.: "The Future of Family Property in Europe", in Boele-Woelki, K, Miles J., and Scherpe J.M.(eds): *The Future of Family Property in Europe*, Intersentia Publishing, Cambridge, 2011, p. 428 and Cooke, E., Barlow, A. and Callus, T.: *Community of Property. A regime for England and Wales?*, Nuffield Foundation, 2006, p. 28 ff.

35 See e.g. *Preston v. Preston* [1981] 2 Family Law Reports 331; *Gojkovic v. Gojkovic* [1990] 1 Family Law Reports 140; *F v. F (Ancillary Relief: Substantial Assets)* [1995] 2 Family Law Reports 45.

36 See e.g. *A v. A (Financial provision)* [1998] 3 Family Court Reports 421; *Thyssen-Bornemisza v. Thyssen-Bornemisza (No. 2)* [1985] Family Law Reports 1069; *Dart v. Dart* [1996] 2 Family Law Reports 286.

37 Law Commission (above n. 4), 27.

38 Law Commission (above n. 4) 61.

Conversely, women who were primary carers in cases were the family had been wealthy often were *worse* off than their continental European counterparts because the 'glass ceiling' meant that they would not receive anything near to a half-share of the assets.

2.2. The 'White Revolution' of judicial discretion *after* the House of Lords decision in *White v. White*.

That the welfare and financial security of the children of the family and the primary carer should remain the centre piece of the court's considerations continues to be virtually undisputed in England and Wales. However, there was significant criticism of the 'glass ceiling' in academia and practice as it effectively led to a discrimination of the homemaker spouse who did the 'family work' (then, usually the wife), often over decades, but was without any share in the often very significant assets and pension entitlements the breadwinner spouse (then usually the husband) managed to accumulate during the marriage. Often the acquisition of these assets was realistically only possible because of the division of labour the couple had in their marriage. This fact essentially deprived the homemaker spouse of his or her (but usually her) share of the fruits of joint labour and also failed to recognise financially the significant contributions made to the family welfare – disrespecting the family work as insignificant and less valuable[39].

Despite this pertinent criticism, Parliament did not seem inclined to reform the Matrimonial Causes Act 1973, and thus it was only in 2000 that the House of Lords in *White v. White*[40] took matters into their own hands when the opportunity arose to re-evaluate the interpretation of section 25.[41] The result can rightly be called a 'revolution'. Under the heading 'Equality' the House of Lords (per Lord Nicholls of Birkenhead) held:

"But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children

39 See e.g. *Peter Singer,* Sexual discrimination in ancillary relief, [2001] Family Law 115; Gibson LJ in *Dart v. Dart*,[1996] 2 Family Law Reports 286 , Paragraph 303.

40 [2001] 1 AC 596.

41 It needs to be noted that because of the very significant costs of legal proceedings in England and Wales hardly any matrimonial disputes made it to the (then) highest court (now replaced by the Supreme Court); so *White v. White* indeed was an opportunity – and potentially one the judiciary had been awaiting for quite some time.

during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party (...)'"[42].

"Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination'"[43].

The criterion of the 'reasonable requirements', which had dominated the jurisprudence for decades was not merely abolished expressly, it was actually branded an erroneous interpretation:

"But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division'"[44].

So in *White v. White* the House of Lords gave to the courts of England and Wales an interpretation of section 25 Matrimonial Causes Act 1973 that meant there was to be no discrimination of the spouses based on the role they had performed in the marriage, and to that end introduced the 'yardstick of equality'.

42 Paragraph 24.

43 Paragraph 25.

44 Paragraph 35.

Undoubtedly much was gained for the equality of spouses by this decision, but the exact consequences arising as a result of *White v. White* were (and to a certain extent still are) far from clear. Particularly, the possible (and in many cases desired) departure from the equal sharing of assets created significant problems in practice. When was it actually 'fair' or necessary to depart from equal sharing of (as it needs to be pointed again) the *entire* assets[45] of the spouses? Would it only apply in cases of short marriages[46] or if one of the spouses had actually brought the lion share of the assets into the marriage or inherited them during the marriage?[47] Or would it apply if the acquisition assets were largely due to the 'genius' of one of the spouses who had made a 'stellar contribution'?[48].

As Parliament still showed no interest in this area of law, it was once again down to the courts to develop and clarify the law further and provide answers to these pressing questions.

