NEEDS AND MATRIMONIAL PROPERTY AGREEMENTS: A NEW PERSPECTIVE INSPIRED BY FRENCH LAW

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ABSTRACT

By analysing the 2014 Law Commission's Report, this paper considers the possible reform of matrimonial property agreements, focusing on the difficulties of achieving a balance between the autonomy of the parties and the protection of the 'vulnerable' spouse. It identifies a key limitation of the Report as being a lack of clarity regarding the concept of 'needs', as 'needs' are used as a safety net against binding matrimonial property agreements. It suggests examining the solutions adopted in French law and their possible applicability in England and Wales. It argues that binding matrimonial property agreements should have an impact on the definition of fairness.

Key words: matrimonial property agreements, needs, fairness, autonomy, French law, divorce, maintenance, judge's discretionary powers.

INTRODUCTION

Matrimonial property agreements are contracts entered into by couples in order to govern their financial arrangements if their relationship ends. These agreements are not binding in England and Wales but the Law Commission has recommended that they should be, as they provide 'an important source of legal certainty for high net worth couples' and permit couples entering into a second union to protect their children from previous relationships.[1] However, this proposal includes an important exception; it would be possible for a judge to set aside or

[1] Law Commission, *Matrimonial Property, Needs and Agreements*, Law Com No 343 (HMSO, 2014), at para 1.36-1.37.

modify the agreement when the 'needs' of one of the spouses so require,[2] to guarantee that it cannot cause any 'unforeseen hardship'.[3]

This safeguard aims to achieve 'fairness' and is inspired by the current rules that perceive it to be essential to protect any spouse against the economic disadvantage created by divorce. The rationale for this is two-fold: first, one of the primary functions of family law is to protect the 'weaker' spouse; second, the spouse in greater financial need should be maintained by his or her ex-spouse rather than being dependent on state support.[4] As the law does not distinguish between maintenance or property, the courts' discretion as to how needs should be met is not limited to the protection of the spouses' basic income needs, but encompasses the distribution of their assets. Courts have, therefore, important redistributive powers in order to ensure the protection of the 'economically weaker spouse'.[5] As 'there is no definition of "needs" in English law,' and as the Law Commission has not defined it either,[6] this means that even if the Law Commission's recommendations are followed, judges would retain extensive powers over matrimonial property agreements.

This article argues that this is problematic, as the presence of a matrimonial property agreement should influence the definition of fairness. The Law Commission itself acknowledges the complexity of the concept of 'fairness' and underlines that outcomes agreed by the parties might be considered as fairer than those imposed on them by the courts, especially as the 'Court system cannot provide tailor-made justice for all'.[7] Yet giving important discretionary powers to the judge despite a matrimonial property agreement creates uncertainty and the potential to override the wishes of the parties. It limits autonomy in a context where fairness should take into account the individuals' views. In divorce law cases, the courts define marriage as a contract or as a partnership, which are both based on autonomy. As marriage itself stands on autonomy, the non-recognition of matrimonial property agreements seems to create a 'remarkable anomaly' as it limits the spouse's ability to 'make their own agreements' while this right is not restricted in the same way for unmarried cohabitants.[8]

Academic reflection on whether to grant spouses far-reaching autonomy through binding matrimonial property agreements is therefore timely. This article opts for a comparative approach, suggesting alternative ways in which English law could solve the socio-legal problem of 'autonomy' of the spouses and protection of the 'vulnerable' ex-spouse in the context of divorce. It analyses the solutions in France, which recognises binding matrimonial

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[2] This paper concentrates on the relationship between the spouses: further research on the consequences of matrimonial property agreements for the children would need to be addressed, as the age of minor children always makes them 'vulnerable'.
[3] Law Commission, n 1 above, at para 1.38.
[4] Ibid, at para 5.26.
[5] The phrase 'economically weaker spouse' was especially used by Lady Hale in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, at [137].
[6] Law Commission, n 1 above, at para 2.32.
[7] Ibid, at para 1.5.
[8] S Cretney, 'The Family and the Law: Status or Contract' (2003) 15 CFLQ 403, 412.

property agreements and thus provides an example of a legal system where fairness is defined distinctively by giving autonomy a much more predominant position and by addressing differently the imbalance between ex-spouses. It argues that instead of using the concept of 'needs' as an exception to 'binding' matrimonial property agreements (as proposed by the Law Commission), a clear distinction needs to be made between two issues in divorce: the 'distribution of assets', and 'financial relief' or 'maintenance'. Building on previous analyses of this distinction,[9] it moves the discussion forward by proposing to take into account the way in which French law limits the judge's intervention; the judge can only take decisions related to financial support and cannot redistribute assets between the spouses. This article provides an in-depth analysis of the practical consequences of this distinction and argues that lessons drawn from it could contribute to the clarification of 'needs' in England and Wales. In particular, the distinction between 'maintenance' and 'property' should not be limited to cases including foreign elements but should be extended to pure English divorce cases.

However, it is important to acknowledge that there are differences between the social, cultural and legal environments of these two countries. First, in France, financial relief is generally based on fixed rules, while in England and Wales, it is based on the judge's discretion. Second, in English law, providing a roof to the ex-spouse is crucial,[10] which is not the case in France as the housing market and the social welfare system will make the rehousing of the ex-spouse easier. This means that 'needs' cannot be calculated similarly in both countries and any comparisons have to be made cautiously.[11]

This article starts by briefly introducing the English system of financial relief upon divorce and its consequences for matrimonial property agreements. It then analyses the Law Commission's proposals before exploring how the French system tries to achieve a balance between autonomy of the parties and protection of the 'vulnerable' spouse at the time of entering into the matrimonial property agreement and at the time of the divorce. Based on French law, the final section proposes a reconsideration of the definition of 'fairness' in the context of matrimonial property agreements in England and Wales, thereby making a timely contribution to the current discussion of law reform in this area, as well as to the broader debate on how best to achieve a balance between autonomy and protection of the weaker spouse in the context of divorce.

The judge's intervention in England and Wales

[9] J Scherpe, 'Marital Agreements and Private Autonomy in Comparative perspectives' in Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012).
[10] E Cooke, 'Marital Property Agreements and the Work of the Law Commission in England and Wales' in K Boele-Woelki, J Miles and J M Scherpe (eds), *The Future of Family Property in Europe* (Intersentia, 2011).
[11] Law Commission, n 1 above, at para 1.30.

The key role played by the judge in divorce settlements in England and Wales explains the current approach to matrimonial property agreements. As there is no distinction between the distribution of assets and the maintenance of the ex-spouse, judges have important discretionary powers in both of these aspects, aimed at protecting the weaker spouse.

In 1882, the Married Women's Property Act introduced a rigid separation of property between spouses but offered only a very restricted protection to the financially weaker party in the event of a divorce. Later, following the introduction of the non-fault divorce under the Divorce Reform Law 1969, the relief of hardship caused by divorce became essential as far fewer married women worked than today.[12] There were pressures for the introduction of a community of property regime,[13] under which property accumulated by both spouses during their marriage becomes joint property, even if it was originally acquired in the name of one of them only.[14] However, this proposition was rejected several times because most wanted the courts to have discretionary powers to reallocate property on divorce or on death.[15] The lack of discretionary powers would have produced 'unintended results in that important needs are remaining unsatisfied'.[16] Consequently, the Matrimonial Causes Act 1973 chose to protect the 'economically weaker' spouse by giving considerable powers to courts when deciding upon financial provisions and property adjustments.[17]

Since 1973, the courts have adopted a 'fairness' approach, which is inherently subjective.[18] Originally, 'fairness' was equivalent to a 'reasonable requirements' approach, based on the financial needs of the spouse and where the 'needs' represented only a very small percentage of the other spouse's wealth.[19] Gradually, this was replaced by a more generous approach. *White v White*[20] regarded contributions made by way of home-making or childcare as equal to contributions made as a result of monetary work and advocated a 'yardstick of equality'. This 'yardstick' meant that judges had to check their decision against equality of assets, whereas the Court of Appeal later considered equality not only as a 'yardstick' but also as the starting point.[21] *Miller; McFarlane*[22] continued the move toward the acceptance of equal sharing and

