Rules vs Discretion: Calibrating the Scales for Financial Remedies on Divorce

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Abstract:

This thesis will critically analyse the extent of judicial discretion provided by the Matrimonial Causes Act 1973, specifically for the purposes of the law relating to financial remedy orders. Through a theoretical perspective, this thesis will examine the relationship between rules and discretion, with the aim of determining how these opposing components of the law ought to be balanced. It will be argued that in order to ascertain the 'ideal balance' for financial remedies, it is first necessary to discern the overarching purpose of the law. Upon answering this fundamental question, naturally it will be queried what the appropriate balance between rules and discretion is for financial remedies, and whether the current legal framework aligns with this inference. Ultimately, this thesis will conclude that reform is necessary to adjust the extent of discretion and rules provided in the statute in an attempt to resolve the deficiencies of the Matrimonial Causes Act 1973 applicable to the granting of financial remedy orders.

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Introduction

The symbol of the scales of justice portrays an essential function of the law: weighing and evaluating competing interests. The relative weight, or importance, of such interests may vary according to number of factors, including, *inter alia*: social or economic context, moral values, legal precedent, and the specific area of law. One such example is the conflict between rules and discretion in the law relating to financial remedy orders. Both offer qualities that could further the central objectives of the particular law in question, as well as having their own drawbacks which could impede the law's development. Thus, inherent to the scales of justice, the fundamental question is: how should rules and discretion be balanced in financial remedies law?

Overview of the Law Relating to Financial Remedy Orders

When the parties to a marriage or civil partnership decide to end their relationship, they may apply for a divorce or a dissolution of their civil partnership.[1] As part of matrimonial proceedings, one issue which frequently arises is how property and assets are divided between the parties. Where a case is heard by a judge, the court has the authority to make a financial remedy order to reallocate the total assets amongst the former spouses.[2]

[1] For the sake of brevity, this thesis will henceforth use the terms marriage and divorce to encompass the law relating to both heterosexual and same-sex marriages, as well as civil partnerships (which *might* soon apply to both opposite- and same-sex couples: see *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415). This is because of the predominantly overlapping provisions which apply to these various formalised relationships: Marriage (Same Sex Couples) Act 2013; Civil Partnership Act 2004, sch 5(5). It is also worth noting that the path to receiving a divorce is likely to change: see the Divorce, Dissolution and Separation HC Bill (2017-19) 404.

[2] This may be in the form of financial provision orders, property adjustment orders, orders for the sale of property, pension sharing orders, and/or pension compensation sharing orders: Matrimonial Causes Act 1973, ss 23, 24, 24A, 24B, and 24E respectively.

Alternatively, a case may be settled through alternative dispute resolution (ADR), through the mediums of mediation or arbitration.[3] In either scenario, the law relating to financial remedies involves the resolution of financial disputes arising from the breakdown of a marriage. This thesis will evaluate financial remedies law in England and Wales—particularly the extent of rules and discretion therein. In other words, the law relating to financial remedy orders will be analysed in order to discern the nature of the present formulation of the legal framework, with the aim of reaching a normative judgement on how the law ought to be constructed in relation to the weighting of rules and discretion.

This area of law is predominantly governed by the Matrimonial Causes Act (MCA) 1973.[4] In handling financial remedy cases, practitioners will refer to Section 25, which lists matters to which the court is to have regard in deciding how to exercise its powers under ss. 23, 24 , 24A, 24B and 24E. For example, under Section 25(1), the court should give first consideration to the welfare of any child of the family. Moreover, Section 25(2) provides a list of factors which are relevant to the division of assets, which includes, among other considerations: the parties' current and future income, their financial needs, their standard of living, the age of each party, and the duration of the marriage.[5] Additionally, Section 25A creates a duty for the courts to consider whether the financial ties between the parties should be terminated (i.e. a clean break). It is important to note

[3] In fact, in order to issue financial remedy proceedings, it is a requirement that the parties first attend a Mediation Information & Assessment Meeting (MIAM): Family Procedure Rules (FPR), Rule 3.6 and Practice Direction 3A [11] and [13].
[4] Specifically Part II Financial Relief for Parties to Marriage and Children of Family.
[5] MCA (n 2) ss 25(2)(a)-(d). Additional factors within the Section 25 list: (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.

that the Section 25 factors merely provide guidance for the court when making an award. They are not prescriptive, nor has Parliament assigned a relative weight or degree of importance to any of these factors.[6] Evidently, Parliament chose to leave the interpretation of the statute by the judiciary open and flexible.

As a result, it has largely been the responsibility of the judiciary to develop principles over time to clarify and embellish upon the critical issues in need of resolution by the law.[7] For example, the landmark House of Lords decision in *White v White*, through Lord Nicholls' articulation of the yardstick of equality, acknowledges the significance of fairness and the need to ensure non-discrimination as between the breadwinner and homemaker when making an order for financial relief.[8] Subsequently, the House of Lords judgment in *Miller v Miller; McFarlane v McFarlane* expanded on the yardstick of equality, calling it the sharing principle. Moreover, the considerations of needs and compensation have also been classified as additional guiding principles in reaching a decision in a financial remedy case. However, these judicially developed principles are not intended to be binding or applied in a mechanical manner, but rather are designed to simply act as 'guidelines' or 'relevant considerations.'[9] Accordingly, when this is coupled with the flexible nature of the MCA, the law is clearly suitable to the adjudication of each

[6] Other than that the first consideration must be given to the welfare of any children to the parties: MCA (n 2) s 25(1).
[7] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 [7] (Lord Nicholls): 'This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance.'
[8] *White v White* [2000] UKHL 54, [2001] 1 AC 596 [25]: '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.'
[9] *White* (n 8) [59] (Lord Nicholls).

case ‘on an individual basis according to its facts.’[10] In other words, the law has been designed to provide judges with extensive discretion when determining the outcome of a case.[11]

Issues with the State of the Current Legal Framework

The discretionary nature of the law has a number of advantages, the foremost of which is its aptness to reach ‘tailor-made solutions’ to financial remedy disputes.[12] This is particularly beneficial in seeking individualised justice for each case. As Lord Nicholls provided, ‘fairness requires the court to take into account all the circumstances of the case,’ because the ‘features which are important when assessing fairness differ in each case.’[13] As a result, it may be doubted whether a substantively fair outcome could be achieved through the application of an inflexible rule.[14] Moreover, this flexibility enables the judiciary to interpret the law in a way which appreciates the evolution of social and moral values—an especially important trait to the ever-changing law applicable to family relationships.[15] Therefore, it may be submitted that the discretionary nature of the MCA

[10] Catherine Fairbairn, ‘Financial Provision when a Relationship Ends’ (House of Commons Library Briefing Paper No 05655, 16 January 2019) 5.
[11] Mary Welstead, ‘Judicial Reform or an Increase in Discretion - The Decision in *Miller v Miller*; *McFarlane v McFarlane’* [2008] International Survey of Family Law 61, 63. It has been described as ‘almost limitless discretion’: Alexander Chandler, ‘When should a party state their case in ancillary relief?’ (Family Law Week 2009) <http://www.familylawweek.co.uk/site.aspx?i=ed37814> accessed 11 October 2018.
[12] Lady Hale, ‘What is a 21st Century Family?’ (International Centre for Family Law, Policy and Practice, 1 July 2019) 11 < https://www.supremecourt.uk/docs/speech-190701.pdf> accessed 9 August 2019.
[13] *White* (n 8) [1], [24] (Lord Nicholls).
[14] Hale (n 12) 11.
[15] Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (3rd edn, Hart Publishing 2012) 294.

is vital to the law in ensuring that financial remedy orders stay 'in tune with current perceptions of fairness.'[16]

However, while extensive judicial discretion clearly provides a number of important advantages, this legal structure means that the relevant legal rules are, usually, less forceful and determinative. A critical consequence of this trade-off is that the law is deficient in other areas—particularly legal consistency and certainty. As Jackson contends, the wide discretion provided by Section 25 of the MCA is widely recognised as being 'responsible for the inconsistencies…and unpredictability of the present system.'[17] These considerations are relevant because legal consistency, it is argued, is an important aspect of the principle of fairness 'that like cases should be treated alike.'[18] Moreover, the lack of certainty or predictability can have negative impacts in practice. Indeed, it has been observed that it is 'very difficult for lawyers to predict the outcome of an adjudication…[causing] more couples…to bear increasing legal costs.'[19] Cretney submits that there is a policy objective in ensuring that divorcing couples reach an 'agreement as amicably, quickly and inexpensively as possible.[20] By framing the law to provide extensive judicial discretion at the expense of clear and definitive legal rules, this is seen to impede the attainment of that objective.[21] Furthermore, these issues are exacerbated when the state of the family justice system is considered. For example, the cuts to legal aid for nearly all private family law cases has heightened the need for the law to be clear

[16] *White* (n 8) [26] (Lord Nicholls).
[17] Emily Jackson and others, 'Financial Support on Divorce: The Right Mixture of Rules and Discretion?' (1993) 7 International Journal of Law, Policy and the Family 230, 231.
[18] *Miller; McFarlane* (n 7) [6] (Lord Nicholls).
[19] Jackson (n 17) 231.
[20] Stephen Cretney, 'Trusting the Judges: Money After Divorce' (1999) 52 Current Legal Problems 286, 310-311.
[21] ibid 310-311.

and accessible.[22] This is because the legal aid cuts have caused an increase in the number of self-represented litigants (otherwise known as litigants in person), which results in slowing down 'the progress of a hearing, leading to the case overrunning and increased costs.'[23] Accordingly, a significant problem with the current legal framework is that the presence of extensive judicial discretion has resulted in a law which is unclear, unpredictable, inconsistent, and inaccessible to the layperson. These deficiencies may, in fact, serve to undermine rather than advance what this thesis will argue to be the law's principal objective: to reach an outcome which is both substantively *and* procedurally fair.[24]

Clearly, there is a tension in the law regarding what the appropriate extent of judicial discretion and rules is for the law on financial remedies. In heightening the relevance of this debate, there is currently a Bill sponsored by Baroness Deech (which has passed through the House of Lords and will soon have its second reading in the House of Commons[25]) attempting to enhance the structure of the law and provide greater certainty.[26] However, this particular attempt to remove a significant portion of discretion afforded to the judiciary has faced serious criticism. Lady Hale—as a sitting judge and the President of the UK Supreme Court—publicly, and controversially, criticised the Bill, arguing that the reduction of the law to a 'one size fits all' rule would be unlikely to result

[22] Today, private law cases 'typically involve at least one litigant in person, involve longer hearings and return to court more frequently; thus, in private law, the burden on the court is not simply represented by a numerical rise in applications': Andrew McFarlane, 'Living in Interesting Times' (Resolution Conference 2019) 3 <https://www.judiciary.uk/wp-content/uploads/2019/04/pfd_resolution-april19-1.pdf> accessed 13 June 2019.
[23] Lesley Cox, 'Litigants in Person Cases: It Doesn't Have to Be Like This' (*Family Law Week* 2012) <http://www.familylawweek.co.uk/site.aspx?i=ed97034> accessed 10 June 2018.
[24] This will be discussed in Chapter Two.
[25] Divorce (Financial Provision) HL Bill (2017-19) 310.
[26] ibid.

in fair outcomes which reflect the complexity of spousal relationships.[27] Therefore, given the stark divide present in the rule or discretion debate for financial remedies law, as well as the urgency and relevancy of the issue in England and Wales, it is imperative for this debate to be thoroughly analysed. Thus, the core theme of this thesis will be searching for the appropriate balance between rules and discretion for the specific law relating to financial remedy orders. Interestingly, this is an area which many accept to be in need of change,[28] yet there has been relatively little academic research attempting to achieve this end—a gap in the literature to which this thesis responds.

Research Questions

This thesis comprises several research questions, which are intended to flow sequentially, with each conclusion informing the subsequent discussion. Firstly, it will be questioned why the law needs to have a balance between rules and discretion. This will lead to the critical question of how to determine the appropriate balance for a specific law. The approach which is decided to be most effective in pursuing the appropriate balance will then be applied to the law relating to financial remedy orders. Through this method, it will be queried what the appropriate balance between rules and discretion is for financial remedies, and whether the current legal framework aligns with this conclusion. Ultimately, this thesis will conclude that reform is necessary to adjust the extent of

[27] Hale (n 12) 11.
[28] Welstead (n 11); Baroness Buscombe in HL Deb 27 January 2017, vol 778, col 959 (Divorce (Financial Provision) Bill).

discretion and rules provided in the statute in an attempt to resolve the deficiencies of the Matrimonial Causes Act 1973 applicable to the granting of financial remedy orders.

Methodology

This thesis will approach its central research questions through different research methods. Namely, it will incorporate doctrinal, philosophical, historical, and some comparative approaches to its analysis. Additionally, it should be clarified which 'type' of cases will be covered as part of the analysis of this thesis. Broadly speaking, there are two classifications of cases in financial remedies: the 'everyday' case and the 'big money' case.[29] In the everyday cases, there is usually not a surplus of assets to extend beyond that which will be used to meet the needs of the parties. Moreover, the Law Commission has noted that in certain circumstances, an equal division of the matrimonial property would 'be wholly inadequate to meet the needs of the economically weaker party.'[30] It follows that in these cases, needs are generally the focus for the courts, as meeting the basic requirements of both parties is regarded, *ipso facto*, as fair. By contrast, in big money cases there are assets which extend beyond the needs of the parties, and which are distributed according to the sharing and compensation principles. Naturally, the range of considerations for the court in these situations may be quite different to those in an everyday case. This thesis will aim to address both the everyday and big money cases in its analysis, though it is important to be mindful of the fact that the majority of reported

[29] Emma Hitchings, 'Chaos or Consistency? Ancillary Relief in the "Everyday" Case' in Jo Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing 2009).
[30] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014) [4.98].

cases—which will be frequently referred to throughout this thesis—almost exclusively involve big money cases. As a result, when this thesis submits normative contentions, they are intended to apply to both types of cases.

This thesis will consist of four separate yet connected chapters. Firstly, Chapter One will explore the relationship between discretion and rules from a theoretical perspective, with the aim of better understanding in subsequent chapters how these two components of a common law legal system can be rationalised in the context of financial remedies law. It will be established that a legal system would not properly function if it was solely reliant on either discretion or rules, and therefore, a balance between the two is required. Naturally, this will be followed by an investigation to discover an approach which can determine the appropriate balance between rules and discretion for a specific law. Through the illustration of a rule-discretion spectrum—which will be central to the subsequent chapters—Chapter One will conclude that the appropriate balance will be determined by the fundamental purpose(s) of the particular law under scrutiny.

The primary aim of Chapter Two is to discern the appropriate balance between rules and discretion for the law relating to financial remedies. It will begin with a historical analysis, which will assist in uncovering the purpose of the current law. Upon concluding that fairness is the overriding purpose of the law, this Chapter will dissect the different question of what 'fairness' means—revealing a number of objectives subsumed within this overarching purpose. Subsequently, it will analyse the tensions between these competing objectives subsumed within fairness, and will seek to discern how they ought to be prioritised, as this influences the respective weight that should be given to either rules or discretion. Ultimately, after a thorough analysis of the purpose of the law, Chapter

Two will conclude that the appropriate position on the rule-discretion spectrum for financial remedies is near the middle, with a slight preference for the applicability of greater judicial discretion.

Chapter Three will aim to determine whether the law on financial remedies in England and Wales aligns with this 'ideal' position and, if not, whether it departs from that position to such an extent that it warrants legislative reform.[31] This will be approached through an evaluation of the extent of discretion afforded by the Matrimonial Causes Act 1973, with the view of determining whether this is in line with the ideal position. Subsequently, the impact that judicial pronouncements in the higher courts have had on the administration of the law will be analysed to assess whether this has altered the position of the law. Lastly, this Chapter will examine whether the various objectives subsumed within fairness are being met,[32] and consider whether any shortcomings are attributable to the law's position on the rule-discretion spectrum, or whether they are caused by other factors.

Upon concluding that the current English and Welsh law is incorrectly situated on the rule-discretion spectrum, and that it is failing to attain a number of its core objectives, the fourth and final Chapter will consider the way forward. Given its relevance and controversy, this Chapter will begin by discussing the Deech Bill, and evaluate a number of criticisms it has received. After determining that this Bill should not be adopted, a different model for reform will be proposed. This proposal, which will be dubbed the 'fail-safe model', shall attempt to satisfy the theoretical conclusion that the law should *slightly* prioritise discretion, as well as justify and defend its position against potential criticism.

[31] Ideal, as argued and interpreted by this thesis.
[32] These are the objectives that will be discussed in length in Chapter Two.

Ultimately, this thesis will submit that the fail-safe model represents a compelling reform proposal: it reaches a compromise which can appeal to a wide range of family lawyers, and it reflects the appropriate position (as concluded by this thesis) on the rule-discretion spectrum.

Chapter One: Rules and Discretion – A Jurisprudential Analysis

Introduction

The purpose of this Chapter is to explore the relationship between discretion and rules from a theoretical perspective, with the aim of better understanding in subsequent chapters how these two components of a common law legal system can be rationalised in the context of financial remedies in family law. Through a jurisprudential analysis in a broad sense, the key tensions prevalent in financial remedies—such as certainty and individualised justice—can be reduced to the fundamental principles of law regarding judicial discretion and rules. It is submitted that the debate over the discretionary nature of financial remedies can be most persuasively argued if the key issues are discussed not only within the confines of family law, but are also justified according to legal theory; a novel approach to this subject.[33] For example, in order to convincingly posit that the discretionary nature of the Matrimonial Causes Act 1973 is a strength rather than a weakness, it must first be understood what is meant by 'discretion'. When a judge is exercising judicial discretion to reach a fair outcome in a financial remedies case, it is necessary to discern the freedom and scope of such discretion and the guidelines which exist to confine the extent of its application. If this authority is restricted by certain standards, it is important to appreciate their nature—whether it be legal, moral or otherwise. Equally, in which situations is a legal official expected (or obligated) to use discretion? These are all questions which must be explored before asserting a certain

[33] Barry Hoffmaster, 'Understanding Judicial Discretion' (1982) 1 Law and Philosophy 21, 26: 'If one looks closer at what writers mean when they use the term "discretion", some progress can be made, at least to the extent of seeing whether genuine disagreement exists, and if so, what the disagreement is about.'

position on the discretion-rules debate, and the coherency of financial remedies law generally.

This Chapter will first explore the difficulties in attempting to define judicial discretion, and will subsequently evaluate the jurisprudential debate regarding its meaning. Those findings will then lead to an analysis of why it is necessary for any law to establish a balance between rules and discretion, as pursuing either to its logical extreme would have negative consequences. Naturally, the question which arises is how to determine the ideal balance of rules and discretion for any given law. This thesis will argue that the most effective approach to this issue is to first discern the purpose of the particular law, which will then inform which balance between rules and discretion would be most appropriate. Though this project cannot be completed with axiomatic precision, this thesis will draw upon an established model in this area[34]—the rule-discretion spectrum—which can be used to helpfully illustrate the ideal balance. Ultimately, this Chapter will conclude with an approach that will be utilised in Chapter Two to discover the ideal position on the rule-discretion spectrum for matrimonial finance law.

The Meaning of Discretion

The meaning of judicial discretion has been debated for centuries and yet there is still no universally accepted definition. As a result, it is widely held that this concept 'is one of the most general expressions in the law.'[35] This inherent uncertainty surrounding

[34] See, for example, Carl Schneider, 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (OUP 1992).
[35] Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143, 143.

discretion is largely attributable to the 'exceptionally difficult' nature of the task to search for a definition.[36] Accordingly, it is worth exploring the reasons which make this task a particularly challenging one. One possible reason is the conflicting and unsubstantiated interpretations provided by the early judges which have persisted in modern definitions of discretion. For example, the oft-quoted statement from Lord Coke, originating in the sixteenth century, provides that:

> '[D]iscretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private effections.'[37]

Plainly, this—along with most judicial pronouncements on discretion—is not very helpful, because whilst a definition is provided, it is merely an assertion lacking any further elaboration or supporting evidence. While it may be retorted that, contextually, this is understandable given that it is an articulation from the Elizabethan era, later judicial opinions suffer the same fate. In the United States, Chief Justice John Marshall rejected the concept of judicial power, arguing that judicial discretion 'is never exercised for the purpose of giving effect to the will of the judge, [but] always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.'[38] However, disappointingly for the purposes of this Chapter, there is no further elaboration on this interpretation of judicial discretion in the judgment. Marshall directly proceeds to discuss

[36] Daniel Kanstroom, 'Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law' (1997) 71 Tulane Law Review 703, 717.
[37] *Rooke's Case* (1598) 5 Co Rep 99b.
[38] *Osborn v Bank of the United States* 22 US 738, 866 (1824).

the submissions of the parties of the case. This perfectly illustrates the limitations of using judicial views from specific judgments to engage in a theoretical analysis of discretion. Given their role as arbitrators to resolve practical legal disputes, their capacity to contribute to theoretical research is restricted.

Furthermore, this is not helped by views which appear to be provocative and overstated rather than constructive. For example, during the 'famous controversy between Lord Mansfield and Lord Camden in *Doe d. Hindson v Kersey*' surrounding the issue of credible witnesses attesting wills,[39] Lord Camden described discretion in the following way:

> 'The discretion of a judge is the law of tyrants; it is always unknown; it is different, in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes capricious; in the worst, it is every vice, folly and passion, to which human nature is liable.'[40]

As Burke posits, such attempts to define 'judicial discretion' likely create greater confusion than clarity.[41] However, it should be noted that a particular insight may be gained from reading the perspectives of judges, as the debate surrounding judicial discretion is one which raises issues regarding how they perceive their role; whether they view themselves as interpreting or making the law. Yet, the inevitable shortcoming of this research path is that, inherently, judges are not in a position to properly engage with a *theory* of discretion in their judgments. Therefore, judicial accounts of discretion should

[39] Alvin Evans, 'The Competency of Testamentary Witnesses' (1927) 25 Michigan Law Review 238, 238.
[40] *Hindson v Kersey* (1765) 4 Burn's Ecclesiastical Law, Lord Camden CJ. See also the debates the common law versus equity which were relevant at the time—in particular, Chief Justice Coke and Lord Ellesmere in *Earl of Oxford's case* (1615) 21 ER 485.
[41] H P Burke, 'Judicial Discretion' (1920) 90 Central Law Journal 355, 355.

not form the focus of this Chapter's analysis, as they merely scratch the surface of the concept's meaning.

It is submitted that another reason for the complexity of attempting to define discretion is 'the many varied efforts in the literature.'[42] For academics approaching this issue, it would appear that one of the greatest difficulties is not only the *amount* of literature, but also the *variance* of those accounts. For example, it is Isaacs' contention that there are at least seven distinguishable definitions of discretion.[43] Further, confusion is exacerbated by the multitude of labels for academic theories which essentially purport the same idea. By way of example, Schneider discusses two different *types* of discretion: that which is either created 'directly and deliberately'[44] or 'indirectly and undeliberately'.[45] Similarly, Goodin's work closely mirrors these two categories of discretion, such that discretion may either be 'explicitly written into rule…[or] merely implicit in the statement of rule.'[46] However, he applies the labels of 'formal' and 'informal' discretion.[47] This added confusion inevitably contributes to the lack of clarity in the meaning of discretion. This thesis will attempt to avoid this difficulty by narrowing its focus to a single debate between two jurists: HLA Hart and Ronald Dworkin.

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[42] Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (OUP 1992) 14.
[43] Nathan Isaacs, 'The Limits of Judicial Discretion' (1923) 32 Yale Law Journal 339, 339.
[44] Schneider (n 34) 61-65. Within this category, he identifies four different forms of discretion: 'khadi-discretion'; 'rule-failure discretion'; 'rule-building discretion'; and 'rule-compromise discretion.'
[45] ibid 65-67. Under this category, he identifies three separate sources of discretion: where 'decision-maker is not subject to review' [see Dworkin's second weak sense of discretion in Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 32]; where 'the first decision-maker…must decide what the relevant rules are, and in the first instance this must effectively be the fact-finder, since it is impossible to know what facts are relevant until the rules to which the facts are relevant have been identified'; and the 'power to decide how to apply the rule to the facts.'
[46] Robert Goodin, 'Welfare, Rights and Discretion' (1986) 6 Oxford Journal of Legal Studies 232, 235.
[47] ibid 235.

Whilst there are many valuable theories on discretion which approach the issue from different angles, the decision to direct the attention to the Hart-Dworkin debate is a calculated and reasoned one. Primarily, this debate is most useful to this thesis, as it will be demonstrated that it closely reflects the debate over discretion in the context of financial remedies. Specifically, through Hart's understanding of discretion as ultimately representing a broad legislative power,[48] and Dworkin's theory that discretion is confined by legal or extra-legal standards,[49] the key points of contention regarding discretion with respect to financial remedies—namely its uncertainty, unpredictability, and perceived boundless nature—are at the forefront of this jurisprudential clash. As it will become apparent over the course of the remainder of this thesis, it is essential to the purpose of this project to unpack the benefits and drawbacks of judicial discretion, as these findings will be instrumental in analysing and proposing improvements for matrimonial finance law. Ultimately, the Hart-Dworkin debate raises a number of issues (including the inevitability and scope of judicial discretion) which directly contribute to the broader arguments advanced in this thesis. Furthermore, it is important to acknowledge that the 'type' of discretion predominantly discussed by both Hart and Dworkin is about the way judges approach legal rules, whereas the MCA is an express statutory conferral of discretion on judges (i.e. an express grant). However, while this difference is noteworthy, it does not dilute the significance of the Hart-Dworkin debate to the broader focus of this thesis: the extent of rules and discretion in relation to financial remedies law. This is because, what is relevant for this thesis is not necessarily the origin or root of discretion, but rather the scope and impact of judicial discretion on the law's ability to attain its

[48] Herbert Lionel Adolphus Hart, *The Concept of Law* (3rd edn, OUP 2012) 272.
[49] Dworkin (n 45) 31.

fundamental objectives. Accordingly, the following section will evaluate the theories advanced by both the Hartian and Dworkian schools of thought, with the aim of discovering which conception of judicial discretion can most effectively guide this thesis in its subsequent analysis.

Hart vs Dworkin: The Debate Over Discretion

HLA Hart's central work, *The Concept of Law*, has had a profound impact for jurisprudence and legal positivism,[50] and has garnered the respect of its strongest opponents 'as a masterpiece worth at least the compliment of careful refutation.'[51] In this work that he 'regarded as an essay in descriptive sociology,'[52] Hart attempts to elucidate the meaning of law and its components,[53] for as Austin said, it is crucial to use 'a sharpened awareness of the words to sharpen our perception of…the phenomena.'[54] Hart postulates that a legal system can be described as a 'union between primary and secondary rules,'[55] and that with this claim lies 'the key to the science of jurisprudence.'[56] Crucially, the criteria for validity of primary and secondary rules is provided by an ultimate rule of recognition, which whilst it has no 'criteria for the assessment of its own legal validity,'[57]

[50] Cristobal Orrego, 'Gains and Losses in Jurisprudence since H.L.A. Hart' (2014) 59 The American Journal of Jurisprudence 111, 117.
[51] Neil MacCormick, *H.L.A. Hart* (Edward Arnold 1981) 3.
[52] Hart (n 48) vi.
[53] Herbert Lionel Adolphus Hart, 'Definition and Theory in Jurisprudence' in Herbert Lionel Adolphus Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 21: 'Legal definitions however fundamental can be elucidated by methods properly adapted to their special character.'
[54] John Austin, 'A Plea for Excuses', in James Urmson and Geoffrey Warnock (eds), *Philosophical Papers* (3rd edn, Clarendon Press 1979) 182.
[55] Hart (n 48) 99. See Chapter V of Hart's *Concept* for further explanation of what he meant by 'primary rules' and 'secondary rules'.
[56] ibid 81.
[57] ibid 107.

it must be 'accepted as common public standards of official behaviour by its officials.'[58] Importantly, secondary rules—such as subordinate rules of recognition—may manifest themselves in a variety of forms, including 'reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases.'[59] In other words, the validity criteria for law derives from a rule of recognition which is accepted and followed by society. Accordingly, extra-legal standards which do not originate from the rule of recognition cannot properly be considered 'law'. This core viewpoint has been extrapolated to the 'separability thesis,'[60] which posits that there is no necessary connection between law and morality.[61] This brief overview of Hart's legal positivist conception of law is relevant to this thesis, insofar as it explains *why* Hart holds his views about the notion of discretion.

