Outlines for a draft EU Regulation for a brave new world: harmonised matrimonial finance

If you were responsible for drafting such a regulation, what elements would you see as fundamental to that exercise and, in particular, how would you solve the conceptual difficulty of harmonising divergent cultural approaches to the issue of spousal maintenance so as to maximise the prospects for Europe-wide support?

O, wonder!
How many goodly creatures are there here!
How beauteous mankind is! O brave new world,
That has such people in't!

Miranda, *The Tempest* (V, i)

Comment voulez-vous gouverner un pays qui a deux cent quarante-six variétés de fromage?

Charles de Gaulle, quoted in *Les Mots du Général*, Ernest Mignon (1962)

Miranda's wonder at seeing human beings for the first time is, of course, ironic for the audience: the men she sees are not "goodly creatures", but drunken sailors leaving a wrecked ship.

Would the "brave new world" of harmonised European matrimonial financial rules be just as much a mixed blessing? It might seem so. Oxford's eminent Professor Adrian Briggs gave voice to this viewpoint in 2006 when considering Rome III[1]—

Social standards in relation to family law are far too diverse (and in some respects, odd) for a court to apply foreign divorce law.

To examine this further, we must sail from Prospero's island to another storm-tossed sea: the English Channel.

The problem

The Channel is a gulf of both geography and of understanding. The traditional view is that while England and the continent are but twenty-five miles apart, they are utterly alien to each other in their understanding of matrimonial finance. A world of fixed property regimes and limited maintenance lies to the south; one of free-thinking judicial discretion and lifelong maintenance to the north. A continent where ante-nuptial agreements are commonplace meets a country where they remain an exotic species.

[1] Submission to House of Lords European Committee, included in the Committee's *Report on Rome III: choice of law in divorce* (Fifty-Second Report of Session 2005-6, HL Paper 272).

Of course continental Europe is far more heterogeneous than this suggests. All her nations have unique rules of matrimonial finance which make harmonisation problematic: de Gaulle's plea of frustration above, quoted above, is apposite. The outcome of divorces under Germany or Switzerland's *Zugewinngemeinschaft* or the *communauté réduite aux acquêts* with *prestation compensatoire* in France can be significantly different. The former Warsaw Pact states have a range of family law codes which differ depending on how far they wished to reject the Communist principle that private family law was bourgeois[2].

But it is fair to say that the fundamental gulf of understanding remains between the common-law and Napoleonic traditions. Those on the continent, through political will and because it is easier from a practical point of view, are much more ready and willing to move towards closer matrimonial law: witness the relative ease with which the Hague Protocol on Applicable Law in relation to maintenance was signed; the Franco-German agreement on matrimonial property regimes; or the moves to enhanced co-operation under Rome III.

This gulf in understanding originates in two turning-points. First was the introduction of the Code Napoleon in 1804, which began the continental shift from feudal, customary and national laws to a common code. (This is relevant not just in France itself, but in Germany too: the Code itself was used in the Rhineland, Berg and Baden until 1900 until the creation of the *Bürgerliches Gesetzbuch*.)

The second turning-point was in England in 1970. After a century and more where the courts refused to accept that divorce should permit significant redistribution of property, English law turned on its head. The Matrimonial Property and Proceedings Act 1970 (which became Part II of the Matrimonial Causes Act 1973, in use today) gave the courts a free hand to make such provision as it thought reasonable. Significant discretion was given to individual judges to find the result. As Lord Denning MR said in *Wachtel* v. *Wachtel*[3]—

> We regard the provisions of sections 2, 3, 4 and 5 of the Act of 1970 as designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end … so far as we are aware, the principles clearly stated in section 5(1)(f) have nowhere previously found comparable statutory enactment.

The Parliamentary draftsman almost certainly did not predict any of: the enormous increase in the number of divorces in forty years; the importance of London as one of the centres of the world's rich; or the mobility of those couples which allows them to flit to the jurisdiction best suited to award or deny financial provision (as appropriate).

The stark difference between these two worlds has been thrown into stark relief since the entry into force of Brussels II: consider the rush to court in *LK* v. *K*[4], a case involving two French nationals. On 24 March, 2005, the wife presented a petition for divorce to the Principal Registry of the Family Division in London. Within a matter of

---

[2] Olga A. Khazova, "Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends", *Electronic Journal on Comparative Law*, vol. 14.1 (May, 2010).
[3] [1973] Fam 72, at 91C.
[4] [2006] 2 FLR 1113.

hours, the husband issued his application in Paris. The husband was rich. The difference in the English and French awards would have been huge, and all caused by a quirk of procedure. Small wonder that the English courts have referred to the "caprice in outcome" the Regulation can cause[5].

How then can we bridge the Channel? The very first hurdle is describing the range of powers to make financial provision on divorce. English law admits no distinction between orders resolving the property consequences of divorce, and provision for maintenance[6]. Only Ireland and (to a limited extent) Scotland are of the same mind.