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[12] Ibid, at para 3.9.
[13] *Hansard*, HC Deb, Vol 776, col 801 (24 January 1969).
[14] S Cretney, *Family Law in the Twentieth Century* (OUP, 7th ed, 2003), at p132; E Cooke, A Barlow, T Callus, *Community of Property- A regime for England and Wales?* (The Nuffield Foundation, 2006), 1.
[15] Morton Commission, *Royal Commission on Marriage and Divorce*, Cmnd 9678, (HMSO, 1956), at para 651; Law Commission, *First Report on Family Property*, Law Com No 52, (HMSO,1973), at paras 46-60.
[16] Law Commission, *Family Law: Matrimonial Property*, Law Com No 175, (HMSO, 1988), at para 3.5.
[17] Law Commission, *Matrimonial Property, Needs and Agreements,* Supplementary Consultation Paper No 208, (HMSO, 2012), at para 3.5.
[18] *White v White*, [2000] UKHL 54, [2001] 1 AC 596, [2000] 3 WLR 1571, at [599] (Lord Nicholls).
[19] *Dart v Dart* [1996] 2 FLR 286 (CA), where the wife was awarded a 'mere' £4 million of her husband's £400 million fortune.
[20] *White v White* [2000] UKHL 54.
[21] *Charman v Charman* (No 4) [2007] EWCA Civ 503.
[22] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

identified three strands of financial provision: needs, compensation and sharing. A relationship generates 'needs' that the other party should meet; 'compensation' aims to redress any significant prospective disparity between the parties arising from the way they conducted their marriage; whilst 'sharing' refers to marriage as 'a partnership of equals',[23] where both individuals are perceived as working together for common benefits. Upon divorce, redistribution of assets between the spouses is permitted as a financial remedy. These strands were considered as general principles that aimed to limit the judicial discretion in the future. However, the judges do not necessarily explain what proportion of the financial relief they have chosen falls under any of these three 'categories'. A consequence is that there is no distinction between 'maintenance' and 'the distribution of assets'. Even if maintenance might be defined as 'the provision of food, clothing, and other basic necessities of life'[24] resulting from the spouses' mutual duty of support, financial relief also includes the distribution of all the assets belonging to the spouses regardless of their origin. This reallocation of assets is perceived as a means to guarantee the standard of living and equality between the spouses.[25]

The concept of fairness used in this context is not based on the parties determining what they regard as fair. It rather delegates to the courts the power to oversee what is fair in each individual case. For a long time, therefore, the autonomy of the parties was restricted, as it could have limited the court's powers. Matrimonial property agreements were regarded with suspicion and were unenforceable for two reasons. First, any matrimonial property agreement was in contradiction with the duty of a husband and a wife to live together as it anticipated a future divorce.[26] Not only could a person not contract out of their responsibility to a child[27] but matrimonial property agreements were perceived as encouraging separation and divorce.[28] Second, any attempt to exclude the powers of the courts to grant financial relief was considered as void on the grounds of public policy.[29] The wide powers granted to judges permitted fairness in divorce. Fairness did not mean treating spouses as contracting parties and respecting their autonomy but rather meant ensuring an equitable decision according to the parties' respective situations. Therefore, English law considered that financial remedies in divorce rely on discretion being broadly afforded to the divorce court, which was difficult to combine with binding matrimonial property agreements.

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[23] Ibid, at [16] (Lord Nicholls).
[24] J Law and EA Martin (eds), *Dictionary of Law* (OUP, 2013), see *maintenance.*
[25] W Pintens, 'Matrimonial property law in Europe' in K Boele-Woelki, J Miles and JM Scherpe (eds), *The Future of Family Property in Europe* (Intersentia, 2011), 21.
[26] *Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165, 171. See also *Brodie v Brodie* [1917] P 271; *N v N (Jurisdiction: Prenuptial Agreement)* [1999] 2 FLR 745.
[27] A 'maintenance agreement' is subject to the court's powers under the Matrimonial Causes Act 1973 (ss 34, 35 and 36). See *MacLeod v MacLeod* [2008] UKPC 64, at [41] (Baroness Hale): 'it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family'.
[28] *Westmeath v Westmeath* (1830) 1 Dow & Cl 519.
[29] *Hyman v Hyman* [1929] AC 601.

There are several reasons justifying this rule. First, it ensures that spouses cannot pass their responsibility to support their former spouse on to the State.[30] Second, according to the Matrimonial Causes Act 1973, financial remedies aim to achieve a fair outcome for each individual case, requiring 'tailor-made' orders made by the court.[31] However, the development of a settlement approach when dealing with the financial consequences of divorce has eroded these two rules.[32] Agreements concluded after divorce, ie 'separation agreements' have been encouraged, and gradually the courts have come to view matrimonial property agreements as an increasingly significant factor, one to be considered as part of their wide discretion exercised within section 25 of the Matrimonial Causes Act 1973.[33] In this context, the Supreme Court took a major decision in the direction of the recognition of matrimonial property agreements.

Radmacher (formerly Granatino) v Granatino[34] involved a wealthy German woman divorcing a French man. Prior to their marriage, the parties signed an agreement in Germany separating their assets and barring either party from applying for maintenance. The husband later gave up his banker's career for a lower paid position, and by the time of the divorce, the wife was much more financially secure than he was. The Supreme Court had to determine the impact of the matrimonial property agreement within English law and held that the common law rule considering matrimonial agreements as being against public policy as anticipating a future divorce was 'obsolete and should be swept away'.[35] As the duty upon husband and wife to live together was no longer enforceable, the reasoning that led to the rule had disappeared.[36]

In addition, the Supreme Court insisted on the importance of the parties' autonomy: 'the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'.[37] A matrimonial property agreement could be enforced, although it would be subject to any application to the court under the Matrimonial Causes Act 1973, as no matrimonial court can be 'bound' by such an agreement according to the *Hyman* principle.[38] While before *Radmacher* the agreement was only one of the factors of section 25 that the court had to take into account, *Radmacher* created a 'rebuttable presumption' under which, once it is shown the parties freely entered into the agreement,

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[30] Law Commission, n 1 above, at para 4.8.
[31] J Scherpe, 'Towards a matrimonial property regime for England and Wales?' in R Probert and C Barton (eds), *Fifty years in family law: essays for Stephen Cretney* (Intersentia, 2012).
[32] N Lowe and G Douglas, *Bromley's Family Law* (OUP, 11th ed, 2015), 854.
[33] See *Crossley v Crossley* [2007] EWCA Civ 1491.
[34] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.
[35] Ibid, at [52].
[36] Ibid, at [38]-[39].
[37] Ibid, at [75].
[38] J Miles, 'Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money' (2011) 74 MLR 430.

such agreement should be enforced unless one of the parties can prove that it would be unfair to give effect to it.[39]

However, Lady Hale gave a strong dissenting judgment, observing that such a presumption would undermine the vision of marriage as a status, as couples would be able to contract out of the mutual duty of support created by marriage and highlighting the risk of gender discrimination against women.[40] Several academics shared this view,[41] which will be considered further in the next section.

Others welcomed *Radmacher* as a 'clear, fair and certain decision',[42] in line with developments in other European countries.[43] And indeed, following *Radmacher*, the Law Commission proposed the introduction of 'qualifying' matrimonial property agreements.[44] These would enable spouses to make contractual arrangements about the financial consequences of their divorce. Certain procedural safeguards would have to be met and these agreements could not be used to contract out of meeting 'financial needs'. Drawing upon two public consultations, upon research into the law in England and Wales, and into other jurisdictions (especially Canada), the Law Commission issued its report after long debates on the need for greater certainty and capacity for private ordering. At least three factors can explain the proposal to create 'binding' matrimonial property agreements.

The first reason is the increasing number of international divorces, eg divorces involving a foreign element such as divorces between parties of different nationalities or divorces where an agreement was drawn up in one country but examined by a judge of another one. In 2007, in the 27 EU Member states, 13 per cent of divorces had an 'international element'.[45] The lack of harmonisation of substantive family law and a corresponding lack of harmonisation of conflicts of laws' rules give rise to various disputes relating to property rights. When the European Commission took various steps to unify private international law rules in the area of matrimonial property regimes,[46] with a view to preventing forum shopping, the British government decided not to opt into these proposals. This decision reveals England and

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[39] R George, P Harris, J Herring, 'Ante-nuptial agreements: fairness, equality and presumptions' (2011) 127 LQR 335.
[40] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, at [131] -[195].
[41] B Clark 'Ante-nuptial contracts after *Radmacher*: an impermissible gloss?' (2011) 33 JSWFL 15; George et al, n 39 above; R George, P Harris, J Herring, 'With this Ring I Thee Wed (Terms and Conditions Apply)' (2011) Fam Law 367.
[42] D Hodson, 'English Marital Agreements for International Families After *Radmacher*' (2011) IFL 31.
[43] J Scherpe, 'Fairness, freedom and foreign elements – marital agreements in England and Wales after *Radmacher v Granatino'* (2011) CFLQ 513.
[44] Law Commission, n 1 above, at Clause 5 of the Draft Bill.
[45] Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, (COM (2010) 104 final, para 20).
[46] See the 1978 Hague Convention on the law applicable to matrimonial property regimes; the European Parliament legislative resolution of 23 June 2016 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2016) 0106).

