FORGETTING THE DEBATES OF LAWYERS: THE CODIFICATION OF FAMILY LAW IN NEW ZEALAND

Family law in New Zealand has undergone a number of legislative reforms in recent years and the signs are that this process will continue. It is the view of the writer that these reforms would be more rationally and coherently made if they were all brought together in a single code to regulate family law. He discusses the advantages of codification, the parameters of the code, and some of the practical difficulties in formulating appropriate principles.

I. From Spartan Simplicity to Legislative Welter

Every few years, with a lemming-like inexorability, the New Zealand legislature sets about "reforming" our family law. The most recent attempt promises to be a long-drawn out affair: it commenced with the introduction by the Labour Government in October 1975 of the Matrimonial Property Bill which was not passed into law[1] until December 1976. However, it seems this is only the first step in a grand march of reform. The Minister of Justice, Hon. D.S. Thomson, speaking on the reporting back of the Matrimonial Property Bill from the Statutes Revision Committee, promised a thorough-going review of all family law, with a view to incorporating it into one statute, if possible.

Certainly, the time is ripe for a wholesale rationalisation of New Zealand's family law, which has over the past hundred and fifty years undergone radical changes, particularly as it regulates the husband and wife relationship. Prior to the passage of the Matrimonial Causes Act 1857 in England, and the Divorce and Matrimonial Causes Act 1867 in New Zealand, the law relating to the termination of marriage was one of relatively pristine simplicity. Divorce was available only by Act of Parliament, a process of such financial and practical difficulty that it was effectively out of the question for all but the very rich and influential.[2]

On the property side, it has been well said that,[3] under the common law:

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1. Effective 1 February 1977.
2. See, for example, the 1844 judgment of Maule J., quoted in Megarry, R., *Miscellany-at-law* (1955), 116-117.
3. *Matrimonial Property — Comparable Sharing;* White Paper on Matrimonial Property, 1975 A. to J., E.6, 3.

> . . . the legal position of married women was one of complete inferiority. Any property a married woman might have owned before her marriage was stripped from her and given by law to her husband. Anything she earned or was given during the marriage became automatically her husband's. In short, a married woman was incapable of owning or disposing of any property while the marriage lasted.

While this property regime would score badly on any modern day social justice rating, like the divorce law, it was wondrously simple in its application.

Acting under the impulsion of changing social needs and awareness, successive New Zealand Parliaments have intervened to ameliorate the legal harshness outlined above. In a relatively short space of years there has been a positive welter of legislation, regulating not only divorce and matrimonial property, but virtually every other aspect of family life as well. The legal relationships within the nuclear family, from engagement to marriage, through marriage, the birth and upbringing of children, to the termination of the marriage, are regulated by at least eleven major statutes bearing largely on the familial establishment.[4] In addition, there is a large number of other statutes which touch, peripherally at least, on the family relationship.

Thus, while New Zealand can take justifiable pride in the reforming zeal it has shown in the field of family law, it must also acknowledge the price to be paid for legislative boldness. From that legal landscape of spartan simplicity, outlined in the first few paragraphs of this article, we are now in a situation where complexity abounds and confusion is rife.

With this profusion of statute law, enacted on an ad hoc basis to solve specific problems, it is not surprising that there are considerable ambiguities as to the "true" state of the law. Going beyond this, there developed, particularly in the area of matrimonial property, glaring contradictions. Judicial interpretation has done little to clarify the situation; indeed, in some cases it has simply added to the confusion.

The Matrimonial Property Act 1976 is an attempt to rectify the most undesirable features within the sphere of matrimonial property, and to this end purports to be a code. However, it is particularly characteristic of family law that its branches are almost inextricably intertwined. Thus, to "codify" matrimonial property in isolation, simply shifts the problem. Certainly, some advantages accrue by consolidating all provisions overtly concerned with property questions in the one statute. However, this takes no account of, for instance, the relationship between property disposition and maintenance payments. Again,

4. Adoption Act 1955, Children and Young Persans Act 1974, Domestic Actions Act 1975, Domestic Proceedings Act 1968, Guardianship Act 1968, Infants Act 1908, Joint Family Homes Act 1964, Marriage Act 1955, Matrimonial Proceedings Act 1963, Matrimonial Property Act 1976, Status of Children Act 1969.

questions of the occupancy of the matrimonial home cannot be resolved in isolation from the custody of children. The Act attempts to make provision for "contracting out". Should we, then, consider amending the Marriage Act to make the reading and understanding of the salient features of the property regime a condition precedent to being issued a marriage licence?

