COMMUNITY OF PROPERTY: A REGIME FOR ENGLAND AND WALES?

Project description

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The Project Idea
The overall theme of the project is, in the light of the predicted ‘Europeanisation’ of family law, to examine the advantages and disadvantages of some selected European systems of ‘Community of Property’ during marriage and some cohabitation relationships as compared with the system of separate property during marriage or cohabitation with discretionary redistribution on divorce or sometimes death which exists in England and Wales.

1. Background to the project
The difficulty of restructuring family finances on relationship breakdown, whether in the married or unmarried cohabitation context, is a source of both distress and expense to those involved and an unresolved matter of concern for government policy makers. Given, as McGlynn (2001, 35) has emphasised, ‘[An] EU family law is being developed as part of package of measures to promote integration, enhance judicial co-operation, give substance to the concept of EU citizenship and ensure the sound operation of the single market…[which] may or may not be appropriate for a transnational family law’, it is vital to explore what advantages or disadvantages a European-style ‘community of property’ regime may hold for England and Wales.

The 1998 government consultation document Supporting Families addressed the issues of uncertain outcomes and expensive, prolonged conflict in financial provision disputes. It suggested options such as equal sharing on divorce and the use of pre-marital contracts, which have not been pursued (Thorpe, 1998, Law Society, 2003). It remained silent about unmarried cohabitation, although the Law Commission, in its Discussion Paper Sharing Homes, has recognised the inadequacies of the application of strict property law to such relationships but felt unable to make any concrete proposals for reform (Law Commission, 2002). A key aspect of the dilemma is the difficulty in fairly balancing easily quantifiable financial contributions to family life against non-financial ones such as homemaking and childcare (Fineman, 1991). This is exacerbated by our system of separate property ownership by spouses as well as cohabitants during the relationship (unless assets have been purchased in joint names). However, whilst this is significantly repaired by a discretionary adjustive regime for financial provision on divorce which takes account of all forms of ‘contributions to the welfare of the family’ (Pt II Matrimonial Causes Act 1973), strict property law applies during relationships and on cohabitation breakdown. Within Europe, this same dilemma has traditionally been resolved through the concept of ‘community of property’ within marriage (and extended now to registered cohabiting partners in some jurisdictions). Here, marriage (or partnership registration) generates a “community” of certain assets belonging to or acquired by the couple, unless they opt out of the community regime. The range of assets included in the community varies but will normally include the family home. The community is treated for some purposes as if owned jointly during marriage/partnership, and is split equally on divorce, although the courts may have power to adjust the impact of this to promote the security of any children involved.
Similar ideas have in the past been considered in this jurisdiction. In 1973 the Law Commission recommended automatic joint ownership of the matrimonial home (Law Commission, 1973). The proposal never became law. Recommendations made in the “Report to the Lord Chancellor by the Ancillary Relief Advisory Group” emphasised the need for research prior to any statutory reform seeking to move towards community of property (Thorpe LJ, 1998). The decision in *White v White* [2000] 2 FLR 981 could be said to have imposed a deferred community regime on divorce, but of uncertain scope; the decision in *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139 has taken the process further by emphasising a preference for equal treatment of husband and wife. Research into community of property in its various forms will provide important insights pertinent to some of the difficulties faced in this area both during marriage and on divorce. Different issues are raised in the context of the unmarried family. The increase in cohabitation across Europe and the prevalence of a “common-law marriage myth” that cohabitants have the same financial relationship as married couples (Barlow et al, 2002) expose a need to consider the implications of any proposed community of property regime for cohabitants. The Civil Partnerships Bill 2002, itself a European-style initiative extending marriage-like legal rights to cohabitants registering a partnership, proposed automatic joint ownership of the home and other assets where no ownership arrangement had been agreed; yet the Government’s plans for registered partnership limit its availability to same-sex cohabitants and assimilate to registered partnership the existing law of financial provision on divorce (Women and Equality Unit, 2003).

These developments combine to highlight the need to revisit community of property afresh and to evaluate its benefits and pitfalls from a British perspective.

Our project will begin by studying selected community regimes in Europe, then split into two streams as we consider, the potential merits of the introduction of a community regime in our own jurisdiction, on the one hand from the perspective of married couples and on the other from that of cohabitants.

2. Issues to be addressed

Our research questions are:

(a) for married couples and, if so, in what form; and/or

(b) for unmarried cohabitants and, if so, in what form?