Wales' preference for the discretionary power of the judge in divorce proceedings.[47] This isolated position is questionable. Other European countries recognise matrimonial property agreements as enforceable, and the non-recognition of these agreements in England and Wales could be problematic in international cases.[48] 'How could the respondent accept as fair a London order that he transfer or pay over a substantial proportion of his hard earned fortune knowing that in his homeland, his liability would have been minimal?'[49] It is then possible to argue that it is necessary to recognise matrimonial property agreements at least in international cases.[50]

The second reason for creating binding matrimonial property agreements is that they could protect non-matrimonial assets.[51] Currently, even when an agreement has been concluded, there is no clear distinction between the various categories of assets owned by the spouses. [52] Precluding the sharing of non-matrimonial property on divorce might enable individuals to protect 'special property', eg family businesses, property acquired in a previous marriage or a previous relationship, or inherited or gifted property. Signing a matrimonial property agreement is a way to protect 'earned' wealth or family assets[53] and is especially relevant for mature couples entering into a second marriage and wishing to regulate the distribution of their property if the marriage fails in order, for example, to protect any children born from a previous relationship.[54] This suggests a shift in the reality of marital relationships and the interests of the parties, and that matrimonial property agreements can avoid unnecessary conflict in the event of a divorce.[55]

A third reason for making matrimonial property agreements binding is that English law allows spouses to freely dispose of their assets via various mechanisms such as trusts or gifts. 'Outside the matrimonial context, no court can modify the outcomes dictated by the laws of property and express trust, and spouses have to make do with the consequences'.[56] For instance, if one of the spouses decides to give all their assets to a third party during the marriage, the other spouse cannot intervene against this decision. This is especially notable as, by contrast, France erects important barriers to limit gifts to third parties in order to protect qualified relatives via a 'legal share' ('réserve héréditaire'). As such, the surviving spouse always has a temporary right to stay in the matrimonial home and sometimes a

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[47] *Hansard*, HC Deb, col 69 WS (30 June 2011).
[48] J Miles, 'Marital Agreements and Private Autonomy in England and Wales' in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart, 2012).
[49] M Thorpe, 'Financial consequences of divorce: England versus the rest of Europe' in K Boele-Woelki, J Miles and J Scherpe (eds), *The Future of Family Property in Europe* (Intersentia, 2011).
[50] Law Commission, n 1 above, at para 5.39.
[51] Ibid, at para 8.76 and following.
[52] See for example *N v F* [2011] EWHC 586 Fam.
[53] E Hitchings, 'From pre-nups to post-nups: dealing with marital property agreements' (2009) Fam Law 1056.
[54] L Lestienne- Sauvé, *Le beau-parent en droit français et en droit anglais* (LGDJ, 2013).
[55] R Deech, 'What's a woman worth?' (2009) Fam Law 1140.
[56] Miles, n 38 above, 440.

permanent right in the matrimonial home,[57] and children automatically receive a share of the inheritance.[58] In France, a key principle is to ensure that property stays within the family. English family law usually offers a greater freedom as to whom property can be given. The solutions prevailing for matrimonial property agreements can thus be perceived as exceptions to this rule. The coherence of the property system will then justify making matrimonial property agreements binding.

The first two reasons outlined above influenced the Law Commission when they were considering a possible reform of matrimonial property agreement.[59] According to their Report, binding agreements require some formalities, among which are: the agreement has to be made by deed; both parties have to disclose the value of their properties; and each party must receive advice from a qualified lawyer.[60] The aim is to ensure that both parties enter freely into the contract and that each clearly understands its consequences. In addition, if all of the conditions have been fulfilled, an important exception remains: where the agreement does not meet the needs of a party or the interests of a child of the family, the court would not only be able to make orders inconsistent with the agreement but would also be able to alter them.[61] These propositions are discussed further in the following section.

Fairness in matrimonial property agreements: a balance between autonomy and protection of the vulnerable party

By proposing the introduction of qualifying matrimonial property agreements, the Law Commission aims to obtain 'the best balance between enabling parties to achieve autonomy and certainty without removing protection of the vulnerable'.[62] To do so, the judge shall be able to alter these agreements and make financial orders when necessary to meet the 'needs' of the parties. In other words, the Law Commission provided a safety net by opting to protect 'fairness' via the recognition of 'needs'. However, 'needs' is difficult to define and, as such, the Law Commission's proposals limit the significance given to autonomy. This section examines the concept of autonomy and then argues that a particular definition of 'needs' should be used if there is a matrimonial property agreement.

According to Alison Diduck, autonomy in family law takes two forms. 'Autonomy of the individual' consists of encouraging people to make decision about their relationships. 'Autonomy of process' is the creation of an autonomous system of dispute resolution. In the context of matrimonial property agreements, it gives to spouses the ability to choose by themselves the consequences of their divorce.[63]

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[57] Articles 763 and 764 al. 1 of the French Civil Code.
[58] Article 912 of the French Civil Code.
[59] Law Commission n 1 above, at para 5.39, 8.76.
[60] Ibid, at para 6.6.
[61] Ibid, at para 5.84.
[62] Ibid, [5.81].
[63] A Diduck, 'Autonomy and Family Justice' (2016) 28 CFLQ 133.

Regarding 'autonomy of the individual', Diduck expresses two main concerns. First, in family law, the 'autonomous individual' is opposed to the 'dependent individual', now recast as being 'vulnerable'.[64] As the 'vulnerable category' is narrower than the 'dependent category', this may reduce the protection offered by the court to the 'primary caretakers'.[65] Second, the 'autonomy/vulnerability dichotomy is gendered (…) the vulnerable side of the dichotomy is marked as feminine and the autonomous side as masculine'.[66] This new language 'dramatically reduces the role of the court from protector of basic principles of fairness, to protector only of a gendered form of autonomy'.[67] In the context of matrimonial property agreements, spouses might be described as 'vulnerable' or 'dependents' when entering into an agreement if they do not fully understand or realise the consequences of it. Such 'vulnerability' can come from an imbalance between the parties in respect of their age, gender, maturity, intellectual understanding, social status, education, and/or financial means,[68] which means that the parties do not have an equal bargaining position. A spouse can also be 'vulnerable' at the time of the divorce, as disparity in economic and social wellbeing can lead to such vulnerability.[69] Divorce can create inequality between spouses and can have important consequences for the standard of living of one of them. The 'economically vulnerable' spouse would require the protection of a judge, as autonomy appears to reinforce their vulnerability.[70] Today, the extensive powers given to the judge by section 25 of the Matrimonial Causes Act 1973 ensure that 'economically vulnerable' spouses cannot, by a contract, renounce the protection they need.[71]

While on one hand, autonomy should not become 'the very essence' of the family justice system',[72] as it is essential to carefully consider safeguards to protect fundamental social values, on the other hand, we have to consider the growing importance of autonomy as a fundamental principle in the area of family law. Today, family justice encourages private settlements.[73] A justification in favour of this evolution is that giving more options to individuals to control their 'normative positions', eg allowing individuals to create new obligations and powers for themselves, can contribute to their wellbeing.[74] 'The ruling idea behind the ideal of personal autonomy is that people should make their own lives'.[75] Today's couples perceive 'marriage as a vehicle of personal fulfilment and self-realization rather than

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[64] Ibid, 145.
[65] Ibid, 146-147.
[66] Ibid, 148.
[67] Ibid, 148.
[68] S Ouazzani, 'Prenuptial agreements: the implications of gender' (2013) Fam Law 421.
[69] M Fineman, 'The vulnerable subject: Anchoring equality in the human condition' (2008) *Yale Journal of Law and Feminism* 1, 10.
[70] Cooke, n 10 above, 27.
[71] B Hale, 'Equality and autonomy in family law' (2011) 33 JSWFL 3.
[72] Diduck, n 63 above, 134.
[73] Lowe and Douglas, n 32 above, 827.
[74] W Chan, 'Cohabitation, Civil Partnership, Marriage and the Equal Sharing Principle' (2013) 33 LS 16.
[75] J Raz, *The Morality of Freedom* (OUP, 1986), at p 369.

a commitment for life-long sharing'.[76] Additionally, in the context of matrimonial property agreements, autonomy can be seen as a means of achieving a level of certainty. Under the current rules, 'parties are denied precisely the satisfaction of knowing where they stand and the resultant peace and security which they might reasonably consider a high priority'.[77] This argument is especially convincing, as the approach adopted by the courts in the division of assets is 'chaotic'.[78] By concluding an agreement, parties can avoid being submitted to this disordered approach and can instead opt for certainty. As will be shown in the final section, there are various ways to achieve equal bargaining powers between spouses. If the parties were well-protected and well-informed at the time of the conclusion of their agreement, the agreement would certainly reflect their willingness to determine themselves what they consider as 'fair' in their particular situation.