Until these, and the numerous similar problems are resolved,[5] the new "codified" property regime will simply multiply the anomalies. The complexities and confusions endemic to family law will be best, and most permanently, removed by enacting an exclusive, comprehensive, Family Law Code.

II. What is Codification?

The suggestion of a Family Law Code, in the New Zealand context is unlikely to arouse the cries of anguished national pride that would be expected in the United Kingdom. New Zealand is less wedded to the sacred rites of the common law tradition, having most of its law embodied in statutory form, and having shown a willingness on numerous occasions to "codify" in name, if not in fact.[6]

Equally importantly, however, it is doubtful whether New Zealand's legislators (and lawyers) really understand the essential nature of codification; certainly, the available examples of "codes" suggest that they do not.

The term "code" defies precise definition. A code gives the law "legislative, rather than mere judicial or academic authority",[7] but so also does a statute, so what more does a "code" give? Codification goes further than consolidation which:[8]

> merely reduces into shape the law as already written in many existing statutes; whereas *codification* not only does that, but fuses into the whole the Common Law (as laid down by judicial decisions) besides.

Perhaps Professor H.R. Hahlo has come as close as is possible to identifying the crucial feature in saying that:[9]

> A code is an end and a beginning. Unlike a statute, which is superimposed upon the common law like a ship floating on the water, a code supersedes the common law, excluding all

5. Not to mention those arising from the silence of the so-called "code" on a number of substantive points of matrimonial property law.
6. Random recent examples of this are the Guardianship Act 1968, the Accident Compensation Act 1972, the Domicile Act 1976, and the Matrimonial Property Act 1976.
7. Donaldson, Bruce, "Codification in Common Law Systems", (1973) 47 A. L.J. 160, 161.
8. *Wharton's Law Lexicon*, 12th ed., 1916 — in Calvert, H., "The Vitality of Case-Law under a Criminal Code", (1959) 22 M. L.R., 621, 622.
9. Hahlo, H.R., "Here Lies the Common Law", (1967) 30 M. L. R., 241, 243.

> reference (except on very special grounds) to any source of law other than itself.

However, the "flavour" of codification is probably best sensed when we consider the rationale behind codification. Quite simply, a code is intended as a means of making the law readily comprehensible and accessible to layman, lawyer and legislator alike. Ideally, all the law regulating a particular matter will be gathered in one place, not hidden away in the nooks of many statutes, and the crannies of countless cases.

From this a number of consequences follow. Jeremy Bentham, the so-called "Father of Codification" in the common law world, saw this as the means of disseminating, as widely as possible, knowledge of the law among all reasonably intelligent men and women. This was particularly important for the proper functioning of Bentham's utilitarian scheme of legislation. It is equally necessary, however, if our accepted constitutional notions of "the rule of law" are to have any significance. If the law is to rule, it must first be known.

One of Bentham's main hopes of codification was that it would destroy the "alliance between the sinister interest of judges and that of professional lawyers",[10] a breed of humanity whose iniquities, in Bentham's eyes, were of deeper hue even than those of the common law which was their tool in leeching the general public. The legal fraternity is no doubt (at least marginally) better regarded today; nonetheless, the germ of Bentham's argument remains. There is, surely, something grotesque about a political and legal system which is explicable to the great mass of the people only through professional intermediaries.

Paradoxically, however, lawyers are probably the prime day to day beneficiaries of any codification. The physical difficulties of searching out the true state of the law are minimised when there is a code offering a guaranteed starting point.

In regard to the benefit accruing to the legislator from codification, it has been said that:[11]

> The real case for codification . . . is that it facilitates law reform. We can improve the content of the law when we create the new code; and we can improve it later by revising the code.

When the far-flung rules of family law are laid side by side, in a coherent whole, it is possible for the legislator to see the contradictions and anomalies mentioned previously in this paper. For instance, he will see that the new property regime, as was its predecessor, is inconsistent in a number of important respects with the Joint Family

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10. Bowring, J. (ed.), *Jeremy Bentham's Works* (1843) Vol. VII 201.
11. Diamond, A. L., "Codification of the Law of Contract", (1968) 31 M. L.R., 361, 372.

Homes legislation.[12] With the law gathered in this unified whole, the reformer will see the amendments to other areas of the law which are inevitably necessary as a result of reforming a specific area. He is, therefore, less likely to lose sight of the homogeneity of the whole body of law.