Hart's theory on judicial discretion can be neatly summarised as follows:

> 'The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case…Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards. In a system

[58] ibid 116.
[59] ibid 100.
[60] Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1035.
[61] Herbert Lionel Adolphus Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 601.

> where stare decisis is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body.'[62]

Whilst it is well-known that Hart was far too brief with his explanation of adjudication and discretion in *Concept,* further analysis was discovered in an essay which had never been published during his lifetime.[63] In this paper, Hart proposes that the indeterminate—or 'open textured'—nature of the law is inevitable because of the limits of human language, and that legal systems must accept discretion as a necessary mode of decision-making for two main reasons: the 'Relative Ignorance of Fact' and the 'Relative Indeterminacy of Aim.'[64] The former evinces that when a new legal rule is created there are certain clear applications of the rule that are envisaged, yet nonetheless 'the totality of possible circumstances in which the application of the rule may be drawn in question…are not confined to such clear cases.'[65] Hart demonstrates this inevitability through the example of a rule which clearly states: 'No vehicles are to be taken into the park.'[66] Whilst this would evidently cover cars and motorcycles, it is less clear whether the rule would also prohibit skateboards or bicycles or toy motor cars. As a result, in order to determine the applicability of the rule to any of these unforeseen situations, a judge must search beyond the explicit law to resolve the case. For Hart, he must exercise judicial discretion. It may be suggested that the courts in these cases need not use discretion, but instead can apply a purposive or teleological approach to the rule.[67] Accordingly, whilst the creators

[62] Hart (n 48) 135.
[63] Geoffrey Shaw, 'H.L.A Hart's Lost Essay: "Discretion" and the Legal Process School' (2013) 127 Harvard Law Review 666, 670.
[64] Herbert Lionel Adolphus Hart, 'Discretion' (2013) 127 Harvard Law Review 652, 661.
[65] ibid 662.
[66] ibid 662.
[67] See Alisdair Gillespie, *The English Legal System* (5th Ed, OUP 2015) 119.

of the rule may not have envisaged every application of the law, the statutory intention can instruct judges as to whether their decision would fall in line with the *purpose* of the rule.

However, this approach is flawed, as under Hart's reason of 'Indeterminacy of Aim', it is posited that searching for the aim of a rule will also inevitably involve the use of discretion. Ultimately, there will be a point where the purpose of the rule will have to be balanced against the rights and interests of the individuals to whom this rule may apply. This is because any aim (unless it is an absolute one, such as, for example, the prohibition of torture under the European Convention on Human Rights[68]), must be curtailed in order to accommodate competing interests. Continuing with the example of the ban on vehicles in the park, Hart provides that if the purpose of this prohibition is to enhance the safety and peace of the park, the indeterminate situations described above are still left unresolved. Whether a skateboard may be deemed to be dangerous remains uncertain, as it turns on how broadly 'dangerous' is interpreted, and such an interpretation would have to consider additional interests like the skateboarder's enjoyment of the park and his freedom. Similarly, in the context of financial remedies, the question of special contributions (contributions to the welfare of the family that were so exceptional that it 'would be *inequitable* to disregard it' when determining the shares of either party[69]) will inevitably trigger the exercise of judicial discretion. This is because not only is the term 'special' nebulous, the underlying purpose—acknowledging contributions which would be 'inequitable' to disregard—is also ambiguous, and therefore open to interpretation.[70]

[68] European Convention on Human Rights, art 3.
[69] *Miller; McFarlane* (n 7) [146] (emphasis added).
[70] See Roberts J in *Cooper-Hohn v Hohn* [2014] EWHC 4122 (F), [2015] 1 FLR 745 [255] citing Sir Mark Potter in *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 [89] who links 'special'

Accordingly, given the necessity for a judge in these difficult cases to weigh considerations beyond that which the rule provides and make fresh judgements in novel circumstances (which then become law by virtue of stare decisis), Hart concludes that discretion is an inevitable truth of any legal system. However, as Hart recognises in his *Postscript*, 'this picture of the law as in part indeterminate or incomplete and of the judge as filling the gaps by exercising a limited law-creating discretion is rejected by Dworkin.'[71]

Dworkin's initial incisive attack to Hart's thesis was presented in his *Model of Rules I and II* essays. He began by outlining three different senses of discretion: two of which are 'weak' and one which is 'strong'.[72] The first weak sense of discretion refers to a situation where 'the standards an official must apply cannot be applied mechanically but demand the use of judgment.'[73] The second weak sense simply provides that the 'official has final authority to make a decision and cannot be reviewed and reversed by any other official.'[74] Lastly, the strong sense of discretion states that an official when making their judgment is 'not bound by standards set by the authority in question.'[75] It is Dworkin's contention that Hart's account of judicial discretion provides that judges are not bound by standards, and accordingly that it falls within the category of strong discretion.[76] Through this assumption, he proceeds to dismantle the legitimacy of strong discretion by way of his

with the extent of wealth: 'If such a contribution is special, it follows that it is unmatched; and the greater the wealth, the greater is the extent to which it is unmatched and to which it calls for an unmatched, or unequal, division under the sharing principle.' If wealth is indeed the measure of 'special' for the sake of finding the existence of a special contribution, determining how much wealth is required to meet the threshold is evidently a matter of judgement—thus demanding judicial discretion.

[71] Hart (n 48) 272.
[72] Dworkin (n 45) 31-32.
[73] ibid 31.
[74] ibid 32.
[75] ibid 32.
[76] ibid 34.

analysis of principles—a legal standard binding upon judges yet distinct from rules. For Dworkin, there are standards beyond legal rules which make up the law, including, *inter alia*, principles and policies. However, he uses the term 'principle' generally to refer to all of these standards.[77] He defines principles as standards that are to be observed 'because it is a requirement of justice or fairness or some other dimension of morality.'[78] Crucially, they are different from rules because the former have a 'dimension of weight or importance,'[79] whereas the latter simply apply in an 'all-or-nothing fashion.'[80] Following Dworkin's persuasive evaluation of relevant case law,[81] it is his submission that principles are binding upon legal officials, meaning that 'he must follow it if it applies, and that if he does not he will on that account have made a mistake.'[82] Accordingly, he concludes that Hart's representation of strong discretion cannot be plausible, as even if the reach of rules fails to extend to a given case, judges are still bound to follow the most relevant principles when making their decision. In other words, 'discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction';[83] that restriction being the obligation to give effect to relevant legal standards beyond 'rules'.

The major points of rebuttal to Dworkin's attack against Hart's conceptualisation of discretion can be condensed into his mischaracterisation of Hart's view on two important issues: the existence of principles, and associating strong discretion with 'Hartian'

[77] ibid 22.
[78] Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 23.
[79] ibid 27.
[80] ibid 25.
[81] *Riggs v Palmer* 115 NY 506 (1889); *Henningsen v Bloomfield Motors Inc* 32 NJ 358 (1960).
[82] Dworkin (n 45) 35.
[83] ibid 31.

discretion. With respect to the former, Dworkin's claim that Hart views the legal system as simply a 'model of rules' without the existence of principles and policies is simply false. In Hart's *Postscript*, he provides that it was never his intention to solely refer to rules as being 'all-or-nothing', and that he did indeed discuss variable standards in the law.[84] Whilst Hart's emphasis on law as a union of primary and secondary rules makes Dworkin's mistake understandable,[85] it is clear that this is not Hart's position.[86] Moreover, it is important to note that Hart admitting the existence of principles does not necessarily mean that he must concede that law is 'a gapless system of entitlements.'[87] The logic of the indeterminacy of rules may equally apply to principles, and as a result the submission that the law can at certain points be incomplete or indeterminate survives the principle attack.[88] Secondly, whilst Dworkin identifies Hart's theory on discretion as falling under his category of 'strong discretion',[89] the similarity between the two is not as close as he suggests. Strong discretion is unrestricted by legal standards, such as if a teacher has the discretion to pick *any* five students she chooses for an exclusive trip. In contrast, if a teacher was required to pick her five *best* students for an exclusive trip, this would be considered, for Dworkin, an exercise of a weak sense discretion as it requires judgement.[90] It is not, however, Hart's contention that a judge in deciding hard cases is not bound to follow *some* legal standards. In fact, he provides in the *Postscript* that the judge's law-

[84] Hart (n 48) 263.
[85] ibid 99. See also Hart Discretion (n 64) 662: 'we are forced to say that the rule either does or does not apply.'
[86] As discussed earlier in this Chapter, it is often difficult to fully comprehend discretion because of the range of diverse accounts and the common misconstruction of theories or particular terms in academic literature.
[87] Herbert Lionel Adolphus Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 7.
[88] ibid 138.
[89] Dworkin (n 45) 34.
[90] ibid 32-33.

making powers are quite different from that of the legislature, in part because they are 'subject to many [substantive] constraints narrowing his choice.'[91] Accordingly, as Shiner states, to suggest Hart's theory claims that judges are not bound by any legal standards in cases requiring their discretion is absurd.[92] However, whilst Hart does not promote strong discretion, he does contend that at certain points, legal standards—whether it be rules or principles—will 'fail to dictate any decision as the correct one' due to the indeterminacy and open-texture of language, and in these cases the 'judge must exercise his law-making powers.'[93] Crucially, the judge's decision cannot be arbitrary, but rather it must appeal to a plurality of reasons (social interests, economic and political policy objectives, morality, justice, etc.) to justify a given outcome.[94] Importantly, this approach cannot be neatly categorised under Dworkin's labels of strong or weak discretion. While it does not contest the claim that judges are bound to follow *some* legal standards, it is distinct from the mere 'hard to determine'[95] scenario of weak discretion because there is an element of judicial creativity. This thesis proposes the following analogy to illustrate Hart's theory of discretion: the task of filling in a colouring book. You must colour within the lines, but you have the discretion to choose whichever colours you believe are most suitable for the picture. There is a framework within which you must operate, yet ultimately there is the freedom as to *how* and with *what* the picture will be filled. On this point, an allusion can be drawn to financial remedies. The Matrimonial Causes Act 1973 provides guidance for judges, yet ultimately one judge hearing a particular case may approach the search for a

[91] Hart (n 48) 273.
[92] Roger Shiner, 'Hart on Judicial Discretion' (2011) 5 Problema 341, 354.
[93] Hart (n 48) 273.
[94] Hart Essays (n 87) 107.
[95] Dworkin (n 45) 32.

fair outcome differently from another judge. The weight which they attach to certain factors—and indeed the eventual outcome they reach—may differ, despite both aiming for the same objective.[96] This image is not accurately depicted by either weak or strong discretion, and accordingly Dworkin's attack in his *Model of Rules* essay against the validity of strong discretion, as well as his dismissal of weak discretion as being 'a tautology,' fails to persuasively defeat Hart.[97]

In response to the criticisms of his 'principle attack', Dworkin replies with one of his most contentious theories[98]: the right answer thesis. This self-evident theory submits that in every case—including hard cases[99]—'there will always be a right answer in the seamless web of our law.'[100] It is his belief that the task of a judge—even in hard cases—is to determine the rights which the parties are entitled to, and 'not to invent new rights retrospectively.' Ostensibly, this is not a radical or controversial position, as it would seem unfair for judges to impose new legal rights *ex post facto*.[101] However, the necessary implication of this 'rights thesis'[102] is that every legal case has an objectively right answer; that irrespective of the novelty of a particular set of facts or the unexplored application of a given law, there exists a single correct outcome. The method for a judge to achieve this Herculean task is constructive interpretation, a process which requires a judge to satisfy

[96] The subsequent Chapters, particularly Chapters Two and Three, will thoroughly discuss, *inter alia*, the scope for judicial disagreement and interpretation of the MCA 1973.
[97] Dworkin (n 45) 34.
[98] William Lucy, 'Adjudication' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 219.
[99] A hard case, for Hart, is where the law is indeterminate and the gaps are left to be filled: Hart (n 48) 135. For a more detailed interpretation of what constitutes a hard case, see Neil MacCormick, *Legal Theory and Legal Reasoning* (Clarendon Press 1978) 101.
[100] Ronald Dworkin, 'No Right Answer?' in Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society – Essays in Honour of H.L.A Hart* (Clarendon Press 1977) 84.
[101] Gial Victoria Karlsson, 'The legal philosophy of Ronald Dworkin' (MA Thesis, University of Massachusetts Amherst 1977) 1-2.
[102] Dworkin (n 45) 87.

two dimensions: the decision on a point of law must fit within the past political decisions, and it must be justified so that it places the law as a whole in its best light.[103] Accordingly, Sartorius asserts that the duty of a judge should be viewed as searching for the decision which best coheres with the entire background of law, politics and morality.[104] This, he concludes, means there will always be something in the 'vast body of the law which [will provide] a basis for distinguishing one decision as the correct one.'[105] Therefore, following this theory would suggest that judicial discretion as described by Hart clearly does not exist, and that it should not, because such judicial discretion cannot be said to be taking rights seriously.[106]

However, this theory can be criticised both in terms of legal theory and its practical usefulness. Firstly, because Dworkin's theory is predicated on interpretation, the individualised nature of this exercise inevitably means that different judges can reach different results, and neither is necessarily wrong. As Couzens purports, 'appraisals of interpretations are only matters of degree and there can be no claim to be the "single best" or the "only correct" result.'[107] This is devastating to Dworkin's constructive interpretation, because part of the search for the right answer involves reaching a decision which portrays law 'in its best light,'[108] and there is no definite way of determining what is meant by "the best". Simmonds astutely notes that given that the method of determining what "best" means 'is itself an interpretative task, we are simply driven back in our search,

[103] Ronald Dworkin, *Law's Empire* (Fontana 1986) 90, 226-228.
[104] Rolf Sartorius, 'Social Policy and Judicial Legislation' (1971) 8 American Philosophical Quarterly 151, 158.
[105] ibid 158.
[106] Dworkin (n 45) 197.
[107] David Couzens Hoy, 'Dworkin's Constructive Optimism v Deconstructive Legal Nihilsim' (1987) 6 Law & Philosophy 330.
[108] Dworkin Empire (n 103) 47.

stage after stage, ad infinitum.'[109] This 'infinite regress' attached to Dworkin's theory of constructive interpretation raises doubt as to whether a judge could ever reach the correct decision.

Furthermore, Dworkin faces the sceptic challenge, which purports that legal decisions cannot satisfy the standards of rationality because of the reality of language and value indeterminacy.[110] Naturally, in hard cases where the applicable law is disputed or unsettled, the crux of the decision lies in value judgement. For example, in *Radmacher v Granatino*—the landmark Supreme Court decision augmenting the weight given to prenuptial agreements—the majority's partiality for respecting autonomy[111] clashed with Lady Hale's dissent which raised the concern of discrimination to an economically weaker party.[112] In such instances, judges may well share the same values, yet equally they may disagree on the weight to be attached to certain values—a reality inherent of an adjudication process which raises moral, ethical and philosophical issues. As Lady Hale stated in *Radmacher*, 'some may think it permissible to contract out of the guiding principles of equality and non-discrimination within marriage; others may think this a retrograde step likely only to benefit the strong at the expense of the weak.'[113] Accordingly, this elucidates that value-laden judgments in cases raising novel or contentious issues cannot be neatly explained by Dworkin's theory wherein judicial discretion is negated by the rights thesis, as it is theoretically possible (and indeed

[109] Nigel Simmonds, 'Imperial Visions and Mundane Practises' (1987) 46 Cambridge Law Journal 472.
[110] Lucy (n 98) 240.
[111] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 [78].
[112] ibid [135]. For further analysis of the gender and economic considerations for the law on prenuptial agreements, see Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart Publishing 2015).
[113] *Radmacher* (n 111) [135].

demonstrable in practice, as seen in the example above) for there to be a range of desirable outcomes which cannot be convincingly justified as representing the single right answer. As Lucy puts it, 'in the face of incommensurability reason is indeterminate.'[114]

Whilst it may be argued that 'epistemic indeterminacy does not imply substantive indeterminacy,'[115] it must be acknowledged that there is no methodology for how Dworkin's theory can be usefully implemented in practice. [116] Given that it is the practical relevancy of a theory on judicial discretion which is required to advance the central purpose of this thesis, Dworkin's conception of discretion can be rejected. Therefore this thesis will henceforth regard judicial discretion in a jurisprudential sense as Hartian discretion: that 'there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers.'[117] Of course, there are laws which may not perfectly fit the description of the law running out of reach. Matrimonial finance law under the Matrimonial Causes Act 1973 is one such example. Section 25 of the MCA—a statutory legal rule—clearly fails to provide a decisive legal framework, as it allows for the judiciary to consider a range of factors without any indication of their relative weight or degree of importance.[118] In this context, it is in fact the intention of Parliament to confer discretion to the judiciary due to the advantages that this approach offers.[119] However, even in this scenario, Hart's

[114] Lucy (n 98) 241.
[115] Kenneth Einar Himma, 'Trouble in Law's Empire: Rethinking Dworkin's Third Theory of Law' (2003) 23 Oxford Journal of Legal Studies 345, 347.
[116] Jeremy Waldron, 'Did Dworkin Ever Answer the Crits?' in Scott Herschovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2012) 171.
[117] Hart (n 48) 273.
[118] Apart from the fact that the 'first consideration [must be]…given to the welfare while a minor of any child of the family who has not attained the age of eighteen': MCA 1973, s 25(1).
[119] *Miller; McFarlane* (n 7) 625 (submission by counsel: Turner QC): 'Parliament has deliberately chosen not to introduce' a structured rule-based regime for financial remedies.

interpretation of discretion remains valid, as the House of Lords recognised this aspect of their role as performing 'a necessary judicial function in the absence of parliamentary guidance.'[120] In either case, judicial discretion fills in the gaps left by rules.

Balancing Rules and Discretion

It was concluded in the previous section that the Hartian perspective of discretion is the most persuasive, and as such this thesis has adopted the understanding that discretion involves a judge exercising law-making authority when the expanse of legal rules has run out. Naturally, it is necessary to analyse the consequences of adopting this interpretation of judicial discretion. In particular, due to its relevancy to the rest of this thesis, it is essential to discern whether, based on this perspective, judicial discretion ought to be restricted in terms of the scope of its application and the frequency with which it is exercised by the courts. To highlight this matter, it is worth turning to some of the issues that would arise if a specific law or legal system as a whole were to be governed by an 'overly' or 'extremely' discretionary regime.

a) Issues arising from too much judicial discretion

Firstly, it is relatively intuitive that if a legal system were to provide judges with unfettered discretion, it would result in great uncertainty of the law, as it would 'leave persons unsure of their entitlements…[and without] justifiable expectation of a decision one way or the

[120] *Miller; McFarlane* (n 7) [7].

other.'[121] This is because, as established above, judicial discretion allows the judge to decide a legal issue according to their 'individual sense of what is right and just, conscientiously applied,' taking into account the relevant legal context.[122] Before delving into why such uncertainty would be undesirable, it is necessary to elaborate on what is meant by legal certainty. As Bone highlights, nineteenth century legal conceptualists often regarded legal certainty as the maturation of a legal system which led to the establishment of principles or standards that 'had a fixed, determinate meaning, which was knowable.'[123] As a result, the development of these principles into 'concrete rules' provided a certainty in the law similar to the progression of 'the fundamental laws or axioms of a scientific or mathematical theory to more concrete propositions and theorems.'[124] More modern theorists, such as Llewellyn, considered the 'predictability of judicial decision' to more closely align with the concept of legal certainty.[125] This interpretation is more useful, as it more accurately depicts the reality that, because discretion is an inevitability, the law can never be perfectly certain. The value of certainty lies not in the translation of law into mathematically calculable equations, but rather in its effects on the people it governs and the broader objectives of the State. As Kennedy posits, certainty benefits the former by providing them with the knowledge and confidence to proactively adjust their affairs to

[121] Anthony D'Amato, 'Legal Uncertainty' (2010) Northwestern University School of Law Faculty Working Paper 108, 3 < https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/108/> accessed 14 November 2019.
[122] Roscoe Pound, 'Discretion, dispensation and mitigation: The problem of the individual special case' (1960) 35 New York University Law Review 925, 929.
[123] Robert Bone, 'Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920' (1986) 59 Southern California Law Review 1101, 1113.
[124] ibid 1114.
[125] Lon Fuller, 'American Legal Realism' (1934) 82 University of Pennsylvania Law Review 428, 431, referencing the legal realist, Karl Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika: eine Spruchauswahl mit Besprechung (Weicher 1933) [60].

take into account the consequences of a given law.[126] Equally, certainty benefits the State's broader policy objectives by increasing 'the likelihood that private activity will follow a desired pattern.'[127] Evidently, legal certainty serves a number of important functions which justify it being a valued element of a functioning legal system.

Naturally, where a law demands or allows for the presiding judge to exercise their discretion, the level of certainty and predictability with respect to the outcome of legal proceedings is diminished.[128] As United States Second Circuit Court of Appeals Judge Kaufman disclosed, 'when I think of any one of my esteemed colleagues on the Second Circuit, for example, I cannot predict with certainty how he or she will lean in a case allowing for judicial discretion.'[129] Certainly, judicial discretion serves a number of vital functions and is a necessary component of the law. Yet, simply in terms of its impact on legal certainty, discretion contributes nothing 'in terms of clarity, and little is gained in terms of predictability.'[130] Though this issue will be explored in considerably greater depth in Chapter Two, it is widely asserted that greater legal uncertainty would result in fewer cases settling out of court. The reasoning for this position is that 'if the outcome of litigation is highly uncertain, there is a greater chance that the two parties will emerge with substantially different estimates of the expected gains from litigating.'[131] In the context of criminal punishment, studies have shown that reaching settlement agreements

[126] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685, 1688-89.
[127] ibid 1688-89.
[128] James Wilson, 'The Morality of Formalism' (1985) 33 University of California, Los Angeles Law Review 431, 436.
[129] Irving Kaufman, 'The Anatomy of Decisionmaking' (1984) 53 Fordham Law Review 1, 13.
[130] Walter Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process' (1983) 97 Harvard Law Review 386, 417.
[131] Andrew Hanssen, 'The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges' (1999) 28 The Journal of Legal Studies 205, 209.

prior to a criminal hearing have been impeded where the judge holds greater sentencing discretion, as there is 'more uncertainty about what punishment would actually result from conviction.'[132] The impact of judicial discretion on the prevalence of settlements may vary depending on the area of the law, and as such a focused analysis on settlements in the family financial remedies context will be conducted in Chapter Two. For the present purposes of this section, it may be concluded that, following predominant perspective amongst legal critics, an excessive amount of judicial discretion would, by increasing the degree of uncertainty in legal outcomes, 'raise the amount of litigation.'[133]

Finally, the marginalisation of legal certainty could have a harmful effect on the possibility for equal treatment. Equal treatment requires legal consistency—an aspect of justice commonly summarised in the phrase, 'like cases should be treated alike.' The late and former Justice of the United States Supreme Court, Antonin Scalia, submitted that this value of justice should not be underestimated, as it is 'a motivating force of the human spirit.'[134] To highlight its importance, he outlined the following scenario:

> 'Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.'[135]

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[132] Jennifer Mnookin, 'Uncertain Bargains: The Rise of Plea Bargaining in America' (2005) 57 Stanford Law Review 1721, 1723.
[133] Hanssen (n 131) 209.
[134] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 The University of Chicago Law Review 1175, 1178.
[135] ibid 1178.

The issue with too much discretion, however, is that it is not conducive to such consistency in the application of the law. Where judges have freedom to interpret a legal issue through the use of discretion, rather than being bound by strict rules dictating the outcome of a case which falls within the scope of its applicability, the possibility for like cases to be treated differently increases. For example, in the context of financial remedies, the substantial extent of judicial discretion immanent in the legal framework has been argued to be a contributing factor to the inconsistent application of the law, as well as the existence of geographical tendencies of courts to decide cases differently.[136] For this reason, this method of legal problem solving is not widely believed to satisfy the principle of legal consistency.[137] Accordingly, it may be concluded that it would be preferable, 'even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.'[138]

Secondly, where there is an excessive amount of discretion afforded to the judiciary, there is a real risk of prejudice influencing judicial decisions. As it has been established above, given that judicial discretion enters in situations where judgement on a legal issue is subject to interpretation, judges may disagree on what is right and just for a particular case.[139] An important reason why such disagreement may arise is because, while judges may act professionally and reasonably, it is widely accepted that their decisions may, in part, 'be affected primarily by their own political, ideological, and socio-economic

[136] Jackson (n 17) 231; Law Commission (n 30) [4.99]. Legal consistency, geographical tendencies, and forum shopping will be discussed at length in Chapter Two.
[137] Scalia (n 134) 1178.
[138] ibid 1178.
[139] Joseph Singer, 'Legal Realism Now' (1988) 76 California Law Review 465, 470.

backgrounds.'[140] Certainly, however, it is a fundamental and respected value of democracy and separation of powers for the judiciary to remain impartial and independent.[141] Yet, the emergence of prejudice or bias is generally covert, due to such biases being implicit rather than explicit.[142] For example, Trope and Thompson studied the effect of judicial questioning of individuals grouped into categorical stereotype (such as race, gender, etc.), and found that the formulation of their questions was subconsciously constructed in a way which sought to quickly confirm the relevant stereotype, rather than search for the complete context to disprove the stereotype.[143] Moreover, it is argued that the insistence on the impartiality of the judiciary and failure to acknowledge the influences on judges as humans vulnerable to fallibility does a disservice to the legal system.[144] As Mills contends, these implicit biases 'blind adjudicators to their partiality, while the doctrine of impartiality protects the blind from seeing.'[145] Accordingly, the impact of providing the judiciary with too much discretion could exacerbate the issue of implicit bias or prejudice filtering into legal decisions, due to the liberty this adjudicative model provides.[146]

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[140] Mark Cohen, 'The Motives of Judges: Empirical Evidence from Antitrust Suits' (1992) 12 International Review of Law and Economics 13, 13-14.
[141] Courts and Tribunals Judiciary, 'Independence' (Judiciary 2019) <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed 22 July 2019.
[142] Andrew Luesley, 'Playing the race card: racial bias in judicial decision-making' (JD Thesis, University of British Columbia 2017) 1.
[143] Yaacov Trope and Erik Thompson, 'Looking for truth in all the wrong places? Asymmetric search of individuating information about stereotyped group members' (1997) 73 Journal of Personality and Social Psychology 229, 229.
[144] For more on the 'Herculean' image of judges and the issues this creates, see Erika Rackley, 'Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor' (2002) 22 Legal Studies 602.
[145] Linda Mills, *A Penchant for Prejudice: Unraveling Bias in Judicial Decision Making* (University of Michigan Press 1999) 18.
[146] For case examples of judicial partiality, see ibid 18-19.