Regarding 'autonomy of process', as family law produces some public consequences, 'the justice of fairness in financial orders must be measured against social values including non-discrimination and equality'.[79] The recent 'fight over same-sex marriage has intensified the idea that marriage is fundamental to the social order, a permanent commitment of the utmost importance, permeated by unshrinkable obligation and public normativity'.[80] Some argue that the recognition of autonomy would undermine the concept of marriage as an institution; property division upon divorce is a manifestation of the marital obligation of mutual support and, as such, cannot be defined by the parties.[81] One of the main differences between marriage and cohabitation is that marriage involves a mutuality of support between the spouses initially based on a voluntary choice (the spouses' choice to enter into the marriage) but then recognised as a binding commitment by the state. Allowing spouses to negotiate this mutual support would deny the specificity of marriage. It would also encourage agreements 'that fall outside the guiding principle established by the law (…) and may serve to benefit only the strong at the expense of the weak'.[82] However, the fact that courts erected the traditional solutions upon divorce having in mind a 'traditional gender binary' model, ie a 'systematic imbalance' between the husband ('money-earner') and the wife ('non-money earner') undermines this argument. The recognition of the individuals' preferred choice may prove more 'egalitarian' than the current solutions based on stereotypes.[83] 'The changes in the institution of marriage do not mean that vulnerability, dependence, clouded cognition, and unequal bargaining power have disappeared from the world of marital contracting. Still,

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[76] A Cherlin, *The Marriage-Go-Round: The State of Marriage and the Family in America Today* (Vintage Books, 2010), 114-115.
[77] S Cretney, 'From Status to Contract?' in F Rose (ed) *Consensus ad Idem: essays in the Law of Contract in Honour of Guenter Treitel* (Sweet & Maxwell, 1996), 281.
[78] C Bendall, 'Some are more "equal" than others: heteronormativity in the post-*White* era of financial remedies' (2014) 36 JSWFL 260.
[79] Diduck, n 63 above.
[80] J Halley, 'Behind the law of marriage (I): From Status/Contract to the marriage system' (2010) *Unbound*, Vol 6:1.
[81] George et al, n 41 above.
[82] Diduck, n 63 above, 144.
[83] Bendall, n 78 above.

socioeconomic shifts between men and women and the emergence of same-sex marriage invite us to rethink traditional limits placed on the contractual autonomy of spouses'.[84] Our current society is 'pluralistic' and, as such, is governed by a growing acceptance of different lifestyles and religious or ideological views. The perception is that intimate relationships belong to the private sphere and, therefore, more freedom for parties within their marriage should be acknowledged.[85] In addition, matrimonial property agreements can discourage future spouses from marrying or divorcing for the 'wrong reasons' (ie in the hope of obtaining a share of the wealthier party's fortune). As such, they promote the institution of marriage. 'If promoting marriage is a public objective, permitting flexibility in the meaning of marriage would seem more likely to attract people to the institution rather than adhering to fixed and immutable status'.[86]

Thus, this paper argues that the duty to maintain what was created by marriage,[87] which justifies the liability of one of the spouses to continue to support the other upon divorce, should be defined in a narrower way in the presence of a matrimonial property agreement. A specific definition of 'needs' should be used, reflecting the parties' autonomy.

The Law Commission Report recommends that 'needs' are 'needs as understood in the general law'[88] but the understanding of this concept varies and the extent of a needs-based provision is not clearly defined. While 'needs' most commonly takes into account all the circumstances of a particular case, especially the lifestyle enjoyed by the spouses during their marriage,[89] needs have sometimes been 'generously interpreted'[90] or, in reverse, defined in a narrower way. According to the 'generous' interpretation, 'needs' adjust the parties' respective resources as a result of the choices made during the marriage, while the 'less generous' interpretation refers to a 'predicament of real needs', [91] which 'merely seems to be one that did not leave the claimant in a state of destitution'.[92] Therefore, it is not clear if the mere function of needs is simply ensuring that the spouse will not be maintained by the State, or if needs have to be more 'generously assessed'.[93] For instance, in the recent newsworthy case of *Estrada Jaffali v Jaffali*, the High Court awarded an annual budget of £2.5 million to

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[84] B Atwood, 'Marital contract and the meaning of marriage', (2012) 54 Ariz L Rev 11, 40.
[85] N Dethloff, 'Contracting in Family law: A European perspective' in K Boele-Woelki, J Miles and J M Scherpe (eds), *The Future of Family Property in Europe* (Intersentia, 2011), 65.
[86] Atwood, n 84 above, 41.
[87] Statutory obligations to maintain during the marriage are imposed by Domestic Proceedings and Magistrates' Courts Act 1978, s 2; Matrimonial Causes Act 1973, s 27 and s 22 A (4); Family Law Act 1996, s 40.
[88] Law Commission, n 1 above, at para 5.82.
[89] See for example *G v G* [2012] EWHC 167 (Fam), [2012] 2 FLR 48 [136] (Charles J).
[90] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, at [138] (Baroness Hale). See also *Lauder v Lauder* [2007] EWHC 1227; *Z v Z (no 2*) [2011] EWHC 2878.
[91] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, at [118].
[92] See *BN v MA* [2013] EWHC 4250 (Fam) [30].
[93] Miles, n 38 above.

the ex-wife of a billionaire. The Court took into account the marital standard of living to assess her future needs.[94]

The Law Commission itself has underlined the difficulties related to the concept of 'needs', especially in respect of geographical inconsistency and the lack of transparency.[95] Under its recommendation,[96] the Family Justice Council[97] prepared guidance as to the meaning of financial needs. On 'needs-based cases', the Family Justice Council encourages the courts to enable a transition to independence for the ex-spouses by departing from equal sharing.[98] When sufficient financial resources are available, needs would be subsumed within the equal sharing principle as 'it may be fair (and so appropriate) for the court to sanction a continuation of 'the lifestyle choices' made during the marriage'.[99] However, it is regrettable that the Family Justice Council does not propose any specific definition of 'needs' in the presence of a matrimonial property agreement. 'When spouses contract themselves to alter the law that would otherwise apply, the enforceability of their contract should be governed (…) by a clear legal framework reflecting realistic policy choice'.[100] This should require a clearer definition of 'needs'.

Despite the silence of the Law Commission and the Family Justice Council, some cases have given a specific definition of needs in the context of matrimonial property agreements, such as *Radmacher*, referring to 'predicament of real needs'.[101] Similarly, according to *Limata v Luckwell,*[102] a matrimonial property agreement may affect 'the size and the structure of any award' (…), as 'an agreement is capable of altering what is fair, including in relation to "need"'[103]. The presence of an agreement in itself has an impact on the definition of 'needs'. This solution is welcomed as it can be argued that the presence of an agreement suggests that the spouses wished to conclude a contract that would limit interference by the courts. A clear definition of 'needs' in the context of matrimonial agreements also permits legal predictability, an aim which has been expressly pursued by the spouses.[104] These solutions should be clearly confirmed by the legislator and the concept of 'predicament of real needs' could be explained further. Taking into account solutions that exist in another country can then be useful to show alternatives.