It must not be supposed, however, that codification is devoid of pitfalls, and it is on these that opponents of codification tend to focus in their counter-arguments. The most frequently posed criticism of codified law is of its supposed rigidity. Because of the code's fixed and unyielding nature, the argument runs, judicial discretion is minimised, and individual justice thereby sacrificed.

It is surprising, therefore, that the second major attack on codes is on the uncertainty they introduce to the law; thus, the previously settled law will be cast into a state of flux, and it is only when, decades later, "the code has become overlain with a thick encrustation of case law"[13] that certainty can return.

It is further argued that the chief virtue claimed for codification — its making the law accessible to lay-people — is, in fact, chimerical. According to this assertion, the law is inevitably and permanently impenetrable by the untutored mind; therefore, "the man on the Wadestown bus" will always have to rely on lawyers to interpret the law to him.

In addition to these assaults on codification's fundamental premises, there are certain practical difficulties which threaten the operation of law codes. The first of these practical problems lies in the possibility of the pre-existing law rising vampire-like from its grave, to suck the vitality from the code. The proper approach to the construction of a code is to consider it totally uninfluenced by the law it replaced, and to discern its meaning from its face.[14] However, this reckons without the human element: the generations of lawyers and judges who grew up with the "old" law will not easily be weaned from thinking in terms of that law which they know and understand.

On the other side of this coin there lies the possibility of "interpretative" case-law growing up around the code, and thus distorting its original intention. To jettison the doctrine of precedent entirely, as suggested by one proponent of codification,[15] seems an impracticable and unnecessarily radical solution. Rather, some safeguard must be sought which will minimise the potentially damaging effect of case-law on the code.

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12. See, for instance, *Plimmer* v. *Plimmer* (1975) Unreported, Welington Registry, M. 163/74.
13. Hahlo, op. cit., 249.
14. The definitive judicial statement on this point is contained in the judgment of Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107, at 144.
15. de la Cour, P., "Codification — Another Look", (1968) 33 Law Guardian, 15.

Various responses are possible to these objections and difficulties on an individual basis; there is, however, one rebuttal which is common to them all, and which also leads us to the visible feature which, more than any other, sets an effective code off from any other legislative instrument. A code, if it is to be of any utility whatever,[16]

> is based on . . . criteria of generality, simplicity and conciseness. It is not concerned with foreseeing all circumstances and covering all details of every conceivable case. Its only purpose is to lay down the basic principles of the law from which practical applications can then logically be derived.

By reference to this standard, New Zealand's major efforts at (purported) codification have been notable failures. The Accident Compensation Act is a kafkaesque legislative nightmare, which, in attempting to cover, in advance, every possible situation, becomes completely incomprehensible even to lawyers (also, one suspects to its administrators), let alone the baffled public.[17] The Matrimonial Property Act 1976 falls short of these heights of obfuscation only insofar as it is a smaller statute; it does not quite have the sheer bulk which so daunts anyone confronted by the Accident Compensation Act. At its core, the Matrimonial Property Act, represents an eminently reasonable and relatively straight-forward approach, that of deferred equal sharing. This system has functioned efficiently in a number of civil law jurisdictions, notably Germany, for many years. In its essence, it means that gains made during the course of the marriage are shared equally. This, presumably, is the intention of the New Zealand legislation; it is difficult to tell. It is swathed around with so many provisos and exceptions, that any sense of direction and purpose is long since lost.

This is not altogether surprising. The Matrimonial Property Act rolled out of the New Zealand statute-fabrication plant via exactly the same route as most other legislation. Thus, it is fairly typical of the drafting style favoured in New Zealand and England, which dictates that:[18]

> a statute should spell out everything to the smallest detail. Its criteria of excellence are meticulousness and precision. Hence, the rule often becomes complex, and one can lose sight of it in the profusion of detail.

This, indeed, seems an excessively charitable characterisation. In the words of former Minister of Justice, Dr. Martyn Finlay, (the Matrimonial Property Act's original Parliamentary sponsor):[19]

> . . . it is hard to describe [our statute law] today as other than turgid and lumbering.

16. Law Reform Commission of Canada, *Criminal Law — Towards a Codification*, Ottawa, 1976, 19.
17. Any doubters are directed to the proviso to s.117 (2)(a), as a fine example of wall-to-wall incomprehensibility.
18. Law Reform Commission of Canada, op. cit., 18.
19. Hon. Dr. A.M. Finlay, Alan Robinson Memorial Lecture, 26 October 1976 (unpublished).