In addressing these questions, we propose to investigate the following issues:

*a) What is the user experience of the different forms of community regime found in European countries?*

Under this head we are researching both subjective and objective factors. How far are community regimes acceptable to users in Europe; is there a high level of opting out, or do married couples (and registered partners where this is relevant) usually accept the default regime? What are the implications of community of property on divorce? To what extent, if at all, do community regimes protect family assets from creditors of one partner during the relationship? How do regimes impact upon men and women in different socio-economic groups? What is the experience of community regimes in the new registered partnership context?

*b) What form, if any, of community of property would be most appropriate for married persons in this jurisdiction. This would depend upon:*
- The potential financial impact of such a regime upon married couples, taking into account socio-economic factors such as social security, earning patterns, and child care, both during marriage and upon divorce.
- The effect of a community regime upon the negotiation of the financial outcomes of divorce, and its potential for reducing conflict, increasing certainty and facilitating mediation. Contrast with the present law on divorce, where outcomes approaching equal sharing following long-term wealthy marriage stand alongside the more needs-based redistribution of assets for the less well-off.
- The expectations of potential users of the regime. Would community of property be acceptable to them, given the potential legal and practical effects of its introduction? It is suggested that the emotional impact of a regime is at least as important as its practical implications.
- The interaction of a community regime with other areas of English law, in particular property law (differing radically from European property concepts in its extensive use of the concept of the trust), succession law, and the development of land registration embodied, in particular, in the Land Registration Act 2002 (Cooke, 2002). In this context it would be relevant to look at community of property regimes operating in common law jurisdictions in the US.

c) What form, if any, of community would be appropriate for unmarried cohabitants in this jurisdiction.

The factors considered above in the context of married couples would remain relevant (financial impact, effect upon dispute resolution, “fit” with the existing law and, most importantly, acceptability to users), but in the case of cohabitants additional factors arise. At present, cohabitants have none of the benefits of the adjustive regime available on divorce, yet many are unaware of this. As a result many fail to take legal advice, and on the break-up of the family needs may be unmet and hardship caused, particularly to children and those who care for them. The prevalence of cohabitation as an accepted family form makes community of property as relevant, potentially, to at least some cohabitants as it is to spouses.

d) What are the theoretical arguments for and against a community regime?

Against a cultural backdrop in which women’s perceived inferiority has been symbolised through their exclusion from property, the implications for women and men of a regime that replaces separate with communal ownership require careful consideration. Whether women’s interests are best served by protection or by financial independence has been the subject of deep academic disagreement and is in need of constant re-assessment as society changes (Deech, 1977; O’Donovan, 1978; Smart, 1984; Fineman, 1991).

In exploring whether or not a community regime would be “appropriate”, for married or unmarried couples, our approach will be to look both at the practical consequences of the introduction of a regime at different points in a relationship and at the views on this of those who would be affected by it. This would enable us to measure both men’s and women’s views and needs against the polarised and theoretical feminist positions noted above.

3. Expected outcomes

The project aims to achieve the following objectives:

1. An evaluation and developed understanding of the relative merits of different community of property regimes and identification of the most appropriate form, if any, of such a regime for England and Wales
   (a) for married couples alone; and/or
   (b) for unmarried cohabitants, whether for registered partners and/or all or specified classes of cohabitants.
2. Consideration of any need for further, much larger-scale research in Europe, making use of the Eurobarometer survey and/or national statistical organisations. Such research would use far wider sources of empirical data than is practicable in the study proposed here, in particular interviews of users of European community systems.

3. Dissemination of our findings to policy-makers in the fields of both family law and property law in Britain and Europe.

4. **Method**

   **Doctrinal Research**: Information in English on European regimes tends to be available only in summary form (Hamilton and Perry, 2002). Library and web-based comparative doctrinal research will be undertaken to compare the practical effects of community of property regimes in Europe and identify their relative merits and disadvantages, both during marriage and on divorce or separation. The implications for succession law on death of a spouse will also be explored. We also propose to look at community regimes in common law jurisdictions for the purpose of comparison.

