

FAIRNESS IN FAMILY LAW ACROSS EUROPE: A PAN EUROPEAN IDEAL OR A PANDEMONIUM OF CULTURAL CLASHES?

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Introduction

In the second week of November 2006, England and Wales was within a few days of having imposed upon it the concept of applicable law in family law proceedings. No longer would English judges, lawyers and mediators have settled their cases according to concepts of fairness and justice based upon a millennium of English cultural, religious and similar values. Instead, some English family law settlements would be based on concepts of fairness totally alien to the English family law process yet in accordance with conventional fairness of the home country of the couple concerned.

A consequence of the decision by the government not to opt in to Rome III is that family law in England and Wales will still be pursuant to English law.

Nevertheless, England is probably the most cosmopolitan country in the world. England is considered a very favourable family law jurisdiction. London has recently been described by the Court of Appeal as the divorce capital of the world. England is an extremely tolerant culture. Many family lawyers are keenly aware of the very different cultural backgrounds of their clients; backgrounds which are sometimes at odds with conventional concepts of fairness. Many of these clients are now nationals and residents of England. But many are from Europe and elsewhere, living and working in England.

Within the implementation of English family law, what accommodation should be made for the different cultural, religious and other understandings of fairness across Europe and the rest of the world? If we will not have applicable law, how can we accommodate demands for different outcomes based on different fairness? In doing so, how much will England create a multicultural family law fairness?

Within divorce, how do we accommodate the vast range from non fault, speedy divorces to fault based, slow and sometimes judgemental divorces?

Within financial provision, how do we accommodate the maintenance for life with the automatically imposed clean break, the redistribution of marital assets to provide for the vulnerable party with the automatic division based on an agreement made perhaps decades ago, the piercing of corporate veils to ascertain financial realities with the acceptance of traditional asset holdings, the colossal divorce settlements with the almost insignificant "equitable" rearrangements?

Within children arrangements, how do we accommodate shared parenting with minimal contact, judicial direct listening to a child with second-hand reporting, the freedom to relocate with xenophobic refusals?

Within the family court process, how do we accommodate the inquisitorial with the accusatorial, the mediator and the notary, the litigant in person and the party paying a million euros of costs, the fast with the slow, the publicly open with the closed chambers?

Within family law itself, how do we accommodate those who believe their personal law should be applied irrespective of the national law, those from the faith communities with those from the fiercely secular?

By rightly rejecting applicable law yet wanting to maintain a liberal concept of fairness for all, has English family law found itself again at the centre of a debate about what is fairness for families at a time of family breakdown? But this time it is not just fairness within the English traditional culture but extends to an understanding of fairness in other cultures and societies. It is against the background in England of an open, internationally aware and very multicultural family law process and profession.

This paper is not an academic treatise. It is by a practising solicitor, dual qualified in England and Australia, a mediator and part-time family court judge in London, who specialises in international family law work. It takes a practical and pragmatic consideration rather than a purely jurisprudential approach.

Finding a European sense of fairness

Only a decade or so ago, very dramatic differences existed across Europe in family law. Neighbouring countries were almost strangers to each other. Whereas national corporate and commercial laws had increasingly become similar because of the demands of multinational companies and cross-border contracts, family law was struggling to catch up. It still remained very parochial, with very little sharing and cross-border harmonisation.

This past decade has seen incredible changes. There are still differences across Europe, such as to make forum shopping a worthwhile expedition. Nevertheless in certain ways the differences are getting less. The following has occurred across Europe (and some other westernised jurisdictions):

- most jurisdictions have non fault divorce either solely or as one of many grounds
- the jurisdiction for a divorce across Europe is now identical following Brussels II
- with a few exceptions, the timetable for a divorce is now quite quick
- in most jurisdictions, there is little difficulty in litigants acting in person in relation to the divorce itself
- final divorce orders are recognised automatically across Europe
- the best interests of children, alternatively the welfare of children, are the paramount consideration in most jurisdictions on children issues
- there is a unified child abduction law, and which across Europe is stronger than the Hague convention,
- contact orders are automatically recognised across Europe
- courts must listen to the voice of the child
- financial outcomes start from an equal division of capital where discretion exists
- within a matter of years, most westernised jurisdictions introduced pension sharing provisions
- automatic enforcement of maintenance orders by consent across Europe
- the European judicial network is starting to create a network of family law judges

There are many others. However against this commendable list, many big differences and problems exist. The following can only be a sample