Furthermore, even if judges when exercising their discretion are not affected by personal prejudice regarding a stereotype or their political views, their background may still influence the manner by which they reach a judgement. Cardozo outlined four main 'directive forces' which a judge may adopt in adjudication: the method of philosophy, evolution, tradition, and sociology.[147] While a particular judge's approach will be influenced by the facts of the case and the issues which arise, Kaufman acknowledges that, 'ultimately, the choice reflects the personal bent of the individual judge.'[148] While diversity in legal approach and interpretation is important for a healthy judiciary, this finding becomes concerning in the context of extreme judicial discretion because it is increasingly more difficult to ensure that judges reach fair outcomes and to hold them accountable. As Kronman puts it, a challenge with judicial discretion is accounting 'for the legitimacy of adjudication.'[149] This is because the main safeguard to prevent judicial error or misjudgement is 'the possibility of reversal by a higher court.'[150] If the aim were to appeal a decision made on the basis of discretion, the prospects of successfully appealing are low. For example, in the context of appeals for financial remedies cases, the threshold to successfully appeal is set quite high—in part 'because the courts want finality and to discourage people from appealing.'[151] Moreover, in the vast majority of family cases, this measure of accountability is ineffective as most parties are unable to afford the

[147] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 30-31.
[148] Kaufman (n 129) 12-13.
[149] Anthony Townsend Kronman, 'The Problem of Judicial Discretion' (1986) 1 Yale Law School Legal Scholarship Repository 481, 481-482.
[150] Richard Higgins and Paul Rubin, 'Judicial Discretion' (1980) 9 The Journal of Legal Studies 129, 129-130.
[151] 'Appeals in financial remedies cases' (David on Divorce 2019) <https://www.davidondivorce.co.uk/divorce-finance/appeals-variation/appeals-financial-remedies-cases> accessed 15 July 2019. According to Rule 30.3(7) of the Family Procedure Rules 2010, 'permission to appeal may be given only where – (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard.'

costs involved in pursuing an appeal. Therefore, while judicial discretion offers a number of benefits, it also evidently causes several significant problems if it is left unconstrained.

b) It is necessary to balance rules and discretion

Evidently, a legal system predicated on judicial discretion alone would be undesirable, for it creates various issues which would harm the substantive and procedural justice of the law. The solution to this scenario is to limit the scope of discretion exercised in judicial decision-making. Naturally, the method to counteract excessive judicial discretion is through the insertion of legal rules when developing a legal framework.[152] Rules, as opposed to discretion, can be described as 'all-or-nothing' obligations which a court is compelled to enforce if the factual scenario falls within the ambit of the rule.[153] Importantly, however, an exclusively rule-based legal framework would have its own set of problems, the most obvious of which include the lack of flexibility to achieve individualised justice and the inadaptability of the law to reflect changing social norms. Indeed, Pound submits that 'unbending rules rigidly administered may not merely fail to do justice, they may do positive injustice.'[154] Intrinsically, a rule is a broad brush approach which is effective in achieving certain objectives. For example, Kennedy uses the example of setting the age of majority in the United States to 21 on the basis of the assumption that maturity is necessary to exercise free will.[155] He eloquently states that 'if we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the

[152] Hawkins (n 42) 13.
[153] Dworkin (n 45) 24.
[154] Pound (n 122) 928.
[155] Kennedy (n 126) 1689.

standard of "free will" directly to the facts of each case.'[156] However, while rules offer a number of benefits, framing a law which does not allow for the court to take into account case-specific facts is not conducive to pursuing substantive justice, and as such it is imperative that the courts are unconstrained from the 'imperfect generalisations' of absolute rules.[157]

Thus, just as rules are necessary to counteract the harmful effects of excessive judicial discretion, discretion acts in the same way with respect to the consequences of excessive legal rules—discretion serves to 'fill gaps in rules.'[158] Ostensibly, it may be concluded that discretion plays a necessary and 'inevitable' role in a functioning legal system.[159] Given the symbiotic relationship between rules and discretion—particularly the moderating effect they have on each other[160]—the logical conclusion is that, when developing a fair and just legal framework, it is imperative that there is an appropriate balance between rules and discretion. Naturally, the question that follows is how to determine what the appropriate balance is for a given law.

The Ideal Position on the Rule-Discretion Spectrum

When taken in the abstract, the task of determining the appropriate balance between rules and discretion would appear to be an impossible one. As Schneider notes, concluding that

[156] ibid 1689.
[157] Scalia (n 134) 1177.
[158] Schneider (n 34) 61.
[159] Hawkins (n 42) 11. See Kanstroom (n 36) 718: 'discretion has been long accepted as a necessary concept in Anglo-American law.' As Klatt puts it, 'discretion remains a *conditio sine qua non'*: Matthias Klatt, 'Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion' (2007) 20 Ratio Juris 506, 506.
[160] Hawkins (n 42) 12.

a balance is required 'leaves us in an irreducibly equivocal position, for it is not possible to say a priori what mixture of rules and discretion will best serve in any particular situation.'[161] Yet, when the project is broken down and contextualised to a particular issue, there may still remain hope. For, in light of the analysis of law as language with an open-textured nature, it is not realistic nor productive to search for an answer to this 'balancing question' to a degree of axiomatic precision. Rather, it is much more useful to undertake an enterprise attempting to narrow down the appropriate balance of rules and discretion to an estimation translatable in terms of language. The tool by which this can be accomplished is: 'The Rule-Discretion Spectrum.' This 'regulatory spectrum' involves absolute-rules at one end of the spectrum and absolute-discretion at the other.[162] Pound neatly outlines four different positions on this spectrum:

> '1) cases governed by and to be decided according to rule in the strict sense-according to the literal exactness of the strict law;
>
> (2) cases not within the first category but to be decided by reasoning from authoritative principles as starting points, using an authoritative technique guided by authoritative ideals;
>
> (3) cases calling for judicial discretion, i.e., discretion guided by the analogy of principles of law as starting points for reasoned determination; and

[161] Schneider (n 34) 88.
[162] Louise Crowley, 'Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision' [2012] International Family Law 388, 388.

(4) cases left to the personal discretion of judge or official or person authorized to act, without any organized grounds of or guides to decision.'[163]

This spectrum helpfully illustrates the various ways a legal system or particular law may balance the competing elements of rules and discretion. While not perfectly precise, reference to the rule-discretion spectrum will allow for simple and comprehensible articulations of how a given law should be balanced.

It is submitted that, when assessing the appropriate position on the spectrum for a law, the compass used to guide this evaluation should be the purpose of the relevant law. Evidently, the appropriate balance between rules and discretion will vary depending on which area of law and which particular issue within that area of law it is covering.[164] For example, while judicial discretion serves a crucial role in criminal sentencing law and family law by allowing the courts to take into account individual circumstances,[165] the value of certainty provided by rules is much more important for the laws of contracts.[166] Ultimately, the calibration of the balance should be determined according to the objectives and the fundamental purpose(s) that the specific law aims to achieve. As Wilson posits, the suitability of either rules or discretion will depend 'upon the underlying purposes of the substantive laws being interpreted, and upon the assessment of the costs and benefits of applying either technique.'[167] Accordingly, it would seem that the approach to determining the appropriate position on the rule-discretion spectrum for a given law is to

[163] Pound (n 122) 929-930.
[164] Hawkins (n 42) 11-12.
[165] See, for example, David Thomas, 'Judicial discretion in sentencing' in Loraine Gelsthorpe and Nicola Padfield (eds), *Exercising Discretion: Decision-making in the criminal justice system and beyond* (Routledge 2011).
[166] John Goldring, 'Certainty in Contracts, Unconscionability and the Trade Practices Act: The Effect of Section 52A' (1988) 11 Sydney Law Review 514.
[167] Wilson (n 128) 436.

first ascertain its fundamental purpose(s), and then analyse which balance would most effectively serve that overriding objective.

Conclusions

This Chapter has explored the nature of judicial discretion by attempting to find a clear working definition which could be utilised in this thesis. Given the prominence of the two jurists, the Hart-Dworkin debate regarding judicial discretion was dissected, and it was concluded that Hart offered the more persuasive interpretation of discretion: a law-making function by the judiciary to fill in the inevitable gaps of legal rules due to the open-texture of language and law. Given this understanding of judicial discretion, the consequences of framing a law purely in terms of discretion was evaluated, and it was seen that it would lead to great uncertainty and bias or prejudice in judicial decisions. Equally, however, governing a legal issue solely in terms of strict rules would be undesirable, as it would inhibit the attainability of substantive justice. The result of such findings is that a balance between rules and discretion is necessary. Ultimately, it was concluded that in searching for an ideal position on the rule-discretion spectrum for a given law, it is imperative to determine the purpose of that law. Once this has been ascertained, it is possible to deduce which mixture of rules and discretion would most effectively promote the achievement of the law's fundamental objective. Accordingly, Chapter Two will follow this approach in searching for the ideal position on the spectrum for the specific law relating to financial remedy orders.

Chapter Two: Searching for the Ideal Balance between Rules and Discretion for the Law Relating to Financial Remedy Orders

Introduction

It has been seen that a law administered through unfettered discretion can produce undesirable consequences, yet equally so too can an overly rigid rule-based legal system. Rather, with most laws, a balance must be struck between discretion and rules in order to achieve an optimal state of appropriately counterbalancing competing interests. Naturally, however, the particular balance may vary from one law to the other—altering depending on their nature, history, and purposes. It therefore follows that the next issue to evaluate is how such a balance should be constructed for the specific law applicable to financial remedies following divorce or dissolution of civil partnership. As explained in the previous chapter, the extent of discretion which is appropriate for a given law depends on its overriding (and ancillary) objectives. Accordingly, this chapter will first strive to unpack what has been determined the primary purpose of financial remedies law: fairness. It will approach this through an evaluation of the historical background leading up to the enactment of the Matrimonial Causes Act (MCA) 1973, and will dissect the meaning of fairness. Subsequently, this paper will analyse the tensions between competing objectives subsumed within fairness, and seek to discern how they ought to be prioritised. Finally, after a thorough analysis of the purpose of the law, this chapter will conclude where on the rules-discretion spectrum the law applicable to the making of financial remedy orders should lie.

However, it is first worth stating at the outset that there are challenges within this task. Firstly, because the MCA does not explicitly mention any overriding purpose or

objective[168]—coupled with the fact that all judgments on this issue qualify their words as not intended to be received as more than mere guidance—this thesis does not seek to purport that its findings with respect to the purpose of the law are indisputable, nor are they unanimously agreed upon. Rather, they are the product of analysis and evaluation of the available evidence obtained through the case law and academic commentary. Secondly, in relation to the construction of an appropriate balance within the discretion-rules spectrum, this thesis concedes that, naturally, there is no scientific or quantifiable way of determining the answer to this question. However, this should not preclude an attempt to approach the issue in light of the significance of this area of law for litigants. Accordingly, this thesis will propose a model which can be described through language, rather than a numerical or calculable scale—which, while not being exact in its precision, can roughly locate the optimal balance between discretion and rules and provide useful guidance for questions on reform.

The Purpose of Financial Remedies Law

Upon a preliminary investigation, it becomes readily apparent that the overriding objective for the courts when deciding on the division of assets upon divorce is to reach a fair outcome. This was most famously expressed in the House of Lords decision in *White v White*.[169] In his seminal judgment, Lord Nicholls states that whilst the MCA does not explicitly provide any objective for the courts to follow when deciding these cases,

[168] *Cowan v Cowan* [2001] EWCA Civ 679, (2001) 2 FLR 192 [25]: 'The original statutory objective having proved quite impossible of practical attainment, it was removed in 1984 without anything being substituted.'
[169] *White* (n 8).

implicitly, it 'must be to achieve a fair outcome.'[170] However, whilst being the most well-known decision to express achieving fairness or obtaining a fair outcome as the purpose of financial remedies law, there were several decisions prior to *White* which did the same. For example, Thorpe LJ in *Dart v Dart* noted that 'the purpose of this statute was to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses.'[171] Likewise, Wood J in *Page v Page* opined that the ultimate aim of the statute is clearly 'to do that which is fair, just and reasonable between the parties in rearranging the family finances.'[172] Accordingly, as noted in *Cowan v Cowan*, it is the 'almost inevitable judicial conclusion that the unexpressed objective of the [section 25 MCA] exercise is to arrive at a fair solution.'[173]

Yet, the utility of fairness (alone) as an objective may be limited because, as Lord Nicholls expressed:

> '[F]eatures which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.'[174]

Rather, what made the decision in *White* historic was its elaboration on how the courts should exercise their discretion to achieve a fair result, as well as what fairness means.[175]

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[170] ibid [23].
[171] *Dart v Dart* [1996] EWCA Civ 1343, [1996] 2 FLR 286 [16].
[172] *Page v Page* (1981) 2 FLR 198 (CA) 206 (Wood J).
[173] *Cowan* (n 168) [58] (Thorpe LJ).
[174] *White* (n 8) 6 [1].
[175] For further materials on the historic impact of *White*, see Elizabeth Cooke, 'White v White: A Late Instalment in a Long Story' in Stephen Gilmore, Jonathan Herring and Rebecca Probert, *Landmark Cases in Family Law* (Hart Publishing 2011); Jonathan Herring, 'White v White (2000)' in Erika Rackley and Rosemary Auchmuty, *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Hart Publishing 2018).

It established what it now referred to as the 'equal sharing principle': a concept which prescribes that before awarding an unequal division of assets, 'a judge would always be well advised to check his tentative views against the yardstick of equality of division.'[176] Beyond promoting (albeit not requiring) equality, Lord Nicholls mandated that when seeking to achieve a fair result, there should be no discrimination between the homemaker and breadwinner.[177] Accordingly, *White* represented a landmark decision in financial remedies law because, rather than simply declaring that fairness is the law's fundamental purpose, it unpacks the substance behind this 'difficult and elusive concept.'[178] As Diduck opines, Lord Nicholls intelligently 'integrated a principle of equality within non-discrimination and in turn within fairness.'[179]

The reason for this brief overview of the *White* judgment is to highlight the need for this Chapter's analysis to delve beyond a layperson's understanding of the 'purpose'. Accepting fairness as the purpose of financial remedies is merely a starting point. Whilst the judgment in *White* provides that equality and non-discrimination are subsumed within fairness, they are not necessarily the only elements of fairness. For example, fairness may be understood as representing both *substantive* fairness (a decision and the reasons for arriving there) and *procedural* fairness (the process and practical realities of court proceedings). Therefore, it is necessary to unravel what fairness—the claimed overriding purpose of financial remedies law—actually means. In pursuit of this aim, this section will undertake an evaluation of the historical development of financial remedies orders to

[176] *White* (n 8) [25].
[177] ibid [24].
[178] Jens Scherpe (ed), *European Family Law Volume III: Family Law in a European Perspective* (Edward Elgar Publishing 2016) 166.
[179] Alison Diduck, 'Fairness and Justice for All? The House of Lords in White v White' (2001) 9 Feminist Legal Studies 173, 177.

determine whether fairness was always the objective, and if not, what its purpose was and why it changed. It will also explore the different 'senses' of fairness (substantive and procedural), and consider how they interact with each other.

a) Historical development of the law applicable to financial remedy orders: How has the purpose of the law evolved?

Whilst the law regulating marriages dates back many centuries, the starting point for the purposes of this paper is 1857.[180] This is not only when divorces became available to all married couples,[181] but also when Parliament created a 'Court with exclusive Jurisdiction in Matters Matrimonial' which had the authority to order the husband to pay his ex-wife.[182] Under the Matrimonial Causes Act 1857, a husband could divorce his wife if she was found guilty of adultery, whereas a wife had to prove that the husband committed adultery *and* either incest, bigamy, cruelty, or desertion for at least two years.[183] Evidently, there was significant inequality in terms of the grounds for divorce—a blatant double standard.[184] As Kha asserts, 'the Campbell Commission itself had suggested that

[180] For further coverage of the pre-1857 law dominated by the ecclesiastical jurisdiction, see William Blackstone, *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979) Book I, Chapter XV; Sybil Wolfram, 'Divorce in England 1700-1857' (1985) 5 Oxford Journal of Legal Studies 155.

[181] It should be noted that at this time, the rate of divorce was very law, the ground weighted in favour of the husband, and it was largely geographically restricted to London. Nonetheless, prior to this, divorce was a privilege of the wealthy. See Lord Wilson, 'Changes over the centuries in the financial consequences of divorce' (Address to the University of Bristol Law Club, 20 March 2017) 5 <https://www.supremecourt.uk/docs/speech-170320.pdf> accessed 20 January 2019: 'following the Restoration, the practice grew up whereby rich, well-connected husbands, and occasionally their wives, persuaded Parliament to pass a private Act relating only to them and declaring them to be divorced.'

[182] Matrimonial Causes Act 1857, preamble.

[183] ibid s 27. Alternatively, she could allege the husband committed rape, sodomy or bestiality.

[184] Ann Sumner Holmes, 'The Double Standard in the English Divorce Laws, 1857-1923' (1995) 20 Law & Social Inquiry 601, 601.

wives could be expected to forgive a straying husband otherwise divorce would be too readily available.'[185]

Unsurprisingly, this inequality was reflected in relation to the law regulating the financial issues in marriage and divorce. Particularly, it was only in 1882—25 years after the passing of the 1857 Act—that married women had the right to own property as her separate property.[186] Naturally, this placed women in a disadvantaged position when it came to receiving a financial remedies order (maintenance, as it was then called) from a judge upon her divorce. The Matrimonial Causes Act 1857 provided that, upon divorce, the 'Court may, if it shall think fit…order that the husband shall…secure to the wife such gross sum of money…it shall deem *reasonable*' (emphasis added).[187] Firstly, it is important to note the wording of this provision. Providing any financial provision whatsoever to the wife was an exercise of discretion for a judge—it was not an obligation for the court, nor was it a right which the woman could enforce. Secondly, the statute provided that the basis upon which a judge would determine this amount to be awarded to the wife was 'reasonableness'.

However, it is necessary to discern what 'reasonable' meant in its proper historical context, and how the judges undertook the search for a reasonable financial provision. The practice of the ecclesiastical court prior to the enactment of the 1857 Act was to

[185] Henry Kha, 'The Reform of English Divorce Law: 1857–1937' (PhD thesis, University of Queensland Australia 2017) 63.
[186] Married Women's Property Act 1882, s 1(1). It should be noted that prior to the passing of this landmark statute, *some* property could be ring-fenced using a marriage settlement or recognising the wife's separate estate in equity: Andy Hayward, 'Married Women's Property Act 1882' in Erika Rackley and Rosemary Auchmuty, *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Hart Publishing 2018).
[187] MCA 1857 (n 182) s 32.

consider one fifth of the net income a reasonable award for the wife,[188] although depending on circumstances, that award could be higher[189] or lower.[190] This 'one fifth rule' was perpetuated by the Family Courts for many years. As Lord Wilson noted, over a century later when he began practising as a family lawyer, he would argue as counsel 'that a wife should have a fifth of the joint incomes pending the suit for divorce and a third of them following the grant of a decree.'[191] Beyond being unfair and discriminatory according to modern standards, this structure was also said to be overly rigid and arbitrary.[192]

Yet, this rule of thumb was a starting point, which could be departed from in either direction depending on the individual circumstances of the case.[193] From the enactment of the 1857 Act until the far-reaching changes introduced through the Divorce Reform Act 1969[194] and the Matrimonial Proceedings and Property Act 1970,[195] marital fault or wrongdoing was the focal point for judges when determining a reasonable financial award.[196] The rationale—which lasted over a century—was that a wife should not have to suffer from her husband's wrongful conduct, and as such there is an obligation for the husband to support her after separation.[197] Notably, this closely mirrors the law of

[188] *Hawkes v Hawkes* (1828) 1 Haggard's Ecclesiatical Reports 526, 526; 162 ER 666, 667 (Sir John Nicholl).
[189] E.g. *Finlay v Finlay* (1841) Milward's Irish Ecclesiastical Reports 575; *Irwin v Dowling* (1842) Milward's Irish Ecclesiastical Reports 629, where the Court awarded one fourth of the net income.
[190] E.g. *Butler v Butler* (1842) Milward's Irish Ecclesiastical Reports 529, where the Court only awarded one eighth of the husband's income.
[191] Lord Wilson (n 181) 5.
[192] Max Guest, 'Needs in the Everyday Divorce' (MJur thesis, Durham University 2016) 21.
[193] *Wachtel v Wachtel* [1973] 2 WLR 366 (CA) 376.
[194] For the first time, divorce could be granted without the need to prove fault. See s 2(1)(d-e) of the 1969 Act.
[195] This statute brought about significant change, as it entitled either party to seek a financial order—either in the form of a financial provision or property adjustment.
[196] Danaya Wright, 'Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866' (2004) 38 University of Richmond Law Review 903, 906.
[197] *Kershaw v Kershaw* [1964] 3 WLR 1143 (Divisional Court) 1147 (Sir Jocelyn Simon P).

contract, whereby a breach of contract results in liability to compensate the affected party.[198] Therefore, this principle which applied to matrimonial finance law was referred to as the 'contractual analogy.'[199] As a result, the respective blameworthiness of both the husband and the wife became central to a judge's decision. For example, in *Kettlewell*, a wife obtained a divorce on the ground that her husband was guilty of adultery and cruelty.[200] He had a substantial annual income of £19,000, and the Court found that an adequate permanent maintenance for the wife would be £3,000 per year. As part of Sir Francis Jeune P's reasoning, he noted that 'where the conduct of the wife has been blameless, the allowance should be handsome.'[201]

By contrast, where the wife was guilty of adultery and it was the husband petitioning for divorce, the consequences for her could be devastating—whether that be in relation to their finances or the custody of their children.[202] Given that the rationale for financial provision orders was a breach in the marriage contract, where the wife was responsible for the breach, the courts were extremely reluctant to make an order in favour of these 'guilty wives.'[203] However, at the turn of the 20th century, the courts began recognising the 'guilty' wife's entitlement to a 'compassionate allowance'[204]—an award of typically

[198] Law Commission, *The Financial Consequences of Divorce: The Basic Policy–A Discussion Paper* (Law Com No 103, 1980) [11]. For an in-depth analysis of the economic and contractual aspects of marriage law, see Antony Dnes and Robert Rowthorn (eds), *The Law and Economics of Marriage and Divorce* (Cambridge University Press 2002).
[199] Law Commission (n 198) [12].
[200] *Kettlewell v Kettlewell* [1898] P 138 (PDA).
[201] ibid 141.
[202] *Wachtel* (n 193) 371.
[203] Louise Tee, 'Division of Property Upon Relationship Breakdown' in Jonathan Herring (ed), *Family Law: Issues, Debates, Policy* (Willan Publishing 2001) 63. Of course, the centrality of religion was also largely responsible for this perspective, as the 'guilty wife' was breaching her marital vows.
[204] Gillian Douglas, 'Bringing an End to the Matrimonial Post Mortem: *Wachtel v Wachtel* and its Enduring Significance for Ancillary Relief' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Hart Publishing 2011) 136.

£1 per week 'so that she may not be turned out destitute on the streets.'[205] Crucially, this order would be made *dum sola et dum casta* (as long as she remained single and chaste). The reasoning for this was if her livelihood depended on remaining celibate, there would be a strong pressure placed upon 'her not to lapse again into sin.'[206] Fortunately, the judicial sentiment evolved over time, to the point where they rejected the compassionate allowance doctrine on the basis that nowhere in the statute is it stated 'that a wife against whom a decree has been made cannot be awarded maintenance.'[207]

This aspect of the court's historical legal reasoning reveals important aspects of the overall objectives of the law. Whilst the statute provided that the courts had to search for a reasonable outcome, there appeared to be other factors influencing their reasoning. Whilst the compassionate allowance doctrine could be argued to reflect the contractual analogy, the condition placed on these maintenance awards for the wife to be chaste suggests an interest in the structuring and behaviour of individuals and families. Given the taboo nature of divorce at the time,[208] the courts were concerned with deterring husbands from divorcing their wives, and rationalised that 'the fact that there was to be no escape from the financial ties created by marriage would operate as an important buttress to the institution of marriage.'[209] This was supported by Lord Penzance, who, in rather dramatic terms, proclaimed that:

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[205] *Ashcroft v Ashcroft and Roberts* [1902] P 270 (CA) 273 (Gorell Barnes J).
[206] *Squire v Squire and O'Callaghan* [1905] P 4 (PDA) (Sir Francis Jeune P).
[207] *Trestain v Trestain* [1950] P 198 (CA) 202 (Denning LJ).
[208] Gavin Thompson and others, *Olympic Britain: Social and economic change since the 1908 and 1948 London Games* (House of Commons Library 2012) 33: 'Before 1914 divorce was rare; it was considered a scandal…In the first decade of the 20th century, there was just one divorce for every 450 marriages… Though it was becoming more widespread, divorce remained uncommon enough to be a potential source of shame throughout the first half of the 20th century.'
[209] Law Commission (n 198) [10].

> '[I]t is the foremost duty of this Court in dispensing the remedy of divorce to uphold the institution of marriage. The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved is, that it loosens the bonds of so many others. The powers of this Court will be turned to good account if, while meting out justice to the parties, such order should be taken in the matter as to stay and quench this desire and repress this evil.'[210]

Fundamentally, the reason for this concern was the threat divorce posed to the social stability that the traditional English family created.[211] To this day, marriage remains a matter of public and State interest, as it impacts a wide range of issues in society; most prominently of which is the development of children.[212] For example, there are many studies which have suggested that 'increasing the divorce rate meant increasing numbers of disadvantaged children.'[213] Moreover, the effects of children being raised in single-parent families have been shown to be detrimental, with increased likelihood of teenage pregnancy and being pushed 'out of school and out of the labour force.'[214] Consequently, the rejection of 'unconventional' family arrangements spanned wider than simply wanting to uphold the institution of marriage. The social structure that marriage created placed support and financial dependence on the family unit, rather than the State.[215] As a result,

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[210] *Sidney v Sidney* (1865) 4 Swabey & Tristram's Probate & Divorce Reports 178, 181-182 (Sir James Wilde).
[211] HC Deb 5 May 1933, vol 277, col 1198 (Matrimonial Causes Bill).
[212] Jonathan Herring, 'Divorce, Internet Hubs and Stephen Cretney' in Rebecca Probert & Chris Barton, *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia 2012) 197. See also Elizabeth van Acker, 'Disconnected Relationship Values and Marriage Policies in England' (2016) 38 Journal of Social Welfare and Family Law 36; Andrew Gilbert, *British Conservatism and the Legal Regulation of Intimate Relationships* (Hart Publishing 2018).
[213] Catherine Fairbairn, 'No-Fault Divorce' (House of Commons Library Briefing Paper 01409, 29 September 2016) 13.
[214] Linda Waite, 'Does Marriage Matter?' (1995) 32 Demography 483, 494.
[215] HC Deb (n 211) col 1198. For a more in-depth discussion on the State interest in marriage and divorce, see Jonathan Herring, 'Why Financial Orders on Divorce Should be Unfair' (2005) 19 International

it followed that many judges and lawmakers were of the view that the statutory authority of the Court when deciding on financial remedies was 'granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support.'[216] Accordingly, beyond reaching a reasonable outcome, one of the objectives of financial remedies law under the Matrimonial Causes Act 1857 was to preserve the status and solemnity of marriage—motivated by both prevailing religious conservatism and the effect of financial obligations as an instrument to steer social behaviour.

During the mid-1960s, the social and judicial attitudes towards divorce law evolved, with pressures to move from a regime centred on fault and conduct, to one concerned with distributive justice and the real-life consequences for families.[217] As the Law Commission stated in advocating for the reduced role of fault in divorce cases, 'the public determination that one party is guilty of destroying a marriage causes bitterness and distress both to the parties and their children.'[218] The official shift in the law began with the enactment of the Divorce Reform Act 1969,[219] as it restructured the basis upon which an individual could obtain a divorce. Rather than shaping divorce around a specific matrimonial offence, the only ground of divorce became that the marriage must have

Journal of Law, Policy and the Family 218; Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33 Journal of Social Welfare and Family Law 3.

