THE NOTION OF A CLEAN BREAK: A COMPARATIVE ANALYSIS OF POST-DISSOLUTION FINANCIAL TIES IN IRELAND AND SWEDEN

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A INTRODUCTION

Distribution of marital assets and ancillary relief is recognised in all western jurisdictions as a natural element following marital breakdown. The extent to which jurisdictions give rise to such rights however vary considerably all over the globe and individual jurisdictions are often placed at various parts of the regulatory spectrum. Sweden has taken a strict rule-based approach to the concept of ancillary relief, placing itself on the opposite end of the regulatory spectrum to Ireland, which has settled for an approach governed by broad judicial freedom. This paper will assess the positions of these two jurisdictions with regards to ancillary relief post-divorce and discuss the impact of these two systems on the notion of a clean break.

B IRISH POSITION

The divorce regime in Ireland is grounded upon Article 41.3.2° of the Irish Constitution, which in turn is supported by the lengthy and broadly drafted provisions of the Family Law (Divorce) Act 1996.[1] The Divorce Act gives the Irish judiciary extensive scope in determining what orders to make when an application for a decree of divorce and ancillary relief comes before the courts. By according such broad discretion to the judiciary and by avoiding the use of strict guidelines, it was believed that this discretion would serve to facilitate the varying circumstances that may arise in each individual case.[2]

1 History

Divorce in Ireland was prohibited under Article 41.3.2° of the Irish Constitution up until 1996. In 1996, Ireland finally legislated for divorce and repealed the constitutional

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[1] Family Law (Divorce) Act 1996 (the Divorce Act).
[2] L Crowley, 'Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part I' (2007) 1 Irish Journal of Family Law 19.

prohibition. This came as a direct result of a public referendum on the matter held in late 1995. The outcome of the 1995 referendum showed that 50.28% of the Irish voters supported the legalisation of divorce. In the aftermath of the referendum it was, however, concluded that only two-thirds of the Irish eligible voters had voted on the issue, meaning that only one-third of the Irish electorate had actually shown to be in favour of divorce. The 1995 referendum consequently repealed Article 41.3.2° of the Constitution which stated that, 'No law shall be enacted providing for the grant of a dissolution of marriage.'[3]The 1995 referendum was the second time the Irish people voted on the legalisation of divorce. The first referendum on divorce was held in 1986 following two reports advocating for reform on the matter. The 1983 Law Reform Commission Report[4] and the Report of the Joint Oireachtas Committee on Marriage Breakdown[5] both advocated strongly in favour of a Constitutional referendum concerning Article 41.3.2°. The first referendum was held in 1986, which was defeated by a 63% majority opposing the introduction of divorce.

The restrictive approach taken by many Irish people to divorce is rooted in the strong Catholic ethos that has dominated Ireland for centuries. The classic notion of Irish family life has traditionally been strictly premised upon Catholic teaching and this is apparently reflected in the Irish Constitution.[6] Enacted in 1937, the Irish Constitution expressly declares the family in Article 41 as the 'natural primary and fundamental unit group of Society … possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.' Although Article 41 does not expressly define the meaning of family, it is stated in Article 41.3 that the

[3] The original provision in Article 41.3.2° was repealed and replaced by a new Article 41.3.2° with the following provisions:
A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –
i) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
ii) there is no reasonable prospect of a reconciliation between the spouses,
iii) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
iv) any further conditions prescribed by law are complied with.

[4] Law Reform Commission, *Report on Divorce a Mensa et Thoro and Related Matters* (LRC 8 – 1983).
The report suggested the introduction of legislation 'to permit the Court to make orders for the payment of lump sum and for the transfer of property… and for related matters', 56. It also suggested that discrimination between sexes in separation proceedings should be abolished. It noted that at the time, there was a denial of entitlement to alimony to husbands and that this denial was out of harmony with contemporary standards, 53.