   **Empirical Research**: Empirical research will be undertaken first in Europe and then in England & Wales.

   Different but complementary methods of data collection will be employed in these two research phases. Rather than provide a statistically representative analysis of couples’ attitudes to community of property regimes, this project is designed to map and analyse from a family law perspective a range of views, leading to an understanding of peoples’ perceptions and experiences of family property ownership in general and community of property in particular in the married and cohabiting contexts. Thus the study will be undertaken using qualitative research methods, combining purposive rather than random sample selection of both legal professionals and lay respondents with semi-structured interviews.

   (a) **In Europe**: The user experience of community regimes in Europe, at least for married couples, is already the subject of quantitative analysis and the statistical patterns of those opting in and out of the default regimes are readily available (e.g. France, Champenois-Marmier and Facheaux, 1979; Barthez and Laferrere, 1996). However, with the exception of the Netherlands (Boele-Woelki, 2000) there is little, if any, qualitative research in most European regimes. Agreements to opt out of a community regime must be drawn up by a notary and information is therefore available from the professionals who advise upon and draft them. We will conduct a small semi-structured interview-based study of notaries and divorce lawyers (contacted through the appropriate professional bodies) in three European jurisdictions with contrasting community systems. The relevant jurisdictions are France (community of acquests), The Netherlands (until 2003 community of all property) and Sweden (particularly useful as having a community regime even for unregistered cohabitants). These three jurisdictions have been chosen as examples of three different forms of community, and also, in the case of France, in order to maximise the expertise of the research team. In order to offer a sufficiently robust sample, whilst avoiding concerns of ‘saturation’, we will conduct 10 - 15 interviews in each country which will ensure inter-jurisdiction parity. The interviews with legal professionals will address the following key questions:

   i) what sort of people seek advice on matrimonial property regimes?  
   ii) whom would they advise to opt out of default regimes?  
   iii) what other sources of advice and information are available to their clients?  
   iv) what type of arrangements would they encourage people to undertake in their place? What type of arrangements do people in fact agree in their place?  
   v) what are the consequences of the different regimes on property ownership in the event of divorce /relationship breakdown or death? How do the community regimes interact
with social welfare law in different jurisdictions? We propose to use vignettes in order to anchor the responses of our interviewees in practical scenarios.

In order to ensure that responses are not limited to ‘best practice’ idealism, we shall also ask respondents to describe the main issues and outcomes in their last (say) five cases of selecting and/or dissolving a community regime.

**In England & Wales**: Given that the home is usually a couple’s major or only family asset, a sample of owner-occupiers will be drawn purposively but clustered in three geographical areas – one in Southern England, one in Northern England and one in Wales - selected to reflect variable property-price markets. Using a reputable commercial company, our qualitative research sample will be drawn to include a total of 70 respondents. These will be stratified to reflect key variables which might be expected to significantly affect the user experience both of the current law of financial provision and of any community of property regime introduced. It will also ensure that the sample draws on a range of experiences with and attitudes to the current law as it applies to differently composed family structures. The sample will comprise two main groups: a) 35 married/divorced respondents, and b) 35 opposite-sex cohabitant/former cohabitant respondents. Within these groups, further stratification will take place to ensure that other key variables are captured. Thus in addition to having roughly equal representation of men and women, each group will as far as possible include respondents both with and without children of the relationship and/or of previous relationships; those aged both under and over 40; short and longer-term relationships (below and over 5 years); and asset-rich and asset-poor relationships.

Selected respondents will be interviewed using a 1.5/2 hour semi-structured interview which will examine respondents’ views on a possible community regime and on pre-marital contract in contrast with typical outcomes under the current law, during the relationship, on breakdown and on death. The interview schedule will be drafted, piloted and refined. Scenarios will be used to optimise explanation and facilitate understandings by respondents of the legal concepts and possible outcomes. In addition to fuller information as to the family’s assets, income and expenditure, interviewees will be asked to give further details of their relationship history and their perception of the level of commitment therein, together with details as to the presence of or intention to have children. It is anticipated that these latter factors will also provide the basis for valuable insights and will intersect in meaningful ways with the external categories of classification identified. In the course of content analysis of the resultant data, the impact of each of these factors will be examined in the light of recent research into ancillary relief outcomes following divorce (Davis et al, 2001). Our research will also build upon the findings produced by Barlow et al (2002) as to cohabitant and former cohabitant legal beliefs, attitudes and practices and on those by Arthur et al (2002) regarding financial settlements by divorced and formerly cohabiting couples.