[216] *Hyman v Hyman* [1929] AC 601 (HL) 628-629.

[217] Notably, this movement aimed to reduce fault in both the contexts of divorce and financial remedies, as bad conduct impacted both the ability to divorce and the financial awards.

[218] Law Commission, *Reform on the Grounds of Divorce, The Field of Choice: Report on a Reference Under 3(1)(e) of the Law Commissions Act 1965* (Cmnd 3123, 1966) [27].

[219] It should be acknowledged that there were statutes enacted between 1857 and 1969, including legislation amending the 1857 Act in 1860, 1866, 1884, the Matrimonial Causes Act 1923, and the Matrimonial Causes Act 1937. See Christine Davies, 'Matrimonial Relief in English Law' in Ronald Graveson and Francis Crane, *A Century of Family Law: 1857-1957* (Sweet & Maxwell 1957) 319-322.

broken down irretrievably.[220] Furthermore, in order for the court to grant a decree nisi, one of five different 'facts' needed to support the application. Rather than solely relying on fault for divorce, this list of facts created three distinct philosophies: fault (three different options[221]), consent with two years' separation, and unilateral divorce with five years' separation.[222] Certainly, this demonstrated a significant development in divorce law, and would lay the foundations for subsequent reform. Yet, while fault played a diminished role in divorce law,[223] it remained crucial to ancillary relief cases.[224] In fact, Parliament included this in the Matrimonial Proceedings and Property Act (MPPA) 1970, such that it was the duty for the courts to have regard to the conduct of both parties when deciding how to use their statutory powers.[225]

The landmark case which removed the centrality of fault and conduct when determining financial provision orders was *Wachtel v Wachtel.*[226] Here, the Court of Appeal held that the blameworthiness of either the husband or wife to the breakdown of their marriage should not affect the order for financial provision, unless the conduct of one of the parties is both 'obvious and gross.'[227] Ormrod J reasoned that to punish a spouse for being 'guilty'

[220] Divorce Reform Act 1969, s 1.
[221] As per s 2(1)(a-c), these were, respectively: 'the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.'
[222] Joseph Jackson, 'Matrimonial Finance Consequent on Divorce: The English Structure' (1982) 20 Alberta Law Reivew 229, 232.
[223] Though this was not yet the reality in practice, the wording of the statute clearly suggested a diminishing role.
[224] For example, see Sir George Baker P in *Ackerman v Ackerman* [1971] 3 WLR 725 (PDA) 741, suggest that where a wife is partially responsible for the marital breakdown, the husband can claim up to a 25% discount from his maintenance payment. This decision, however, was rejected on appeal: *Ackerman v Ackerman* [1972] 2 WLR 1253 (CA).
[225] Matrimonial Proceedings and Property Act 1970, s 5(1).
[226] *Wachtel* (n 193).
[227] ibid 372 (Lord Denning MR).

of destroying the marriage failed to acknowledge the complexities of human relationships and that:

> '…shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality.'[228]

Furthermore, while the MPPA 1970 provided that conduct should be a consideration for the courts, there was nothing to suggest that this should be construed narrowly, rather than being interpreted broadly. Moreover, the statute did not prescribe that conduct has to reduce an award, but rather is simply another factor to consider—one which 'usually proves to be a marginal issue which exerts little effect on the ultimate result.'[229]

Beyond minimising the importance of fault in matrimonial proceedings, the MPPA 1970 (later consolidated in the MCA 1973) also made significant additions to the law. The statute provided an express objective for the courts, namely:

> '…to exercise those powers as to place the parties, so far as it is practicable and…just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'[230]

[228] *Wachtel v Wachtel* [1973] 2 WLR 84 (F) 90 (Ormrod J).
[229] ibid 90 (Ormrod J).
[230] MPPA 1970 (n 225) s 5(1); MCA (n 2) 25(1).

This was later commonly referred to as the 'minimal loss' principle.[231] However, this objective was heavily criticised for various reasons. Firstly, the 1980 Law Commission Report on the financial consequences of divorce highlighted the incompatibility between the lifelong commitment this objective promoted and the modern day reality of divorce.[232] The argument was that because divorce was no longer a rarity,[233] and that consequently a growing number of people were willing to terminate an unhappy marriage, the basis of an award should not be compensation for the breach of a lifelong marital contract.[234] Moreover, given that the ground of divorce is irretrievable breakdown rather than marital fault, the contractual analogy was thenceforth rendered inappropriate and outdated.[235] Finally, in the vast majority of cases, the objective to place the parties in the financial position they would have been in had the marriage not broken down was an unattainable goal. Given that upon marital breakdown there is the fundamental need of financing two homes rather than one,[236] 'in all but a very small percentage of cases the practical difficulties of achieving the result envisaged by the Act will be insuperable.'[237] For these many reasons, it was the firm recommendation of the Law Commission to remove this statutory objective. Accordingly, the Matrimonial and Family Proceedings Act 1984 abolished the minimal loss principle and removed it from section 25 of the MCA 1973.[238]

[231] John Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld & Nicolson 1984) 109.
[232] Law Commission (n 198) [31].
[233] Richard Leete, *Changing patterns of family formation and dissolution in England and Wales 1964-76* (Her Majesty's Stationery Office 1979) 82.
[234] Law Commission (n 198) [30].
[235] ibid [35].
[236] *Scott v Scott* [1978] 1 WLR 723 (CA) 727 (Cumming-Bruce LJ).
[237] *Wachtel* (n 228) 88 (Ormrod J).
[238] Matrimonial and Family Proceedings Act 1984, ss 3 and 48(2).

Conversely, the 'clean break' principle was introduced by the 1984 Act.[239] This provides that when the courts exercise their powers to make a financial provision order, it is their duty 'to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.'[240] There are many benefits to the clean break principle—such as enabling divorced parties to transition into leading independent lives—which allowed it to garner widespread support.[241] Naturally, it is desirable for the judicial process to minimise animosity and encourage the parties to move forward with their lives unhindered by the ending of their marriage.[242] However, there are limits to the principle's effectiveness. As Ormrod LJ opined, clean breaks are often not possible because the dissolution of marriage does not erase the relationship of a mother and father—two lives which are, at least to some degree, inevitably intertwined.[243] While this argument pertains to the parental obligations of divorced spouses rather than their financial circumstances, depending on the age of the children it may be very difficult to clearly separate these two factors—particularly with respect to housing and education. As a result, while achieving a clean break is desirable if possible,[244] the statute expressly provides that it 'is not intended to bring about an unfair result.'[245] Thus, while the purpose

[239] MCA (n 2) s 25A, inserted by MFPA 1984 (n 238) ss 3 and 48(2). Notably, the clean break principle had been recognised as 'an object of the modern law' since *Minton v Minton* [1979] AC 593 (HL) 608.
[240] MCA (n 2) s 25A(1).
[241] Law Commission, *The Financial Consequences of Divorce: The response to the Law Commission's Discussion Paper, and recommendations on the policy of the law* (Law Com No 112, 1981) [30]. See also Baroness Hale in *Miller; McFarlane* (n 7) [144]: 'the ultimate objective is to give each party an equal start on the road to independent living.'
[242] *Minton* (n 239) 608 (Lord Scarman).
[243] *Pearce v Pearce* (1980) 1 FLR 261 (CA) 266.
[244] *Miller; McFarlane* (n 7) 628 (submission by counsel: Jeremy Posnansky QC and Stephen Trowell).
[245] *Miller; McFarlane* (n 7) [38].

of the clean break principle is to terminate the financial ties of the parties, this should only be done where it is 'just and reasonable' to do so.[246]

The MCA 1973 continues to govern financial remedies law, and since the removal of the minimal loss principle and the addition of the clean break principle in 1984, the statute has remained virtually unchanged.[247] Yet, despite this legislative inertia, there has been substantial reform in relation to the objectives of the law over the past 20 years. Before discussing the details of this reform, it is important to question how and why this happened. While the courts are afforded a uniquely substantial amount of discretion when deciding financial remedies cases,[248] they are nevertheless bound to follow the fundamental directives set out by the statute. Beyond the clean break principle, within which there is a caveat that it must be applied only where it would be just and reasonable, there is little in the MCA 1973 by way of any express objectives. However, what the analysis of the historical background of financial remedies law has demonstrated is that the fundamental purpose of the law has remained fairly consistent—simply transitioning from reasonableness to fairness. As mentioned above, the MCA 1857 directed the courts to order a financial provision which was reasonable. When the judicial objective evolved to become fairness over the course of major statutory developments,[249] it could be argued that 'true' fairness was not attained until much more recent times.[250] However, it is

[246] MCA (n 2) s 25A(1).
[247] It is worth noting that the Matrimonial and Family Proceedings Act 1984, ss 3 and 48(2) also added to section 25(1) MCA that when the court is deciding on how to exercise their statutory powers, 'first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.' Importantly, while this is an important consideration, it is not the *paramount* consideration—the courts must still attempt 'to attain a financial result which is just as between husband and wife': *Suter v Suter and Jones* [1987] 3 WLR 9 (CA) 17 (Sir Roualeyn Cumming-Bruce).
[248] Chandler (n 11).
[249] *S v S* [1976] 3 WLR 775 (CA) 781 (Ormrod LJ).
[250] Since, for example, the House of Lords espoused equality and non-discrimination as pillars of the law: *White* (n 8).

arguable that the mirroring of financial provisions to a breach of contract was, *in the context of society at the time*, achieving a fair outcome.[251] Since then, it has been established that both the minimal loss and clean break principles are to be overridden where they would otherwise impede a court from reaching a just and reasonable result. Ostensibly, it is evident that the purpose of the law has become to achieve fairness between the parties.[252] Naturally, this raises the question: if the objective has simply evolved from reasonableness to fairness over the course of more than 150 years, how has the law been able to change beyond recognition? Put simply, the reason is because while the objective of fairness is constant, its meaning is fluid. What was fair 50 years ago is very different to what is fair today.[253] As Lord Nicholls stated:

> 'Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognise and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness.'[254]

[251] Fairness is an evolving concept. For example, 'even as recently as the 1980s and 1990s, "fairness" in legal terms could leave a homemaker, usually the wife, along with the children, with little property and barely enough to live on': Carrie Paechter, 'Concepts of Fairness in Marriage and Divorce' (2013) 54 Journal of Divorce and Remarriage 458, 467.
[252] *S v S* (n 249) 781 (Ormrod LJ).
[253] Lord Wilson (n 181) 7-8: 'In the course of one professional life-time in family law (although I believe that I must be one of the few family lawyers still working full-time after 50 years), its pre-occupations have changed out of all recognition.'
[254] *White* (n 8) [26].

Accordingly, in order to more accurately understand the purpose of the law today, it is necessary to investigate what considerations of fairness are present in modern judicial reasoning.

b) Meaning of fairness

i) Substantive sense of fairness

Clearly, the challenge is not determining whether a party is entitled to a fair division of the assets, rather the difficulty is determining what 'the requirements of fairness [are] in the particular case.'[255] As has been established earlier in this Chapter, *White v White* provided that fairness meant non-discrimination between the husband and wife and a drive towards equal sharing unless there are good reasons for departing from such equality.[256] Furthermore, it is often an element of fairness to meet the needs of the parties.[257] However, in the particular context of prenuptial agreements, fairness may prioritise party autonomy over needs.[258] Nonetheless, it can be deduced that, generally, the core objectives subsumed within fairness include meeting the basic needs of both parties, the absence of discrimination, and equal division unless there are good reasons for departing from this.

In order to attain these objectives, it may be contended that the courts should have as much discretion as they need. This wide margin of discretion enables the courts to pursue individual justice because, as Lord Nicholls stated, 'fairness requires the court to take into account all the circumstances of the case.'[259] With over 100,000 divorces of different-sex

[255] *Miller; McFarlane* (n 7) [9].
[256] *White* (n 8) [25].
[257] *Miller; McFarlane* (n 7) [10].
[258] *Radmacher* (n 111) [118]-[120] (Lord Phillips).
[259] *White* (n 8) [24].

couples in England and Wales every year,[260] it is evidently of great importance to ensure that the law protects both spouses' entitlement to a fair portion of the assets.[261] Naturally, given that the outcomes of financial remedies cases 'are highly fact dependant,'[262] it is logical to conclude that the objective of fairness demands that wide discretionary powers are afforded to the judiciary. However, whilst judicial discretion lends itself well to achieving the objectives of fairness noted above (needs, equality, and non-discrimination), this is a rather limited understanding of fairness.

ii) Procedural sense of fairness

As provided in *Miller/McFarlane*, fairness does not simply aim to seek individualised justice, but also purports to maintain that 'like cases should be treated alike.'[263] Put simply, fairness requires the courts to interpret the law consistently.[264] Accordingly, whilst it is important for the courts to consider the specific circumstances of each case, it is also necessary for them to apply the law in the broader context of the past and present case law. Beyond being 'widely accepted as a core element of egalitarian moral and social philosophy,'[265] a degree of legal consistency is crucial for practitioners and the affected parties to gain a greater sense of certainty and predictability—a consideration which leads to a distinct element of 'fairness'.

[260] Office for National Statistics, 'Divorces in England and Wales: 2017' (National Statistics 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017> accessed 29 April 2019.
[261] Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 133.
[262] *North v North* [2007] EWCA Civ 760, [2008] 1 FLR 158 [27].
[263] *Miller; McFarlane* (n 7) [6] (Lord Nicholls).
[264] Karen Steyn, 'Consistency: A Principle of Public Law?' (1997) 2 Judicial Review 22, 22.
[265] John Coons, 'Consistency' (1987) 75 California Law Review 59, 59.

While this paper has analysed fairness in its substantive sense, it is necessary to consider whether there are procedural aspects which can be attached to this overriding purpose. Part 1 of The Family Procedure Rules 2010 provides that the overriding objective of this procedural code is to enable 'the court to deal with cases justly.'[266] Notably, this should not be interpreted as a legislative pronouncement of the overriding objective of financial remedies law. Rather, this statutory instrument only mandates the court to give effect to this objective when applying or interpreting the rules within this procedural code.[267] Nonetheless, this is greatly relevant to the meaning of fairness in the context of financial remedies, as the procedural code prescribes both the 'procedure for applications in matrimonial and civil partnership proceedings' and the rules for 'applications for a financial remedy.'[268] In dealing with a case justly, the court must, insofar as is practicable, ensure that it is handled expeditiously, proportionately, cost effectively, and to place the parties on an equal footing.[269] Furthermore, the court has a duty in facilitating the overriding objective to exercise active case management,[270] which includes encouraging cooperation between the parties, helping the parties to settle the case, and ensuring that the case reaches its conclusion quickly and efficiently.[271] Therefore, in the context of financial remedy orders, it is clear that there are important procedural aspects of the overriding purpose of fairness.

In sum, while fairness is the overriding purpose of financial remedies law, it has multiple elements. Substantively, it pursues individualised justice through non-discrimination and

[266] FPR 2010 (n 151) pt 1.1(1).
[267] ibid pt 1.2(a)-(b).
[268] ibid pts 7, 9.
[269] ibid pt 1.1(2).
[270] ibid pt 1.4(1).
[271] ibid pt 1.4(2).

the needs of the parties, and suggests that the courts should consider the facts of each case and exercise their discretion to reach a fair outcome. Yet, fairness also demands for a degree of consistency—for like cases to be treated alike. Procedurally, the courts have a duty to deal with cases justly, which includes minimising the costs of proceedings for the parties and resolving disputes expeditiously. Many of these aspects of fairness seem to clash with each other. Indeed, while individualised justice may best be served through wide judicial discretion, this may come at the expense of legal certainty.[272] Alternatively, an overly rigid legal framework may enhance the consistency and predictability of outcomes, but result in widespread unfairness.[273] It is, therefore, crucial to determine whether these competing objectives (which are all subsumed under the term fairness) can be harmonised, and if not, how they should be prioritised.

The Relationship between the Competing Objectives

In order to determine where the law on financial remedies should be placed on the rules-discretion spectrum, it is necessary to understand the relationship between the multiple objectives subsumed within the overriding purpose of fairness. Firstly, this section will evaluate whether these objectives are *actually* incompatible, and if so, decipher the reasons for this. It will approach this by examining whether a particular objective could be pursued absolutely without abandoning the other objectives. This section will then move on to assess how the multiple objectives should be balanced. This will involve a detailed discussion of whether any factors should be prioritised, rarely derogated from, or

[272] Jackson (n 17) 233.
[273] ibid 233.

dispensed with when necessary. Ultimately, this Chapter will conclude with a model to represent the relative value of each objective—the aim of which is to direct the analysis of the optimal point on the rules-discretion spectrum in the subsequent and final section of this Chapter.

a) Can the competing objectives be harmonised?

In an attempt to reconcile these multiple objectives, it is encouraging that they do in fact share commonalities. Most obviously, they inherently share the same fundamental purpose. Whether it be non-discrimination or legal certainty, both of their virtues lie in their contribution to fairness in the application of the law. Accordingly, it was the view of Geoff Hoon, parliamentary secretary to the Lord Chancellor's Office, that the solution for an optimal law 'must be to deliver a greater sense of certainty for the parties, without preventing the courts from ensuring that the outcome of cases is, as far as possible, fair and just to all concerned.'[274] This suggests that an optimally constructed law on financial remedies requires a symbiotic relationship between substantive and procedural elements of fairness. However, it is important to highlight the caveat that was included in Hoon's statement: certainty should not, '*as far as possible'*, prevent the courts from reaching fair and just outcomes. This demonstrates why, fundamentally, the objectives of procedural fairness and substantive fairness will inevitably clash. One cannot be pursued without compromising the other. The reason for this is that the regulatory framework required to most effectively advance procedural fairness is rule-based, whereas substantive fairness is most efficaciously promoted through a discretionary legal system.[275] As discussed in

[274] Geoff Hoon, 'Speech to the Solicitors' Family Law Association' in *Cowan* (n 168) [26] (Thorpe LJ).
[275] Jackson (n 17) 233.

Chapter One, a legal system which relies solely on discretion would be problematic and undesirable, just as would an entirely rule-based system. Accordingly, a law whose aim is to achieve individualised justice absolutely would come at the expense of other vital objectives subsumed within fairness. Moreover, tailoring a legal system to solely focus on being sufficiently flexible to adjust according to the individual circumstances of each case is a futile mission, as even within the widely discretionary jurisdiction of section 25 MCA, it is recognised that 'no family judge in exercising this jurisdiction can achieve perfection.'[276] As a result, given that perfect 'justice' is both impossible in practice and detrimental to the other objectives, 'a willingness to entertain some trade-off between simplicity and aspiration is not only the counsel of prudence, it is also a precondition for justice in the broad run of cases.'[277] Equally, an overly structured regime which aims to uncompromisingly achieve legal consistency and certainty would adversely affect the attainability of reaching a substantively fair outcome. For example, it has been suggested that 'it matters less [which] rules are chosen than that whatever is done is clear and applied with consistency, for that at least will be fair.'[278] However, the obvious flaw with this statement is that it would be plainly unjust to consistently apply a discriminatory law. Consistent application of the law contributes to fairness, but it is not the only factor when assessing whether a law is just. Accordingly, to pursue both strands of fairness—certainty and fair outcomes—the law requires a 'resolution of [these] two objectives, each

[276] *M v M* [2003] EWHC (F) 2410 [28] (Bennett J).
[277] Richard Epstein, 'Settlement and Litigation: Of Vices Individual and Institutional' (1984) 30 University of Chicago Law School Record 2, 5.
[278] Ira Ellman, 'Why Making Family Law is Hard' (2003) 35 Arizona State Law Journal 699, 707.

intrinsically desirable, but perhaps mutually inconsistent.'[279] In other words, an appropriate balance is required.

b) How should the competing objectives be balanced?

It has been proven that a compromise is required because it would be undesirable to pursue any of the objectives underpinning the overreaching objective of fairness absolutely, as that involves the abandonment of other important policy aims. However, while balance is necessary, it must be determined how the relevant objectives should be weighed relative to each other. For example, whilst uncompromisingly pursuing individualised justice has been demonstrated to be detrimental, should it be prioritised over legal certainty? In approaching this question, this thesis will discuss three important objectives of financial remedies law subsumed within fairness (as established above), and evaluate whether prioritising individualised justice is the best means of pursuing these three objectives, or if indeed favouring certainty in the balance is more effective. The three objectives, which shall be discussed in turn, are: efficiency, procedural fairness (in particular, legal consistency), and the absence of discrimination.

i) Efficiency

Firstly, it is necessary to elaborate on the meaning of this term. Beyond simply resolving a case quickly, it also encompasses the benefits this provides, including saving expenses, minimising animosity between the parties, and enabling the parties to restructure their lives apart from one another. This is supported by the 'Supporting Families' consultation document, which expressed as a policy objective the importance of reaching an

[279] Law Commission (n 241) [19].

'agreement as amicably, quickly and inexpensively as possible.'[280] Whilst it may be argued that the focus of lawmakers' attention in relation to this objective should be pushing methods which promote greater efficiency in the courts, the more effective approach is to concentrate on the role of negotiations outside of the courtroom. By avoiding contested litigation and settling the issues privately, both parties unquestionably benefit from saving costs in legal fees, resolving matters more quickly, and ending the financial remedy proceedings in agreement.[281] Given the central role that negotiation has in the efficiency of financial remedy cases, it must be considered whether this is most effectively encouraged through a legal framework which prioritises certainty or individualised justice.

At first glance, it would appear that with a greater degree of legal certainty, the parties in divorce cases would be more likely to settle their dispute. As Brake contends, a system based on fixed rules 'provides a manner of property division that is inexpensive, predictable, and able to minimize the need for litigation.'[282] By allowing the parties to be aware of and understand their rights under the law, it removes the scope for disagreement and influences them to accept the proposed outcome. This effect has been demonstrated in California through their Family Law Act of 1969, which introduced no-fault divorce and a requirement of equal division of community property.[283] Research studies have

[280] Ministerial Group on the Family, *Supporting Families: A Consultation Document* (Home Office 1998) [4.44].
[281] Howard Erlanger, Elizabeth Chambliss and Marygold Melli, 'Participation and Flexibility in Informal Processes: Cautions from the Divorce Context' (1987) 21 Law & Society Review 585, 589-590; Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950.
[282] Stephen Brake, 'Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act' (1982) 23 Boston College Law Review 761, 778.
[283] Chapter 1608 of the Statutes of California 1969, [4507-4508], [4800].

shown that, as a result of this reform, divorcing couples in California have demonstrated 'increasing propensity to divide their property out of court.'[284] It is argued that by 'allowing divorcing couples and their attorneys to predict the type of settlement they can expect in court,' the clarity of the legal requirement—equal sharing of community property—has facilitated negotiation and agreements on financial provisions outside of court.[285] Following this premise, a legal framework which prioritises individualised justice, and therefore diminishes legal certainty, would have an adverse effect on the promotion of negotiations and efficiency. As Rheinstein posits, a lack of predictability inhibits agreements on property issues, as the parties 'need a firm basis upon which to negotiate.'[286] It is argued that this degree of certitude is essential to reaching settlements outside of court because it allows the parties to understand 'exactly what he or she stands to gain by proceeding to court.'[287]

However, it is precisely this uncertainty of the outcome of court proceedings which leads Harris to submit that unpredictability facilitates settlements and, therefore, 'increased predictability might in some circumstances provoke litigation.'[288] In support of these assertions, Harris references two research studies. Firstly, he submitted that a 2003 study[289] suggested that uncertainty regarding a court's decision if a case went to trial 'may

[284] Ruth Dixon and Lenore Weitzman, 'Evaluating the Impact of No-Fault Divorce in California' (1980) 29 Family Relations 297, 303. Specifically, 'the percentage of petitioners referring to property or debts to be divided by the court did drop significantly from 1968 to 1972, from 58 to 31% in San Francisco and from 65 to 49% in Los Angeles, holding at 44% in 1977'.
[285] ibid 302.
[286] Max Rheinstein, 'Division of Marital Property' (1975) 12 Willamette Law Journal 413, 433.
[287] Brake (n 282) 776.
[288] Peter Harris, 'Financial orders after divorce: a category error?' [2012] Family Law 860, 860. See also Robert George, Peter Harris, and Jonathan Herring, 'Pre-nuptial Agreements: For Better or Worse?' [2009] Family Law 934, 936.
[289] Tom Baker, Alon Harel, and Tamar Kugler, 'The Virtues of Uncertainty in Law: An Experimental Approach' (2004) 89 Iowa Law Review 443.

be a significant deterrence to people contemplating breaches of the civil law because it hinders them in calculating the costs and the benefits and in managing the risks.'[290] However, beyond the fact that this study inquired into uncertainty in the context of criminal and tort law,[291] the circumstances of deterring wrongful (criminal or civil) behaviour are far removed from negotiating financial remedies in the context of divorce. Accordingly, little weight should be afforded to this authority. The second research study cited is a 2006 article, wherein it is argued that, in the context of child support, greater uncertainty as to the judge's decision increases the incentive for risk-averse parents to cooperate outside of court.[292] Harris rationalises this on the basis that where the 'court may do anything,' there is good reason for the parties to gain 'some control over the risks and their management through negotiating rather than litigating.'[293] This is a forceful argument, and is particularly compelling when applied to the 'everyday' case where few assets are owned by either party and thus available for distribution.[294] Under these circumstances, parties are more likely to be risk averse, as an unfavourable outcome in court could be, in financial terms, incredibly damaging. However, there are two points to be noted with respect to this study's findings. Firstly, though a subtle difference, the conclusions were made in relation to child support, not the division of assets upon divorce. Evidently, the dynamics involved in deciding to negotiate are different when it regards dividing property with a former spouse as opposed to supporting a child.[295] Beyond this

[290] Peter Harris, 'The *Miller* Paradoxes' [2008] Family Law 1096, 1100.
[291] Baker, Harel, and Kugler (n 289) 468.
[292] Bruno Deffains and Eric Langlais, 'Incentives to cooperate and the discretionary power of courts in divorce law' (2006) 4 Review of Economics of the Household 423, 433.
[293] Harris (n 290) 1100.
[294] Jonathan Herring, Rebecca Probert, and Stephen Gilmore, *Great Debates in Family Law* (2nd edn, Palgrave 2015) 248.
[295] Mary Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1985-1986) 60 Tulane Law Review 1165, 1178.

point, it should also be noted that the article concluded that in enhancing cooperation in between parents, their 'recommendation should be to promote indicative guidelines and not to impose restrictive calculus.'[296] Notably, while this conclusion suggests that compelling a judge to reach a particular decision might not facilitate negotiation, there must nonetheless be a framework which recommends the typical outcome.[297] Accordingly, it cannot be affirmatively deduced that prioritising individualised justice facilitates negotiation.

Lastly, it is worth discussing the implications of the 'efficiency' debate in relation to vulnerable individuals. Whilst it is evidently a clear policy objective to promote and increase the number of cases resolved outside of court, it should be considered how this would impact divorcing couples. In particular, it is submitted that a greater degree of certainty is central to the protection of vulnerable parties during the negotiation process. Naturally, where legal standards are imprecise in order to create the flexibility necessary for individualised justice, it becomes imperative that both parties seek legal advice to allow them to understand, roughly, what the outcome will be if they enter court proceedings.[298] However, this creates two problems: an imbalance in negotiating power and a reduction in efficiency. Firstly, as Glendon argues, where it is difficult to provide clear advice as to how a case will likely conclude, 'the economically stronger party gains negotiating leverage from the superior ability to prolong negotiation, to engage in expensive pre-trial discovery, and to use preliminary court appearances for harassment.'[299] Whilst the court procedure rules and the judge's case management can

[296] Deffains and Langlais (n 292) 438.
[297] Pound (n 122) 927.
[298] Mnookin and Kornhauser (n 281) 979.
[299] Glendon (n 295) 1170.