The proposed legal model put forward in this paper is that of France, where the way to achieve fairness in the presence of a matrimonial agreement is different. In its Report, the

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[94] *Estrada Jaffali v Jaffali* [2016] EWHC 1684 (Fam).
[95] Law Commission, n 1 above, at para 2.32 and following.
[96] Ibid, at para 3.88.
[97] The Family Justice Council is an advisory, non-departmental, public body that promotes an inter-disciplinary approach to family justice.
[98] Family Justice Council, *Guidance on 'Financial Needs on Divorce'*, June 2016, at para 13-16.
[99] Ibid, at para 26.
[100] Atwood, n 84 above, 41.
[101] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, at [118].
[102] *Luckwell v Limata* [2014] EWHC 502 (Fam).
[103] Ibid, at [130].
[104] Law Commission, n 1 above, at para 5.61.

Law Commission engages with comparative experience but explains that any comparison 'has to be treated with caution'.[105] Firstly, English law does not differentiate between income and capital, while such a difference does exist in France. Secondly, the Report reminds us that providing a home to the spouse is essential in England and Wales,[106] when in France the housing needs can be covered by periodical or capital payments covering ongoing needs and renting of an adequate accommodation.

It is important to keep in mind these differences between English and French law. They will have some consequences on considering safeguard against autonomy harming the vulnerable spouse. However, despite these differences, an analysis of the French system can lead to some new solutions. While French law upholds autonomy, it protects the vulnerable spouse by making a distinction between 'the division of assets' as decided by the parties where there is no possible interference of the judge, and 'maintenance' as decided by the judge, which offers a protection to the 'vulnerable spouse'.

Financial relief upon divorce and matrimonial property agreements in France

French law treats the division of property and the issue of maintenance separately, in effect creating different 'stages' or 'pillars'[107] of the divorce process. Here, two of them are relevant. Firstly, the matrimonial regime is enforced; secondly, the judge evaluates the amount and the form of maintenance. When the divorce court has to wind up the matrimonial regime by applying the rules regulating this particular regime, the second stage of the divorce process, ie the possibility to claim for 'financial relief', might protect the vulnerable spouse.

In France, a set of mandatory rules applies automatically to all married couples with the purpose of protecting their family life; it is called the 'primary regime'. According to these imperative rules, the spouses cannot decide to organise maintenance in a matrimonial property agreement. Therefore, these agreements can only organise the administration of, and the entitlement to, the spouses' assets during and after the marriage.

When spouses do not opt for a specific matrimonial property regime, they are subject to a 'default regime', the regime of 'community of property', or 'community of acquests'.[108] In this regime, the community consists of marital acquisitions ('acquests'),[109] meaning that all assets acquired during the marriage belong jointly to the spouses with the exception of assets received through gift or inheritance. In the event of a divorce, communal property is divided equally. The results achieved are similar to those obtained in English law, where the concept of equal sharing has become the starting point for financial settlements in divorce since *White*

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[105] Ibid, at para1.30.
[106] Ibid, at para 3.121 and following.
[107] Scherpe, n 31 above, 138.
[108] *Régime de la* c*ommunauté réduite aux acquêts* (article 1387, article 1400 and following of the French Civil Code).
[109] Acquisitions can be made by the spouses together or separately. They can result from the spouses' activity (eg salary) or from savings made from the fruits of their assets (eg income produced by company shares belonging to one of the spouses).

v White.[110] Some academics even consider that English law has moved towards the establishment of a kind of 'community of property' similar to that which exists in the rest of Europe.[111] Therefore, in England and Wales, and in France, marriage is conceived as a partnership in which assets should be divided equally.[112]

Despite these similarities, the perception of matrimonial agreements differs in these two systems for two reasons. First, in France, agreements are often a method by which a spouse can give property to the other spouse, rather than as a means to deprive them of such property. Second, in the French default system, gifts and inheritance are outside the sharing pool. The only way for spouses to share these kinds of assets will be to opt for a 'regime of full community'. Therefore, in France, the spouses will have to voluntarily decide to expand the sharing pool, whereas in England and Wales, the distinction between the various categories of assets is not clear, which means that the judge can include gifts and inheritance into the sharing pool.

Whilst French matrimonial property agreements do play a key role when a divorce occurs, one of the main distinctions between the French and English systems is that the powers of French judges are much more limited compared to those of their English counterparts.[113] Therefore, in England and Wales, there is a strict limit to the concept of autonomy in order not to call into question the discretionary powers of judges, while in France, greater latitude is given to the spouses. It is crucial to understand these differences before exploring how the approach of French law can lead to advocating new alternatives in England and Wales.

In France, parties can conclude their own *contrat de mariage*. As some significant differences in the bargaining powers of the parties can exist when they enter into the agreement—one may be wealthier or the other easily influenced[114]—and as both spouses may marry for love and be naïve about their future, their protection requires some formalities. The notary draws up the agreement in a notarial deed, both in the presence and with the simultaneous consent of the spouses.[115] The notary must provide the spouses with independent advice and be satisfied that said spouses understand the nature and consequences of their agreement and freely consent to it. Failure to do so can result in professional liability.[116] If the spouses decide to sign an agreement, they have a considerable degree of freedom. They can choose from among a wide range of 'conventional matrimonial regimes' proposed by the statutes, or they can create a 'tailor-made' matrimonial regime. The process of electing one particular conventional matrimonial regime is discussed by the parties with the notary and will depend

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[110] *White v White* [2000] UKHL 54.
[111] See S Cretney, 'Community of property imposed by judicial decision' (2003) 119 LQR 349; Scherpe, n 31 above, 135.
[112] Ibid, 139.
[113] Article 1397 of the French Civil Code: 'Legislation regulates conjugal association, with respect to property, only in default of special agreements, which the spouses may enter into as they deem proper, provided they are not contrary to public morals and to the following provisions.'
[114] Dethloff, above n 85, 68.
[115] Article 1394 al 1 of the French Civil Code.
[116] Cass Civ 21 juill 1921, D 1925 I 29.

on the specific circumstances of their case, eg the disparity between their assets and/or income, their professional situation, any previous marriage, any child from a former union, potential inheritance, or age.[117] Should the marriage end, the rules of the chosen matrimonial regime will govern the allocation of assets; this is called 'the liquidation of the matrimonial regime'.

Among all of the conventional matrimonial regimes existing in France, one is particularly relevant for the purposes of this paper: the 'separation of property regime'. [118] Under this regime, assets owned before the marriage, acquired during the marriage, or obtained by gift or inheritance, belong to the spouse who has acquired them. This spouse is the sole owner. This means that when a divorce occurs, the other spouse has no right to, or a share in, these assets. This can lead to cases where, for example, the husband retains his wealth and the wife is left with little means, as there are no matrimonial assets to share between them.[119] It does not mean that fairness is ignored, however, but whilst fairness is in England and Wales is seen to require discretionary powers of the judge, in France it is mainly obtained via a set of fixed rules, thus fairness seems to equate to certainty and to compliance with the pre-nuptial wishes of the parties.

A 2013 study revealed that young French couples are increasingly opting for this regime. In 2012, 10 percent of all the couples married did so under a separation of property agreement versus only 6.1 percent in 1992. The study concluded that young couples are more independent than they used to be. Some may want to marry but also wish to keep their financial independence; for them, marriage is not necessarily about the sharing of assets and money. The study gives various reasons for this desire of independence. First, because of the increase in divorces, young people are more likely to consider the short-term consequences of marriage and are therefore less likely to opt for a 'community of property'. Second, women are more independent today than they were in the past. Third, people get married at a later age; the spouses might already have an important estate when entering into marriage that they do not always want to share with their future husband or wife.[120]

The French separation of property regime is very similar to that in England and Wales when a matrimonial property agreement is signed, as it is in this very specific situation that one of the spouses can be in a disadvantaged position if a divorce occurs. However, the 'vulnerable' spouse will be protected by 'maintenance'.

Similarly to English law, French law imposes a duty to maintain on marriage. Divorce puts an end to this duty but one of the spouses may be compelled to pay the other a financial remedy; 'maintenance' could therefore protect the vulnerable spouse. As explained before, a

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[117] C Bitbol, 'Le choix du régime matrimonial : une liberté encadrée' (2008) AJ fam 72.
[118] Articles 1536 and following of the French Civil Code.
[119] See for instance, Versailles, 2e ch, 1ère sect, 5 juin 2014, discussed below.
[120] N Frémeaux, M Leturcq, Institut national de la statistique et des études économiques, 'Plus ou moins mariés : l'évolution du mariage et des régimes matrimoniaux en France' (2013) Economie et statistique, pp 462-463.