2.3. Developing the concept of fairness further: the three 'strands' of fairness according to *Miller v. Miller; McFarlane v. McFarlane.*

The next major milestone for the development of this area of law was in 2006 in the House of Lords in *Miller v. Miller; McFarlane v. McFarlane*[49]. In their speeches, Lord Nicholls of Birkenhead and Baroness Hale of Richmond (despite differences in the details) defined more closely and fleshed-out the guidelines given in *White v. White*, especially the aims of non-discrimination, the overarching principle of 'fairness' as well as the application of the 'yardstick of equality'. In particular, both judges identified the basic (yet overlapping) principles, referred to as 'strands' or 'rationales', which are to underpin the court's exercise of discretion with the aim of achieving 'fairness': needs, compensation and equal sharing.

Needs, which since then has proved to be the most important, difficult and controversial 'strand' of fairness in practice, according to the decision is meant to comprise the actual financial needs/requirements of the spouses and their children. Compensation, however, was to be understood to refer to compensation for relationship-generated disadvantages. For example, it would apply if one of the spouses had given up or reduced his or her career to primarily look after children

45 As there still was no concept of a limitation to 'matrimonial property' or anything comparable. But on this see III.2.3. and IV. below.

46 See e.g. *McCartney v. Mills-McCartney* [2008] EWHC 401 (Fam).

47 See e.g. *S v. S* [2006] EWHC 2793 (Fam); *J v. J* [2009] EWHC 2654 (Fam); *McCartney v. Mills-McCartney* [2008] EWHC 401 (Fam).

48 See *Cowan v. Cowan* [2001] EWCA Civ 679, *Lambert v. Lambert* [2002] EWCA Civ 1685; *Charman v. Charman* [2007] EWCA Civ 503 as well as the more recent decisions of *SK v TK* [2013] EWHC 834 (Fam) and *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam).

49 (2006) UKHL 24. On this decision see, from a comparative perspective, Scherpe, J. M.: "Causes for Concern? – A Comparative Analysis of Miller v. Miller"; *McFarlane v. McFarlane* [2006] UKHL 24, (2007) 18 *King's Law Journal*, , pp. 348-360.

and, as a consequence, had earned less (or nothing) or had been less able to build up a pension etc. Sharing, as a 'strand', was meant to ensure that the contributions of the spouses in principle are valued equally, whether they be family work or remunerated work.

With regard to the last 'strand' of fairness, sharing, the House of Lords arguably left open which assets exactly should be subject to the sharing exercise and there also seem to be different views on this point in the lead speeches by Lord Nicholls and Lady Hale. However, it needs to be noted that between them, they refer nine times to 'the fruits of joint labour/the matrimonial partnership/the couple's labours'[50] and also three times to the 'joint/common endeavours' of the couple[51]. In doing so, they arguably introduced a differentiation hitherto unknown in English law, namely between matrimonial and non-matrimonial property[52]. Both judges make clear that property acquired during the marriage other than through inheritance or gift was, in principle, to be shared equally[53]. But, importantly this does not in any way detract from the fact that the two other 'strands' of fairness, needs and compensation can take precedence over equal sharing where the circumstances require it. In practice, these aspects dominant the decisions in the vast majority of cases and particularly in the negotiations in cases that end up not being decided by the courts, so anecdotally it has been said that most cases begin and end with 'needs'. In addition, both judges in their speeches found that the longer the marriage the less important the judges thought the distinction between the two different groups of property to be and thus the less relevant for the equal sharing.

Although arguably a simplification, the division of assets in England and Wales now happens along the following lines:

- Matrimonial property in principle is to be divided equally *unless* considerations of fairness (and especially needs and compensation but also considerations such as the short duration of the marriage and potentially 'stellar contributions') require otherwise;

- Non-matrimonial property is *not* to be shared *unless* fairness (and especially needs and compensation) requires otherwise.

50 Paragraphs (17), (19), (20), (21), (85), (141), (149) und (154) (twice).

51 Paragraphs (22), (91) und (143).

52 This is the terminology Lord Nicholls used in the decision and that has been used in subsequent case law (see e.g. *K v. L* [2011] EWCA Civ 550; *AR v. AR* [2011] EWHC 2717 (Fam); *N v. F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam); *Jones v. Jones* [2011] EWCA Civ 41. However, it does not follow from this that subsequent case law also followed Lord Nicholls' speech in full. As mentioned above, his and Lady Hale's speech (arguably) differ as to how exactly the division into these two groups of assets is to take place.

53 See esp. paras. (21 ff.) and (149 ff.) of the decision.

This basic approach and the reference to 'matrimonial property' in the case law following *Miller v. Miller; McFarlane v. McFarlane*[54] might give the impression that England and Wales now has some form of matrimonial property regime. However, the academia and the judiciary have expressly refuted such claims, and indeed Baroness Hale in *Miller v. Miller; McFarlane v. McFarlane* itself made this very clear:

"We do not yet have a system of community of property, whether full or deferred. Even modest legislative steps towards this have been strenuously resisted"[55].