'counteract the additional bargaining power enjoyed by whichever party has no pressing need to bring matters to a conclusion,'[300] this protection for the weaker party does not exist when bargaining in the shadow of the law. Accordingly, if the legal standards are unclear, this provides the financially (or emotionally) more powerful spouse an advantage, as there will be more scope for bargaining on a wider range of outcomes, thereby enabling the stronger party to apply strategy and tactics as part of the negotiations.[301] Furthermore, it should be recognised that the centrality of power in negotiations inevitably has an impact of gender inequality, as 'women typically hold less power…in marital relationships than men.'[302] Thompson notes that stereotypes and tropes about women can weaken the wife's bargaining power, as she will be perceived as 'an undeserving gold-digger or parasitic alimony drone if she asks for more money than her spouse is willing to part with.'[303] As mentioned above, the second issue with vague legal standards in relation to negotiations is the reduction in efficiency. It would be ideal for parties in financial remedy cases to receive legal advice in order to, at the very least, 'learn what his bargaining chips are.'[304] Yet, the reality is that, as a result of legal aid cuts in 2012,[305] the number of cases involving litigants in person have dramatically increased.[306] Statistics suggest that in 36% of private law applications neither party was represented,[307]

[300] Gwynn Davis and others, 'Ancillary Relief Outcomes' [2000] Child and Family Law Quarterly 43, 44.
[301] Mnookin and Kornhauser (n 281) 979-980.
[302] Tess Wilkinson-Ryan and Deborah Small, 'Negotiating Divorce: Gender and the Behavioural Economics of Divorce Bargaining' (2008) 26 Law & Inequality 109, 120.
[303] Sharon Thompson, 'A millstone around the neck? Stereotypes about wives and myths about divorce' (2019) 70 Northern Ireland Legal Quarterly 179, 184.
[304] Mnookin and Kornhauser (n 281) 979.
[305] Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.
[306] Gabrielle Grimwood, 'Litigants in person: the rise of the self-represented litigant in civil and family cases' (House of Commons Library Briefing Paper No 07113, 14 January 2016) 6.
[307] Monidipa Fouzder, 'Litigant-in-person figures expose family courts crisis' (The Law Society Gazette, 29 September 2017) <https://www.lawgazette.co.uk/law/litigant-in-person-figures-expose-family-courts-crisis/5062993.article> accessed 6 May 2019.

and in 80% of all family court cases at least one party did not have legal representation.[308] With respect to the discussion of efficiency, the main harmful effect of these legal aid cuts is that, as Cox notes, 'a litigant in person will usually slow down the progress of a hearing leading to the case overrunning and increased costs.'[309] This is understandable, as these litigants are often new to legal proceedings and may be 'uninformed participants in the process.'[310] Nonetheless, the unfortunate reality is that the increasing number of litigants in person will have negative consequences to the efficiency of financial remedy cases. This is supported by psychological research which has consistently found that individuals will consider the legal arguments which favour their position as being most compelling, and that the negotiation process may often be hindered by the 'self-serving biases' of parties to a case.[311] As a result, the Law Commission has taken the view that the present discretionary system is not 'sustainable for the future,' as the reduction of legal aid and the improbability of benefitting from adjudication means that 'individualised fairness is in any event largely unavailable.'[312] Accordingly, in order to facilitate both the negotiation and court process for the growing number of litigants in person, having a greater degree of legal certainty and clarity would be preferable.

In conclusion, when considered in theory, the arguments for certainty and for individualised justice are evenly balanced. However, when considering the additional

[308] Amyas Morse, 'Implementing Reforms to Civil Legal Aid' (National Audit Office, HC 784, 20 November 2014) 15.
[309] Cox (n 23).
[310] Roisin O'Shea, 'Judicial Separation and Divorce in the Circuit Court' (PhD thesis, Waterford Institute of Technology 2013) 206.
[311] Linda Babcock and George Loewenstein, 'Explaining Bargaining Impasse: The Role of Self-Serving Biases' (1997) 11 The Journal of Economic Perspectives 109, 115.
[312] Law Commission, *Matrimonial, Property, Needs and Agreements – A Supplementary Consultation Paper* (Law Com CP No 208, 2012) [4.90].

real-life factors of the imbalance of bargaining power (typically) along gender lines and the harmful consequences of drastic legal aid cuts, this paper submits that, in the interests of efficiency, certainty should be, to a limited extent, prioritised over individualised justice.

ii) Procedural fairness (legal consistency)

Clearly, if 'fairness' was narrowly defined to simply mean achieving a just result in each case by considering their specific circumstances, a model prioritising individualised justice would be best suited for this. Rather than engaging in a tautological discussion, this section will evaluate the strengths and weaknesses of prioritising certainty or individualised justice in relation to a distinct element of what makes an outcome procedurally fair: legal consistency (like cases should be treated alike).

To begin, it would seem natural for a greater emphasis on certainty to enhance the legal consistency in judicial decisions. Schneider reasons that clear rules make it more probable that like cases will be decided alike, not only because they minimise the scope for the judge's opinion to influence the outcome, but also because they may 'serve as record-keeping devices, so that decision-makers can more easily coordinate their rulings over time and among themselves.'[313] As a result, this ameliorates the prospect of judicial reasoning and decisions 'to develop an internal coherence.'[314] By contrast, it may be argued that where legal standards are vague in order to serve individualised justice, it follows that 'decisions will have to continue to be made on a pragmatic, and individual

[313] Carl Schneider, 'The Tension Between Rules and Discretion in Family Law: A Report and Reflection' (1993) 27 Family Law Quarterly 229, 440.
[314] Glendon (n 295) 1178.

basis.'[315] As a result, many commentators have attributed the inconsistencies experienced in the present system to the lack of clear legal guidance.[316] Accordingly, O'Sullivan contends that such a system fails to achieve fairness in the broad sense, as consistency is a fundamental part of justice.[317] However, the powerful rebuttal to this position is that certainty, by failing to take into account all of the particular facts of an individual case, would in fact be counterproductive to the efforts of securing legal consistency. As Harris states, the issue with 'strict rules' is that they will result in nearly identical cases being treated entirely differently due to 'an insignificant difference between the cases.'[318] He highlights this with the following hypothetical scenario:

> 'Compare two cases identical in every way, except that by chance alone, in one case, the asset is acquired by the husband-to-be the day before the marriage and, in the other, by the husband the day after the marriage. In the first case, applying the strict rule [referring to Scottish law], the non-owner spouse would have no claim in respect of the asset, in the second case she would.'[319]

Beyond the issue that similar cases will be treated wholly differently because of what should be an inconsequential difference in fact, the broad-brush nature of strict rules means that seemingly divergent cases may be grouped together.[320] In this sense, different cases may not be treated differently. These are compelling arguments which undoubtedly

[315] *McFarlane v McFarlane; Parlour v Parlour* [2004] EWCA Civ 872, [2004] 3 WLR 1480 [118] (Latham LJ).
[316] Jackson (n 17) 231.
[317] Kathryn O'Sullivan, 'Rethinking ancillary relief on divorce in Ireland: the challenges and opportunities' (2016) 36 Legal Studies 111, 115.
[318] Harris (n 290) 1100.
[319] ibid 1100.
[320] Schneider (n 313) 440.

weaken the position of certainty in this particular debate.[321] Accordingly, Harris concludes that the certainty acquired through strict rules would not enhance the legal consistency necessary for fairness, as it would inevitably produces arbitrary decisions.[322]

In response to this criticism of certainty, it may be posited that while the difference used in Harris' example is a subtle one, lines must be drawn to create a workable framework, and that couples should be aware of the law and act responsibly.[323] Moreover, where couples find that the default rules do not appropriately reflect their relationship, they have the opportunity to contract out of them through a marital property agreement.[324] However, it is important to appreciate the unique context of family law. For most couples, they will never consider the legal implications of divorce while they are still married—even less so before their marriage. While uncompromisingly applying a standardised rule in commercial law is welcomed,[325] in family law it would result in manifest unfairness and overlook the complex (and at times irrational) behavioural dynamics of interpersonal relationships.[326]

The stronger reply to Harris' argument is that a system which is overly flexible would suffer the same fate. As submitted above, vague legal standards will result in a variance

[321] See Lord Wilson (n 181), where he discusses the historical shortcomings of formulaic approaches (e.g. the ecclesiastical court's one-fifth rule, Sir George Baker's 25% reduction rule in *Ackerman*, and the *Wachtel* one-third rule) through their total arbitrariness and inefficacy in reflecting a fair result.
[322] Harris (n 290) 1100.
[323] Moreover, it may be possible to create a rule that provides discretion to dispense with an arbitrary time period.
[324] Michael Trebilcock and Rosemin Keshvani, 'The Role of Private Ordering in Family Law: A Law and Economics Perspective' (1991) 41 The University of Toronto Law Journal 533, 556.
[325] In commercial law, 'the sanctity of contract is a vital principle': Peter Harris, Robert George, and Jonathan Herring, 'With this Ring I Thee Wed (Terms and Conditions Apply)' [2011] Family Law 367, 372.
[326] This sentiment has been extensively expressed in relation to prenuptial agreements. For example, see Lady Hale's judgment at [131] in *Radmacher* (n 111).

in judicial determination on the issue, which would lead to inconsistency. However, this does not necessarily mean that one or both decisions are not fair. As Ellman notes, for most decisions reached in this area, there will often be a range of 'alternative [outcomes] with equal or nearly equal claims to being fair.'[327] However, whilst this variability is inherent to a legal framework underpinned by 'fairness', it is submitted that 'the fact that reasonable judges can differ on how to decide identical cases does not mean it is a good idea that they do.'[328] For if they are consistently inconsistent, the law would fall into the same trap that it did under overly rigid rules: arbitrariness. Rather than the rules themselves being arbitrary, it would result from the random selection of which judge hears the case.

More crucially, beyond dissatisfaction with outcomes in cases, a troubling concern is where experience and trends reveal 'a considerable difference in approach and outcome depending on the judge who hears the case.'[329] Where judges and regions gain a reputation for deciding cases in a particular way, different from other courts across the country, this raises the problem the Law Commission for England and Wales has dubbed 'forum shopping.'[330] This, they explain, is where 'practitioners choose particular courts in order to get the result their clients want.'[331] Given that lawyers will try to best serve the interests of their client, the fact that practitioners may be taking advantage of judicial biases is unsurprising. A Resolution survey revealed that the majority of solicitors who responded

[327] Ellman (n 278) 707.
[328] ibid 707.
[329] Gerard Durcan, 'Reimagining the Family Court System' (Consultative Seminar on Family Law Courts, 6 July 2013) 12 <http://www.justice.ie/en/JELR/Mr.%20Gerard%20Durcan,%20S.C..pdf/Files/Mr.%20Gerard%20Durcan,%20S.C..pdf> accessed 16 April 2019.
[330] Law Commission (n 30) [2.49].
[331] ibid [2.49].

agreed that 'they had issued proceedings in a certain court centre or area of the country because they believed the result would be more favourable for their client than issuing elsewhere.'[332] This has also formed part of the substantial criticism of the extremely discretionary Irish law on financial remedies.[333] Practitioners have described the stressful and incomprehensible daily routine, whereby the scheduling of a case will either bring relief or concern 'depending on whether they act for the husband or the wife and see which judge is sitting for their case.'[334] This concern is founded in the reality of their professional experience, and has been buttressed by academic findings which conclude that the financial provision 'may vary quite substantially depending on how the case is scheduled.'[335] The existence of practitioners exploiting these judicial biases, it seems, can be at least in theory accepted by Harris. In a separate piece (co-authored by George and Herring) discussing the Supreme Court decision on prenuptial agreements,[336] Harris deems it relevant to note the backgrounds (gender and practice area specialisms) of the Justices in the majority and contrasts them with the minority, clearly implying the potentiality of personal biases to have influenced their decision.[337] Raising this subject was entirely justifiable, as in that case, Lady Hale—the only Justice dissenting from the majority judgment to afford greater weight to prenuptial agreements—recognised that 'there is a gender dimension to the issue which some may think ill-suited to decision by a

[332] Law Commission (n 312) [3.37].
[333] Family Law (Divorce) Act 1996, s 20(1): 'In deciding whether to make an order…and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists…'
[334] Muriel Walls, 'Meaningful change in our family courts – meeting the needs of the people who use them' (Consultative Seminar on Family Law Court, 6 July 2013) 5 <http://docplayer.net/7283155-Consultative-seminar-on-family-law-courts-6-th-july-2013.html> accessed 29 April 2019.
[335] O'Sullivan (n 317) 115.
[336] *Radmacher* (n 111).
[337] Harris, George, and Herring (n 325) 372.

court consisting of eight men and one woman.'[338] This appears to evidence the claim that judicial biases can, and do, exist.[339] Ostensibly, while there is a strong case in favour of individualised justice to contribute to legal consistency, the arbitrariness argument used to attack certainty appears to be a double-edged sword.

As a concluding remark, it should be reiterated that from the outset, it was conceded that a legal system which prioritises individualised justice would evidently best serve the substantive branch of fairness. However, this section has argued that in terms of achieving a procedurally fair outcome, the benefits of certainty with respect to consistency outweigh those of individualised justice, but only marginally.

iii) Absence of discrimination

Thirdly, this thesis will briefly consider the impact that prioritising either certainty or individualised justice would have on the levels of discrimination. It may be reasoned that if the relevant rules are set at a standard which reflects the marriage as an equal partnership,[340] this could guarantee the absence of discrimination. This is the view that Chan takes, positing that the gender imbalance pervasive in traditional marriages is best remedied upon divorce through 'a presumption of equal sharing.'[341] Given that women are generally the weaker economic party through assuming responsibility for numerous

[338] *Radmacher* (n 111) [137].
[339] See Erika Rackley, 'First Woman President of the UK Supreme Court, Brenda Hale, 2017' in Erika Rackley and Rosemary Auchmunty (eds), *Women's Legal Landmarks: Celebrating the History of Women and the Law in the UK and Ireland* (Hart Publishing 2019) 648: 'Unlike many other women judges, who dismiss their gender as 'irrelevant', Hale has been highly conscious of her position as, the (then) only woman on the Supreme Court.'
[340] As underpinned by Lord Nicholls in *White* (n 8).
[341] Winnie Chan, 'Cohabitation, civil partnership, marriage and the equal sharing principle' (2013) 33 Legal Studies 46, 61.

unquantifiable non-economic contributions to the family unit,[342] having a clear rule of equal sharing could moderate this disparity.[343] However, this position has been heavily criticised, with commentators submitting that a strict equal division rule would have the effect of 'impoverishing women, and not to equalise the historical gender divide in the home.'[344] This, Hale opines, is because where there is a large discrepancy between the earning capacity of the husband and wife, an equal division of the matrimonial property would place the homemaker in a position of significant economic disadvantage.[345] It has been argued from a feminist perspective that providing more than an equal portion of the marital assets would 'encourage women to remain economically dependent and families to remain patriarchal.'[346] Yet, empirical data suggests that a strict rule of equal division of marital assets may perpetuate discrimination against women,[347] as has been demonstrated in California. Studies conducted in the late 1980s and 1990s indicated that the economic status of women in Los Angeles dropped 33%,[348] compared to a 10% increase for men.[349]

[342] Jacqueline Scott and Elizabeth Clery, 'Gender Roles' in John Curtice and others (eds), *British Social Attitudes* (30th edn, National Centre for Social Research 2013) 115.
[343] Chan (n 341) 61.
[344] Crowley (n 162) 391.
[345] Brenda Hale (n 215) 9; Sharon Thompson, 'Submission of Written Evidence on Divorce (Financial Provision) Bill 2017-2019' (2018) [5] <http://orca.cf.ac.uk/111244/1/Dr%20Sharon%20Thompson%20Written%20Evidence%20on%20the%20Divorce%20%28Financial%20Provision%29%20Bill.pdf> accessed July 1 2019.
[346] Barbara Risman, 'Reviewed Work: The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America by Lenore J. Weitzman' (1990) 4 Gender and Society 105, 107. Here, she advocates against including individual career assets as marital property.
[347] Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (The University of Chicago Press 1991) 179.
[348] Saul Hoffman and Greg Duncan, 'What Are the Economic Consequences of Divorce?' (1988) 25 Demography 641, 643.
[349] Richard Peterson, 'A Re-Evaluation of the Economic Consequences of Divorce' (1996) 61 American Sociological Review 528, 532.

Interestingly, the statistics for the long term economic impact of divorce in the England and Wales—a jurisdiction which ostensibly prioritises individualised justice—would appear not to be any more favourable to women. According to a 2009 publication, it is claimed that 'following divorce, the income of men increases by about 23%, while that of women falls substantially by 31%.'[350] Notably, this study includes divorces which were decided post-*White*—a case which declared the importance of non-discrimination between the homemaker and breadwinner. On the basis of these comparative statistics, the experience of these two jurisdictions demonstrates less of a difference in their respective levels of discriminatory outcomes than expected. Therefore, it is submitted that rather than the priorities of the financial remedies law being the cause for discriminatory consequences for women after divorce, the root of the issue can likely be attributed to gender roles and the traditional division of labour which, while in the decline, continues to persist in modern society. Evidently, this is a subject which spans far beyond the scope of this paper. Accordingly, for the purposes of this section, it can be concluded that prioritising either certainty or individualised justice within the specific law relating to financial remedy orders will have relatively little impact on the levels of discrimination present in the long-term economic consequences of divorce. In aiming to reduce discrimination from the law, it has been demonstrated that neither certainty nor individualised justice provide strong justifications to claim supremacy.

[350] Hayley Fisher and Hamish Low, 'Who wins, who loses and who recovers from divorce?' in Jo Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-disciplinary Study* (Hart Publishing 2009) 228.

iv) Ideal balance of competing objectives

The discussion above has demonstrated that the competing objectives of certainty and individualised justice are both pursued when attempting to achieve the overriding purpose of fairness in the law relating to financial remedy orders. However, in doing so, they inevitably clash and promote certain interests at the expense of others. For example, it was concluded that certainty was marginally more effective in promoting the efficiency of the legal system, particularly in light of the current state of a lack of legal representation for litigants in family law cases. Furthermore, after defending the 'arbitrariness' attack, certainty was also held to be slightly more important for ensuring consistency in the application of the law, as it restricts the scope for diverging interpretations of the applicable legal principles. By contrast, prioritising individualised justice was considered to be obviously more effective in securing substantively fair outcomes, and equally as important as certainty for the protection against discrimination. It has also been demonstrated that different jurisdictions disagree on the relative value that prioritising certainty and individualised justice provide to the law on financial remedies. Whilst Ireland clearly places significantly more weight on individualised justice, California has been shown to prioritise certainty through its strict rules.[351] The question, therefore, is how should these competing objectives be prioritised or balanced in order to create an ideal legal framework?

It is contended that the law on financial remedies should establish a clearly balanced approach, with a slight prioritisation of individualised justice. Plainly, the analysis of

[351] It should be noted that, given its relevance, Scotland's approach will be examined in Chapter Four.

efficiency, consistency, and substantive fairness demonstrates that the competing objectives are almost equally able to present compelling justifications for being prioritised over the other. The primary reason for (slightly) preferring individualised justice is because, while family law serves a wide range of interests,[352] ultimately it is traditionally recognised that the crux of financial remedies cases is resolving issues between individuals.[353] Naturally, the main priority of divorced spouses when entering legal proceedings is to not only receive a fair decision, but also for the judge to appreciate the specific facts of their case which reflects the unique relationship they shared. Furthermore, the modern trends towards private ordering,[354] such as the reform proposals for no-fault divorce,[355] suggest that society is placing greater value on the personalisation of the law in order to accommodate their particular needs. As Dewar notes, 'family law has become more responsive to the needs of those it affects and is consistent with the view that private law in general should develop so as to permit 'many autonomies' rather than operating in a traditional 'top-down' way, by imposing one set of values and ideas on everyone.'[356] Notably, it has been asserted that there are extremely high rates of dissatisfaction with litigation regarding financial remedies, and that this is attributable to the extent of discretion afforded to judges.[357] Instead, litigants may be more satisfied with rules as it is easier to perceive fair and equal treatment.[358] However, to condemn discretion as being

[352] Alison Diduck, 'What is Family Law For?' (2011) 64 Current Legal Problems 287, 289.
[353] Anne Alstott, 'Private Tragedies – Family Law as Social Insurance' (2010) 4 Harvard Law and Policy Review 3, 3.
[354] Stephen Cretney, 'Private Ordering and Divorce – How Far Can we go? [2003] Family Law 399.
[355] Divorce Bill (n 1); *Owens v Owens* [2018] UKSC 41, [2018] AC 899.
[356] John Dewar, 'Family Law and its Discontents' (2000) 14 International Journal of Law, Policy and the Family 59, 77.
[357] Richard Neely, *The Divorce Decision: The Human and Legal Consequences of Ending a Marriage* (McGraw-Hill Companies 1984) 32.
[358] Schneider (n 313) 439.

the cause of dissatisfaction with litigation is an overstatement, as the more 'potent source of discontent with the divorce process must be that in most divorce cases there are no winners.'[359] Ultimately, given the fundamental role certainty plays in securing the significant interests of consistency and efficiency with the law, individualised justice, while being incredibly important, should not be overvalued.[360] Rather, it is contended that a nearly even balance should be drawn, but with a slight prioritisation in favour of individualised justice over certainty.

Conclusions: Ideal Position on the Rules-Discretion Spectrum

The conclusion reached in the prior section directly informs which position on the rules-discretion spectrum this thesis will argue to be ideal for financial remedies law. This is because, as previously discussed, a rule-based framework is best suited for serving the interests of procedural fairness and certainty, whereas a discretionary framework is most effective in promoting individualised justice.[361] It follows, therefore, that if a law's objectives are most effectively pursued through the provision of greater weight to certainty, the legal framework should be positioned closer to the 'rule' end of the rule-discretion spectrum. Conversely, if the law's objectives are more successfully attained through the prioritisation of individualised justice, then the legal framework should reflect a position on the 'discretion' end of the spectrum. Given the fact that, in pursuing the overriding purpose of fairness, it has been concluded that individualised justice should be

[359] Glendon (n 295) 1169.
[360] An over-prioritisation of individualised justice and discretion would have adverse effects: Davis (n 300) 44.
[361] Jackson (n 17) 233.

marginally prioritised over certainty,[362] this can be translated into *marginally* prioritising discretion over rules. Critically, this prioritisation is only a slight one, and therefore conceptually the position should be viewed as very close to the middle of the rules-discretion spectrum. Finally, it should be noted that in the fourth and final Chapter of this thesis, a model for reform will be proposed which attempts to illustrate this marginal prioritisation of discretion over rules on the spectrum. Accordingly, it is intended that the proposal in Chapter Four should clarify what the findings of Chapter Two will look like in practical terms.

[362] As determined in the 'Ideal Balance of Competing Objectives' section of this Chapter.

Chapter Three: Does England & Wales Reflect the Ideal Balance between Rules and Discretion?

Introduction

It has been demonstrated that in order for a particular law to find its ideal position on the rule-discretion spectrum, it must first be determined what the purpose of that law is. For matrimonial finance, it was determined that the overriding purpose of the law is fairness. However, the meaning of fairness was dissected to show that it encompasses a number of competing objectives—the most prominent of which are individualised justice and certainty. In Chapter Two, it was concluded that these should be almost evenly balanced, with a slight prioritising of individualised justice. This, it is argued, is because while the objective of certainty is fundamental in securing key elements of the law—including legal consistency and efficiency—the objective of individualised justice is slightly more central to the overriding conceptualisation of fairness in relation to financial remedy orders cases. Accordingly, this thesis has deduced that the ideal position on the rules-discretion spectrum is very close to the centre, though marginally closer to the discretion side of the spectrum. This is because, as Chapter Two explained, the findings from the certainty-individualised justice debate directly reflects the position on the rule-discretion spectrum. In other words, a rule-based framework most effectively serves the interests of procedural fairness and certainty, whereas a discretionary framework is best suited for promoting individualised justice.[363] Consequently, the next issue is whether the law on financial remedies in England and Wales aligns with this ideal position and, if not, whether it

[363] Jackson (n 17) 233.

departs from that position to such an extent that it warrants legislative reform. This will first be approached through an evaluation of the extent of discretion afforded by the Matrimonial Causes Act 1973, with the view of determining whether this is in line with the ideal position. Subsequently, the impact that judicial pronouncements in the higher courts have had on the administration of the law will be analysed to assess whether this has altered the position of English and Welsh law. The following section will examine whether the various objectives subsumed within fairness (as discussed in Chapter Two) are being met, and consider whether any shortcomings are attributable to the law's position on the rule-discretion spectrum or if they are caused by other factors.

The Current Position of England and Wales on the Rules-Discretion Spectrum

Section 25 of the MCA 1973 provides the guidance that governs the orders the court can make through the enumeration of various factors that should be taken into account. The Act simply requires the court when making a financial order 'to have regard to all the circumstances of the case,' as well as giving first consideration to any minor child of the family.[364] Clearly, this provides the courts with wide discretion to decide each case 'on an individual basis according to its facts.'[365] With no strict rules and the lone duty for the courts to *consider* whether the financial ties between divorcing spouses should be terminated,[366] many would accept that this statute has created an 'exceptionally discretionary approach.'[367] Indeed, while there is clear division regarding the benefits or

[364] MCA (n 2) s 25(1).
[365] Fairbairn (n 10) 5.
[366] MCA (n 2) s 25A.
[367] Welstead (n 11) 63.

detriments of such discretion,[368] there is widespread agreement that the jurisdiction of England and Wales enjoys extensive judicial discretion.[369] In fact, it is uncontroversial to assert that the extremely wide discretion afforded to the judiciary means that the position of the law in England and Wales is clearly situated on the far end of the rule-discretion spectrum.[370] Therefore, it is argued that the law as provided for by the MCA 1973 does not correlate with the ideal position for financial remedies law identified in Chapter Two. However, given the significant developments in the case law since the enactment of the MCA 1973, it is necessary to consider whether the development of principles from the Supreme Court and the Senior Courts of England and Wales has shifted the position of the law on the rules-discretion spectrum, and if so, by how much?

Whilst there have been a number of significant decisions which have attempted to advance principle and structure since the enactment of the MCA,[371] it is most pertinent to evaluate the seminal decisions whose principles are followed today. As has been mentioned earlier in this thesis, the seminal decision of *White v White* created the yardstick of equality and the central importance of non-discrimination between the husband and wife.[372] *White* involved a couple who had been married for over 30 years, and had run a dairy farming business as a partnership. After Mrs White appealed the first instance decision and both

[368] See Emma Hitchings and Joanna Miles, 'Rules Versus Discretion in Financial Remedies on Divorce' (2019) 33 International Journal of Law, Policy and the Family 24, 24-25. For example, Baroness Deech—an objector of judicial discretion in the context of financial remedies law—contends that this discretion results in 'uncertainty, expense and unpredictability' HL Deb (n 28) cols 946–947. Cf the Association of Her Majesty's District Judges views in Law Commission (n 312) 270: in defence of discretion, they provide that, 'in [their] experience, s.25 of the Matrimonial Causes Act 1973 provides the court with the appropriate degree of flexibility and discretion needed to ensure a fair outcome.'
[369] Baroness Buscombe in HL Deb (n 28) col 959: 'The Government agree that there is scope for greater clarity and certainty concerning the law and the court's practice in this important area.'
[370] Elizabeth Cooke, '*Miller/McFarlane*: law in search of discrimination' [2007] Child and Family Law Quarterly 98, 99.
[371] E.g. *Dart* (n 171); *Duxbury v Duxbury* [1987] 1 FLR 7.
[372] *White* (n 8).