'primary regime' is automatically applied to all married couples. This regime aims to achieve fairness.[121] It especially prohibits agreements on maintenance when they are concluded prior to any divorce proceedings,[122] as parties cannot assess what could constitute the necessary financial support between them upon a divorce, as external circumstances are sometimes unforeseeable.[123] Maintenance agreements prior to divorce are against public policy and good morals, [124] as, upon divorce, spouses are protected by the possibility to claim for a 'compensatory benefit'. This leads to a distinction between two steps in divorce.

The first step, the allocation of the various assets held between the two spouses, is governed by the rules of the 'matrimonial regime'. The enforcement of the matrimonial property agreement occurs regardless of the regime chosen by the parties. The judge cannot amend or set aside the agreement because of a change in circumstances or on the ground of unfairness. However, the agreement cannot include any provision in relation to maintenance.

Once a matrimonial regime has been wound up, one of the parties can ask the judge to examine the question of 'maintenance'; this is the second step. In France, maintenance takes the form of a *prestation compensatoire* (which can be translated as 'compensatory benefit' even if neither the French name nor the English translation truly reflect its nature). It intends 'to compensate, as far as possible, for any disparity that the breakdown of the marriage creates in the respective ways of living'.[125] However, the judge's discretionary power is limited in its scope. The judge cannot interfere in the distribution of assets, which will be carried out in accordance with the rules of the matrimonial property agreement.

The judge must determine the level of maintenance according to the needs of the spouse to whom it is paid and to the means of the paying spouse, with particular regard to the duration of the marriage, the ages and states of health of the spouses, their professional qualifications and occupations, the consequences of employment choices made by one spouse for the duration of their relationship in respect of raising their children, or for favouring their spouse's career, the estimated or foreseeable level of their assets.[126] Most of these criteria are similar to those considered by English judges under section 25(2) of the 1973 Act. French law perceives maintenance as a way of avoiding hardship and to provide cover for ongoing needs, including the costs of accommodation. It also takes into account a compensatory

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[121] C Butruille-Cardew, 'A French Perspective on International Prenuptial and Postnuptial Agreements' in D Salter, C Butruille-Cardew, N Francis QC, S Grant (eds), *International Prenuptial and Postnuptial Agreement* (Family Law, 2011), 127.
[122] Cass. Civ. 1ère, 21 mai 1988, Bull. civ. II, n°74 ; Cass. Civ. 1ère, 14 déc. 2004, n°02-20.334.
[123] S David, 'Les époux ne peuvent transiger sur leur droit futur à prestation compensatoire' (2004) 3 AJ fam101.
[124] See article 6 of the French Civil Code which states that statutes relating to public policy and morals may not be derogated from by private agreements.
[125] Article 270 al 2 of the French Civil Code.
[126] Article 271 of the French Civil Code.

component and reflects the contribution and sacrifice of the spouse, making the French rules close to the solution raised in *Radmacher.*[127]

Despite the absence of any compulsory formula, French lawyers and judges have developed calculation methods to provide as much certainty as possible for the parties even if, in practice, the amount of maintenance obtained by the ex-spouse may differ from one judge to another.[128] Today, there are some discussions related to the possible introduction of a formula as a form of non-statutory guidance.[129] As such, a working group of practitioners have created a new online tool, 'PilotePC', which aims to help solicitors and judges to fix the awards.[130] The formula takes into account the disparity between the predictable monthly incomes of both ex-spouses, as well as the duration of their marriage and their pension rights. This proposition presents some similarities with the reflection in England and Wales on the introduction of a 'standard model' for calculating financial relief in divorce.[131] Despite the long tradition of judicial discretion, the Law Commission considers that the development of non-statutory guidelines will contribute to make more 'transparent' the solutions in spousal support.[132] It will also allow people to have access to online calculators that would indicate an estimated award. A working group[133] is currently examining these possibilities. In both countries, the use of non-statutory formula could lead to more certainty. However, keeping a reasonable level of discretion for the judge is desirable. The French concept of maintenance is flexible enough to reflect the particular circumstances of a case and to protect the most disadvantaged spouse. Therefore, any future formula should only be used as guidance for the judge and not to be applied automatically.

Despite the similarities of the criteria used in French and English laws to evaluate financial relief, a crucial difference between the two systems is that in France, maintenance cannot correct the results produced by the separation of property regime. When deciding the amount of compensatory benefit, the French judge cannot consider the 'unfairness' caused by the matrimonial property agreement and be more generous with the 'vulnerable party' when the spouses have opted for a separation of property agreement than when they have opted for a community regime. In several cases, the Cour de Cassation[134] held that compensatory benefits should not reverse the rules of the separation of the property regime; judges must not indirectly undermine the provisions of this agreement by allocating a significant compensatory benefit. Separation of property reveals a desire of financial independence, and

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[127] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.
[128] For the different methods of calculations and the variety of the results they produce: see J C Bardout, I Lorthios (2013) 'Nouvelle méthode de calcul de la prestation compensatoire!', AJ fam 693.
[129] Ibid.
[130] See http://pilotepc.free.fr (password is 'pilotepctoulouse').
[131] J Eekelaar, 'Financial and Property Settlement: A Standard deal?' (2010) 40 Fam Law 359.
[132] Law Commission n 1 above, at para 3.151 and following.
[133] J Miles and E Hitching, Final settlements in financial disputes following divorce (Nuffield Foundation): See http://www.nuffieldfoundation.org/final-settlements-financial-disputes-following-divorce.
[134] Cass Civ 1ère, 18 déc 2013, n°13-10.170. See also Cass Civ 1ère, 8 juillet 2015, n°14-20.480.

as such, awards that would call into question this independence are not conceivable. The spouses' autonomy is thus protected.

As such, despite the 'compensatory' component of the compensatory benefit, French law defines 'maintenance' less generously than English law in 'big money' cases where a separation of property agreement exists. For instance, in one such French case where there was a long lasting marriage, the Court of Appeal of Douai awarded a compensatory benefit of 2,000,000 euros to the wife against the husband's assets of approximately 14,000,000 euros.[135] However, the Cour de Cassation reversed this decision as the compensatory benefit should not correct the consequences caused by the rules of the separation of the property regime.[136] Judges are not supposed to correct 'in equity' the results produced by an agreement freely chosen by the spouses.[137] The parties had chosen to keep their assets separate, therefore the judge had to respect this agreement and evaluate the 'maintenance' of the 'vulnerable spouse' accordingly. The compensatory benefit certainly covered the basic needs and the disparity created by the marriage's breakdown, but it did not necessarily promote an 'equitable' distribution. The disparity was appreciated in relation to the ongoing needs of the 'vulnerable spouse' but did not require that the paying spouse had to transfer a substantial part of his or her assets. While capital acquired during marriage is divided equally in a community regime; this is not the case in a separation regime. Here, the presence of a matrimonial property agreement had a restrictive financial aspect.

Similarly, in a case where the parties were married for six years but only cohabited for eighteen months, the Court of Appeal of Versailles rejected the wife's claim for a compensatory benefit, notwithstanding the disparity between the spouses' assets.[138] The Court held that '[the wife] does not prove any disparity created by the divorce…, *moreover the spouses have expressed their willingness to separate their assets and to assume their independence by opting for a separation of property regime*' (emphasis added).[139] There was nothing to compensate and thus the Court rejected the claim. The solution differs from the Law Commission's Report, as the Report does not propose a specific definition of 'needs' in the presence of a matrimonial property agreement. The English concept of 'needs' appears as a statement of practical, material reality. However, this assessment will be incomplete if the existence of a matrimonial property agreement is not fully taken into account when assessing the needs. The definition of 'needs' would have to be different when the parties have signed an agreement to reflect the parties' views. Evaluating the 'needs' identically in all cases, without taking into account the existence of the matrimonial property agreement interferes with their wishes.

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[135] Douai, ch. 07, sect.01, 18 déc. 2014 ; AJ fam 2015, supplément n°5, XXIII.
[136] Cass Civ 1ère, 8 juillet 2015, n°14-20.480.
[137] J Hauser, 'Le juge Magnaud, la séparation de biens et la prestation compensatoire' (2015) RTD civ 857.
[138] The husband's property assets were worth approximately 800,000 euros while the wife's assets were worth approximately 120,000 euros.
[139] Versailles, 2e ch, 1ère sect, 5 juin 2014, AJ fam 2015, supplément n°5, IX.