- a few jurisdictions are exceedingly slow in divorce matters, and other family law proceedings, and require very long periods of separation
- the first to issue principle of Brussels II has given rise to intense, hostile, tactical and decidedly non-family friendly, rushes to court
- most European countries operate applicable law yet there is no harmony of the criteria for which law applies in which circumstances
- some European countries operate local law with practitioners adamantly resistant to the introduction of applicable law
- there are major differences on the understanding of what it means to listen to the child
- there is no common understanding, unity or convention regarding child relocation
- some countries are not operating the child abduction provisions in Brussels II
- there is a dramatic difference across Europe in the operation of maintenance and property

regimes; for some countries all financial issues are treated alike and in other countries the two are totally separate with separate laws and separate lawyers

- some countries allow only minimal redistribution of capital assets to provide compensation for marital commitments or sharing of marital gains
- some countries have binding financial agreements including pre-marriage agreements, including in circumstances of no independent separate legal advice, financial disclosure and even in circumstances of duress or misrepresentation
- final financial family court orders are not automatically enforceable across Europe
- some jurisdictions allow no or minimal spousal maintenance terms whereas others still make orders for lifelong maintenance
- there is no network of family lawyers across Europe to enable lawyers easily to find other lawyers with whom to work together on cross-border cases
- cross-border mediation and other ADR is not happening
- there are even greater differences and problems concerning cohabitation and same sex relationships

As stated, this list is only a sample. The European Commission has been entrusted by the Maastricht Treaty to produce as harmonious a family law judicial system across Europe as possible by the year 2011. Some progress has been made. Some excellent proposals have fallen at the hurdle of applicable law. Some introduced law has been roundly condemned by practitioners and others such as the first to issue under Brussels II. The requirement of unanimity across the EU has inevitably the danger of blandness and lack of vigour.

Yet outside of family law itself, European countries are witnessing an incredible movement of peoples, a corresponding number of cross-border families and many national families with property in other parts of Europe. This significant movement over the past decade has accelerated with the accession states. Moreover as a consequence of events elsewhere in the world, many European countries have experienced a considerable influx of peoples from outside of Europe.

Family law is probably the area of national law most closely linked to the history, religion, culture and ethics of a nation and its people. This is the primary reason why family law has been slow to harmonise and why those seeking to harmonise have had a frustrating experience. It is right that family law change should take account of these very traditional deep seated foundations. Equally however nations are changing. Nations are having to reassess who they are and what they are, given that their demographic structure is changing. Family relationships are central to this demographic change.

With many in each jurisdiction looking not only to their jurisdiction of residence but also to their jurisdiction of nationality or with their original home jurisdiction, there is a need for an analysis of the way forward within Europe to ascertain what is fair outcomes for European families, both nationals within a nation and international families.

The experience of the past decade is that satisfactory harmonisation has not come from imposed specific laws but from satisfactory shared working, debate, common understandings and narrowing of issues between lawyers, judges, family policy advisers, academics and politicians. These have concentrated on more general aspects rather than the specifics of particular laws or legislation. It is submitted that this is the better way forward and that from these shared working arrangements and debates will come, and probably come quite quickly given the demands and needs of international families, some harmonised laws themselves.

So what are the common themes and component elements of fairness found generally across Europe and which should inform thinking about a sense of fairness and justice in family law across Europe. Set out below are some such features. After examining each, the possible implications are set out.

Supporting the Institute of marriage

Despite the high incidence of cohabitation across Europe, a significant number of couples, especially couples with children, are in a marital relationship or aspire to a marital relationship. Studies indicate longer relationships, better child upbringing, better health and wealth and many other benefits from marriage. Supporting the institute of marriage does not mean deprecating or detracting from entitlements in cohabitation or same-sex relationships. Although at times and in some places it is very unfashionable to be seen supporting marriage, there is much public consensus towards it across Europe.

In England, the Family Law Act 1996 which would have introduced, if implemented, no-fault divorce, set out four general principals of the Act of which the first was “section 1(a) That the institution of marriage is to be supported”

Although few countries have a specific policy of checking legislation against the impact on marriage and family life, this informal policy occurs in many other ways including across the media. Support for the institution of marriage is at the foundation of many of the religious and ethical bases in many countries. It will command support when looking at family law fairness