[5] Joint Committee on Marriage Breakdown, *Report of the Joint Oireachtas Committee on Marriage Breakdown* (PL 3074, 1985). The report identified the weak position of the homemaker and her lack of a legal claim in respect of the family home. The report further supported the 1983 Law Reform Commission Report and advocated in favor of a referendum.

[6] The Preamble to the Irish Constitution reads as follows: 'In the Name of the Most Holy Trinity, from Whom all authority and to Whom, as our final end, all actions of both men and States must be referred'. Interestingly, women were not included in this provision.

State is obliged to 'guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack.' Due to Article 41.3 the Irish courts have repeatedly defined the family as the family based on marriage.[7]

Prior to the legalisation of divorce in 1996, Irish couples had the right to judicially separate. In 1989, the Judicial Separation and Family Law (Reform) Act[8] was enacted, giving married couples the right to legally recognised separation. This right, however, did not give the parties the right to remarry, as such right would infringe the Constitutional protection of marriage under Article 41.3. The 1989 Act did however, for the first time, empower the courts to make orders for ancillary relief in respect of assets held legally or equitably by either spouse.

2 Current Legislation

As a response to the 1995 Referendum, the Divorce Act was enacted in 1996. This act together with the new Article 41.3.2° currently governs Irish divorce law. While the new Divorce Act finally allows for divorce, the conditions under which it can be granted have been heavily criticised for being stringent and for carrying an echo of Victorian era anachronisms.[9]

Part III of the Divorce Act grants wide-ranging powers to the court to make various orders to provide for the financial needs of the applicant, respondent and dependent members of the family following a divorce. Pursuant to section 13 of the Divorce Act it is open to either spouse to apply for any form of ancillary relief.[10] Each spouse is entitled to apply at the time of the initial divorce application or at any time thereafter, except where the proposed applicant has re-married.[11] Once the application is made, the court is entitled to make whatever order it

[7] For example, in *McGee v AG* [1974] IR 284 the Irish Supreme Court recognised the unenumerated right to marital privacy between married couples, thereby permitting the use of contraceptives. The right to marital privacy arose out of Article 41 on the protection of the family unit. Therefore the Court only acknowledged a right to privacy in the marital context, arising out of Article 41. Walsh J stated that he had given no consideration whatsoever to the question of the constitutionality or otherwise of laws, which would withhold or restrict the availability of contraceptives for use outside marriage, 319.

[8] Judicial Separation and Family Law (Reform) Act 1989 (the 1989 Act).

[9] J Nyamuya Maogoto, 'Legalising Divorce in the Republic of Ireland: A Canonical Harness to the Legal Liberation of the Right to Marriage among the Disenfranchised' (1 September 2009) 5 <http://ssrn.com/abstract=1465343> accessed 9 February 2014.

[10] The Divorce Act, s 13 – periodical payments and lump sum orders; s 14 – property adjustment; s 15 – miscellaneous ancillary orders; s 16 – financial compensation orders; s 17 – pension adjustment orders; s 18 – provision from estate of deceased spouse; s 19 – orders for the sale of property.

[11] ibid s 13(5)(a) 'Upon the remarriage of the spouse in whose favour an order is made under paragraph (a) or (b) of subsection (1), the order shall, to the extent that it applies to that spouse, cease to have effect, except as respects payments due under it on the date of the remarriage.'

considers appropriate, once it is satisfied that 'it would be in the interest of justice to do so.'[12] As noted by Crowley, this provision of the Divorce Act places the burden for decision and policy-making firmly on the shoulders of the Irish judiciary.[13] Crowley further submits that the Irish legislature has not attempted to identify substantive policy aims nor has it identified the principles and purpose of the legislation to guide the judiciary.[14]

The Divorce Act does not specify how ancillary relief should be distributed or set out any guidelines for the courts to follow in this regard. Section 5(1) of the Divorce Act mandates that prior to the granting of a divorce, the court must be satisfied that proper provision is made for the spouses and children of the marriage. Proper provision has therefore been regarded as the sole objective of divorce remedy.