But for these purposes of this article, an English practitioner must set sail under a European flag, however uncomfortable it may be, and accept that distinction. To do otherwise is to strike at the heart of European family law and kill the project of harmonisation before it is begun.

Harmonising the property consequences of divorce

Setting out the principles of division of property should be easy. Division should: be simple to understand; reflect that marriage is a public commitment, and so society is entitled to give its view as to how assets should be shared; and accept that, in the modern world, parties are entitled to indicate (within limits) their subjective idea of fairness.

It will not surprise anyone with an eye for good design that the answer comes from Scandinavia; in fact, over the past decade English law has crept to a position of surprising comity with the Nordic approach.

In very broad terms (a simplistic summary of a complex concept), those countries apply a default regime of "deferred community of property". All property of either party (including inheritances and pre-acquired property) is available for distribution on divorce, and is divided equally. (In Norway, the Marriage Act 1991 modified this to introduce *skjevdeling* (unequal division) to ring-fence inherited or pre-acquired assets).

Such an approach is now commonplace in England. Since *White* v. *White*[7] in 2000, the court's first task is to consider a "fair" division which has to be cross-checked against the "yardstick of equal division". In the *Miller* and *McFarlane* appeals, the House of Lords went further and described the "equal sharing principle" and "sharing entitlement"[8]. So the English and Scandinavian starting-points at least are the same.

A harmonised European regime on this basis requires movement from the French and German systems to permit financial provision from "personal" assets; but, as this is a technical change to a pre-existing overall system, this should be manageable.

---

[5] *Per* Thorpe LJ in *Radmacher* v. *Granatino* at the Court of Appeal stage: [2009] 2 FLR 1181, at para 11.
[6] Hence the European Court of Justice's struggles in *van den Boogaard* v. *Laumen* (Case C-220/95) European Court of Justice (Fifth Chamber), 27 February 1997; [1997] ECR-I 1147
[7] [2001] 1 AC 596.
[8] *Miller* v. *Miller, McFarlane* v. *McFarlane* [2006] 2 AC 618.

Of course, the other side of this coin is that Scandinavian couples are able to contract out of the operation of the default regime by pre-nuptial agreement.

Here again English law is moving north-eastwards. The landmark decision of the Supreme Court in *Radmacher*[9] has, for the first time, permitted pre-nuptial agreements to be upheld where it would be fair to do so. English law has moved a long way from 1994, when a highly experienced Family Division judge could hold that a German pre-nuptial agreement was of very limited relevance indeed[10].

The English profession waits to see how *Radmacher* is interpreted in practice. The first smoke-signals indicate that judges at first instance have been keen to retain discretion, in particular over the need-based element of any awards. But agreements are now being given considerable weight.

In conclusion, then, an adoption of the Scandinavian system bridges the gulf between England and Europe. It satisfies the three principles set out above. It has the great advantage of simplicity. It fits with the feeling that the public commitment that is marriage should create an obligation to share wealth. But it permits parties with wealth external to the marriage to contract out where appropriate.

The author's preference is for as simple a rule as possible; but, if this general scheme is considered too blunt an instrument, a short marriage "failsafe" could be introduced along Danish lines. In Denmark, where a marriage is shorter than five years, the court may order unequal division if appropriate.

Harmonising maintenance

If harmonising property regimes is complex, harmonising maintenance should be simple.

This is not to say that there are no national differences. The first one is nomenclature. As mentioned above, the European Court of Justice defined it broadly in *van den Boogaard* v. *Laumen*[11] as provision which "is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount".

This causes difficulty for the English, who abolished the word in 1970 (apart from interim financial provision pending the outcome of proceedings) and replaced it with "periodical payments". These may meet the payee's need, but can just as much be intended as a period redistribution of capital[12].

The second problem is differing national attitudes of what "need" actually is. In Scotland, the norm is three years' payments of maintenance with a longer term only in exceptional circumstances[13]. In Sweden, the term is usually one to four years, with

---

[9] *Radmacher* v. *Granatino* [2011] 1 AC 534.
[10] Thorpe J (as he then was) in *F* v. *F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45.
[11] See reference at note 6 above.
[12] See the interesting discussion in *G* v. *G (Maintenance Pending Suit: Legal Costs)* [2003] 2 FLR 71.
[13] S*tott* v. *Stott* (1987) GWD 17-645.

again "extraordinary reasons" having to be given for a longer term which should where possible, be limited in time[14]. But in the Czech Republic, maintenance orders are very rare indeed: statistics from 2001 show that, out of 31,586 divorces, only 932 maintenance orders were made[15].