It is possible to make a comparison with succession law, an area that considers the wishes of the individual. When the deceased dies intestate, the law will distribute the estate according to fixed rules under the Administration of Estates Act 1925. However, when the deceased leaves a valid will, the law will recognise the importance of the deceased's wishes and therefore of the individual's autonomy. In presence of a will, the law still protects the basic needs of certain qualified relatives. However, the financial provision they might receive via the Inheritance (Provision for Family and Dependents) Act 1975 will not be the same as the share they would have benefited from if the deceased had died intestate. This demonstrates that autonomy can have an influence on 'fairness'. In the absence of an expression of wishes, it is for the law to define what 'fairness' is. However, when individuals have clearly expressed their wishes (via a will or a matrimonial property agreement), it can be argued that 'fairness' is required to take these wishes into account. 'Fairness' implies 'freedom to contract out of the terms of the standard form'[140] and therefore to set up a specific definition of 'needs' in the presence of a matrimonial property agreement.

Of course, an explanation for the discrepancy between the French and the English system is that there are differences between the social and economic backgrounds of these two countries. As such, when looking at the female labour market participation, one can notice that in France, childcare is much more affordable than in England and Wales, where full-time childcare facilities are not broadly available and where childcare costs can be a further disincentive for mothers to start or return to work.[141] In addition, providing a home for the ex-spouse is crucial in England and Wales. Consequently, it is not possible to calculate 'needs' similarly in both countries, as the costs of accommodation or rehousing are different and as couples will more frequently own their property in England and Wales than in France, where the rental market is more developed. However, despite these nuances, the core difference between the two systems comes from their distinctive approaches. English law, mainly based on the discretionary power of the judge, can learn from systems such as French law, where financial relief is based on fixed rules that emphasise certainty.

The main difference between the compared systems is that France winds up a matrimonial regime according to its own provisions with no possible intervention by the judge. 'Maintenance' does not permit, in itself, a redistribution of assets by the judge; thus, the existence of a matrimonial property agreement limits the amount of money awarded to the ex-spouse. In contrast, if England and Wales choose to adopt the Law Commission Report's recommendation, the judge would be able to wholly disregard the matrimonial agreement, or to reduce its weight, when considering the issue of 'financial needs'.

Protecting the vulnerable spouse by formal requirements and by opting for a pillar approach

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[140] Cretney, n 8 above, 412.
[141] European Commission, Labour Market Participation of Women: See http://ec.europa.eu/europe2020/pdf/themes/31_labour_market_participation_of_women.pdf

This section considers the Law Commission's aim of protecting the disadvantaged spouse. It praises the safeguard offering protection to the parties at the time of the conclusion of the contract but expresses concerns about the use of needs as a limit to the parties' autonomy.

The first proposition of the Law Commission is to protect parties at the time of the conclusion of the agreement. For a matrimonial property agreement to be binding, each spouse must be able to make an autonomous decision. The Law Commission's Report equally recommends introducing an obligation for each spouse to receive legal advice when entering into a matrimonial property agreement.

The results of an empirical research undertaken in New York found that the disparity of the spouses' reciprocal wealth could create an 'unequal bargaining power'. [142] When the study found that independent legal advice does not always remedy this problem, [143] legal advice prior to marriage could, however, help future spouses realise when they are going to enter into a 'bad deal'. A professional and independent lawyer would be able to warn the parties of the potential changes in financial circumstances that could happen during their marriage, especially on gender lines. As such, the professional would emphasise the risk for the female spouse to end up disadvantaged if she decided to stop her career to look after the couple's children for instance. As Lady Hale recommended, it is necessary to verify whether 'each party freely enter[ed] into an agreement, intending it to have legal effect and with a full appreciation of its implications'.[144]

As recommended by the Law Commission, various formal requirements could be used to ensure that each party is able to make an 'autonomous decision'. Spouses could disclose their assets and debts prior to the conclusion of an agreement and use the services of a notary.[145] As explained in section 3, in France, the protection of the spouses is achieved partly via such mechanisms. This should guarantee that free, voluntary, and informed consent is given by each of the spouses, especially as the legal advisor would be duty bound to inform the client of their legal position and the effect and wisdom of making such an agreement. Likewise, each spouse would be given the opportunity to speak to their lawyer to receive information separately from their intended spouse. Separate counselling should increase protection, as it would reduce the risk of influence exercised upon the weaker party by the more powerful one.[146] In this aspect, the Law Commission's recommendation seems even more protective than the provision under French law.

Legal counselling increases the prospect of an agreement being fully understood. This is especially important when one of the spouses has no legal knowledge or is not fluent in the language used for the agreement. It prevents hasty decisions and emphasises the importance

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[142] S Thompson, 'Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer?' (2011) IFL 327.
[143] Ibid.
[144] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [169] (Lady Hale).
[145] Law Commission n 1 above, at para 6.69 and following.
[146] Ibid, at para 6.125.

of the agreement. All of these formalities increase the likelihood that the future spouses are informed of the potential risks arising from a change in circumstances.[147] Such formalities also have some evidentiary purposes. By providing the parties with a clear and certain solution, they reduce the risk of litigation.

The Law Commission also recommended that a matrimonial property agreement should not be 'qualifying' unless it is a valid contract.[148] This means that the agreement may be void or voidable for mistake, duress, or because of undue influence,[149] and may even be frustrated if circumstances change dramatically. Between endorsing a 'construct of marriage as an immutable status' and placing 'marital contracts almost on a par with commercial contracts', 'a consensus exists that the law should impose an obligation of honesty, good faith, and fair dealing on spouses when entering into a marital contract'.[150] These recommendations are certainly essential as they provide safeguards for the parties at the time of the conclusion of the contract as well as in case of unforeseen circumstances.

The second necessary form of safeguards aims to protect the 'vulnerable' party at the time of the divorce by considering the results produced by the matrimonial property agreement. In the system proposed by the Law Commission, the judge may easily override the agreement as the procedure relies on a vague concept: the 'needs' of the spouse. There 'would be a considerable incentive [placed] upon the parties to provide generously for needs rather than risk litigation' [151] and the Law Commission's proposals would, therefore, construct 'something very like a deferred community of acquests [ie a community of property]'.[152] The principle of sharing the assets, either by allocating generous needs or by creating a 'community of property', will then still exist. As there is not a clear distinction between the distribution of property and financial relief, and because of the risk that 'needs' would be assessed 'generously', it would still be impossible to conclude a 'separation of property' agreement. If based on lessons learned from the French approach, the protection of the spouse could be achieved without altering the autonomy of the spouses in this way. In France, regardless of the regime chosen by the spouses, the discretion of the judge is more limited than in England and Wales. However, maintenance cannot be included in the contract and can then be seen as 'an expression of fairness'[153] because it is related to the duty to support each other created by marriage.

This is a welcome safety net as, while autonomy's recognition is important, it is necessary to ensure that marriage would still be an important channel of protection for the spouse in need. Without this minimal protection, the spousal duty to maintain will simply disappear.

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[147] Ibid, at para 6.6 and following.
[148] Ibid, at para 6.12.
[149] Ibid, at para 6.16 and following: the Law Commission proposes to reform the law relating to undue influence in relation to qualifying nuptial agreement.
[150] Atwood, n 84 above, 41.
[151] Cooke, n 10 above, 111.
[152] Ibid,112.
[153] Scherpe, n 9 above, 504.

Marriage is both a public and a private union[154] and as such, 'the conflicting issues of autonomy and vulnerability apply to divorce settlement across two separate dimensions – the relationship of the parties with the state, and their relationship with each other'.[155] Therefore, despite the growing autonomy within marriage, 'there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children'.[156] In addition, the possibility for a spouse to walk away and leave his partner with nothing will increase pressure on social security to take care of the vulnerable spouse.[157] 'The potential legal duty to support a former spouse becomes an inherent and immutable feature of the marital relationship'.[158]

England and Wales show signs of heading in the direction of a 'pillarised' system' in international cases.[159] This paper argues that England and Wales should go even further by adopting a two-pillar approach systemically, ie in pure English cases, as this would protect the principle of autonomy while ensuring protection for the disadvantaged spouse at the same time. In order to provide a specific definition of 'fairness' when a matrimonial property agreement has been concluded, a distinction between property rights and 'needs provisions' or 'maintenance' should be made.