Implications

- opportunity should be given within the process of divorce and family law generally to encourage attempts to save saveable marriages. See below
- divorce should not be so easy, including as to timetable of separation, as to encourage less respect for marriage and marriage responsibilities. However and probably more important given existing trends, divorce should not be so difficult, again including timetable of separation but also timetable from beginning to final divorce order and proof of any fault grounds, as to encourage cohabitation before the ending of marital ties and responsibilities
- the law should not encourage cohabitation as distinct from marriage, for example in the termination of spousal maintenance on remarriage yet the continuation of spousal maintenance on cohabitation. This therefore directly encourages cohabitation
- there should not be more advantageous tax, welfare benefit, succession, pension and other benefits for those who are cohabiting as distinct from those who are married
- short term spousal maintenance orders, as increasingly prevailing across northern Europe, sometimes do not properly reflect and compensate commitments and sacrifices made for and during the marriage

Saving saveable marriages

With the cost of marriage breakdown being so high, everything possible should be done to save saveable marriages. This cost is first an emotional and relationship cost, for the couple concerned, the children, other extended family members, those close to the family personally, within the community or through employment. The second cost is in loss of employment through time off, sickness and ill-health and other direct financial costs from the marital breakdown. The third and even wider cost is that to society of widespread divorce including significantly higher welfare benefits, reduced employment productivity, physical and mental ill-health, antisocial behaviour of children and young adults affected by divorce, differential in housing needs and many other aspects.

The cost to a country of high marriage breakdown cannot be underestimated.

Yet sadly most governments are not prepared to put proper resources into funding efforts to save saveable marriages. Political parties are afraid of being seen to identify with marriage as distinct from

other forms of relationship. Direct proof of results of different forms of marital help is often difficult to gauge and evaluate. Too often the help, even when funded, is a little too late and often wrongly directed.

Initiatives to deal with potential family difficulties earlier within the marital relationship have been tried. Some have been successful. Family trusts in provincial towns, premarital and marital training, specific help given at particular crisis times such as retirement, pregnancy, civil debt, redundancy etc, and many other initiatives. Some have been very successful but again there is a difficulty with corroborated and verifiable results.

In the meantime, the only reason for the rate of marital breakdown slowing is because the rate of marriages slowed down even more several years ago!

Too often well-meaning elements within the divorce law procedure to encourage reconciliation are meaningless in reality, alternatively paid lip service by the legal profession. An example is the certificate of reconciliation in English divorce procedure. This is an area in which realism and practical effect is needed.

Very often one party to a divorce, sometimes both, cry out for help to save the marriage and look externally for assistance. This help should be available. It is a constituent element of a fair approach to a family law system

Implications

- there should be proper funding and resourcing of initiatives and enterprises to save saveable marriages, both specific to marriages in actual problems and general to marriages at times of crises and particular risk
- there should be a recognition of the inherent difficulties of corroborated and verifiable proof of direct beneficial results of some initiatives and enterprises
- opportunities should be given and encouraged within the legal process to enable genuine attempts to save saveable marriage
- English law gives encouragement by allowing six months of resumed cohabitation for claims of divorce based on separation and allows resumed cohabitation for up to six months after knowledge of the last date of adultery or last incidence of unreasonable behaviour. This should be retained and is specifically commended
- some jurisdictions have a pre-divorce reconciliation and reflection period. This is also specifically commended. However such a procedure should not be allowed to put a party at a greater risk of the other party seizing the timetable advantage in a jurisdiction forum race and thus putting at a disadvantage the party seeking to save the saveable marriage
- specifically, the Brussels II race to issue proceedings on the basis of the party which issues first secures jurisdiction is absolutely destructive of any reasonable attempts to save a saveable marriage. For this reason alone Brussels II should be quickly amended. It puts one party in an appalling conflict position, aware of marital difficulties and wanting to discuss counselling perhaps even a reconciliation yet knowing the mere mention of the possibility of marriage breakdown may cause the other to issue immediately in a more favourable jurisdiction
- family law timetables and processes should be alive throughout to the possibility of reconciliation and do all possible to encourage. Adjournments should be strongly encouraged for this purpose without cost, loss or prejudice

Alternative dispute resolution (ADR)

There is an increasing awareness across westernised jurisdictions that going to court must be the last

resort, the form of dispute resolution when all else has failed, the secondary dispute resolution process. In reality as well, very many people across society simply cannot afford to go to court for a final hearing. Only those with legal aid (public funding certificate) or incredibly deep pockets can afford to do so. By choice and by necessity, settling outside of a final court hearing is no longer the alternative dispute resolution process. It must be viewed as the primary dispute resolution process.

This includes mediation, directive mediation, collaborative law, early neutral evaluation, arbitration, in court mediation and still the best, most reliable and invariably the most satisfactory, lawyer negotiation.