Meanwhile in the Netherlands, the maximum term is twelve years[16] with a special provision for marriages of five years or under: here maintenance lasts a maximum which is the same length as the marriage. In Germany there is no time-limit (which arises from the importance placed on the *nacheheliche Solidarität*)[17]; but lifelong orders are not nearly as common as in England, where they are standard (and indeed the judiciary's preferred response).

Finally, all this is in contrast to France, where in 2000 a law was passed to encourage lump sum payments of *prestation compensatoire* in place of periodic payments[18].

These national differences are surely a reflection of both the basis of government support for those in need, and national working patterns.

By way of example, some of the countries with the least "generous" maintenance provision in Europe are in Scandinavia; but the Nordic countries have a culture of significant state benefits and assistance with childcare. On the other hand, benefits in England and Wales are closer to subsistence level, and a stigma may attach to claiming them. Significant "maintenance" awards are a logical result.

Equally, as noted by Baroness Hale extra-judicially[19], England is unusual in having a large number of women who are neither full-time at home nor full-time in work But the English welfare system has not adjusted to reflect this. There is a natural expectation in consequence that men in work will assist.

The Commission on European Family Law has already attempted to set out draft principles of harmonisation[20]. Some sound uncontroversial: principle 2.2 is that "each spouse should provide for his or her own support after divorce". Principle 2.3 is that "Maintenance after divorce should be dependent upon the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs. "

But others are not so easy to accept. Principle 2.6 is that, "In cases of exceptional hardship to the debtor spouse the competent authority may deny, limit or terminate

---

[14] M Jänterä-Jareborg, *Report of Sweden concerning the CEFL Questionnaire on Grounds for Divorce and Maintenance Between Former Spouses* (http://www.law.uu.nl/priv/cefl).
[15] M. Hrusaková, *Report of the Czech Republic concerning the CEFL Questionnaire on Grounds for Divorce and Maintenance Between Former Spouses* (http://www.law.uu.nl/priv/cefl).
[16] *Staatsblad 1994,* numbers 324, 325 and 570.
[17] D. Martiny and D. Schwab, *Report of Germany concerning the CEFL Questionnaire on Grounds for Divorce and Maintenance Between Former Spouses* (http://www.law.uu.nl/priv/cefl).
[18] Loi No. 2000-596 du 30 juin 2000.
[19] Baroness Hale of Richmond, *The Audrey Ducroux Lecture 2011: What's The Deal? Marital Property Agreements, past, present and future* (delivered to the International Academy of Matrimonial Lawyers Twenty-fifth Annual Meeting, Harrogate, 2011).
[20] K. Boele-Woelki *et al*., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Intersentia, 2004).

maintenance because of the creditor spouse's conduct. Principle 2.8 is that maintenance should be granted "for a limited period, but [the court] exceptionally may do so without time limit".

Conceptually, these principles pose difficulties as maintenance is intended to be in response to a defined need of a spouse. This is all the more so if property division is not to be quantified on the basis of need (as is the European norm).

If this is right, every proposed codification or restriction on maintenance can have highly unsatisfactory outcomes. Three examples suffice.

Should maintenance in short marriages last for no longer than the marriage on which it is founded (as on the Dutch model)? But even a short marriage can have a significant impact on earning capacity: consider a woman who marries a rich man at 41, is able to leave work and have a child, but leaves the marriage at 46. Five years of maintenance might well be insufficient to meet need.

What of a formulaic approach under which maintenance should be no more than a specified proportion of the payer's income? But the lower a payer's income, the more he will need as a percentage to meet basic living costs which are absolute.

What of the Commission's principle 2.8? Again, it is easy to conceive of circumstances where a marriage creates a financial imbalance which can never be addressed in the payee's lifetime. Care for a disabled child would be an obvious example. Where the operation of the property regime would not satisfy financial need, lifelong maintenance is the only possibility.

For these reasons, maintenance should be possibly lifelong, but rarely in practice. It should have no formula attached but be reasonable in the circumstances of the payer's income. It should not be used as a device to readjust capital provision, but should meet need alone. Because it depends on inherently unpredictable facts, it cannot be fixed by rule.

The realistic conclusion must be that any attempt to harmonise by codification can spell real danger. One principle alone should be the rule: maintenance should be paid from what the payer can afford to meet a payee's need, and only to meet need.

Conclusion

A "brave new world" could be reached with real effort. It would require common-lawyers to embrace the new world after *Miller* and *Radmacher*. They would have to come to terms with a generally equal division of property, but with mature adults being given the autonomy to opt out. But it means that the "classic" European property regime would need to broaden out to include inherited and pre-acquired assets.

It means too that legislators should be brave enough to let judges deal with need on a case-by-case basis. Rules which impose artificial time-limits should be swept away on the basis of the single principle set out above.

The legal shift might not be hugely significant; the cultural one might well be. But if Miranda managed to cope with seeing humanity for the first time, anything is possible.

Nicholas Bennett
Farrer & Co LLP

30 November, 2011