Radmacher was the first 'international' case to adopt a 'pillarised' approach by 'permitting contracting-out of [the] equal sharing [of assets], but preserving liability for (some level of) needs/compensation-based provision to separate "sharing of assets" and "needs provisions"'.[160] Later, *Z v Z (no 2)*[161] accepted the exclusion of sharing due to the French matrimonial property agreement signed by the parties and pronounced an order based on needs only. In this case, two French citizens concluded a separation of property agreement in France, which excluded any right to share personal assets and assets acquired during the marriage. However, there was no mention of maintenance in the matrimonial property agreement in accordance with the rules of the French primary regime. At the time of the divorce, the couple were living in London. They had three children and the assets involved were worth £15 million, most of them belonging to the husband, whose income was extremely high. Moor J held that English law was applicable; he upheld the agreement but made provision for the wife's needs. In total, she received 40 percent of the assets (£6 million). If the couple had divorced in France, the amount of provision for the wife would

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[154] M Parker, 'The draft Nuptial Agreements Bill and the abolition of the common law rule: 'swept away' or swept under the carpet?' (2015) CFLQ 63.
[155] G Douglas, 'Simple Quarrels? Autonomy vs. Vulnerability' in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), 218.
[156] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [132] (Lady Hale).
[157] See *Hyman v Hyman* [1929] AC 601.
[158] Atwood, n 84 above, 25.
[159] J Scherpe, 'A comparison overview of the treatment of non-matrimonial assets, indexation and value increases' (2013) CFLQ 61.
[160] J Miles, 'Marital Agreements: The More Radical Solution' in R Probert and C Barton (eds), *Fifty Years of Family Law: Essays for Stephen Cretney* (Intersentia, 2012), 103.
[161] *Z v Z (no 2)* [2011] EWHC 2878 (Fam).

have probably been lower (between £2.25 million and £4.8 million[162]) but, as explained before, the cost of living is higher in England and Wales than in France. What is important here is that Moor J reasoned as a French judge would have done by applying first the terms of the agreement, and then by calculating the amount of maintenance.

More recently, in *SA v PA* (*Pre-Marital Agreement: Compensation*), there was another case with a foreign component in which Mostyn J followed a similar 'pillar' approach.[163] A Dutch man and an English woman had signed a Dutch pre-marital agreement, which addressed 'how existing capital might be shared, but left the question of maintenance entirely at large'.[164] As a first step, Mostyn J implemented the capital provisions and followed the content of the agreement. Then, as a second step, he considered the wife's needs under section 25. In this case, there seems to have been a clear distinction between property division and maintenance. Property division (with specific rules applying for the matrimonial home) was made in accordance with the agreement, and the wife's needs were then considered separately.[165] This solution was the result of the choice made by the parties, who decided to limit the content of their agreement to the sharing of their capital and to exclude the issue of maintenance from it.

Adopting a 'pillar approach' would be a way to allow couples to sign any kind of property matrimonial agreement, the only limit being the possibility to claim for 'maintenance provision'. When defining the concept of needs in the near future, English legislation should consider adopting a genuine pillar approach in order to clarify the concept of needs and the role played by the judge. As previously explained, 'needs' should be defined differently depending on whether or not a matrimonial agreement has been signed. An alternative to the current proposals would be to use two different concepts: 'needs' in the absence of any matrimonial property agreement, and 'maintenance' when an agreement has been signed. Using two different concepts would reflect the importance of matrimonial property agreements. In the presence of such an agreement, the judge would not apply the vague concept of 'needs'—which can be defined in an extremely generous way in some cases—but a more clearly-defined concept: 'maintenance'. The concept of 'maintenance' would allow the spouses to conclude a separation of property agreement without any interference from the court in the property distribution. This would provide a new answer to the criticisms of the current solutions.

The definition of 'maintenance' in each country takes into account the socio-economic factors of the particular country. In England and Wales, it is especially important not to leave the other party reliant on state benefits, and capital-provision for housing is crucial.[166] Therefore, the notion of 'maintenance' would be defined in accordance with the criteria

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[162] One can note that this is a wide range of amounts, which shows that even in France the judge has some discretionary powers.
[163] *SA v PA* (*Pre-Marital Agreement: Compensation*) [2014] EWHC 392.
[164] Ibid, [14].
[165] A Murray, 'Prenuptials, LSPs and Compensation Guidance: before and after the Law Com report' (2014) Family Law 491.
[166] Cooke, n 10 above, 111.

already used in other areas of English family law. As such, it is helpful to consider the definition of maintenance in the context of the Inheritance (Provision for Family and Dependents) Act 1975, which permits some relatives of the deceased to claim, upon certain conditions, a provision necessary for their maintenance. In its 2014 Report, the Law Commission made a connection between 'financial needs' in the matrimonial context and the 'maintenance' standard in the 1975 Act, but rejected the link 'because there are so few claims by former spouses under the 1975 Act, and [therefore] it is not really clear what maintenance means for such claims'.[167] However, it might be possible to refer to the 'maintenance standard' used in claims introduced, not by the former spouse but by other relatives (for instance, children of the deceased).

When considering case law related to the 'the maintenance standard' in relation to claims made by other dependents, it appears that this standard could be used as a safety net to prevent financial hardship and to ensure that one spouse will not be left dependent upon the state for financial support. For instance, in *Re Coventry,* maintenance was described on the one hand as 'not just enough to enable a person to get by [but] on the other hand, it does not mean anything which may be regarded as reasonably desirable for [the claimant's] general benefit or welfare'.[168] Additionally *Re Dennis* states that 'maintenance' connotes only payments which (…) enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him'.[169] More recently, in *Ilott v Mitson*,[170] the Supreme Court reaffirmed that the concept of maintenance 'cannot extend to any or everything which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living'.[171]

The notion of 'maintenance' would be less generous than the current concept of 'needs' but would include ongoing basic needs and reallocation of property. The consequences of this solution would be explained to the parties by a professional legal adviser at the time their agreement is concluded, offering the possibility for the parties to opt for a broader definition of 'needs'. Greater certainty will thus be achieved concerning the quantum and duration of the spousal support. This would certainly be welcomed in England and Wales at a time where the reduction of budgets for family justice and legal aid can make access to a lawyer difficult. Predictable outcomes are even more economically important than before and can be reached by adopting a clear distinction between maintenance and property distribution.[172]

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[167] Law Commission, n 1 above, at para 5.118.
[168] *Re Coventry* [1980] Ch 461, [485D] (Goff LJ).
[169] *Re Dennis* [1981] 2 All ER 140, [145] (Browne-Wilkinson J*).*
[170] *Ilott (Respondent) v The Blue Cross and others (Appellants)* [2017] UKSC 17.

[171] Ibid, [14].
[172] J Miles and J Scherpe, 'The legal consequences of dissolution: property and financial support between the spouses' in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (Routledge, 2014).

Conclusion

In the context of financial settlements after divorce, fairness could be described as a balance between guaranteeing the autonomy of the parties and providing the disadvantaged spouse with the required resources. In France, as in England and Wales, the protection of the disadvantaged spouse is essential in family law. As in English law, French law considers the contributions of the homemaker and monetary contributor as equal, and the legal regime of community is based on the sharing of assets acquired during marriage. However, the safeguards that exist in both countries to protect the disadvantaged spouse, and the place given to autonomy, are different. While English law provides the balance by allocating important discretionary powers to the judge, French law provides a framework for the spouses' willingness at the time of the agreement's conclusion. The latter offers more security to the spouses than the former, and as such, might be considered as offering interesting solutions for the coming discussions related to the concept of 'needs'.

The way in which the law currently makes use of the concept of fairness does not offer sufficient protection to the autonomy of the spouses, as matrimonial property agreements can be set aside by the court. Safeguards to protect the disadvantaged spouse are necessary, but they should be strictly defined in order to leave more room for the spouses' autonomy. Thus, fairness cannot be defined in the same way whether there is a matrimonial property agreement or not; the agreement has an impact on the definition of 'fairness'. A new suggestion is to reconsider the balance between autonomy and protection by creating specific safeguards inspired by French law. Using 'maintenance' instead of 'needs' would offer more clarity and security for spouses, and by establishing a distinction between the distribution of assets and maintenance, the powers of the judge would be more limited, enabling greater possibility for parties to decide freely the distribution of their assets. These propositions might offer the spouses better guarantees and increase the certainty that their agreement would not be amended by the court.