In some jurisdictions some of these ADR methods are very advanced and sophisticated. They run in parallel to the now highly sophisticated and much used ADR in the civil litigation courts. There are specific groups of ADR professionals. Some jurisdictions have committed significant public funds to encourage ADR.

Although most ADR cannot in principle be mandatory by its very nature, ADR is often perceived by governments as cheaper than lawyers and quicker than the court process. Some jurisdictions have therefore made ADR mandatory, at least at the initial stage of the process. There have been mixed responses to this.

Some jurisdictions have sophisticated training for ADR professionals. Others do not and in reality anyone can describe themselves as an ADR professional.

Some jurisdictions have seen incredible infighting between mediators who are also lawyers and mediators without any legal training. Undoubtedly this infighting has significantly held back the development of some ADR.

There is a very little ADR in cross-border cases. There has though been a successful pilot project in England in child abduction cases. More generally, the perception is that ADR cannot occur in cross-border cases until jurisdiction is established; and then the very act of establishing that jurisdiction may have made prospects for successful ADR very limited.

Family lawyers will still retain their fully representative role as client lawyers. However across Europe their primary role will not be as trial court room lawyers but will be increasingly in the out-of-court resolution of cases including roles as ADR professionals.

Implications

- courts should have direct power to refer cases into ADR whenever it is thought that the case is suitable for settlement. This power should extend to the adjournment of cases.
- provided access to justice is not prejudiced, the imperative to ADR and out-of-court resolution is such that some mandatory referral to ADR (including pre-issue) is almost certainly permissible
- ADR is now mainstream dispute resolution. It cannot be undertaken as a hobby or in anything other than a fully professional fashion. ADR professionals such as mediators should be fully accredited and recognised, and appropriately remunerated
- in fighting between non lawyer mediators and lawyer mediators must end with an open acceptance of the strengths and also weaknesses of each
- family laws and procedures should not detract from reasonable prospects of ADR.
- Brussels II race to issue must be rescinded on the basis that a party who has rushed to court to issue tactically makes almost impossible the possibility of subsequent genuine ADR
- court based adjudication of final issues must be recognised by jurisdictions, Parliaments, family law professions, the courts and others as the resolution of last resort
- cross-border mediation must be encouraged, with mutual recognition of ADR standards and accreditation, and an awareness of when and at what stage cross-border ADR can take place

- binding arbitration in family law, increasingly adopted in Canada, Australia and elsewhere, should be introduced and encouraged
- whilst at times new ADR may need specific encouragement and publicity, e.g. collaborative law at present, there should be a recognition that no one ADR method is right for all clients, all cases and at all times. Instead the family lawyer and family court must be keenly aware of the advantages and disadvantages of each ADR method, including for different cultures and backgrounds

Agreements

For a number of years, many jurisdictions have encouraged private ordering by its citizens of their personal and financial affairs including on marriage, marriage breakdown and death. Many continental European countries have an institutionalised regime of marriage agreements providing for what would happen on divorce and death, invariably by opting in or out of specific marital regimes. These agreements are often entered into with the benefit of a notary, one lawyer acting for both and advising them both, often without any real financial disclosure, without independent advice and sometimes with potentially material levels of duress such as the immediacy of the wedding. These marital agreements are at the heart of marital regimes of property across a large part of continental Europe.

England, and the British Isles, has however been in a complete dilemma. There has been dramatic encouragement of private ordering e.g. in relation to arrangements for children and encouragements to settle financial issues through ADR. Nevertheless the English judiciary have set themselves against anything which could bind their discretion to decide for themselves what is a fair outcome. Foreign pre-marriage or other marital agreements are routinely waved aside by English judges as considered unfair; often quite rightly as are very unfair given what has subsequently occurred during a marriage. Government moves in the late 1990s to remedy this situation came to nothing. Of late, with an increasing number of international families, there have been increased calls for pre-marriage and other marital agreements to be made binding.

There are still misgivings in some countries about binding pre-marriage agreements, not least by lawyers. In the US lawyers often the recipient of litigation claims when the marital agreement is shown to be very unfair.

Europe is divided on marital agreements. In the more crowded corner are the jurisdictions where the agreements are binding yet often without independent legal advice, without financial and other disclosure and sometimes under some duress. In the much less crowded corner are jurisdictions where agreements are not binding under any circumstances but may be taken into account and are increasingly followed when there has been independent legal advice, careful and detailed disclosure and clear absence of duress and misrepresentation.