Given the vast discretion still afforded to the courts and particularly the practical dominance of the 'strand' of needs, this undoubtedly is correct[56] although arguably the jurisdiction in substance has moved closer to continental European jurisdictions[57].

IV. REFORM CONSIDERATIONS AND THE FUTURE OF THE FINANCIAL CONSEQUENCES OF DIVORCE IN ENGLAND AND WALES.

The continuous passivity (or even inertia) of Parliament and the resulting discrepancy between the law and love, the reality of most couples not only provoked the 'judicial activism' just described but almost made it inevitable. The same applies to the recent jurisprudence of the Supreme Court on marital agreements[58]. Academic commentators and even judges have criticised this as the judiciary having overstepped the boundaries of the division of powers and instead of merely applying the law creating new law, with the latter being the prerogative of the elected members of Parliament[59].

54 See the cases referred to in n. 52 above.

55 Paragraph [151].

56 See Roethel, A.: "Familiäre Vermögensteilhabe", p. 131 ff. and Scherpe, J.M.: "Towards", p. 129 ff.

57 See e.g. Amos QC, T., Pintens, W. and Scherpe, J.M.: *Civil-ising the English, or: the Europeanisation of Ancillary Relief, Festschrift für Dagmar Coester-Waltjen*, Gieseking, 2015), 2015, pp. 939-952; Scherpe, J.M.: "Marital", cit., p. 476 ff.

58 *Radmacher v. Granatino* [2010] UKSC 42; on this case and the further development see Miles, J.: "Marriage and Divorce in the Supreme Court: for Love of Money?", (2011) 74 *Modern Law Review* , p. 431 ff. and Scherpe, J. M.: "Fairness, freedom and foreign elements – marital agreements in England and Wales after Radmacher v. Granatino", [2011] *Child and Family Law Quarterly*, pp. 513-527; Scherpe, J.M.: "Wirkung ohne Bindungswirkung – Eheverträge in England und Wales, Zeitschrift für Europäisches Privatrecht" (ZEuP) 2012, pp. 615-630. See also Miles, J.: "Marital Agreements and Private Autonomy in England and Wales", and Harper, M. and Frankle, B.: "An English Practitioner's View on Pre-Nuptial, Post-Nuptial and Separation Agreements", both in Scherpe J.M. (ed): *Marital Agreements and Private Autonomy in a Comparative Perspective*, Hart Publishing, 2012, pp. 89 ff. and 122 ff.

59 See e.g. Cretney, S.: "Community of property imposed by judicial decision", (2003) 119 *Law Quarterly Review*, p.349 ff., Harris, P., George, R. and Jonathan, H.: "With this Ring I Thee Wed (Terms and Conditions Apply)", [2011] *Family Law*, pp. 367-369 and even *Lady Hale* in *Radmacher v. Granatino* [2010] UKSC 42, Paragraphs 133-137.

Admittedly, these decisions have (as shown above) fundamentally changed the law on the financial consequences of divorce. However, at least nominally in doing so the courts have remained within the framework Parliament allocated to them in the Matrimonial Causes Act 1973, namely the very wide discretion in order to achieve a fair outcome. Still, it must be conceded that the 'reform' of law through decisions in individual cases may not be the ideal way to bring the law in line with the requirements of modern families. It certainly is not the result of a broad and wide debate about the meaning and nature of marriage and the financial consequences of marriage breakdown. Hence it was to be welcomed that the Government and Parliament seem to be more inclined to engage with these issues. In the '10th Programme for Law Reform' the Law Commission had taken on the task to look into the law of marital agreements (i.e. pre-nuptial, post-nuptial and separation agreements)[60]. In January 2011 a Consultation Paper on *Marital Property Agreements* was published[61]. In February 2012 the mandate of the Law Commission was broadened, and the Commission then looked into two further aspects of the financial consequences of divorce[62], namely the definition and meaning of 'matrimonial property' on the one hand and of 'needs' on the other. As mentioned above, these two concepts indeed seem to be the ones causing the most difficulties in practice, and a clarification would be most welcome.

However, no legislative action has followed these reports and suggestions by the Law Commission. Therefore, while there is some debate about reforming the law governing the financial consequences of divorce, a whole-scale reform of this area currently is not on the agenda. Therefore England and Wales will in the foreseeable future remain a jurisdiction without a matrimonial property regime.

60 The programme can be accessed at *http://lawcommission.justice.gov.uk/docs/lc311_10th_Programme.pdf.*

61 *The Law Commission* (above n. 4).

62 See *http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm*.

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