Mrs and Mrs White appealed the Court of Appeal decision, the House of Lords dismissed both the appeal and cross-appeal, thereby upholding the Court of Appeal judgment to award the wife £1.5m out of the net assets of £4.6m. However, the House of Lords decision departed from the Court of Appeal owing to its rationale—reaching the outcome on the basis of the novel 'yardstick of equality' and principles of fairness and non-discrimination.[373] Though this particular case resulted in an unequal division, this was due to Mr White's father providing an interest free loan towards the purchase of a farm for their business. Accordingly, *White* represents a giant leap forward towards equality and non-discrimination, as it removed 'the ceiling of reasonable requirements…which had permitted the breadwinner to retain the surplus of assets.'[374] Yet, while *White* represented significant progress, there were still a number of issues left unresolved. For example, given the impact of the yardstick of equality, this provoked a rise in the prevalence of stellar contribution claims to avoid equal division. On this issue, there was obvious uncertainty and tension in interpretation. The Court of Appeal in *Cowan v Cowan* endorsed the legitimacy of a stellar contribution claims in justifying a departure from equal division where 'a spouse exercising special skill…has gone beyond what would ordinarily be expected.'[375] On the other hand, a year later the Court of Appeal in *Lambert v Lambert* changed its position, treating stellar contributions as a concept which should be used 'only in exceptional circumstances.'[376] Moreover, there remained doubt as to the scope of the application of the yardstick of equality with respect to matrimonial property,

[373] ibid [25].
[374] Rebecca Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 International Journal of Law, Policy and the Family 229, 232.
[375] *Cowan* (n 168) [160] (Mance LJ).
[376] [2002] EWCA Civ 1685; [2003] 1 FLR 139 [46] (Thorpe LJ).

as well as if it extended to the division of income.[377] Naturally, this led to the House of Lords decision in *Miller v Miller; McFarlane v McFarlane*, for the law under *White* was clearly incomplete without this further development.[378]

In *Miller/McFarlane,* the House of Lords held that the three guiding principles for judges in financial remedies cases trying to achieve fairness are: 'the needs of the parties, compensation aimed at redressing any significant prospective economic disparity between the parties arising from the way they had conducted their marriage and equal sharing.'[379] With respect to stellar contributions, Baroness Hale maintained that this should only be relevant 'if there is such a disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it should this be taken into account in determining their shares.'[380] Ultimately, the two cases of *White* and *Miller/McFarlane* have been viewed as constructing the main pillars of matrimonial finance law, and as a result, Diduck contends that there has been evidence in the past two decades of courts not being 'afraid to forge new policy' in their decisions.[381] Moreover, the reason for the courts' insertion of principles has been, in part, to recognise the important objectives best-served by rules. As Baroness Hale stated in *Miller/McFarlane*, it is important for the law to attain a degree of consistency and predictability 'not only to secure that so far as possible like cases are treated alike but also to enable and encourage the parties to

[377] Thorpe LJ raised the issue that 'if the decision in *White*…introduces the yardstick of equality for measuring a fair division of capital why should the same yardstick not be applied as the measure for the division of income?' Ultimately, he concluded that 'the cross-check of equality is not appropriate for a number of reasons.' *McFarlane; Parlour* (n 315) [106].
[378] Elizabeth Cooke, 'Playing Parlour games: income provision after divorce' [2004] Family Law 906, 909.
[379] *Miller; McFarlane* (n 7).
[380] *Miller; McFarlane* (n 7) [146].
[381] Alison Diduck, 'Ancillary Relief: Complicating the Search for Principle' (2011) 38 Journal of Law and Society 272, 282.

negotiate their own solutions as quickly and cheaply as possible.'[382] Therefore, with reference to the recent significant decisions in this area, they seem to reflect a shift 'toward a new principled basis.'[383]

However, in assessing the position of the law on the rules-discretion spectrum, it is important to note that these judicial decisions do not purport to espouse strict rules or even binding principles, but rather simply act as 'guidelines' or 'relevant considerations.'[384] Naturally, the developments introduced by the courts cannot usurp Parliament's role in this area of the strict wording of the statute.[385] This clear limitation of the courts' authority to limit the discretion in financial remedies law has been recognised by subsequent decisions. For example, Bodey J expressed that 'it remains the statutory criteria which ultimately guide the court's overall discretion by the exercise of which fairness is sought to be achieved.'[386] Furthermore, Sir Mark Potter P posited that an overly structured interpretation of the law would go 'beyond what is required or generally appropriate in the exercise required of the court under s.25.'[387] Accordingly, while the principles espoused by the House of Lords were made to clarify the rationale behind the law and, to an extent, structure the law to enhance the predictability of outcomes, the reluctance of the courts to relinquish the discretion afforded by statute has cast doubt on the effect that these principled judicial developments have had.

[382] *Miller; McFarlane* (n 7) [122].
[383] Diduck (n 381) 282.
[384] *White* (n 8) [27]. In the context of the yardstick of equality, Lord Nicholls noted that 'Despite these changes, a presumption of equal division would go beyond the permissible bounds of interpretation of section 25… That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.'
[385] *Miller; McFarlane* (n 7) [7].
[386] *CR v CR* [2007] EWHC 3334 (F), [2008] 1 FLR 323 [83].
[387] *VB v JP* [2008] EWHC 112 (F), [2008] 1 FLR 742 [52].

Despite these sentiments expressed by some members of the judiciary, it may be suggested that even prior to the House of Lords decisions in *White* and *Miller/McFarlane,* the case law provided guidance which has been understood and followed by practitioners.[388] As a result, it has been claimed that family lawyers can 'advise clients in the confident knowledge that the litigation is likely to be disposed of fairly.'[389] Furthermore, Eekelaar has noted that family lawyers, when dealing with cases involving young children and few assets, have been able to adopt a 'major strategy'—meaning there is a degree of consistency in their approach to this type of case.[390] Additionally, there have been subsequent judgments which have built upon the principles established in *Miller/McFarlane* in an attempt to enhance the clarity of the law. For example, in *Charman v Charman (No 4),* the Court of Appeal elucidated that the sharing principle was not simply a check at the end of the section 25 exercise, and implied that equality should be the starting point and departed from only where there is good reason.[391] Moreover, it clarified the position on stellar contributions and suggested that in limited circumstances—'short' marriages and dual career situations—unilateral assets may be not be included in the equal sharing principle.[392] Notably, the Court did not correct counsel for Mr Charman in referring to this as 'an exception to equal sharing rather than as another form of departure required as a matter of fairness.'[393] Accordingly, it can be inferred that by not renouncing the sharper term of 'exception', the Court may in fact be demonstrating

[388] Davis (n 300) 61.
[389] Cretney (n 20) 300.
[390] John Eekelaar, 'Should Section 25 be Reformed?' [1998] Family Law 469, 469.
[391] *Charman* (n 70) [65].
[392] ibid [82]-[86].
[393] Joanna Miles, '*Charman v Charman (No 4)* – making sense of need, compensation and equal sharing after *Miller/McFarlane*' [2008] Child and Family Law Quarterly 378, 385.

a tendency to structure the law.[394] As was analysed in Chapter One, an overly discretionary legal system would be problematic,[395] and as such these developments by the judiciary to more appropriately balance rules and discretion ought to be welcomed.

There are two points to be made in response to this claim. Firstly, while the intention of the courts when developing principles has been to clarify the law, this has had the effect of creating new conflicts regarding not only their application, but also their conceptual justification. For example, the rationale for the compensation principle articulated in *McFarlane v McFarlane* has been doubted.[396] The principle focuses on 'relationship-generated disadvantage' and aims to redress 'any significant prospective economic disparity between the parties arising from the way they conducted their marriage.'[397] While subsequent cases have supported the compensation principle as an integral part of financial remedies,[398] there has also been widespread opposition to the principle.[399] Most prominently, Mostyn J has expressed his difficulties with the compensation principle owing to a number of reasons. Firstly, he asserts that it is wrong to characterise a voluntary decision regarding the distribution of work and home responsibilities 'as a loss "suffered" by her entitling her to an award in excess of her reasonable needs.'[400] Moreover, it

[394] ibid 385.
[395] Scalia (n 134) 1178.
[396] Most prominently discussed in *Miller; McFarlane* (n 7).
[397] *Miller; McFarlane* (n 7) [13] (Lord Nicholls).
[398] *Charman* (n 70) [68] (Sir Mark Potter P).
[399] Rachel Chisholm, 'Financial Remedies and Ancillary Relief' (Thomson Reuters Westlaw 2018) [33] <https://uk.practicallaw.thomsonreuters.com/Document/I31F7458037F911E3AE60F8D0FC39500A/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac0000016ca66e9f43c71a938a%3FNav%3DRESEARCH_COMBINED_WLUK%26fragmentIdentifier%3DI31F7458037F911E3AE60F8D0FC39500A%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=1eb452d2fc5d354ea471599159f26000&list=RESEARCH_COMBINED_WLUK&rank=1&sessionScopeId=6d0a302da56b9a227a57279048362ef68341447ec6c76346784355da7a62f76a&originationContext=Search+Result&transitionType=SearchItem&contextData=%28sc.Search%29&comp=wluk> accessed 27 May 2019.
[400] *SA v PA (Premarital Agreement: Compensation)* [2014] EWHC 392 (F), [2014] 2 FLR 1028 [22].

involves an impossible task of speculation to make an award 'based on a guess founded on a vision that events that did happen, did not happen, and events that did not happen, did.'[401] As a result, while Mostyn J is bound by the House of Lords decision, he added a gloss to the compensation principle such that it should only be invoked in 'very rare and exceptional cases.'[402] This is within his jurisdiction, as the House of Lords purposely left the rationale for the principles and the hierarchy of their application up to interpretation on a case-by-case basis, owing to 'a fear that anything less than complete flexibility may produce a result which does not generate an order that is just right for this particular applicant.'[403] Ultimately, as Sir Mark Potter P posited in *Charman v Charman*, where the principles clash or the appropriate extent of their application is uncertain, 'the criterion of fairness must supply the answer.'[404] This demonstrates that these principles were originally designed to be fluid and capable of being overridden wherever discretion so demands—thereby lending doubt to their effect on structuring the law. Moreover, the utility of the compensation principle is negligible. It has been observed that 'arguments concerning the compensation principle, occasionally considered as an option by some interviewees, are rarely utilised or successful in the 'everyday' case.'[405] Yet, this principle was meant to act as one of the three central principles 'to guide post-marital distributions.'[406] Therefore, it is contended that these principles, despite the courts' intentions, do not necessarily enhance the clarity of the law in any meaningful way. This

[401] ibid [24].
[402] ibid [30].
[403] Cooke (n 370) 105-106.
[404] *Charman* (n 70) [73].
[405] Emma Hitchings, 'The Impact of Recent Ancillary Relief Jurisprudence in the Everyday Ancillary Relief Case' (2010) 22 Child and Family Law Quarterly 93, 96.
[406] Chan (n 341) 47.

shows that the current state of the law is in need of reform, as there are numerous 'issues left open by the case law in ancillary relief.'[407]

The second point is the obvious lack of consensus amongst members of the judiciary with their approach to financial remedy cases. While in some cases there is an apparent push for principled development, others[408] reflect an 'apparent retreat into a relatively strong, unstructured discretion.'[409] For example, in *Hvorostovsky v Hvorostovsky*, Thorpe LJ challenged the trial judge's exercise of discretion, arguing that though his low award could be justified according to the 'generous ambit of his discretion,' it is more accurate to 'conclude that the judge's shot has failed to clip the target's outer ring.'[410] Furthermore, Thorpe LJ commended 'the utility of a percentage comparison between the original order and the order on variation' to provide a clearer target.[411] Moreover, it has been argued by Mostyn J that 'simple and fair guidance is needed so that the majority of cases can be settled'—a necessary quality of a healthy family justice system.[412] By stark contrast and, dating back to the early days of the MCA 1973, Ormrod LJ opined that the legal framework should enable as unfettered discretion as necessary to achieve fairness in each individual case.[413] More recently, Moylan J has built upon that sentiment and firmly established himself as a proponent of a flexible legal framework so as to ensure that the statutorily conferred discretion is preserved. In *P v P*, he reasoned that bright-line rules would have the adverse effect of encouraging parties to spend their money contesting

[407] Hitchings (n 405) 93.
[408] *B v B (Ancillary Relief)* [2008] EWCA Civ 284, [2008] 1 WLR 2362.
[409] Miles (n 393) 387.
[410] *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 2 FLR 1574 [33].
[411] ibid [33].
[412] *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (F), [2012] 2 FLR 502 [79] (Mostyn J).
[413] *Lewis v Lewis* [1977] 1 WLR 409 (CA) 412.

issues which fall on the borderline of rules.[414] From this perspective, Moylan J's approach to the law is favouring the flexibility of discretion over the certainty of rules. Notably, while in the Court of Appeal, he denied that there are two different schools of thought, and submitted that the differences in application of principles were due to the different circumstances of the cases.[415] However, to deny the clear differences in approach is mistaken. As Evans argues, 'if a case is listed before Mostyn J (and others who share that view, as Burton J did in *S v S*[416]) it seems more likely than not that the formulaic approach will follow.[417] Ostensibly, there is stark dissonance amongst particular members of the judiciary in terms of their interpretation of the discretionary nature of the statute.

Not only does the presence of divergent approaches exacerbate the issue of uncertainty, it also means these judicially developed principles can only have a limited impact on enhancing the role of rules in the law—thereby resulting in a negligible alteration of the position of the law on the rule-discretion spectrum. For judges to enhance the structure of the law through judicial development, there must be a collective movement from all members of the judiciary to harmonise their approaches to the application of the law. The evident disunity in judicial attitudes, therefore, weakens the potential of the principled development. This was evidenced when Mostyn J stated in 2012—a sufficient amount of time for the principles from *Miller/McFarlane* to settle into the law—that 'there are not

[414] *P v P (Post-Separation Accruals and Earning Capacity)* [2007] EWHC 2877 (F), [2008] 2 FLR 1135 [115] (Moylan J). However, as argued in Chapter Two, the absence of rules may, in fact, increase the amount of litigation.
[415] *Hart v Hart* [2017] EWCA Civ 1306, [2018] 2 WLR 509 [87].
[416] *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (F), [2007] 1 FLR 1496.
[417] Gwyn Evans, 'Heartache, *Hart*-break and equal shares' (2018) Family Law 304, 309.

even any signposts along the road to a fair award.'[418] This is similar to the classic 'bus driver' analogy used to portray the extent of discretion in financial remedies law:

> 'The task of the family judge has been likened to that of…a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination.'[419]

This analogy—deployed by the Law Commission in 2014—indicates that the judicial development has been largely ineffective in curtailing the discretion afforded to the courts. As such, it has been recently noted that the law 'is unsatisfactory from both the practitioner level of being able to offer clear advice and from the litigant level of a clear understanding of the principles to be applied with a view to reaching an early and cost economic compromise.'[420] Ultimately, it argued that the overriding perspective of the judiciary is that determining a financial provision remains 'more of an art than a science, given the width of the discretion expressly given to the court by Parliament.'[421] Furthermore, Coleridge J opined that 'there is almost no guidance or authority in relation to the way in which the court should determine this aspect of an ancillary relief claim.'[422] The fact that this is the position of a member of the judiciary is certainly concerning, as it

[418] *B v S* (n 412) [79] (Mostyn J).
[419] Law Commission (n 30) [2.5].
[420] Ashley Murray, 'A *Sharp* turn in divorce finance distribution: the cost of principle versus pragmatism' [2017] Family Law 1196, 1203-1204.
[421] *J v J (Ancillary Relief: Periodical Payments)* [2004] EWHC 53 (F), [2004] 1 FCR 709 [107] (Bennett J).
[422] *V v V (Financial Relief)* [2005] 2 FLR 697 (F) [37].

raises doubt in relation to law's ability to attain its core objectives, including legal consistency and judicial accountability. As Francis rightly commented, 'if such an experienced judge of the Family Division feels that he has almost no guidance, where do the rest of us stand?'[423] Accordingly, while the courts may develop principles in a piecemeal fashion as is common in other areas of law, this has not significantly enhanced the role of rules in the legal framework for the purpose of substantially shifting the position of the law on the rule-discretion spectrum. Therefore, it may be concluded that the law on financial remedies in England and Wales is far too discretionary and fails to match the ideal position.

Are the Objectives being met nonetheless?

While it has been established that the law on financial remedies in England and Wales is not ideally positioned on the rules-discretion spectrum, it is worth considering whether the objectives of the law subsumed within fairness (as discussed in Chapter 2) are being satisfied nonetheless. One of these objectives, identified in Chapter Two, is individualised justice. Naturally, it is nearly impossible to determine whether individualised justice has been realised in a given case, let alone within the family justice system as a whole. Substantive fairness under the discretionary framework of the Matrimonial Causes Act 1973 is, fundamentally, a judgement call which is both 'instinctive and intuitive.'[424] Put simply, it is an immeasurable concept. Given the limited scope of this thesis and the

[423] Nicholas Francis, 'If It's Broken – Fix It' [2006] Family Law 104, 106.
[424] *JL v SL (Financial Remedies: Rehearing: Non-Matrimonial Property)* [2015] EWHC 360 (F), [2015] 2 FLR 1202 [15] (Mostyn J).

challenges of obtaining representative evidence of the 'everyday' cases rather than the reported 'big money' cases, the efficacy of the current law in attaining substantively fair outcomes will not be examined.[425] What can be demonstrated is that the courts are already striving to achieve this objective, and therefore, there is no need for 'any change in direction for the courts.'[426] Many of the key elements of substantive fairness appear to be followed in the reported cases. In relation to the equal sharing principle, there is evidence to point to it being respected and utilised as a tool to attain substantive fairness. For example, in *MAP v MFP*, the wife was awarded half of the total assets valued at roughly £24M. In his judgment, Moor J justified this award because the contributions of the husband and wife were equal and, therefore, 'the fruits of the marriage are to be divided equally.'[427] In this way, the outcome of this case aligned with the spirit of *White* and the application of both the equal sharing and non-discrimination principles. Accordingly, while this thesis cannot conclude with absolute certainty that substantive fairness is being achieved in the everyday cases in England and Wales, it will nonetheless assume that this objective is being fulfilled under the present law.

Next, it is necessary to consider the objective of legal certainty and consistency. As previously discussed in Chapter 2, the Irish legal system suffers from 'forum shopping', whereby parties seek an advantage by targeting a particular regional court with a reputation for favouring certain factors in divorce cases.[428] The Law Commission for

[425] For more on the role of discretion in 'everyday needs-based cases' on financial remedies, see Hitchings and Miles (n 368).
[426] Family Justice Council, 'Guidance on "Financial Needs" on Divorce' (Family Justice Council 2016) 13 <https://www.judiciary.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf> accessed June 17 2019.
[427] *MAP v MFP* [2015] EWHC 627 (F); [2016] 1 FLR 70 [58].
[428] O'Sullivan (n 317) 115.

England and Wales has concluded that this is also occurring in its jurisdiction. It states that 'there is evidence of significant differences in the way the law is applied, both between individual judges and between different areas of the country,' and as a result, it is concerning for the legal system with respect to inconsistencies and forum shopping.[429] A specific example provided in the report was the policy-based approach by the courts on providing either a joint lives or term order. It was discovered that while 'the Principal Registry of the Family Division and High Court tend to make joint lives orders, other major court centres do not.'[430] However, it should be noted that variation is inevitable given the fact-specific nature of financial remedies in divorce. As Lord Hoffman posited, 'judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973.'[431] Nonetheless, these inconsistencies become especially problematic when they can be attributed to geographical location.[432] Accordingly, the Law Commission concluded that given the substantial 'evidence of regional inconsistency, and of its being used strategically by legal advisers…[it should be regarded] as problematic.'[433]

However, this harmful effect may be mitigated by the prevalence of private negotiations out of court. As Davis et al state, the financial remedies system is 'fundamentally a negotiation system,' which is often conducted by the parties and their legal representatives rather than a judge.[434] Therefore, if the participants are able to follow a clear and

[429] Law Commission (n 30) [3.5].
[430] ibid [2.50].
[431] *Piglowska v Piglowski* [1999] 1 WLR 1360 (HL) 1373 (Lord Hoffman).
[432] Law Commission (n 30) [2.47].
[433] ibid [2.53].
[434] Davis (n 300) 62.

comprehensible legal framework to reach fair outcomes, the impact of forum shopping may ultimately be limited. In a 2009 publication, it was contended that 'there is a [largely] consistent approach amongst practitioners in dealing with the everyday ancillary relief case.'[435] While it was noted that there was nonetheless still a 'preference amongst certain practitioners for dealing with particular courts,'[436] this is not especially relevant for the many cases which settle out of court. Furthermore, it has been well-documented that parties struggle to receive any clear advice pertaining to the predictability of outcome.[437] In a study of parties to divorce proceedings, it was found that the 'prevailing impression…was that their solicitors were too vague in the advice they gave and too uncertain in their predictions.'[438] Under the MCA 1973, this hesitation to provide straightforward advice with respect to court or negotiation outcomes will likely not change.[439] As discussed above, the case law has attempted to structure and enhance the certainty of the law, yet it is a process which remains (without much hope for substantial change) incomplete.[440] Given the issues analysed in Chapter Two regarding the imbalance of bargaining power and the rise in the number of litigants in person, a legal system lacking clarity and certainty is likely to lead to injustice in the negotiation process. Thus, not only is the law in England and Wales failing in terms of legal consistency and the incidental effect of forum shopping, the negotiation alternative to the court process is

[435] Hitchings (n 29) 186.
[436] ibid 186.
[437] *Cowan* (n 168) [25].
[438] Gillian Douglas, 'How Parents Cope Financially on Separation and Divorce – Implications for the Future of Ancillary Relief' (2001) 13 Child and Family Law Quarterly 67, 76.
[439] ibid 76.
[440] John Eekelaar, 'Property and Financial Settlements on Divorce – Sharing and Compensating [2006] Family Law 754, 754.

being conducted in an environment which is not well-suited to protect the interests of the most vulnerable in society.

Lastly, with respect to the efficiency of the judicial process, it has been established that financial remedy or so-called 'money-cases' are the primary 'type' of family law case which suffers from delayed or prolonged hearings. A study published by the Ministry of Justice concluded the following:

> 'Longer or additional hearings needed as LIPs (litigants in person) were unable to understand what they needed to do either preparing for or during hearings. LIPs may have made major errors in preparation or failed to complete tasks essential for case progression e.g. filing of Form E. LIPs were unable to present their case effectively, e.g. incapable of grasping how to cross-examine. Judges provided some limited verbal explanations of the process but not enough to enable the LIP to participate effectively.'[441]

In essence, it was found that in cases involving an application for a financial order, the court process suffered from inefficient and longer hearings, as well as the possibility for unfair outcomes where a party did not have representation.[442] Moreover, in 2018, Sir James Munby laid out as one of his core ambitions as President of the Family Division for financial remedies law 'to improve significantly…the application of procedural justice.'[443] As part of his plan, he specifically mentions that the law must address the

[441] Liz Trinder and others, *Litigants in Person in Private Family Law Cases* (Ministry of Justice 2014) 65.
[442] ibid 65: 'LIPs may well have had a strong case but were unaware of their full legal entitlements and/or unable to present their case competently.'
[443] James Munby, '18th View from the President's Chambers: the on-going process of reform – Financial Remedies Courts' (Family Law Lexis Nexis 23 January 2018) <https://www.familylaw.co.uk/news_and_comment/18th-view-from-the-president-s-chambers-the-on-going-process-of-reform-financial-remedies-courts#.W-rvYTpFDyq> accessed 13 June 2019.

issues of efficiency and consistency. Accordingly, it may be concluded with a high degree of certitude that the current legal system does not optimally meet its objective to handle financial remedies cases efficiently.

Other Contributing Factors to the Deficiencies in the Law

It has been clearly shown that many of the objectives subsumed within fairness are not being realised adequately under the present law. The law continues to persist in a state of uncertainty and remains prone to inefficiencies and conflict.[444] However, before delving into possible proposals for reform in Chapter Four, it is necessary to consider whether these deficiencies are solely attributable to the discretionary nature of the legal framework, or if there are any other contributing factors. Undeniably, the legal aid cuts since the LASPOA 2012[445] have had seriously damaging effects on the family justice system. The significant delays and procedural difficulties in family courts have been often linked to the lack of funding and the increasing number of parties who must be self-represented.[446] Clearly, this unfortunate state of legal aid and access to justice contributes to the difficulties the law on financial remedies faces in attaining its objectives. However, it is submitted that even if this were to improve (for which at present there is no guarantee), the root of the issue would remain. Whilst litigants in person certainly impact upon the

[444] Anne Barlow, Therese Callus, and Elizabeth Cooke, 'Community of Property – A Study for England and Wales' [2004] Family Law 47, 47.
[445] Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[446] Bar Council, 'LASPO has created an unfair and inefficient justice system' (Politics Home 25 October 2018) <https://www.politicshome.com/news/uk/home-affairs/justice-system/opinion/bar-council/99311/laspo-has-created-unfair-and> accessed 13 June 2019.

efficiency of the judicial process,[447] the challenges the law faces with respect to procedural fairness are inherent to an extremely discretionary legal system—as argued in Chapter Two.

A different factor which may be presenting difficulties to obtaining the various objectives is the lack of specialist 'family finance' judges. In more recent academic literature, it has been noted that money cases have not been regarded as a 'specialist discipline.'[448] The consequence of this is that 'any deputy district judge (DDJ) or district judge can be expected to take on a money case load with little or no experience and no specialist training.'[449] The logical solution—which has been proposed and implemented in the Central Family Court in London—is to establish specialist 'Financial Remedies Units around England and Wales.'[450] The benefits of such a model, it has been argued, are 'greater efficiencies in the administrative process…greater efficiencies in the judicial process…[and the] promotion of more consistency in the judicial approach to money cases.'[451] This, of course, is a factor separate from the rules-discretion spectrum debate and is a welcomed change. In fact, it has been noted that a pilot conducted in Birmingham one year ago has shown nothing but positive signs.[452] However, while the introduction of specialist courts to hear financial remedies proceedings will certainly have profound impacts on the attainability of the relevant objectives, the challenges in achieving

[447] For more on this issue, see Mavis Maclean (ed), *Delivering Family Justice in Late Modern Society in the wake of Legal Aid Reform* (Routledge 2017).
[448] Edward Hess and Joanna Miles, 'The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units' [2016] Family Law 1335, 1337.
[449] ibid 1335.
[450] ibid 1338.
[451] Martin O'Dwyer, Edward Hess, and Joanna Miles, 'Financial Remedies Courts' [2017] Family Law 625, 625.
[452] Andrew McFarlane (n 22) 10.

consistency and legal certainty will remain. As discussed above, even expert family law judges and practitioners disagree on fundamental issues in the law, and the variance in the application and approach to the law will likely remain—even if reduced by the Financial Remedies Unit reform proposal. Accordingly, while there are other relevant factors which influence the attainment of the objectives of financial remedies law, they do not outweigh or diminish the primary role which the discretionary nature of the law plays in contributing to these deficiencies.