However, Dr. Finlay himself echoes the old canard that opponents of codification use (as do even some of its champions):[20]

> Many . . . have sighed for simple legislation that the man-in-the-street can read and understand. This is a worthy aspiration, but quite impractical.

Apparently, Dr. Finlay, like so many other adherents to this view, has given scant consideration to the style of drafting characteristic of North American jurisdictions. An inspection of statute books from the United States and in Canada quickly shows that the laws are framed in general terms, indicating clearly the underlying principle, and the policy direction intended by the legislature, but leaving a great deal of leeway for the judge in the individual case. The argument against this is usually expressed in terms of: "Oh, our judges are not used to this, they wouldn't know what to do." The declaimer will then point to a case such as *E.* v. *E.*,[21] saying that this is an example of the mess judges make when given room to move. This example, in fact, proves, if anything, quite the opposite. The Matrimonial Property Act of 1963 was itself, as has been noted by Lord Simon of Glaisdale,[22] "extraordinarily difficult to construe". This statute was, indeed, an eloquent proof of the assertion that:[23]

> Most of the problems encountered by the Courts flow directly from the tendency of Parliament to ignore the virtue of enacting broad general rules in which the principal and overriding intention can be readily seen, and to try to legislate in detail for particular aspects of the mischief which presumably the statute is intended to curb.

This carpet-bombing approach to legislation reflects a disturbing lack of confidence in the calibre and abilities of the judiciary. There is, however, no reason to doubt the ability of the judges to make rational decisions in accordance with the will of the legislature, provided this will is comprehensible. If they are considered unable to perform this task, they are surely also incompetent to carry out in any significant manner their alloted constitutional role. In that case, we are faced with a crisis far transcending any problem discussed in this paper.

Applying this discussion directly to codification, it can be seen that the drawbacks earlier discussed would all be substantially ameliorated by strict adherence to the "clear principle" method of drafting. Firstly, that much-prized flexibility would be retained. When the courts are given room to move they are enabled to do justice to each case before them without having to indulge in the unedifying fictions and distortions which are so often seen at present.

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20. Idem.
21. *E.* v. *E.* [1971] N.Z.L.R. 859.
22. *Haldane* v. *Haldane* 11 October 1976 Unreported Privy Council decision, P.C. 39/75, 4.
23. Submission by Lord Emslie, Lord President of the Court of Session, and Lord Wheatley, Lord Justice Clerk, in *The Preparation of Legislation* (Renton Report), Cmnd 6053, May 1975, 6.5.

Certainty is also more surely preserved by this method than by the current method of legislative drafting. Where the existing law is both certain *and* satisfactory, there will be no difficulty in framing the code principles to accommodate this. Where the extant law is certain but unsatisfactory, there is a good reason to enunciate a clear principle to alter the law. Where the pre-code law is in a state of uncertainty, there is no better means of giving it certainty than to enact an unequivocal policy direction for the courts to follow.

It has already been demonstrated, in the course of this argument, that it is possible to enact laws which are comprehensible to lay-people, and that the North American-style statement of general principles is the most effective means of doing so. It is no accident that the United States, particularly, has come much further down the road of codification than have those jurisdictions which are closer to the English tradition.

It follows as a logical corollary from what has gone before, that the greatest danger of the pre-existing law returning to destroy the impact of the code, arises when the code is either incomplete, ambiguous, or both. The Matrimonial Property Act 1976 fails both tests; it will not be surprising to see many of the old rules reappear. It must be stressed, therefore, that codification is a slow and painstaking business.[24] The principles must be stated with the utmost conciseness and preciseness. This is not impossible, but requires that the draftsman should have a great deal of control over the English language, and that he should be left to work slowly and thoughtfully towards the desired goal.

Once this clear statement of principles has been arrived at, the growth of subsequent case-law should not represent an unmanageable problem. With the law reduced to these unambiguous principles, the scope for legal interpretation is commensurately reduced. The judicial task becomes much more one of applying the principles to the fact situation under review. This still leaves room for the healthy development of case-law, where necessary, but only such as will flesh out and give effect to the intentions of the code. The code must remain the starting point, and be the overriding consideration in every instance. If, perchance, it is found that judicial interpretation is leading the law down undesirable paths, it is always possible to modify the particular code provisions (taking due care with the effect on the rest of the code) to exclude the unwanted developments.