Brussels has found itself in the middle of this combative ring. It has naturally encouraged agreements on choice of law criteria, for example as set out in draft regulation known as Rome III. However Brussels has continually turned down submissions made by SFLA/resolution, the 5000 strong English family law solicitors organisation, to overcome the appalling injustice and anti-family policy of Brussels II by providing a hierarchy of jurisdiction - at the top of which hierarchy would be agreements reached between the couple on jurisdiction of where the divorce would take place. Brussels is itself inconsistent.

Implications

- agreements should be binding with only narrow discretion on material injustice or and fairness
- these agreements must be in writing and after each party has had independent specialist legal advice, with financial and other relevant disclosure and in the absence of duress and

misrepresentation

- As a consequence of the above two factors, the opposing parties would both have to move towards each other
- Brussels can then be confident in giving weight to agreements, whether on applicable law or jurisdiction, knowing that they will be binding throughout but also with appropriate safeguards
- despite deep-seated historical traditions each way, this can be the only fair approach on this highly conflictual issue

International movement of children

Along with the huge increase in the number of international families, as referred to in the introduction, and the increase in the movement of families across borders, there has inevitably been a large movement across borders of children with only one parent. These have been of two forms; child relocation and child abduction. Child relocation occurs when a child moves his habitual residence from one jurisdiction to another with the consent of both parents and all others with parental responsibility. It is post parental separation when one parent wants to move, with the child, to live in another country. Child abduction is the wrongful removal from or wrongful retention away from a child's country of habitual residence.

The Hague convention on child abduction has worked well. The Brussels II revised regulation has incredibly added to the strength of the Hague convention including adding additional safeguards, urgent time requirements, opportunities for "trumping" orders by the courts of the child's habitual residence and other measures. These are much to be applauded and congratulated.

Nevertheless some European countries seem to be proceeding as if neither the Hague convention nor the Brussels revised regulation existed. Time periods are wantonly ignored. The welfare criteria is used to avoid return orders. Central Authorities either seem to take no action or are powerless with their courts. In some countries, America being the primary object, cases are dealt with by judges unfamiliar with family law work and who sometimes make the most incredibly unjust orders, wholly inconsistent with any international treaties or conventions.

The Brussels revised regulation is excellent and, where it works, it is probably the best example of inter jurisdictional co-operation and a law in the best interests of children. It is of great concern that in some places it is simply not working and seemingly disregarded

Moreover there are too many countries not within the Hague convention. How can it be expanded? Bilateral treaties such as the Anglo Pakistani Treaty are working well yet are not the long-term answer.

Child abduction, both from the Hague convention and the Brussels revised regulation, proceeds in the expectation that a child will be expeditiously returned to the country of its habitual residence whereupon those courts will give careful and balanced consideration to a relocation application. Yet there is simply no international convention or even any international understanding of the criteria and circumstances in which child relocation orders will be made. Some countries such as England are perceived as incredibly liberal in favour of the party seeking to relocate. Other countries put much greater weight and emphasis on the rights of the left behind parent, and thereby habitually refuse relocation. Some countries simply do not allow an application for a relocation at all.

The lack of consensus on relocation raises some questions about the automatic return after a child has been abducted.

Often child abduction and child relocation matters are supported by mirror orders; surely the pinnacle in judicial international comity. Too frequently, the spirit (or even the precise content) of mirror orders are flouted, giving either inadequate protections or simply being ignored. It is not only the child and parents

who then lose out. The home court making the original order is frustrated and appears ineffectual.

Implications

- Child abduction law as embodied in Brussels II is an excellent example of cross-border international family law directed to the best interests of the child and bringing about the renewed status quo for the child; it is a pattern for other legislation
- yet it seems almost ignored and disregarded in some jurisdictions. Should some form of pan European task force be created to oversee the actions of Central Authorities and with substantial interventionalist powers, rather than leaving it to individual countries to make bi-national complaints.
- the time requirements in Brussels II of six weeks for a return of a child commendably requires urgency and priority to child abduction work yet is impossible in complex cases and seems to be ignored altogether in some jurisdictions; the impact of a slightly longer time period should be considered
- there must be a debate, then consensus and then convention on child relocation principles
- mirror orders must be adhered to as a crucial function of international judicial comity, with a referral back to the home court on issues of doubt or intention of the original order or interpretation
- international children matters should only be dealt with by judiciary at a senior level and experienced in dealing with family law work
- there should be more publicity given to the European commission paper, July 2006, "Towards an EU Strategy on the Rights of the Child" with the appointment of a EU Commissioner Co-ordinator for the Rights of the child and to implement UNCROC within Europe
- given the lack of effective national borders within the European Union, greater co-operation is therefore required between state agencies to track the movement of children across Europe, whether by parental or non-parental abduction