Conclusions

This Chapter has demonstrated that the law on financial remedies in England and Wales does not align with the ideal position on the rule-discretion spectrum. While the ideal position is near the middle, the English and Welsh law reflects an unduly discretionary approach at the far end of the spectrum. Furthermore, it has been argued that many of the core objectives which financial remedies law is designed to achieve are not currently being fulfilled. While there are other factors which may either positively or negatively affect the attainment of these objectives, it is plain that the discretionary nature of the legal framework is primarily responsible for these shortcomings. In short, it can be concluded that reform is needed for two reasons: to correct the position of the law on the rule-discretion spectrum and to increase the propensity of fulfilling the substantive and procedural fairness objectives of the law.

In turning this thesis' attention to reform, it is imperative to clarify the most effective method by which this should occur. Plainly, it is essential for reform to come from

Parliament. The current state of the law under the MCA 1973 is framed in a way which is far too discretionary for any significant restructuring to emerge from the judiciary. As has been demonstrated above, when senior judges develop principles in key cases, they must qualify their judgments with an acknowledgement that their pronouncements are not binding rules, but merely guidance. For example, Lord Nicholls made sure to clarify that 'the yardstick of equality is to be applied as an aid, not a rule.'[453] If the judiciary were to lay down a rule to enhance the certainty of the application of the law, it would usurp the legislature.[454] Without parliamentary reform, the discretion conferred by the current statute will always prevail. Therefore, reform to reposition the law on the rule-discretion spectrum and to more effectively achieve the objectives of financial remedies law must come in the form of new legislation from Parliament. Accordingly, Chapter Four will propose a model which could be adopted by the legislature.

[453] *Miller; McFarlane* (n 7) [16].
[454] *Miller; McFarlane* (n 7) [7].

Chapter Four: The Way Forward

Introduction

In Chapter Two, it was argued that the ideal position on the rule-discretion spectrum for financial remedies law is near the middle, with a marginal prioritisation of discretion. This was concluded to be the optimal position because it would reflect the view that individualised justice should be slightly favoured over certainty—a standpoint which was justified on the basis that it most accurately appreciates the relationship between the various objectives of the legal framework subsumed within the overarching pursuit of fairness. It was then demonstrated in Chapter Three that the law in England and Wales is on the extreme-discretionary end of the spectrum, and therefore clearly fails to match the ideal position. As a result, it was concluded that legislative reform should be pursued in order to enhance the law's capability of achieving its primary objectives. Accordingly, the purpose of this Chapter is to propose the way forward for financial remedies law. In particular, this proposal will be aiming to translate the ideal position described in Chapter Two from theoretical to practical terms. Put simply, this Chapter will seek to create a model which could be described as 'near the middle of the rule-discretion spectrum, with a marginal prioritisation of discretion.' In approaching this undertaking, there will be a thorough discussion of this thesis' proposal for reform, which will involve justifying each of its components, explaining how it would be implemented and integrated within the existing legal framework, and demonstrating how it would be applied in practice through the use of both actual and hypothetical case examples. As a part of this analysis, this Chapter will evaluate the challenges that this thesis' proposal for reform might face, and discern whether it would be well received by the legal community. However, it is first

important to discuss the current reform proposals being examined by Parliament and family lawyers, and consider whether such models should be adopted.

The Current Climate for Reform

It is undeniable that there is a growing movement amongst judges and practitioners for 'the modernisation of the statutory approach to the financial division of assets on divorce.'[455] One of the main issues, therefore, is how such reform should be constructed. Whilst there has been a great deal of discussion regarding legal reform, the most prominent (and current) proposal has come from Baroness Deech with her Divorce (Financial Provision) Bill [HL].[456] In this Bill, she lays out three key issues: matrimonial property, periodical payments, and prenuptial and postnuptial agreements.[457] With respect to matrimonial property, the Bill lays out as a general rule that its net value should be shared fairly, which, save for a few prescribed situations,[458] means an equal division.[459] It would, therefore, exclude non-matrimonial property—such as premarital assets, inheritances and gifts—from sharing.[460] Furthermore, the most notable part of the periodical payments provision is the limitation of payments to no more than five years,

[455] Sean Hilton, 'Attempting modernisation: the Divorce (Financial Provision) Bill' (Family Law Lexis Nexis 2018) <https://www.familylaw.co.uk/news_and_comment/attempting-modernisation-the-divorce-financial-provision-bill> accessed 20 June 2019.
[456] Financial Provision Bill (n 25).
[457] ibid.
[458] ibid, s 4(5): 'The court may make an order involving an unequal sharing of the net value of the matrimonial property to the extent to which it is satisfied that to do so would be fair, having regard to any of the following matters— (a) the terms of any agreement between the parties relating to the ownership or division of any of the matrimonial property; (b) any destruction, dissipation or alienation of matrimonial property by either party; (c) the needs of any children of the family aged under 21; and (d) actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.'
[459] ibid, ss 1-2.
[460] HL Deb 11 May 2018, vol 791, col 377 (Divorce (Financial Provision) Bill).

'unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.'[461] Finally, the Bill sets out that prenuptial and postnuptial agreements shall be binding except where a prescribed procedural condition is not met.[462] As Baroness Deech expressed in her speech for the Second Reading of the Bill in the House of Lords, part of the justification for this proposal is to correct the failure of the Matrimonial Causes Act 1973 to satisfy the requirements of the rule of law to 'be accessible, intelligible, clear and predictable.'[463] This aspect of the Bill is to be welcomed, as it seeks the noble objective of ameliorating the state of legal certainty and procedural fairness. Of course, it is imperative that the pursuit of this aim takes a sensible approach with the view of reaching the ideal balance of rules and discretion. The rigidity of this Bill has been criticised by many, including Lord Wilson who states that it would have 'grotesque consequences' if applied in practice.[464] Most notably, Lady Hale has publicly criticised the Bill for its 'one size fits all' approach, doubting whether it could conceivably satisfy the interests of fairness and justice in cases.[465] The appropriate extent of structure and flexibility is, therefore, a naturally contentious issue bearing a number of different perspectives.

[461] Financial Provision Bill (n 25) s 5(1)(c).
[462] Financial Provision Bill (n 25) s 3(1).
[463] HL Deb (n 460) cols 375-376.
[464] Lord Wilson (n 181) 11.
[465] Hale (n 12) 11. See also Monidipa Fouzder, 'Hale risks political storm by questioning legislation before parliament' (The Law Society Gazette 2019) <https://www.lawgazette.co.uk/news/hale-risks-political-storm-by-questioning-legislation-before-parliament/5070911.article> accessed 9 August 2019.

Yet, the most controversial element of this Bill is its impact on women and the mischaracterisation of gender roles in marriage.[466] It is Deech's view that her Bill, through the limitations on equal sharing and periodical payments, will enable women to lead independent and economically prosperous lives. This is because, she contends, 'extreme handouts to divorced wives do nothing to help unmarried women and single mothers who are making their own way in the workplace.'[467] Furthermore, she argues that a law which allows divorced wives to be dependent on their former partner removes the individual responsibility and autonomy of women, and consequently serves as 'a very serious impediment to equality.'[468] However, while there is some merit to the notion that divorced wives must (and usually do) assume a significant share of the responsibility for the financial aspect of their lives, there are other crucial factors which are not considered—thereby making it an incomplete depiction of the challenges women face post-divorce. For example, economic research studies have shown that women re-entering the workforce after caring for their children face significant disadvantages, including lower earnings, difficulty retaining the same position in a company, and barriers to promotion.[469] This leads Thompson to correctly note that the only women Deech's Bill helps are those with 'privileged irresponsibility,'[470] meaning members of the upper and middle class who are sufficiently affluent to seamlessly transition into the workforce without adversely

[466] For more discussion on the gendered element of the Deech Bill, see Thompson Written Evidence (n 345).
[467] HL Deb (n 460) cols 375-376.
[468] Patrick Sawyer, 'Divorces are Skewed by Judges' Outdated Chivalry, says Female Peer Pushing for Cap on Payments' (The Telegraph 2017) <https://www.telegraph.co.uk/news/2017/02/12/divorces-skewed-judges-antiquated-chivalry-says-female-peer/> accessed 20 June 2019.
[469] Shoba Arun, Thankom Arun and Vani Borooah, 'The effect of career breaks on the working lives of women' (2004) 10 Feminist Economics 65, 80.
[470] Term originating from: Joan Tronto, *Caring Democracy: Markets, Equality and Justice* (New York University Press 2013) 60.

affecting their responsibilities at home. With rises in childcare costs, as well as the additional challenges women face in re-entering the workforce, it becomes plain that this element of Deech's justification for the Bill represents a gross mischaracterisation of the experience of most divorced wives.[471]

Furthermore, Deech mentions that London is considered the 'divorce capital of the world' because 'the wives of wealthy men come to London from all over the world for a generous settlement.'[472] The terms 'gold digger' or 'alimony drone' have been coined to represent these women who seek a big pay-out.[473] It is suggested that the Deech Bill, through its binding enforcement of prenuptial and postnuptial agreement, is able to effectively eradicate the *prominence* of gold diggers by protecting the assets of wealthy men. While the subject of gold diggers and its effect on the public perception of divorce law is far too large for this thesis to delve into in much detail, it is worth raising an important point.[474] The inclusion (and overstatement) of gold digging as part of the justification for binding prenuptial agreements has the harmful effect of overshadowing the most relevant and important considerations which must be taken with respect to this issue. In the ordinary case, a serious concern is the role of bargaining power and undue influence when reaching marital agreements. As the Law Commission noted as a point of caution, 'a spouse may agree to something for the sake of peace, particularly if it has no immediate effect.'[475] Moreover, in the unique context of family relationships, agreeing to a financial settlement

[471] Lucy Warwick-Ching, 'Childcare costs rise steadily across the UK' (Financial Times 2019) <https://www.ft.com/content/5eca0294-3b4c-11e9-b72b-2c7f526ca5d0> accessed 21 June 2019.
[472] HL Deb (n 460) col 376.
[473] HL Deb 27 June 2014, vol 754, col 1491 (Divorce (Financial Provision) Bill).
[474] For more depth on the gender biases and misrepresentations the term 'gold digger' perpetuates, see Sharon Thompson, 'In Defence of the Gold-Digger' (2016) 6 Oñati Socio-legal Series 1225.
[475] Law Commission, *Matrimonial Property Agreements—A Consultation Paper* (Law Com CP No 198, 2011) [5.27].

before a number of (potentially) unforeseeable significant changes in circumstances will likely render the agreement unjust.[476] Ultimately, these agreements have a largely 'androcentric effect on divorce whereby masculine values take precedence and inevitably advantage men.'[477] With a focus on gold diggers as being the primary justification for binding prenuptial agreements, it 'often overshadows these inequalities.'[478] As a result, it is clear that the Deech Bill is vulnerable to criticism and should not be pursued as the ideal model for reform of financial remedies law. Therefore, it is submitted that an alternative model for reform must be explored—the focus for the remainder of this Chapter. Presently, however, the Deech Bill has progressed through the House of Lords and is due to have its second reading in the House of Commons. Evidently, if it receives approval from the House of Commons, it will have a serious impact on the law on financial remedies.

Reform Proposal: The Fail-Safe Model

Before delving into the core of this thesis' model for reform, it is first necessary to present the opening section of the proposal. In the interests of transparency and clarity, it is the position of this thesis that the statute should include a provision which expressly states that the objective of the law is fairness, whilst also including a list of some of the factors which make an outcome both substantively and procedurally fair. This may take the following form:

[476] Somaya Ouazzani, 'Prenuptial Agreements: The Implications of Gender' (2013) 43 Family Law Journal 421, 423.
[477] Thompson (n 474) 1242.
[478] ibid 1242.

1. Overriding Objective

(1) The overriding objective of the sections of this statute governing the law relating to financial remedy orders shall be to achieve fairness between the parties.

(2) In pursuing the objective of fairness, the courts shall in particular have regard to the principles of substantive equality, non-discrimination, and legal consistency.

This is not novel to family law, as The Family Procedure Rules 2010 includes a section with the 'overriding objective' of those rules and some examples of how its objective 'of enabling the court to deal with cases justly' can be satisfied.[479] Crucially, the inclusion of Section 1(2) serves to expressly lay down the fundamental guiding principles. While this non-exhaustive list is not prescriptive, it is intended to facilitate judicially developed principles to be rooted in statute, rather than case law. This not only enhances the clarity of the law for practitioners and judges, it also makes the law more accessible and easier for a layperson to understand. Accordingly, the inclusion of an express objective would result in a statutory law which is both clearer and more intelligible than the present system.

In searching for a model of reform which reflects a middle or balanced position on the rule-discretion spectrum, this thesis is proposing the 'fail-safe model'.[480] To reduce it to its core elements, the fail-safe model is a law which represents the following structure:

RULE ➡ THRESHOLD ➡ DISCRETION

Firstly, there would be a legal rule which ought to be followed. However, this rule would not have absolute application. Rather, it could be departed from if the particular case meets the relevant threshold. If the threshold is satisfied, then the legal issue is to be

[479] FPR 2010 (n 151) pt 1.1(1)-1.1(4).
[480] An original term created by this thesis.

resolved through the use of judicial discretion, taking into account the relevant legal rules, principles and standards.[481] In essence, if the legal rule would lead to an unfair outcome for either party to financial remedies proceedings, the availability of discretion to decide a particular issue on its facts acts as the fail-safe to the general law.[482] Naturally, the crucial aspect of this model is how the threshold is defined. If it is set to a low standard, rather than discretion acting as a fail-safe, it would be so easily accessible that it would likely be a normal or expected part of proceedings. Conversely, if the standard for the threshold were to be set overly high, there would be a high number of cases which would benefit from the exercise of judicial discretion yet would not meet the requisite criterion—thereby resulting in undesirable consequences for the law's pursuit of individualised justice. As was demonstrated in the preceding Chapters of this thesis, the ideal balance of rules and discretion in the law varies depending on a particular law's purpose. Therefore, while this fail-safe model could have a general application, its threshold must be specifically designed to most accurately reflect the appropriate balance of rules and discretion for the law on financial remedies: a nearly centred position on the spectrum.

a) Financial remedies example

In revealing the threshold that would be assigned to the fail-safe model for financial remedies law, it is clearest if it is demonstrated through an example. Given its prominence in debates and case law surrounding this area of law, the issue of how matrimonial

[481] Legal rules, principles and standards as interpreted by Dworkin (which was explored in greater detail in Chapter One): Dworkin Model (n 78) 23-27.

[482] Naturally, if the issue of determining whether an outcome would be unfair arose in court, the judge would be reach a judgement on this matter. However, in the context of out of court settlements, it would be a matter for the parties (or, if applicable, their legal representation) to navigate the threshold of unfairness according to the statutory guidance and the standard approach of the courts—a phenomenon which would require a few years to develop.

property should be divided will be used as the example. Importantly, it is worth noting that this thesis is not planning on reformulating all provisions in the MCA that relate to the division of assets. Rather, the following matrimonial property provision is an illustrative example that, if accepted, could be used as the basis for applying the fail-safe model to other areas of matrimonial finance. To recall, the model consists of a rule, a threshold, and judicial discretion. The law governing matrimonial property would be the following:

2. Matrimonial Property

(1) Matrimonial property[483] shall be shared equally between the parties to the marriage *unless* it would result in an *unfair* outcome to either party.

(2) When deciding whether an outcome would be unfair for the purposes of section 1(1), the first consideration is 'the welfare while a minor of any child of the family who has not attained the age of eighteen.'[484]

(3) When deciding whether equal division of matrimonial property would result in unfairness, the court shall in particular have regard to:

   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;

[483] The meaning of which will be discussed in greater detail below.
[484] MCA (n 2) s 25(1).

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.'[485]

Before delving into each aspect of this proposal, there are a few matters to clarify from the outset. Firstly, it is evident that the threshold includes, almost verbatim, the current Section 25 factors under the MCA 1973. However, it is worth observing that this matrimonial property section utilises the factors differently from the MCA. The current use of Section 25 is for a court to use when making an award, whereas this proposal uses the factors to determine whether something is unfair in the first place. This, of course, is intentional, and will be explained shortly. Additionally, while the matrimonial property section is heavily influenced by Section 25, it has omitted the 'all the circumstances of

[485] MCA (n 2) s 25(2).

the case' aspect of that MCA provision. This is because not only is it unnecessary,[486] but to retain that element would be overly discretionary. In terms of the structure of this example, it is worth clarifying each component of the matrimonial property provision and how it fits with the fail-safe model. Drawing upon the findings of Chapter One, the rule element of this provision is that 'matrimonial property is to be shared equally between the parties to the marriage.' Naturally, the term 'matrimonial property' is far from straightforward, and as such this presents an issue which this proposal will address in the 'justification' section of this chapter. The threshold aspect of this provision is 'unless it would result in an *unfair* outcome to either party,' coupled with a sub-section which provides guidance for a court when deciding whether an outcome would be unfair. Lastly, the discretion component is introduced where the threshold of unfairness has been satisfied, thereby empowering the court to reach a decision on the particular issue (in this case, it is the division of matrimonial property) by exercising their discretion in light of the relevant statutory framework and jurisprudence. This leads to the matter of how this proposal would fit within the existing legal framework.

b) Implementation

When discussing how this proposal would be implemented, there are a number of different considerations which must be addressed. For the purposes of this thesis, it is clearest to separate these into two categories: the statute and the case law. With respect to the former, it is necessary to consider the effect that this proposal would have on the current primary statute: the Matrimonial Causes Act 1973. While the fail-safe model can be applied to a

[486] Given that the statute was enacted nearly 50 years ago, judges are familiar with Section 25, and therefore they already know to approach financial remedy cases holistically. Lord Nicholls in *Miller; McFarlane* (n 7) [22]: 'The statute requires the court to have regard to all the circumstances of the case.'

number of different issues currently covered under the MCA, it is the position of this thesis that the MCA should not be repealed or replaced,[487] but rather amended to include the relevant changes and remove certain aspects which would be made redundant. Moreover, given that Part II of the MCA is the main branch of the statute which governs financial relief, there is no need to replace the entire statute which covers other aspects of matrimonial law.[488] Given the scope of this thesis, it is not possible to specify and justify whether each individual provision within Part II would be affected, nor how it would be changed. However, what can be assured is that Section 25 would be repealed, as its overly flexible nature would contravene the purpose of this reform—principally because it fails to operate within the fail-safe model. That being said, many of the principles within Section 25 would be retained through its application in the threshold element of some provisions (for example, the matrimonial property provision).

In relation to the case law and the principles created therein, they would play a significant role in the development of this proposal insofar as it pertains to the drafting of the specific provisions and the definitions of key terms within the statute. Given the limited direction provided by the current MCA 1973, the development of policy and the parameters for whether a rule would be considered unfair would largely be influenced by the case law. For example, the provision on matrimonial property—whereby such property is to be shared equally unless it would result in unfairness—is a reflection of the generally accepted equal sharing principle developed by the judiciary in *White* and

[487] Cf Coleridge J arguing to repeal the MCA 1973: Paul Coleridge, 'Lobbing a few pebbles in the pond: the funeral of a dead parrot' [2014] Family Law 168.
[488] Whereas Part I covers 'Divorce, Nullity and Other Matrimonial Suits' and Part III covers Protection, Custody, Etc., of Children. Notably, if the Divorce Bill (n 1) passes, then Part I is likely to be fundamentally reformed so as to enable pure no-fault divorce.

Miller/McFarlane. To refer to the components of the fail-safe model, the rule of this provision reflects the judicially approved view that when a marriage ends, the parties are entitled to an equal share of the fruits of the partnership.[489] Further, the threshold reflects the view that such equality may be departed from where 'there is good reason for doing so.'[490] Therefore, the discretion is engaged to reach an outcome which is fair to both parties of the marriage.[491] Consequently, the case law remains relevant and is reflected in the statute in a more transparent and comprehensible manner. By incorporating many of the principles of the case law into the statute, it is intended that this will carefully maintain their objectives for individualised justice while also establishing a much-needed degree of certainty to their application. It follows, therefore, that the following section will discuss the way in which this proposal promotes many of the core objectives of fairness and the justifications for the various elements of this model.

c) Justifications

This section will be divided into four main discussions. It will explain the reasoning behind each of the three components of the fail-safe model and why it has been formulated in such a way. It will then analyse the proposal as a whole to determine its potential impact on a number of crucial issues for matrimonial finance law. It will ultimately reveal that

[489] *Miller; McFarlane* (n 7) [20]. However, a crucial difference exists between the judicially developed 'equal sharing principle' and the fail-safe model. While Lord Nicholls *White* envisaged equal division to act as a 'yardstick' for the division of assets, this thesis proposes a model for reform which automatically applies equal division of matrimonial property (which can subsequently be departed from).
[490] *White* (n 8) [25].
[491] See, for example, *Sharp v Sharp* [2017] EWCA Civ 408, [2018] 2 WLR 1617 (summary of judgment): 'where there had been a short, childless marriage with dual incomes and where only some of their finances had been pooled, the need to achieve overall fairness between the parties might require a departure from the sharing principle (which would otherwise require matrimonial assets to be shared equally) or the exclusion of some property from the calculation, notwithstanding that parties had not entered into a pre-nuptial agreement expressly opting out of the sharing concept.'

the combination of the three components of the fail-safe model would, from a holistic perspective, improve the state of the law relating to financial remedy orders by creating a more balanced framework for the application of both rules and discretion.

i) The rule component

To begin, the rule element of this proposal is designed to enhance the structure and certainty of the law. Self-evidently, it promotes the rules side of the spectrum, which is almost non-existent in the current statute and certainly even more absent in the case law. By providing a general rule, it serves as a benchmark for lawyers and the parties to gauge what would be a fair settlement to agree upon. However, as it was noted earlier in this chapter, a rule may contain one or more terms which are subject to interpretation—thereby weakening the effect that such a rule could have on the certainty of the law. To refer to the earlier example of the 'Matrimonial Property' provision, the meaning of the term 'matrimonial property' is contentious and presents a challenge to the strength of that particular provision.[492] The way this proposal addresses this issue is similar to its approach for the primary provisions: apply the fail-safe model to reflect the balance which has been argued to be ideal for financial remedies law. This would mean that the key terms would be given a specific statutory definition,[493] which can be departed from if the factual pattern meets the relevant threshold (unfairness), and consequently it would be decided by the exercise of judicial discretion. For the sake of clarity, the specific model for the definition of matrimonial property would be the following:

[492] See, for example, the dissonance between Lord Nicholls and Baroness Hale on the meaning of matrimonial property in *Miller; McFarlane* (n 7).
[493] Though naturally, judicial development means that these terms could be gradually modified over time.

In Section 2(1) 'Matrimonial Property' of this proposal—

'Matrimonial property' means the matrimonial home plus any property—excluding gifts or inheritance—acquired by either party during the marriage.

From the outset, it is worth evaluating the fact that the chosen definition also reflects the positively received Scottish law. The Family Law (Scotland) Act 1985 provides a positive definition, which considers matrimonial property as:

'[A]ll the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—(a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or (b) during the marriage but before the relevant date.'[494]

The strong and robust nature of this provision—when coupled with the statutory presumption of equal division—has been commended for its positive impact by offering predictable results without compromising the attainment of substantive fairness.[495] However, as Thompson cautions, the Scottish experience should not be blindly relied upon, as the legal culture is very different from that of the English and Welsh jurisdiction. Indeed, it has been found that Scotland enjoys a 'settlement-friendly environment'; in part due to the country's civil law structure and its firmly established 'use of marriage-related contracts.'[496] Nonetheless, given the high praise and overwhelmingly positive reviews

[494] Family Law (Scotland) Act 1985, s 10(4).
[495] Crowley (n 162) 394.
[496] Jane Mair, Fran Wasoff and Kirsteen Mackay, *All Settled? A Study of Legally Binding Separation Agreements and Private Ordering in Scotland: Final Report* (Centre for Research on Families and Relationships 2013) 16.

from ‘solicitors, advocates, sheriffs and judges’ alike,[497] there is certainly value in considering the potential benefits of adopting specific aspects of their legislation. Therefore, while the alignment of this thesis’ definition of matrimonial property with that of the Scottish legislation is not *necessarily* evidence that it should be adopted, this overlap may be said to assist the case of this thesis.