Thus, when all factors are weighed, it seems beyond doubt that real and lasting benefits would accrue from a thorough-going and genuine codification of New Zealand's family law. However, it is one thing to speak in these conceptual terms of the codification of law.

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24. In this regard it is noteworthy that the English Law Commission has been working on codifications of family law, criminal law and the law of contract for some ten years now, without (as yet) giving any sign of coming close to completion.

It still remains to apply the concepts to a specific situation, in this case family law. What will be the likely problem areas encountered, what reforms should be incorporated, what ambiguities must be resolved? It is to these questions that we must now turn.

III. The Scope and Content of a Family Code

The decision to codify having been made, the first task is to establish the parameters of the family code. Most of the matters to be dealt with by such a code are self-evident — such as marriage, divorce, guardianship, maintenance — and a cross-check with codes in other jurisdictions will confirm that view. However, it is inevitable that any area of law is surrounded by a penumbra of legal rules and situations which do not fit quite easily within the general rubric, or which would fit with equal ease in some other area. It is not sufficient to say that any issue affecting family relations should axiomatically form part of a family law code. There are certain crimes, for instance, that arises by definition out of the family relationship, yet it would be inappropriate to deal with them away from the penal statute.[25]

The principles contained in the Family Protection Act 1955 provide a very difficult case. This statute is frequently treated as part of family law[26] but in conceptual terms it appears to belong elsewhere. It does not regulate family relations (by definition, the family relationship has been terminated by death); rather it acts as an intervening factor in the law of succession.

Another denizen of this same disputed territory is that equitable creature, the presumption of advancement. The presumption applies only between parent and child and between a person *in loco parentis* and his charge.[27] Therefore, as the doctrine relates only to *inter vivos* dispositions between family members, it may well be considered that the family code is the most appropriate place to deal with it.

Surprisingly, matrimonial property can also be seen as a marginal matter. The French Civil Code deals with this in the book entitled "Acquisition of Property Rights", completely separately from other family law provisions which are contained in the book of "Persons". There is a great deal of conceptual merit in this categorisation, which sees the emphasis as being on "property", not on "matrimonial".

However, in the common law world it has become customary to treat matrimonial property as being right at the heart of family law. It might also derogate from the code to treat property questions separately from the matters in conjunction with which such questions normally arise.

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25. E.g. bigamy, incest.
26. E.g. Inglis, B.D., *Family Law* (2nd ed.), 1968, Vol. I, 283.
27. The Matrimonial Property Act 1976 abolishes the presumption as between husband and wife.

To a large extent, therefore, such difficulties must be settled in an arbitrary fashion, with the deciding factor in many cases being the historical categorisation. The code must aim at maximum inclusiveness but it must also be recognized that at a certain point this becomes counter-productive, because:[28]

> [E]ach separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected with any other.

The codifier must beware of the possibility of casting his net so widely that the entire body of statute and common law is thereby ensnared.

IV. Instituting Reforms and Resolving Conflicts

The specific needs for reform of New Zealand's family law, in terms of remedying injustices, are not great. The piecemeal legislative approach which has wrought the confusions and complexities has, nonetheless, prevented the ossification of outmoded rules. There is, however, a widespread social demand for reform of the law relating to divorce, and in the field of matrimonial property, despite the new statute, there is still a large number of inconsistencies and lacunae, which may well give rise to injustices. Therefore, it is on these two areas that the remainder of this paper will focus, as an exemplary, rather than exhaustive, discussion on meeting the problems of codification.

It seems likely that reform of the grounds for divorce is already in its formative stages. The National Party's 1975 Manifesto promised that:[29]

> National will legislate for the granting of divorce where the Court is satisfied, after a two year compulsory waiting period, that the marriage has irreconcilably broken down. The legislation will require consultation and a genuine attempt at reconciliation, but will not require proof of fault.

This statement is redolent of the ambiguity inherent in election "pledges", but the underlying intent appears to be to enact, for New Zealand, something akin to the Australian Family Law Act 1975. Under the Australian law,[30] a divorce shall be granted by the court on the proof of irretrievable breakdown of the marriage. Evidence of twelve months' separation is sole and conclusive proof of this ground (unless the court is satisfied that there is a reasonable chance of resumed cohabitation).

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28. Report of the Criminal Code Commission, 1879, in Garrow, *Criminal Law in New Zealand* (3rd ed., 1950) 3-4.
29. *National Party 1975 General Election Policy*, policy no. 34, 3.
30. Family Law Act 1975, s.48.