Hearing the voice of the child

A consistent trend across many countries in the late 1980s onwards was the dismissal of the previously held notion that a child had no right to be heard until hitting the magic age of 18. Case law and legislation across Europe now require the child to be heard. This is of course subject to maturity, age and understanding. Jurisdictions have approached the question of hearing the voice of the child in different ways, refining and developing this philosophy over the last decade. Approach now differs. In some jurisdictions the child is actually heard by the judge in chambers, either in confidence or in the presence of others. In some jurisdictions the child is given the opportunity of separate representation alternatively representation is provided in all cases. In some jurisdictions, ancillary family court workers with appropriate qualifications see the child, including in the context with each parent and in the family home, and then report to the court. Some jurisdictions have a mixture.

The issue has been given greater importance as hearing the voice of the child is a precondition to the automatic recognition of contact orders across Europe, as introduced in 2005 by Brussels II bis. Some jurisdictions, for instance Germany, allegedly say that unless their style of hearing the voice of the child is adhered to, the contact orders will not be recognised. In Germany, judges routinely see children including those of a very young age. In some jurisdictions some judges are also prepared to do so and feel confident and trained to do so. But other judges are keenly aware of entering into very dangerous waters when judges see children including the risks of being perceived to make promises to the child or knowing what information to pass on to the parents. Yet these judges believe they are just as conscientious in hearing the voice of the child second hand as those judges talking to a five-year-old across the court room table.

Implications

- The automatic recognition of contact orders is a colossal boom across Europe for parents as well as being a significant benefit for children. It should be a model for other children orders for instance as to residence, custody, parental responsibility.
- The precondition of hearing the voice of the child is a reasonable one in all matters concerning children, consistent with their age, maturity and taking account of undue influence of parental or other family pressure
- judicial and legal traditions should reasonably be able to differ as to how the child's voice is heard and should not be a bar to the greater benefit of the automatic recognition of children orders
- the judiciary should be appropriately trained to meet with children and be given very careful guidelines on what is appropriate to say, and not to say, to children and what can subsequently be relayed to parents
- the judiciary need careful guidance on when, and in what circumstances, they should depart from recommendations and guidance given by family court workers who have seen the children and family and heard the voice of the child
- appropriate funding should be available for opportunities of child representation

Recognition of financial orders

Across Europe, an order made by a family court by consent pertaining to maintenance will be automatically recognised and enforced, following changes in October 2005. Brussels I gives a passport for a family court order for maintenance to be enforced across Europe.

A considerable part of Europe has a dramatic divide between maintenance and property regimes. Maintenance is not just spousal maintenance or child maintenance orders themselves but relates to the needs of the family members. It is invariably found in spousal maintenance or child maintenance orders but can occasionally be found in equitable distribution lump sum orders. It is an issue resolved before the courts or between the lawyers.

IN these jurisdictions, property regimes on the other hand are the subject of pre-marriage agreements, statutory regimes opted into or opted out of by the couple at or before the time of the marriage and which govern the couple through to marriage breakdown or death. Invariably, the property regime is fixed. An implementation of the division of the matrimonial property regime is undertaken by notaries, one notary acting for the couple together. It is often a non contentious process and with no input from the courts. Hence maintenance and property are understandably well apart

For a few countries, income and capital, maintenance and property is all simply money! It is all resources of the family capable of division to produce a fair result. If this fair result is determined exclusively by needs, these countries are aligned with the community of property countries with their emphasis on maintenance. However once the family courts start making orders based on sharing, compensation, contribution or general fairness, and not referable just to maintenance, they are stepping outside of the main matrimonial regimes across Europe. These non-maintenance orders will not be automatically recognised nor automatically enforced. International judicial comity, together with the immutability of real property, comes to some occasional assistance. However even here many continental European jurisdictions require local orders for real property situated within its jurisdiction. This can require a second order to be made to implement against a property abroad. This causes delays and additional costs.

As there is such a stunning difference between maintenance and marital property regimes in many continental European countries, European family law has distinguished between the two in recognition

and enforcement purposes. There are no reciprocal recognition and enforcement conventions across Europe for property or a lump sum orders of family courts for redistribution of property rights for fairness, other than those demonstrably referable to maintenance.

This demarcation is clear and certain yet resolution is needed. The reality is that each of these separate “marital systems” will not change in the foreseeable future. Other processes must change instead. Equally, international families should be entitled to expect that the final financial orders of competent family courts, arrived at after a fair hearing, will be recognised and enforced across related jurisdictions. Not to do so, including making parties commence fresh proceedings where the assets are situated, is simply unfair.