As stated per Denham J in *T v T,*[15] the Divorce Act is not a scheme of division of property; it provides for proper provision and not division. Murray J further states that proper provision for a financially dependent spouse should ensure that the spouse is not only in a position to meet her financial liabilities and to continue the standard of living held during the marriage. Also, to enjoy what might be reasonably regarded as the fruits of the marriage, so she can live an independent life and have security in the control of her own affairs.[16]

In *C v C,*[17] O'Higgins J rejected the suitability of percentages or fractions as a means of determining an application for ancillary relief in the particular circumstances. Furthermore, in *MS v PS,*[18] Sheehan J made no reference to percentage-based spousal entitlements, rather after considering the guidelines set out in section 20 of the Divorce Act,[19] he made 6 orders of financial and property relief that he deemed necessary to reach proper provision.[20]

[12] ibid s 20(5) 'The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so.'
[13] L Crowley, 'Irish divorce law in a social policy vacuum – from the unspoken to the unknown' (2011) 33(3) Journal of Social Welfare & Family Law 227, 232.
[14] ibid.
[15] [2002] 3 IR 334, 383.
[16] ibid 408.
[17] [2005] IEHC 276.
[18] [2008] IEHC 448.
[19] The Divorce Act, s 20 sets out several factors the Court must have regard to when determining the provisions of an order of ancillary relief. These factors include for example the standard of living enjoyed by the family concerned before the proceedings were instituted, the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future and the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future.
[20] *MS v PS* (n 18) 10.

As noted by Buckley, the most common outcome of ancillary relief in both consensual and non-consensual divorce cases is that of periodic payments and property transfer.[21] This has undoubtedly created a system whereby spouses fail to receive independence and a clean break post-divorce. As further noted by Moore, there are different models of ancillary relief available depending on the bread-winner and the mother's prior occupation to the marriage in question.[22] Moore notes that in cases where the mother had sacrificed a professional career to care for her family, she was predominantly rewarded a clean break by virtue of a lump sum payment. Mothers who had never been employed or who stayed at home prior to having children were rewarded with a rehabilitative maintenance support model, providing for ongoing maintenance for the dependent spouse.

In *JD v DD,*[23] McGuinness J held that:

> The subsequent enactment of the Family Law Act 1995 and the Family Law (Divorce) Act 1996, the Oireachtas has made it clear that a 'clean break' situation is not to be sought and that, if anything, financial finality is virtually to be prevented … the court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved.[24]

The lack of a clean break in the Divorce Act has received much critical commentary since its enactment in 1996. Martin favours a shift towards the possibility of a clean break, noting that it facilitates sufficiency amongst the former spouses and ultimately is far more likely to benefit the parties psychologically.[25] Crowley further argues that the current system in Ireland lacks both purpose and objective and, consequently, the regulatory process can operate neither predictably nor fairly.[26]

Furthermore, even in situations where parties to broken-down marriages have sought as much finality as possible, the stark reality of the recession is becoming another rock to climb in the process of reaching a clean break. As Aylward notes, a large majority of matrimonial cases

[21] LA Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21(1) International Journal of Law, Policy and the Family 48.
[22] E Moore, 'The significance of "home-maker" contributions upon divorce' (2007) 1 Irish Journal of Family Law 15, 18.
[23] [1997] 3 IR 64.
[24] ibid 89.
[25] F Martin, 'From prohibition to Approval – The limitations of the "No Clean Break" Regime in the Republic of Ireland' (2002) 16(2) International Journal of Law, Policy and the Family 223.
[26] Crowley (n 13) 240.

are now re-entered into the family law courts seeking variation of orders of ancillary relief due to parties' inability to pay.[27] This has arguably slowed down the process even further for the possibility of Irish couples to receive a clean break and the courts are now not only struggling with its broad parameters of granting orders of ancillary relief, it is also stressing to meet the high demand of variation orders in light of the current legislation.