The National Party's principal departure from the Australian model appears to lie in the requirement for two, rather than one, years' separation by the parties. Strict adherence to the letter of this policy would be unfortunate. The majority of divorces are granted now on the basis of two years' subsistence of a separation order or agreement, so there would be no benefit accruing in those cases from the proposed reform (except insofar as any procedural delays were eliminated). On the other hand, those who are at present entitled to an "immediate" divorce, based on the matrimonial offence of their spouse, would be severely disadvantaged in having to wait two years.

As Salmond J. said in *Mason* v. *Mason*:[31]

> [I]t is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed. Such a condition of marriage in law which is no marriage in fact leads only to immorality and unhappiness . . .

The Australians obviously felt that such a marriage should not be extended even by two years. It is also noteworthy that the Law Reform Commission of Canada has recommended a radical reform which would make divorce available, in some circumstances, after only six months, and, in all circumstances, in no more than thirteen months.[32] There is also a strong argument in favour of New Zealand maintaining legal parity with Australia in matters such as this. It is easy to imagine the difficult conflict of laws problems which could arise for New Zealand courts at any time, whether under the existing law or the National Party's proposed reform[33].

With a sole ground for divorce of "irreconcilable breakdown" (whether evidenced by one or two years' separation) it is questionable whether there would be need to retain the separation procedure at present embodied in the Domestic Proceedings Act 1968. The major advantage arising from these provisions, now, is that two years' existence of a separation order is a ground for divorce. This benefit would, of course, be superseded by the proposed reform. The various orders generally considered ancillary to the separation order (such as the non-molestation order and the maintenance order) can equally well exist, as they can under the present law, independently of the separation order. Therefore, it is difficult to see what practical gain there would be in retaining the separation procedure.

There may still be some merit, however, in preserving some kind of "separation registration" procedure. This would considerably ease the evidencing of the period of separation, and would also provide a

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31. *Mason* v. *Mason* [1921] N.Z.L.R. 955, 961.
32. Law Reform Commission of Canada, *Family Law* (1976) 24-25.
33. For a discussion of this see Nicholas, P., "Divorce Aussie Style: Will We Accept It?", *Christchurch Star*, 9 January 1976.

means by which conciliation proceedings could be invoked at a time when they might still have a significant impact.[34] (It is noteworthy that under the scheme suggested by the Law Reform Commission of Canada[35] the first step towards divorce would be the filing, with the court, of a notice of intent to seek dissolution). If such a procedure was to be instituted, however, it could impose a considerable penalty on those people who have separated, in fact, for a considerable period, but who, for one reason or another, have not registered the separation. Their actual period of separation, prior to the divorce, would then be much greater than the statutory requirement. This may be an acceptable social cost, when weighed against the advantages of some kind of separation registration procedure, provided the requisite period of separation is no more than one year. If the period is to be two years, the added burden of some kind of registration requirement could amount to a substantial injustice to many people. In that situation, the disadvantages would clearly appear to outweigh the advantages.

Turning to a consideration of matrimonial property law, this paper is not the place for a detailed discussion of all the gaps left by the Matrimonial Property Act 1976, nor of all the uncertainties carried over from the old law and the new ones added. What shall be done is to focus on some of the major problems which remain in the field of matrimonial property, and which, of necessity, would have to be resolved in a family law code.

The first of these questions deals with the relationship between the Matrimonial Property Act 1976 and the Joint Family Homes Act 1964. The previously applicable matrimonial property law had been clouded by the passage of the Joint Family Homes Amendment Act 1974, which inserted a new section 11 in the principal Act. The new section 11 ("drafted in fashionable convoluted style"[36]) essentially provides that where a joint family home is sold, or the settlement cancelled, the net proceeds of the sale, or the property itself in the event of cancellation, shall, in the absence of a specific agreement otherwise, vest in the parties in equal shares. Prior to the 1974 amendment, in the event of cancellation or sale, the property or proceeds reverted to the settlor or settlors as if there had been no settlement.