Implications

- There must be recognition that the traditional divide in some jurisdictions between maintenance and marital property regimes will not end in the medium term or perhaps at all
- The wide scale redistributive powers of the countries with non community of marital property law will continue to prevail in making often substantial orders to provide for perceived fairness
- International families are entitled to expect competent courts to be able to make orders which would be recognised and enforced across the European Union and elsewhere
- Despite the differences between the separate regimes, community of property countries should automatically recognise and enforce financial orders from competent family courts with redistributive powers. Similarly, the courts of non community of property law countries should automatically recognise and enforce, as if a court order, the notarial division of marital property
- Courts should be cautious, and probably should not, interfere with family court financial orders made abroad after a fair hearing, after representation and similar
- Family financial orders should be capable of automatic enforcement against the other party and, by using local enforcement remedies, against third parties such as banks, employers and similar

International family law co-operation

The European Judicial Network (EJN) operates in civil and criminal matters whereby a liaison judge in each jurisdiction is able to coordinate with national judges in his jurisdiction and liaison judges in other jurisdictions. Family law operates within the civil justice system. Yet it is a very distinctive area with its own specialised professions of lawyers and judges. It can work at its best as a self-contained area within civil justice. Many disputes involving proceedings in two or more countries could be better managed and possibly produce a better result with greater use of the EJN in the family law context.

Central Authorities have a crucial role to play within the Ministries of Justice or similar organisations in each country. They are already involved in issues of child abduction, recognition and enforcement of the family orders and similar.

There are a number of networks of family lawyers. The leading one for family finance lawyers is the International Academy of Matrimonial Lawyers, a 300 strong peer elected group across the world, many in America and England, of lawyers who undertake a significant amount of family work. It includes some international children lawyers but the emphasis is finance. Invariably they are lawyers with high charging rates in large firms in the metropolitan centres, often capital cities. There are other networks such as those linked to reunite, the highly regarded child abduction charity. There is the IBA. Many larger firms now have overseas offices or commercial links such as Eurojuris.

However family law work is no longer the prerogative of the bigger money, bigger firm, bigger city lawyer and his clients. It is found in all towns and villages across every country. Moreover many of these

lawyers have no idea how to contact lawyers in other jurisdictions to order to work on their clients' cross border cases. It is absolutely essential for the smooth running and operation of European and international family law and cross border disputes for these lawyers to have easy, reliable access to other lawyers in other jurisdictions to help their clients in cross-border issues

Implications

- The European judicial network is a vital tool in individual cross-border cases to create greater understanding, to overcome procedural problems, to coordinate timetable and procedural steps and to assist resolution. The importance of a strong family division to the EJM cannot be underestimated
- in any event, complex or substantially contested cases with an international element should be dealt with by the more senior judiciary because of the complexity of the issues and law but also to facilitate greater cross-border liaison and co-working by the judiciary
- the Central Authorities play a crucial role, which role will only increase.
- There is an urgent need for a network of European family law practitioner organisations, so that a lawyer in one country can contact his national family lawyers organisation which in turn would liaise with the family law organisation of the other country which in turn would recommend specialists in the locality to assist and advise. This is one of the most urgent requirements to produce justice and fairness and reasonable outcomes for clients across Europe
- unfortunately, some countries in Europe do not even have a national family lawyers organisation. Urgent assistance from Brussels is needed in setting it up for these jurisdictions. Those who do have some national family lawyers organisation have often very rudimentary and basic groups without any opportunity to embark on this sort of initiative. Again, assistance is needed
- considerable assistance and funding is required from Brussels to set up this network, quickly and efficiently and centrally. It is crucial for the future of representation of clients in cross-border cases and implementation of European family law

Whose law is it anyway?

Although the debate has raged across Europe about applicable law, namely should a country apply its own local law or the law of the country of the couple's origin, joint nationality or closer connection, some countries have also experienced a subtly different challenge. It is a challenge made on several fronts but of particular importance in family law. It arises primarily from sections of the Islamic community who are of the strong belief that the countries in which Muslims are living should not apply either their local law or conventional applicable law but instead should apply Islamic law, often Sharia law. This argument is being seriously contended in a number of quarters.