**Analysis**: The interviews will be transcribed and content analysis used both to organise the data and as a tool for subsequent analysis. In order to conduct a thematic content analysis, the data will be coded independently by the research team. To facilitate the extrapolation of key themes, we will use computer assisted qualitative data analysis software. Given the quantity of the data that will be generated in the course of this study, the hierarchical structured nature of the coding schema within these packages render them a particularly appropriate research tool. The themes that emerge from this coding process will be analysed in the context of the research questions outlined above, and in the context of pre-existing literature on the symbolic and practical significance of property ownership within intimate relationships (Kahn-Freund, 1955, Fox, 2002, Barlow, 2003). Given the reality that women and children are most at risk of financial hardship on family breakdown, the data also will be analysed in the context of a body of socio-legal research, frequently but not exclusively of feminist origin, that evaluates
the impact upon women and children of prevailing financial arrangements within the private sphere (Smart, 2000, Fineman, 1991, O’Donovan, 1978, Arthur et al, 2002). Because we seek to inform policy-making in this area, the emergent data will also be analysed in the framework of pre-existing documents, such as Sharing Homes, that outline but fail adequately to address the community of property issue. In line with the stated research aims, the conclusions reached by this analysis will examine the probable effect of a community regime on all members of married and unmarried families.

5. Ethical aspects
Our empirical research falls into two phases. The first will take place in Europe, and will involve interviews of notaries and other professionals. None of these will be disclosing information personal to themselves; and their own professional codes will dictate that they cannot reveal information that is confidential to clients.

The second phase of our research will take place in England and Wales, and will involve interviews of members of married and unmarried couples. These interviews raise ethical issues, in that all interviewees will be disclosing personal information, and some may prove to be financially and emotionally vulnerable people. We are anxious to secure the confidentiality and safety of our interviewees; they will be assured of anonymity, their comments will be published only under pseudonyms, and interview data will be stored securely. We would not interview both members of a couple, so as to avoid potential conflicts of interest.

6. Dissemination
Our conclusions will need to be disseminated in such a way that they can influence both academic thinking and government policy. In addition to producing a number of articles in legal journals, and possibly a co-authored book, we plan to disseminate our findings at the conferences of the Socio-Legal Studies Association and the Society of Legal Scholars, and to hold a dedicated one-day event under the auspices of the Centre for Property Law at the University of Reading. Members of relevant government departments will be invited to these events alongside academics and professional bodies such as the Law Society, the Solicitors’ Family Law Association. We also plan to produce a succinct ‘Findings’ document specifically for the attention of a target audience of policy-makers.

7. Staffing
The applicants each bring to the project expertise in different aspects of family law, property law and empirical methodology. All have written and taught in the field of family law. Barlow has studied and published in the field of comparative family law, and the study of cohabitants proposed in this project is a natural continuation of her recent research into the financial implications of cohabitation and indeed will draw upon some of her conclusions in the earlier project. Cooke has a special interest in family property law as well as expertise in land law and land registration; Callus has expertise in the family law of France.

While the applicants will provide overall guidance and direction to the project and will carry out a significant proportion of the doctrinal research, two post-doctoral Research Assistants will be based at Reading and Exeter respectively; their appointments will be phased so as to make the best use of time and information. Thus RA 1 will begin work in October 2004, based at Reading, and will assist the Reading team members in the first phase of the empirical
work, in Europe. RA 1’s appointment will be for a period of 15 months, continuing until 31st December 2005.

The second phase of empirical work will begin in Spring 2005, when the qualitative sample will be commissioned from Select Research. RA 1 will then use that sample to carry out interviews of members of married couples, and then analyse the data in conjunction with Reading team members. RA2 (appointed for nine months, to work at Exeter, from April 2005) will carry out interviews of members of cohabiting couples, and then in conjunction with Anne Barlow will analyse data drawn from those interviews and draw conclusions relevant to unmarried couples in the light of the earlier European research. The time-scale for the conduct and analysis of interviews in this jurisdiction is considered realistic in view of the plan to obtain a sample for a commercial organisation which promises a high take-up rate of interviewees from its sample.

Thus:
October 04 to March 05: RA 1: first phase of empirical work
April 05 to December 05: RA 1: second phase of empirical work for married couples
April 05 to December 05: RA 2: second phase of empirical work for cohabitants
Project continues until end of June 2006 to allow time for analysis.

References
Gibb, L *The Times*, November 14 (2003), p.9, “Barristers object to EU plans for divorce”  