In *Sullivan* v. *Sullivan*[37] it was argued that, as a result of the 1974 amendment, settlement of a home under the Joint Family Homes Act ousted the Court's discretion under section 5 of the Matrimonial Property Act 1963. Thus, the court would be bound to order the sale of the property, or order the concellation of the settlement, whereupon the parties would share equally. However, Roper J. rejected this

34. Bearing in mind that this does not mean only *re*conciliation; it equally means the settling of outstanding differences in such a way as to terminate the marriage in the most civilised fashion possible.
35. Law Reform Commission of Canada, *Family Law*, 20-25.
36. Inglis, B.D., "The Joint but Equal Family Home", [1975] N.Z.L.J. 1. This article provides a useful discussion of the confusions inherent in the new s.11.
37. *Sullivan* v. *Sullivan*, (1975) Unreported, Christchurch Registry, M. 172/74.

approach, saying that the new section 11 applied only when the parties were in amity, not when they were in dispute.[38] In *Plimmer* v. *Plimmer*,[39] later the same year, O'Regan J., while agreeing that the new section 11 did not oust the court's jurisdiction under the Matrimonial Property Act 1963, was not prepared to say that section 11 could never apply where the parties were in dispute.

The potential impasse could have been resolved if it had been possible to treat settlement as a joint family home as an expression of common intention, in terms of section 6(2) of the Matrimonial Property Act 1963. However, this avenue had been closed off by several cases where the courts had held that settlement as a joint family home was normally insufficient to meet the requirements of section 6(2).[40]

Surprisingly, the Matrimonial Property Act 1976 does not remove these problems. Unquestionably, the new property regime considerably reduces the scope of the Joint Family Homes Act, but there are still some very real benefits which will accrue to settlors,[41] and there are, of course, many thousands of homes currently settled as joint family homes. Thus, it can confidently be expected that at some time in the future a court will be faced with the invidious task of attempting to reconcile the two statutes. The new Matrimonial Property Act empowers the court to order the cancellation of a joint family home settlement, but that power was never in doubt.[42] The Act states that its provisions regarding the rights of creditors do not override the Joint Family Homes Act, which simply means that the Joint Family Homes Act predominates in that particular sphere. When it comes to a question of whether the Matrimonial Property Act prevails over the Joint Family Homes Act in an issue between husband and wife, the legislature has given no guide. Thus, the courts will almost certainly return to earlier case law, eroding further any claims which the Matrimonial Property Act may have had to being a code.

A further matter which will be of major practical importance is the relationship between the Matrimonial Property Act and the provisions regarding maintenance in the Domestic Proceedings and Matrimonial Proceedings Acts. These two Acts represent an important statutory shift in emphasis away from the common law position where there was an absolute, unilateral duty of support on the husband (provided the wife was not guilty of any matrimonial fault) so long as the marriage subsisted.

The chief criterion has become need, but this is not the sole criterion, and it does not operate equally between the spouses. Although, in both the Domestic Proceedings Act and the Matrimonial Proceedings

38. Ibid., 4.
39. *Plimmer* v. *Plimmer*, (1975) Unreported, Wellington Registry, M.163/74.
40. E.g. *Stevens* v. *Stevens* [1974] 2. N.Z.L.R. 129.
41. E.g. capitalisation of the family benefit is still contingent on settlement of the home as a joint family home.
42. In *Sullivan*, supra n.37, it was argued that the Court could do nothing else.

Act the shift has been away from the unilateral duty of support by husband of wife, there is an inbuilt assumption that the wife is, and should be, the economically dependent party. Although, in each of the Acts, consideration must be given to the wife's ability to support herself, unless she worked during the marriage, or the marriage is of very short duration and there are no children, her future earning-capacity will not, as a general rule, be considered by the court in making an order.[43] Thus, shorn of the various other factors, such as other overriding responsibilities of the husband, or the wife's habituation to work, there is an underlying obligation on the husband to support her.

This is a wraith-like duty, very easily exorcised, but it is nonetheless there. It is, moreover, in these provisions, a "one-way" duty; it is owed only by husband to wife. It is possible for the husband to obtain maintenance from his wife only where, owing to his state of health, his duty of care towards any child of the family in his custody, or some other circumstances, he is unable to support himself. There is thus a presumption favouring maintenance of the wife, but not the husband, a situation which is fundamentally at variance with the underlying philosophy of the new property regime, which raises "equal sharing" as its proudest boast.

