

<p>Institution: University of Reading</p>
<p>Unit of Assessment: 20 Law</p>
<p>Title of case study: Community of Property: Informing law reform on matrimonial property agreements</p>
<p>1. Summary of the impact The findings from a University of Reading research project have provided a key evidential basis for law's ongoing development (via court decisions, policy statements and statutory reform proposals) concerning financial provision upon relationship breakdown. The project, which explored the issue of community of property from a comparative perspective, produced findings that assisted government and non-government decision-making bodies in determining the value of different legal regimes in relation to property disputes following domestic relationship breakdown. By informing the Law Commission's review and reform proposals, the research has directly influenced the processes of law reform in England and Wales.</p>
<p>2. Underpinning research This research was conducted between 2004-6 by Thérèse Callus, Lecturer (2002-8) and Senior Lecturer (2008-), and Elizabeth Cooke, Professor (2003-)* in the School of Law (in collaboration with Professor Anne Barlow, University of Exeter), and was funded and published by the Nuffield Foundation in 2006 (Output One).</p> <p>The project was undertaken to address significant concerns over the way in which financial provision is made for divorcing couples and separated cohabitants under English law. This issue affects a substantial part of the British population; in 2010, 16 per cent of all families contained cohabiting couples, while 47 per cent comprised married/civil partnered couples (ONS 2011). Despite such statistics, family law does not provide for property redistribution upon cohabitation breakdown, and the law following divorce is the subject of much uncertainty due to wide judicial discretion in the making of financial orders. Both the judiciary and the Government have recognised that there is a need to reform the law on financial provision (see Corroborating Sources 1 and 2), and it is against this backdrop that the University of Reading's research was conducted.</p> <p>The project sought to investigate the benefits and disadvantages of a European-style community of property regime as compared with the existing system in England and Wales. As explained in Output One, Cooke, Barlow and Callus found that "<i>In its most traditional form, community of property provides for the automatic sharing of property and liabilities during the relationship; and all forms of community of property provide for a rule-based sharing of property when the community is dissolved by divorce or death</i>". This contrasts with the law in England and Wales, which regards matrimonial property as individually held by each partner and then subject to redistribution (but <i>only</i> in the case of marriage) in a sometimes unpredictable way on separation.</p> <p>A doctrinal analysis of the law in three comparator jurisdictions (France, Sweden and the Netherlands) revealed the existence of very different statutory matrimonial regimes, governing the financial consequences of divorce via contractual agreement between parties and by community-of-property principles. Building upon this foundation, semi-structured interviews and case vignettes were carried out with 30 professional notaries across those jurisdictions in order to gauge user experience. A clear picture emerged of the consequences of such regimes: that community-of-property models reflected predominant social conceptions of marriage as a partnership or joint venture; that, in all three countries, the majority of couples simply fell within the default community-of-property variant applicable; and that the concept of a marital contract was accepted as the norm. These findings informed subsequent, groundbreaking, empirical research in England and Wales on user responses to the potential introduction of a type of community of property regime for married and cohabiting couples. This research involved semi-structured interviews with a random population sample of 74 married, divorced or cohabiting interviewees, and found that there was support in principle for a type of deferred community approach for division of the family home, whether matrimonial or cohabiting,</p>

where children were involved, and that the interests of children and their carers should be paramount. The results of the research provide perhaps the only study of public perceptions in this area, and a unique English-language study of practices in other jurisdictions. Consequently, the research was ideally placed to inform potential law reform in England and Wales.

*Cooke has been on secondment from the University of Reading to the Law Commission for the period 2008-2014.

3. References to the research

1. Cooke, E., Barlow, A. and Callus, T. (2006) *Community of Property: a regime for England and Wales?* Bristol: The Nuffield Foundation
(http://www.reading.ac.uk/web/FILES/law/CommunityofProperty_Version021106.pdf).

This report was commissioned and published by the Nuffield Foundation, and has been recognised as research of quality by the academics, legal authorities, and policy users who have cited it. It was entered into RAE 2008 as a research output of 2* quality or above.

The output was the product of the following research grant:

Grant holders: Professor Elizabeth Cooke (Reading), Dr Thérèse Callus (Reading) and Professor Anne Barlow (Exeter)

Title: Community of property – a regime for England and Wales?

Sponsor: The Nuffield Foundation, UK

Period of the grant: 01 September 2004 until 30 June 2006

Value of the grant: £91,000

4. Details of the impact

The original research (**Output One**) was published by the Nuffield Foundation in November 2006 and was widely disseminated among practitioners, policy-makers and interest groups. It was also made freely available on the internet (**Corroborating Source 3**). The findings were presented to user audiences via events including a one-day conference held at the Nuffield Foundation at which key stakeholders, such as the Law Commission and the Law Society, were in attendance.

The research has impacted upon public policy in two main ways. Firstly, because the project fitted directly into an ongoing process of review of the law relating to cohabitation breakdown, it proved immediately influential, being repeatedly cited by the Law Commission in its 2007 Report on Cohabitation, and informing its decision to recommend reform of the law (**Corroborating Source 4**: pp. 11, 70, 71, 193 and 198). The endorsement of the researchers' work within those proposals meant that the research evidence generated was able to stimulate and inform policy debate around the issue of cohabitation and matrimonial property. Furthermore, the need for reform, and the Law Commission's 2007 recommendations, were also cited by the Supreme Court in the cases of *Kernott v Jones* [2011] UKSC 53, and *Gow v Grant* [2012] UKSC 29. Despite this judicial support, the Government announced in September 2011 that no reform would be forthcoming in this Parliament.