A number of European countries have a sizeable Islamic community. At times it seems as if some members of that community live their lives without any reference to national family laws. Marriages are contracted, and adhered to by communities, which are not recognised in national law. Even more frequently, divorces, talaqs, are entered into either willingly by both parties or unwillingly by the wife, which either take place abroad and may not be recognised or are transnational and therefore definitely not recognised. After these divorces, one or both parties marry, again through religious ceremonies and unrecognised by local law. The family courts are therefore presented with a confusing array of ceremonies and marital events, only some of which are nationally recognised yet are fully endorsed and acted upon by these families and their localised communities.

In addition, at the family courts some parties themselves seek to refer not necessarily or at all to national legislation but to the Koran. Assertions are made that judges should interpret and apply this personal law rather than national law.

This debate has passed beyond embryonic stage although is still relatively new. It is likely to be raised more often as the Islamic community become stronger as a combined voice in many countries. Some governments are anxious about the strength of the Islamic community and have conceded much ground, against some public concern and misgivings. But where is the line drawn?

Moreover, if claims for personal law are made by the Islamic community, why should it not be claimed by other religious communities such as Jews, evangelical Christians and others? Moreover, why does there have to be any limitation due to religious belief? Can it be the law of a group without any religious or similar belief? How large does that group then have to be?

It is here in which issues of family law fairness perhaps stands most delicately poised in the future. What is fairness? How do we decide? This paper has set out some fairness elements and then worked at implications in specific national and international laws, procedures, processes and resolutions. However these are laws and legal practices. What do these laws do when faced with individual codes of fairness?

If and once fairness is accepted as being based on an individual's or an individual couple's sense of fairness, how does the courts and other adjudicators ascertain the sense of fairness?

One solution might be a contractual family law resolution process in which the couples contract into a supra family law system which is then applied and is adjudicated upon by judges in each jurisdiction without reference to their own national laws. This is a distinct possibility for the future. However it has its problems.

Another just as likely scenario is a priority of personal laws with each party having their own sense of fairness according to those personal laws. In this, the mediation experience is informative. Mediators often find that the benefit of being alone with the couple is that couples do have their own distinctive senses of fairness which is not contradictory to national senses of fairness but can be towards the margins. Yet within mediation, this is acceptable. Has the time come or is the time coming when this personal sense of fairness leaves the mediation room and is challenged in the court room? What then is the fairness criteria when a couple cannot agree?

Has the law, and this debate, then gone full circle and the court has to impose its own objective criteria?! From whence cometh that criteria?

Implications

- There needs to be an international family law debate on when, if at all and if so in what circumstances, non national laws, specifically personal, religious and similar laws, will be allowed to have any weight within the family law fairness exercise
- this debate cannot be discriminatory but equally cannot be discriminatory of Christianity as the historically original religious foundation across Europe of nationally held notions of fairness
- if any non national laws are to be permitted to have any weight, what are the criteria? Specifically what are the criteria to avoid outcomes which may severely offend general senses of justice and fairness?
- Should there be an exploration of a supra international family law into which international families can contract and which would be enforceable across all jurisdictions

Conclusion

Europe has not just been the cradle of the modern world. It has been the primary exporter of many ideas and notions of fairness, justice, adjudication and resolution.

Europe is now the microcosm of the world community yet, unlike the world, nationally linked by historic, economic and demographic ties. These ties are increasing year by year.

There are now very many international families. For many of them, they are living in an international community, working in an international market place, trading in an international shopping mall with international brands, preferring to use international currencies and keenly aware of international political and religious/ethnic issues. They deserve better on their relationship breakdown than an xenophobic rat bag of:

- Directly conflicting laws on outcomes
- Directly conflicting laws on jurisdictions
- Directly conflicting laws on stays
- Directly conflicting laws on divorce
- Directly conflicting laws on child support
- Directly conflicting laws on the financial outcome
- Directly conflicting laws on working out the best arrangements for children
- Laws which favour the first party to break up the marriage
- Laws which favour the wealthy
- Low level, lesser qualified, inexperienced judges dealing with international cases
- Major difficulties in international enforcement
- General jingoistic nationalism

Our increasingly closer European connections allow the best opportunity worldwide for family law to debate and co-work on issues affecting international families. At heart is the question of what is fair. This will not be found in the imposition of specific laws. It will be found in a combination of jurisprudential, academic and theoretical exploration alongside pragmatic and practical analysis by those in daily practice. This combination should then allow the application of fairness principles into law, practice, procedure and policy.

Family law fairness is not an elusive ideal. It is essential work for all of us committed to international families and their children.

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Biography

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, London (1995) and an Australian (NSW) solicitor (2003) and mediator.

He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and is an original member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee. He is a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource a member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship.

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

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