Further support for this proposal can be found in the fact that, while there is judicial disagreement regarding the precise meaning of matrimonial property, this thesis’ chosen definition aligns with the essence of the leading judgments on this particular issue. In *Charman,* Sir Mark Potter P equated matrimonial property to ‘the property of the parties generated during the marriage otherwise than by external donation.’[498] Most prominently, Lord Nicholls and Baroness Hale discussed their respective interpretations of the meaning of matrimonial and non-matrimonial property in *Miller/McFarlane.* For Lord Nicholls, he viewed marital property as all property other than ‘property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps the income or fruits of that property).’[499] By contrast, Baroness Hale defined the same as all property other than ‘(a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits)…[and] (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.’[500] Evidently, the definition selected for this proposal for reform more closely reflects Lord Nicholls’ perspective, particularly because it omits

[497] Jane Mair, Enid Mordaunt and Fran Wasoff, *Built to Last: The Family Law (Scotland) Act 1985 – 30 Years of Financial Provision on Divorce* (Nuffield 2016) 172-173.
[498] *Charman* (n 70) [66].
[499] As neatly summarised by Lord Mance in *Miller; McFarlane* (n 7) [167].
[500] ibid [168] (Lord Mance).

the latter half of Hale's position. However, though the difference is notable, Baroness Hale acknowledges that it will be 'irrelevant in the great majority of cases.'[501] Furthermore, Hale's interpretation of the 'business or investment assets' which may be considered non-matrimonial property is fairly limited. Indeed, it would mainly apply in the case of a short marriage, 'the timing of which may or may not coincide with a period of significant increase in the value of non-business-partnership.'[502] Yet, given that the main rationale for this perspective of matrimonial property is to ensure that there is flexibility to depart from equal sharing,[503] it is submitted that the opportunity to depart from the general rule in Section 2(1) preserves that interest. For example, if a case involves a short marriage with one party accruing significant sums of money in a short period of time during the marriage (from, for example, stock investments which are prone to erratic windfalls or shortfalls), the relevant party may submit that equal sharing of matrimonial property—as defined by the statute—would result in unfairness. Consequently, the court (or solicitors during private negotiations) could adjust the division of matrimonial property to reflect the appropriate departure from equality—thereby accommodating the intentions of Baroness Hale's definition. Essentially, given the application of the fail-safe model, the opportunity to depart from equal division of matrimonial property (where the 'unfairness' threshold of Section 2(1) would be satisfied) ensures that a prescriptive definition of matrimonial property does not preclude individuals from retaining independently obtained property which would ordinarily be

[501] ibid [152].
[502] ibid [169] (Lord Mance).
[503] ibid [153] (Baroness Hale): 'This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is *not automatically* to be shared equally between them.'

shared equally between the parties due to its classification as 'matrimonial'. Accordingly, while there will always be disagreement with any prescribed interpretation of matrimonial property, the chosen definition is one which can be said to be widely accepted, as it broadly captures a range of descriptions of matrimonial property.[504]

ii) The threshold component

This leads to the justification for the threshold of the primary provision. It was demonstrated through the example of the matrimonial property provision that the threshold for discretion would be if the application of the rule would lead to an unfair outcome, and that this is to be decided with reference to the Section 2(2)-(3) factors.[505] Firstly, by including the lower (and more flexible) threshold of unfairness, it ensures that access to discretion is not prohibitive. Rather, it allows those who submit that the general rule does not result in a fair outcome to have their case decided in a similar way to the status quo: judicial discretion. This maintains the core balance between a system blending rules and discretion—a crucial aspect of an effective law. This was demonstrated in both Chapter One, where it was argued that such a balance is theoretically necessary to avoid adverse consequences,[506] and Chapter Two, which confirmed the need for a rule-discretion balance in the specific area of financial remedies law.[507] Moreover, the preservation of the Section 25 factors when determining the matter of unfairness for the purposes of the threshold serves an additional motive. It ensures that while this proposal represents a significant change, it is far from radical. This is important when considering

[504] Most prominently of which are Lord Nicholl's and Baroness Hale's from *Miller; McFarlane* (n 7).
[505] Which, for the sake of clarity, are based on the current Section 25 factors.
[506] Hawkins (n 42) 11.
[507] Davis (n 300) 44.

whether this reform proposal would be well received by the legal community; whether it is palatable. Indeed, the most challenging aspect of a proposal gaining approval is reaching a balance of rules and discretion with which a majority can agree. Even if the balanced position on the spectrum which this thesis has argued to be ideal is accepted in theoretical or logical terms, the emotive aspect of politics may be influential in policy-making—particularly in this area. If this proposal were to be submitted in the form of a Bill put before Parliament, the strength of the legal arguments (both practical and theoretical) would be weakened by political pressures which may distort it. As the Law Commission noted in its 2014 report on *Matrimonial Property, Needs and Agreements*, one of the major barriers to the development of a formulaic approach to the calculation of needs in matrimonial finance 'is the memory of the original version of the Child Support Act 1991, whose calculation required some one hundred items of information and produced some notoriously inappropriate results.'[508] In Schedule 1 of that statute, maintenance assessments were calculated in accordance with various formulae, which would create mathematical equations to reach the appropriate child support maintenance.[509] Unsurprisingly, this approach was overly complicated for many parents to apply to their personal lives.[510] Given the 'chaos' the formula of the 1991 Act produced, the Law Commission concluded that this 'experience, and a great respect for judicial discretion, combine to make formulae something of an anathema for English family lawyers.'[511] Yet, while this critique opposes overly rigid formulaic reform—and perhaps

[508] Law Commission (n 30) [3.129].
[509] Child Support Act 1991, sch 1.1(1-5).
[510] For an important critique of the Act, see Alison Garnham and Emma Knights, *Putting the Treasury First: The Truth about Child Support* (Child Poverty Action Group 1994).
[511] Law Commission (n 30) [3.129].

even suggestions to impose financial provision bands[512]— this example of past experience does not appear to run counter to the position of this paper that reform should be balanced between rules and discretion. Rather, it is submitted that this thesis' proposal, through its threshold of 'unfairness', reaches a compromise between changing the legal framework in order to enhance the degree of certainty and appreciating the trepidation towards the imposition of rules—particularly when viewed in the context of the legal and political history of England and Wales in respect of family law. Accordingly, it is imperative that the threshold is important yet also accessible.[513]

iii) The discretion component

The third and final element of the fail-safe model is the exercise of judicial discretion to reach a decision on a particular issue in matrimonial proceedings. The stage would almost entirely resemble the way in which financial remedies cases are currently handled under the MCA 1973: judicial discretion exercised through a holistic evaluation of the facts of a specific case in order to obtain a fair outcome.[514] More specifically, while a judge would be constrained by the relevant legal rules and precedent, they would have the flexibility currently enjoyed by family judges to consider the case on its facts and reach a fair outcome for both parties to the marriage. Accordingly, while the fail-safe model would add two new components to financial remedies law (the rule and the threshold), it would preserve the status quo for cases that overcome the threshold and require a more individualised, fact-sensitive determination. It may be contended that by retaining the discretionary component, this proposal fails to deliver any substantial change. However,

[512] Andrew McFarlane (n 22).
[513] For both the judiciary and for individuals using the law.
[514] For a more in-depth coverage of the current law, refer back to Chapter Three.

in Chapter Two, it was concluded that the ideal position—as asserted by this thesis—on the rule-discretion spectrum for financial remedies law is a middle position, with a slight preference for discretion. Accordingly, in attempting to align the reform proposal to this finding, it would be inaccurate and flawed to present a model which completely—or indeed even significantly—abandons the centrality of judicial discretion to this particular area of law. Consequently, in following the conclusion in Chapter One that a balance between rules and discretion is theoretically important to avoid a deficient legal system, and the conclusion in Chapter Two that the ideal position on the spectrum is a marginal preference for discretion, it is appropriate for the fail-safe model to preserve the role of judicial discretion. In essence, this approach to reform, it is argued, represents a reasonable yet comprehensive change to the law which would be likely to appeal to a wide range of individuals across the family law community.[515] Lastly, to strengthen the case for this particular proposal, it is worth exploring both the advantages and potential disadvantages that this model would provide the family justice system and ultimately why it is concluded that it presents a compelling model for future reform.

[515] See the Law Commission's conclusions regarding the views of practitioners towards reform: '…a child-support-style formula that gave a single answer in a given case would not be acceptable to us or to the family law profession…However, there remains potential for development of guidelines similar to the Canadian SSAG. These are not wholly opposed by our legal practitioner consultees. We agree, of course, that a world where everyone had access to legal advice and to judicial discretion that provided "a bespoke approach in each case so as to achieve fairness" would be ideal. But that is not available. In the light of that, we have recommended a transparent objective for spousal support as described above, and guidelines showing the way in which that objective is to be achieved. In addition, it may be helpful to people to have access to a calculation that could be made available online, as is the child support formula, and that would indicate at least a "ball-park" – a range within which people could then negotiate.' Law Commission (n 30) [3.151-3.152].

iv) Is the proposal more desirable than the status quo?

In analysing the benefits that the balanced approach of this proposal would provide, it is necessary to revisit the core issues that were raised in Chapter Two when determining the ideal balance between rules and discretion, and comparing the predicted impacts this proposal would have on those matters to the current state of the law as assessed in Chapter Three. The three main headings of those matters are efficiency, procedural fairness, and individualised justice. With respect to efficiency, it was concluded in Chapter Two that on a purely theoretical level, the arguments in favour of either rules or discretion were evenly balanced—thereby not providing any real justification for why this proposal would be more desirable than the status quo. However, it was reasoned that when taking into account other crucial factors to the calculus, such as the potential imbalance of bargaining power between parties (often along gender lines) and the harmful effects that legal aid cuts have had on access to justice, certainty should be slightly prioritised over flexibility. Increased certainty would not only create a culture of entitlement to equality of matrimonial property (which could be departed from in either direction if equality would be unfair), it would also assist the economically weaker party, which often turns out to be a woman.[516] The primary issue with the current law is that, where there is an overly uncertain law, this increases the advantage that economically stronger parties may exercise throughout the process—particularly in private negotiations.[517] Without clear guidelines, a more vulnerable party may not have a reliable benchmark to assess their entitlements, and with the threat of court expenses and the emotional labour of enduring

[516] Wilkinson-Ryan and Small (n 302) 120; Thompson (n 303) 189.
[517] As discussed in Chapter Two: Mnookin and Kornhauser (n 281) 979-980.

such proceedings, they may be treated unfairly.[518] Still, under the current status quo, even those who receive legal advice may not be given a clear indication by practitioners of the outcome of their case.[519] It is, therefore, unsurprising that the complex and opaque legal framework has contributed to the inefficiency—in terms of both time and costs—of a case involving a litigant in person.[520] With this proposal, it is expected that the enhanced structure of the law will assist litigants in person and vulnerable parties to understand the basic principles of the law and reach a fair settlement more efficiently.[521] With reference to the Scottish law, the equating of 'fair' as 'equal sharing of matrimonial property' has been seen to allow for much more cost-effective approaches to litigation. As a solicitor from a survey opined, this 'pragmatic approach leads people to think it can make more sense to: "bail out and get on with your life".'[522] Under the fail-safe model, while the rule may be departed from, it at least provides a starting point and structures the discussion that these individuals may have either in or out of court.

In terms of procedural fairness, it was highlighted in Chapter Two that rules ought to be marginally prioritised in order to further this objective. In particular, it was demonstrated that legal consistency is an issue which is especially problematic in legal systems with

[518] Hitchings and Miles (n 368) 47: 'But with the withdrawal of legal aid, the personal shopper is no longer available to most financial remedy customers. Discretion – even if corralled by judicial principle, consistently applied to those cases that reach court, by consent or otherwise – is a difficult juristic tool for parties without legal advice and assistance to deploy in private ordering.'
[519] Douglas (n 438) 76.
[520] Cox (n 23).
[521] Judges already have a number of duties to litigants in person to ensure that they understand the important matters. Given that this duty involves providing clear explanations on the relevant issues, the fact that this proposal clarifies the position of the law would certainly serve to facilitate this process for the judge(s). For more details on the duties owed by the court to litigants in person, see the 'Litigants in Person and Lay Representatives' chapter of Judicial College, 'Equal Treatment Bench Book' (February 2018) 1.1-1.31 <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf> accessed 11 July 2019.
[522] Mair, Mordaunt and Wasoff (n 497) 59.

highly discretionary legal frameworks. In England and Wales, the Law Commission has evidenced the prevalence of forum shopping in different parts of the country—a strategy aimed at receiving a more favourable outcome based on the tendencies of certain regional courts to decide cases in a distinctive way.[523] This has significant effects on the rule of law and the legal consistency present within financial remedies law, and is therefore an important issue which must be addressed.[524] As a prominent family finance barrister noted, the current dependency on judicial discretion means results are 'unpredictable and what our clients are looking for is a principled approach such that the outcome of litigation is not a gamble.'[525] Under the fail-safe model, it must be conceded that forum shopping would not be completely eradicated as it is linked to the individualised application of the law by specific judges, and naturally neither would the possibility of inconsistency in the application of the law. Such inconsistency is inherent with a model which allows for judicial discretion, and a limited degree of legal inconsistency is not only inevitable, it is not necessarily particularly harmful.[526] Perfection is not the aim: improvement is. It is submitted that the fail-safe model does just that. It improves the state of legal consistency by providing a balanced framework. This balance is important in two senses. Firstly, the structure of the initial 'rule' aspect of the model ensures that judges are more likely to reach similar outcomes for similar cases.[527] This is because the weight and scope for

[523] Law Commission (n 30) [2.53].
[524] ibid [2.53].
[525] Ann Hussey QC, 'Spousal Maintenance: Principles or Chaos? The Need for Reform and the Deech Bill' (Middle Temple Amity Visit to Hong Kong, 2015) 28 <https://www.middletemple.org.uk/search/node/Middle%20Temple%20Amity%20Visit%20to%20Hong%20Kong> accessed 17 May 2019.
[526] David Strauss, 'Must Like Cases be Treated Alike?' (2002) University of Chicago Public Law & Legal Theory Working Paper 24 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1197&context=public_law_and_legal_theory> accessed 7 April 2019.
[527] Schneider (n 313) 440.

individual bias and opinion is limited to cases where the threshold is satisfied. While the threshold is not high enough to completely eliminate the potential for the judge's personal interpretation, this actually leads to the second reason why the balanced approach enhances legal consistency. By including a fail-safe through the path to discretion, the model is able to avoid the Harris 'arbitrariness attack'—that overly rigid rules would result in practically identical cases being treated differently because of 'an insignificant difference between the cases.'[528] Accordingly, this thesis' proposal is able to factor the arguments on both ends of the rules-discretion spectrum in harmony and reflect what is argued to be the ideal position of financial remedies law. For these reasons, it is contended that the fail-safe model would represent a significant improvement from the status quo through providing greater legal consistency.

Lastly, the effects that the proposal would have on individualised justice should be considered. It is intuitive that a legal system which is intentionally flexible to allow a judge to evaluate the facts of each case in order to reach the fairest result would be proficient in meeting the objective of individualised justice. As was mentioned in Chapter Three, the limited scope of this thesis is such that it has not gathered and assessed all of the 'everyday' cases in an attempt to determine whether the law in England and Wales is generally substantively fair. Accordingly, it was concluded that this thesis will assume that the English and Welsh regime, which prides itself on its flexible nature designed to achieve fair results, is effective in realising individualised justice.[529] Therefore, while the case for this proposal in relation to individualised justice is not to contend that it

[528] Harris (n 290) 1100.
[529] Jackson (n 17) 233.

necessarily improves this quality of the law, this thesis does submit that it certainly would not worsen the state of substantive fairness. In support of this, it is worth turning to the Family Law (Scotland) Act 1985. This statute, which can be described as being 'positioned at a relatively midway point on the rules-versus-discretion continuum,'[530] would appear to be attaining the requisite standard of individualised justice—not least because it has been a remarkably successful and durable piece of legislation.[531] In fact, it has been argued that while the Scottish law promotes certainty to a greater extent than England and Wales, this has not come 'at the expense of fairness, which remains within reach, whatever the circumstances before the court.'[532] Similarly, the fail-safe proposal would not interfere with the attainment of individualised justice. Given the relatively low threshold in the general provision (whether following the relevant rule would result in unfairness), the access to judicial discretion is readily available for those cases which would benefit from it. Therefore, while the state of individualised justice would not necessarily improve from the status quo, it is not expected that it would deteriorate.[533]

Ultimately, this thesis does not submit that this proposal would solve every issue perfectly. It is contended, however, that many of the issues currently experienced in financial remedies law would be ameliorated by a framework which reflects a more balanced approach to the application of rules and discretion. The fail-safe model, it is argued, most effectively serves this purpose. Accordingly, this thesis submits that the fail-safe model

[530] Crowley (n 162) 392.
[531] Mair, Mordaunt and Wasoff (n 497); Lady Wise, 'The Family Law (Scotland) Act 1985: A Financial Provision Regime Built to Last' (University of Edinburgh, 2016) 1 <http://www.sps.ed.ac.uk/__data/assets/pdf_file/0018/211851/The_Family_Law_Scotland_Act_1985_A_Financial_Provision_regime_built_to_last_April_2016_Lady_Wise.pdf> accessed 27 June 2019.
[532] Crowley (n 162) 392.
[533] Again, it is worth acknowledging that, given the lack of information on the current state of individualise justice in England and Wales, a definitive conclusion on this issue is not possible.

would provide a number of improvements to the financial remedies law, and as such it is clearly more desirable than continuing with the status quo.

d) Case examples

Finally, as the last part of the discussion of the fail-safe proposal, this section will demonstrate how it would be applied to a financial remedies case, and whether the results would differ from those under the current legal framework. This section will explore two different types of cases: one reported, well-known big money case, and the other being a hypothetical everyday case. The reason for this approach is twofold. Firstly, given the vastly different principles and procedures applied between big money and everyday cases, it is important to illustrate how this proposal would impact each separately. Secondly, while analysing the past case will involve comparing the predicted result under this proposal to the actual decision of the court, the hypothetical case exercise will involve a slightly different approach of predicting both the outcome under the status quo and the proposal. Accordingly, the range of insights that can be drawn from these two different case studies should contribute to a greater understanding of the true impacts of this proposal.

i) Past case: Miller v Miller [2006] 2 AC 618

In the *Miller* case, Mr and Mrs Miller married in July 2000, and nearly three years later separated in April 2003. At the time of separation, the husband was aged 39 and the wife was 33 years of age. They did not have any children. During the marriage, the wife was earning an annual income of £85,000 working as an associate partner at a financial public

relations firm. The husband was a fund manager who had accumulated a significant amount of wealth prior to the marriage, and had made plans ahead of the marriage to move to a different company (New Star). Soon after the marriage, the husband made the move to New Star, which grew quickly as a result of efforts made largely during the marriage. Upon divorce, the wife claimed ancillary relief and was awarded the matrimonial home as well as £2.7m—amounting to a total award of £5m. The Court of Appeal upheld this decision, and the husband appealed to the House of Lords. While the issue of how much weight ought to be attributed to conduct was contested, the House of Lords nonetheless dismissed the appeal on the basis that while he had brought into the marriage a considerable amount of wealth, he had also grown his net worth significantly during the marriage. The average between expert valuations was that his shares in New Star had grown to £15m over the course of the short marriage, which, naturally, would be considered matrimonial property.[534] Ultimately, it was estimated that the husband was worth £32m, which meant that the award of £5m represented less than one-sixth of the total assets, and less than one-third of the matrimonial assets. This amount, it was reasoned, 'reflects the amount of work done by the husband on this business project before the marriage.'[535] Accordingly, the House of Lords concluded that £5m was a fair award to the wife in what was a 'highly unusual case.'[536]

It is the position of this thesis that under the fail-safe proposal, the outcome would likely have been the same or very similar to that reached by the House of Lords in 2006. *Miller*

[534] *Miller; McFarlane* (n 7) [71].
[535] ibid [73].
[536] ibid [73].

was uncommon not only because it was a big money case,[537] but also due to the brief duration of the marriage and the remarkable expansion of the husband's wealth during that short period of time.[538] Accordingly, the rule portion of the fail-safe model would have been unfit for this case, and as such the husband would have disputed this aspect of the law (for example, an equal division of matrimonial property). Given the unique set of facts in this case, the threshold would have been engaged and satisfied with ease. With reference to the section 2(3) factors under this proposal, both the short duration of the marriage and the disproportionately larger financial contribution by the husband would indicate equal division would be unfair. Ultimately, this would result in the case being decided according to judicial discretion which would be applying the same set of principles that were relevant in the House of Lords decision. What this example shows is that this thesis' proposal is unlikely to have a profound impact on the unusual outlier cases which find their way to the higher courts. However, it is submitted that this is an inherent—and attractive—part of the model. Under this proposal, where a case raises an issue(s) which sets it apart from the 'average' or 'standard' financial remedies case, it will most likely satisfy the threshold criteria of 'unfairness'. As a result, this would enable the court to depart from the constraints of the rule and seek a fair outcome through the exercise of judicial discretion. While it may be argued that this would dilute the effectiveness of the original rule, it should be considered that, as discussed above, a balance between the

[537] Admittedly, these high-value asset cases make up most of the reported cases. However, in the context of the majority of cases heard across the country on any given day, cases such as *Miller*–which see tens of millions of pounds—can safely be classified as uncommon.
[538] Anne Barlow, 'Community of Property – the logical response to Miller and McFarlane?' (2007) 39 Bracton Law Journal 19, 24.

rule and discretion is necessary.[539] Accordingly, where a particular case presents a unique factual matrix, uniformly applying a rule which would demonstrably lead to unfairness tilts the scales too far in favour of rules and certainty. Rather, it is precisely in these scenarios—where the outlier case does not fit within the broader mould of the rule—where judicial discretion is necessary to uphold the objective of individualised justice. The impact that this proposal could have on the everyday case, however, may be quite different.

ii) Hypothetical 'everyday' case: Kiran v Kiran [2019]

Surya and Eliana Kiran had been married for 25 years when they decided to separate. At the time of separation, the husband was aged 49 and the wife was 48. They had two children who are now fully grown and financially independent. The husband works as a project manager at a media company, earning £32,000 per annum. The wife stayed at home to look after the children as they were growing up, but she has since worked part-time as a learning assistant, which provides an annual income of £14,000. The matrimonial home is valued at £250,000 and is mortgage-free. Surya and Eliana also have combined savings of £260,000.

Under the fail-safe proposal, the rule would be that matrimonial property is to be divided equally. In this case, the total value of the matrimonial assets amounts to £510,000. Accordingly, in the event that the home were to be sold, each party would receive £255,000 out of the matrimonial property pot as part of the settlement for divorce.

[539] As discussed above, this balance is not only imperative according to the theoretical arguments advanced in Chapter One, it is also necessary in order to create important yet realistic (i.e. palatable) change.

Importantly, in a case such as this where there exists no significant complicating factors, a submission by either party that this outcome would be unfair in an attempt to trigger the threshold criteria would be unlikely to succeed. While the husband is currently earning more than the wife, there is no reason why the wife should not be able to sustain herself. She has transitioned from caring for the children to entering the workforce, and has been earning a decent income for several years. Accordingly, she is in a position to increase her hours or move within her industry in order to boost her annual income. Furthermore, bearing in mind the fact that the children are no longer a financial consideration, the settlement award will allow her to secure a house and retain additional savings for the future. For these reasons, the threshold criteria would not be satisfied in this case and the rule of equal sharing of matrimonial property would apply. While this might appear to be restrictive, it provides a number of benefits to both parties. Not only does the fail-safe proposal provide an easy-to-use system for the division of assets—and therefore reduce the parties' legal costs—it would also incidentally increase the efficiency of the resolution of these cases. If the rule was respected and a precedent were to be set, it is likely that neither Surya nor Eliana would dispute the applicability of the rule, because their case is so close to what the rule intended to govern that the difference in outcome if litigated is not greater than the exorbitant costs of matrimonial proceedings. Admittedly, the fail-safe model is not perfect. It may, and likely will inevitably, be that the rule aspect of the model will not lead to a perfectly just result for one or both parties in a given case. Yet, not only is such perfect justice an unrealistic goal, it is also a narrow view of justice. As has been stressed throughout this thesis, and in particular in Chapter Two, fairness and justice must be understood in a broad sense—substantively and procedurally. A balance must be

struck, and thus the pursuit of individualised justice is not an absolute one, but rather a matter of degree. To draw a parallel to a different context, it is worth considering the perspective of Lord Sumption on the issue of eliminating risk. Through the example of road accidents, he said the following:

> 'They are by far the largest source of accidental physical injury in this country. We could almost completely eliminate them by reviving the Locomotive Act 1865, which limited the speed of motorised vehicles to 4mph in the country and 2mph in towns. Today, we allow faster speeds than that, although we know for certain that it will mean many more people being killed or injured. And we do this, because total safety would be too inconvenient. Difficult as it is to say so, hundreds of deaths on the roads and thousands of crippling injuries are thought to be a price worth paying for the ability to get around quicker and more comfortably. So eliminating risk is not an absolute value, it's a question of degree.'[540]

Similarly, while this proposal may be criticised for limiting the extent of judicial discretion afforded to the courts and restricting the flexibility of the MCA, such a measure is justified in order to shift the position of the law to a more balanced application of rules and discretion. While this proposal incorporates a more broad-brush approach to financial remedies cases than the status quo (insofar as the general rule operates as the starting point), it would appear to be capable of achieving results which are holistically fair.[541] While reaching a fair outcome is crucial in financial remedies cases, it is also important for the parties to resolve their legal disputes in an efficient and cost effective manner.

[540] Jonathan Sumption, 'The Reith Lectures: Law's Expanding Empire' (BBC Radio 4, 2019) <https://www.bbc.co.uk/programmes/m00057m8> accessed June 23 2019.
[541] Meaning in terms of both fairness' substantive and procedural branches.

Accordingly, it is argued that this balance between rules and discretion is needed in the modern financial remedies law.[542] The fail-safe model, through its three components (rule, threshold, and discretion), attempts to reflect a near-middle position on the rules-discretion spectrum; effectively weighing and balancing the competing objectives of the law. For this reason, it is submitted that the fail-safe model presents a compelling proposal for reform.

Conclusions

This Chapter has focused on introducing this thesis' proposal for reform: the fail-safe model. It has approached this by delineating the core elements of the model, explaining the model in the context of financial remedies law, justifying each aspect as well as the proposal as a whole, and demonstrating how the proposal would be applied in practice. This Chapter has also identified the current reform proposal being considered by Parliament, and has argued why adopting the Deech Bill would be undesirable for a number of reasons. Given the arguments advanced in Chapter Two, the evidence of the shortcomings of the law in England and Wales in Chapter Three, and the growing movement in favour of reform, it would appear that changes to the law are inevitable. The question, therefore, is how the law is to progress from its current state. Ultimately, it has been argued that a reform proposal should embody a balance between rules and discretion. This is for two main reasons. Firstly, Chapter Two concluded a near-middle position (marginally favouring discretion) would enable the law to attain its core objectives, which

[542] Davis (n 300) 44.

means an effective proposal would attempt to align with this theoretical position. Secondly, reaching a compromise between rules and discretion is useful for the practical success of a model for reform. While a proposal should create meaningful change, a radical shift in the law would decrease its likelihood of amassing widespread support—especially in the area of financial remedies law. It is the position of this thesis that the fail-safe model, as presented and justified in this Chapter, effectively reaches this balance between rules and discretion. For this reason, the fail-safe model presents a cogent approach for future reform.

Conclusion

This thesis has focused on the extent of judicial discretion provided by the Matrimonial Causes Act 1973. In particular, it has examined the relationship between rules and discretion, and sought to discern the appropriate balance for the specific law relating to financial remedy orders. This analysis is important, because the shortcomings of the current law and the topical nature of the subject make it an issue which is both relevant and pressing. Having identified this problem, this thesis sought to provide a unique contribution by attempting to reformulate the MCA through a theoretical approach.[543]

In addressing the research questions raised at the beginning of this thesis, it was first argued that any law needs to draw a balance between rules and discretion, for a system predicated on an extreme version of either would result in undesirable consequences. Chapter One continued by pursuing the question of how to determine the appropriate balance for a specific law. It was contended that this query is best approached by first ascertaining the overarching purpose of the relevant law, which then makes it possible to deduce which mixture of rules and discretion would most effectively promote the achievement of that law's fundamental objective. Accordingly, in Chapter Two, this thesis attempted to search for the purpose of financial remedies law, and concluded that it is to reach a substantively and procedurally fair outcome in each case. Based on this analysis, it was argued that the appropriate balance between rules and discretion for financial remedies would be a position near the middle of the spectrum, with a slight preference for discretion. In Chapter Three, the statutory framework and judicially developed principles

[543] Which was initiated by the jurisprudential and theoretical analysis conducted in Chapter One.

were evaluated to discern the extent of discretion present in the current law. It was found that the law in England and Wales does not align with the theoretically determined ideal position, nor is it effective in attaining a number of important policy objectives, which led to the conclusion that statutory reform is necessary. The fourth and final Chapter assessed the topical Deech Bill which is currently being reviewed by Parliament, and judged it to be an undesirable path for reform. Accordingly, this thesis proposed a model for reform: the fail-safe model. In summary, this model attempted to embody the appropriate position on the rule-discretion spectrum by creating a legal framework which offers a rule that can be departed from where a threshold is satisfied, resulting in the case being decided according to judicial discretion.[544]

Ultimately, this thesis submits that the solution to the rule-discretion debate in financial remedies law is to reach a near even balance in the weight given to each consideration. Admittedly, financial remedies (and perhaps family law as a whole) is a difficult area to reform, as it raises countless issues and considerations which are often fiercely debated.[545] No law can be absolutely perfect, and as such, this thesis does not attempt to claim that it provides the perfect solution. However, through this nearly equally mixed structure, it is argued that the overriding purpose of the law—fairness—can be more wholly attained, in terms of both its substantive and procedural elements. Moreover, beyond aligning with the theoretical conclusions of this research, it is contended that this approach would more likely be received positively by a wide range of legal practitioners and academics, as it reflects a balanced perspective and seeks compromise.

[544] Judicial discretion as explained in Chapter One, which is guided by the relevant legal rules, principles and standards.
[545] John Dewar, 'The Normal Chaos of Family Law' (1998) 61 Modern Law Review 467.

The case for this thesis' reform proposal is increasingly compelling in light of the recent legal and political developments. Baroness Deech has proposed a widely criticised Bill for reform,[546] which has passed through the House of Lords and is due for its second reading in the House of Commons.[547] Sir Andrew McFarlane has outlined various proposals to ameliorate the state of the law.[548] Sir James Munby, during his tenure as President of the Family Division, worked to refine the 'application of procedural justice' for financial remedies law.[549] Moreover, when this is considered in conjunction with the impact of legal aid cuts on the preponderance of litigants in person in private family law cases, it is evident that there is a growing appetite for change and improvement in this area of law. By setting the scales to appropriately balance certainty and individualised justice, legal consistency and flexibility, and, ultimately, rules and discretion, this thesis contends that the fail-safe model is the way forward.

[546] Thompson Written Evidence (n 345).
[547] Financial Provision Bill (n 25).
[548] Including the introduction of the Financial Remedies Court and producing tables with predicted outcomes for cases: Andrew McFarlane (n 22) 10-11.
[549] Munby (n 443).

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