It would be a very easy task simply to rationalise the maintenance provisions to ensure sexual equality. However, there would be considerable merit in progressing a little further, and adopting the approach taken by the Australian Family Law Act 1975. This statute starts from a premise that neither party, either during the marriage or on its termination, has an absolute right to be supported. A right to maintenance can arise only where the party claiming is unable to support himself or herself for one of a number of specified reasons (these reasons generally imputing some kind of causal connection between the marriage and the inability of the claiming party to support him or herself). The quantum of maintenance is limited to what the maintaining party can reasonably afford.[44]

This approach totally erases any vestiges of the common law duty of support, recognizing, as it does, the equality of the partners in marriage, and, indeed, the changed social role of marriage compared with even twenty years ago. Marriage, as an institution, no longer has, as a major imperative, the provision of material security for women. For a number of reasons most women may, in fact, still depend on their husbands for support. But in the absence of these husbands, financial security is available in the form of new employment opportunities, or in the social welfare system.

If maintenance provisions along the lines of the Australian model were to be enacted, there would probably be no appreciable change

43. *Rose* v. *Rose* [1951] P. 29. The result might, perhaps, have been different if the wife, and not the husband, had committed the matrimonial offence. See Denning L.J. at 32.
44. Family Law Act 1975 (Australia), ss. 71,72.

in the incidence of orders made. However, such a measure would have the scope to accommodate a changing social order; it would provide the type of clear policy direction (in this case, towards sexual equality) which is eminently desirable and appropriate to codified law.

In arriving at decisions on these various specific areas of family law, it is necessary always to bear in mind the underlying social policy to which it is desirable to give effect. In the matters discussed, the concern has been with enabling people to escape unhappy marriages as quickly and completely as is consonant with the prevailing social policy in favour of familial stability. At the same time, it is necessary to maintain and enforce equality as between the parties. In codifying family law, regard must constantly be had to this fundamental policy, and principles enunciated which will carry it consistently through all areas of the law.

V. Conclusion

It has been the purpose of this paper to demonstrate that New Zealand's family law is in real need of codification. A century and a quarter of legislative and judicial intervention has resulted in an incongruous patchwork of specific measures, clumsily stitched together into a discordant whole. There are a number of serious anomalies which can result in real injustices being done, as well as many inconsistencies which detract from the conceptual rationality of the law.

This confusion is coupled with a need for reform in certain areas of the law, most notably in the grounds for divorce. The recent revisions in the law of matrimonial property have made all the more urgent the need for a thorough-going review of all of New Zealand's family law, in order that contradictions can be eliminated, and needed reforms accomplished in the context of a total codification.

While piecemeal reform has enabled worthwhile progress to be made in particular areas over the years, the point has been reached where this particularity of approach will be counter-productive; the further anomalies it creates will outweigh its benefits. It is, therefore, impossible to "codify" just one segment of family law, yet this is what is attempted in section 4 of the Matrimonial Property Act 1976. There appears to be the impression abroad that the mere repetition of the term "code" will ensure that its incantory qualities immediately banish the ghosts of the common law, and any extraneous statutory poltergeists as well. Of course, this is not the case. The attempt to create a matrimonial property code, in isolation from the rest of our family law, is doomed to failure. As has been shown in this paper, the interaction between matrimonial property rights and the multifarious other facets of family law is fundamental; it is impossible, therefore, to insulate property matters from the totality of circumstances in which disputes arise, so any code must apply over the entire family law field. Indeed, as has been demonstrated, even this overlaps at places into areas such

as the law of succession and the law of property. In time it may be that a family code could take its place, as in many other countries, as part of a total civil code.

Codification is a means of achieving a real and coherent reform in a total area of law. But even more, it is a means of making the law more accessible to lawyer and layman alike. It thus acquires important constitutional implications. To achieve the desired end, however, certain important tenets must be observed in the process of codification. The code should not attempt to meet every possible fact situation. If it does it will inevitably end up as a morass of confusion and contradiction. Rather, it must state clear, definite, general principles of law, leaving wide discretions within which the courts must act. A failure to do this indicates a general lack of faith in the competence of the courts, and if such an incompetence exists, it is beyond the power of any legislation, however finely worded, to ensure justice.

The writing of such a code cannot be easy. The drafting must be meticulous, with regard constantly being had to clarity, simplicity and precision.

Even at the end of all this, the code will necessarily have its limitations. Because it cannot foresee every situation, nor eliminate human weakness, there will till be the occasional hard case, or bad decision. Nonetheless, codification will take us a long way along the road to more rational, consistent and comprehensible law, so that we may be able to say, with Jeremy Bentham, that:[45] "The great utility of a code of laws is to cause both the debates of lawyers and the bad laws of former times to be forgotten."

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45. Bowring, op. cit., Vol III, 207.