In addition, the Court of Appeal in the 2009 decision of *Radmacher v Granatino* utilised the research findings to evaluate arguments about the basis on which decisions about the redistribution of property after the breakdown of marriage should be made and the relevance of prenuptial agreements (**Corroborating Source 5**, paragraph 8). Moreover, when dealing with the existence of a European matrimonial regime in English financial provision proceedings, Mr Justice Mostyn, the judge in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam), drew extensively upon the findings from the research concerning the application of the regime in its home jurisdiction (**Corroborating Source 6**, paragraphs 5-11). Together, this evidence demonstrates the considerable scope of the impact of the research in informing judicial decisions which not only rule upon the individual case being heard, but also provide direction for subsequent exercise of judicial discretion in deciding how financial provision orders should be made. The relevance of the research is particularly

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acute where English judges are faced with agreements drawn up in other jurisdictions.

The second principal impact of this research occurred subsequent to Professor Cooke's appointment to the Law Commission, in May 2008, when its findings proved to be instrumental in the development of the Commission's Consultation Paper on Matrimonial Property Regimes (**Corroborating Source 2**). This used the research to inform a discussion of the potential for a qualifying prenuptial agreement, and to analyse reform in England and Wales in the light of the law in neighbouring European countries. Although uncited (due to Law Commission convention), Chapter 4 of the Law Commission document clearly draws heavily upon the comparative basis of the research (the only relevant study), and the issues raised by qualifying prenuptial agreements in Chapters 5 and 6 are evidently informed by the findings from the empirical work carried out in the comparator jurisdictions.

As the responsible Law Commissioner, Cooke is directly responsible for the reform recommendations that will follow the Consultation (discussed in **Corroborating Source 7**) and is well-positioned to implement policy change based on the research findings; the intimacy of this connection between research and policymaking illustrates the considerable significance and depth of the project's impact. Callus served as a member of the Law Commission's Advisory Board for the project and also submitted a response to the consultation process (drawing on the earlier research). This particularly focused on public support for the notion that the family home should always be shared equally, irrespective of legal title or contributions, thereby providing an additional pathway for the research into the policy field (**Corroborating Source 8**).

The Law Commission Report that follows the 2011 Consultation Paper will, in due course, propose draft legislation to implement any recommended reforms. This is an ongoing process; the Law Commission published a Supplementary Consultation Paper in September 2012 (**Corroborating Source 9**), and is set to report on all aspects of matrimonial property in late 2013/early 2014. Both researchers remain heavily involved in this process; Cooke as Law Commissioner and Callus via a working paper submitted to the consultation process (**Corroborating Source 10**), which the Law Commission expressly relied upon to inform discussion on how English law on financial provision can be reformed (**Corroborating Source 9**, p51). This constitutes a very significant influence on policy made by government and quasi-government bodies, and it is unlikely that the reform process or the direction of policy travel in this area would be as it is but for the influence of Cooke and Callus' work.

5. Sources to corroborate the impact

1. Consultation Paper: Law Commission (2006) *Consultation Paper No 179: Cohabitation: The Financial Consequences of Relationship Breakdown*, London: HMSO (http://lawcommission.justice.gov.uk/docs/cp179_Cohabitation_Consultation.pdf).
2. Consultation Paper: Law Commission (2011) *Consultation Paper No. 198: Marital Property Agreements*, London: HMSO (http://lawcommission.justice.gov.uk/docs/cp198_Marital_Property_Agreements_Consultation.pdf).
3. Project Website: Community of Property - A Regime for England and Wales? (<http://www.reading.ac.uk/law/research/law-communityofproperty.aspx>); see 'Community of Property: Detailed Description', p6, for discussion of dissemination strategy.
4. Report: Law Commission (2007) *Report 307: Cohabitation: The Financial Consequences of Relationship Breakdown*, London: HMSO (http://lawcommission.justice.gov.uk/docs/lc307_Cohabitation.pdf).
5. Judicial Proceeding: *Radmacher v Granatino* [2009] EWCA Civ 649 (CA); PDF attached.
6. Judicial Proceeding: *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam); PDF attached.
7. Commentary Article: Cooke, E. (2012) 'Pre-nups and beyond: What is the Law Commission up to now?', *Family Law*, March 2012, 323-5; PDF attached.
8. Researcher Submission: Callus, T. (2011) *Response to Law Commission Consultation Paper on Marital Property Agreements, CP no. 198* (submission to Law Commission); PDF attached.
9. Supplementary Consultation Paper: Law Commission (2012) *Consultation Paper 208: Matrimonial Property, Needs and Agreements*, London: HMSO; with supporting materials

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(including a podcast by Cooke) at

http://lawcommission.justice.gov.uk/consultations/matrimonial_property.htm.

10. Researcher Submissions: Callus, T. (2012) *Brief Notes on the Concept of 'Prestation Compensatoire' Upon Divorce in France* (consultation paper submitted to the Law Commission), 01/05/12; and Callus, T. (2012) *Response to the Law Commission Supplementary Consultation Paper: Matrimonial Property, Needs and Agreements, CP no.208* (submission to the Law Commission), 01/09/12; PDFs attached.