C SWEDISH POSITION

The divorce regime in Sweden is grounded upon the 1987 Marriage Code. The code sets out a regulatory structure that spouses follow in order to apply for ancillary relief post-divorce. The Marriage Code provides limited scope for judicial discretion and its underlying presumption is that there should be no financial ties between spouses following a divorce. It puts a strong emphasis on the notion of individualism rather than on a notion of sharing. Only in extraordinary circumstances are courts allowed to make orders for ancillary relief, which places Sweden on the opposite end of the rules-versus-discretion spectrum, in contrast to Ireland.

1 History

Sweden has traditionally allowed various forms of divorce since the early 17th century. When the current governing Civil Code in Sweden was enacted in 1734, divorce was given statutory footing for the first time.[28] The 1734 Marriage Code stated that the courts had jurisdiction to grant divorce and that no man or woman could be forced into marriage. The Code set out several thresholds that had to be met prior to the granting of a divorce. These thresholds included obligatory mediation sessions and a reconsideration period of at least a year. All of these conditions have been abandoned today. The only requirement that must be met by couples today prior to a decree of divorce is that they must take 6 months as a reconsideration period if they have dependent children under the age of 16.[29]

The 1734 Marriage Code was abolished in 1920 and replaced by the 1920 Marriage Code. The 1920 Marriage Code specifically dealt with the issue of asset distribution post-divorce. According to chapter 11, section 26, the court could demand that one spouse provided the

[27] R Aylward, 'Dissolved Marriages and the Recession: The variation of Orders for Ancillary Relief' (2009) (1) Irish Journal of Family Law 10.
[28] Marriage Code (Giftermålsbalken) (1734).
[29] Marriage Code (ÄktB) (1987:230) (Marriage Code), ch 5, s 1 <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf> accessed 9 February 2014.

needy spouse with financial support in special circumstances and if the spouse in question was capable of providing such support.[30]

2 Current legislation

Today in Sweden, marital breakdown is governed by the 1987 Marriage Code.[31] The 1987 Marriage Code replaced the former 1920 Marriage Code. The current Marriage Code was last amended in 2011 and, since Sweden adopted same-sex marriage in 2009, has been made completely gender neutral.

Ancillary relief is governed by chapter 6, section 7 of the Marriage Code. Section 7, para 1, states that, 'Following a divorce, each spouse shall be responsible for his or her own support.'[32] The underlying presumption is consequently that spouses bear no financial burden for their former spouse post-divorce. Due to this provision, law practice in Sweden has developed a restrictive approach with regards to ancillary relief. The presumption set down in Section 7, para 1, is based on the idea that divorced spouses ought to be regarded as financially independent of each other. There is subsequently a strong emphasis on the notion of a clean break in the governing legislation. Some commentary suggests that Section 7, para 1, was enacted with the purpose of creating an incentive for spouses to establish their status as finically independent of each other, even prior to their marriage.[33] It has also been suggested that the provision seeks to bring equality between genders and strives towards diminishing the traditional notion of the woman as the home-maker and the man as the bread-winner.[34]

The underlying objective of marital breakdown in Sweden is the notion of individualism. It is stated in chapter 1, section 3 of the Marriage Code that 'both spouses are responsible for their own private property and their own debts.' This applies even after the parties have entered into marriage. Section 7 states that 'all property which is not the spouses' private property is marital property.' According to chapter 11, section 3, all marital property, after private property and any debts have been taken out of account, shall be divided equally between the parties in the aftermath of a marital breakdown.[35] What counts as private property is set out in

[30] Marriage Code (Giftermålsbalken) (1920) ch 11, s 26.
[31] Marriage Code (n 28).
[32] ibid ch 6, s 7.
[33] L Tottie & Ö Teleman, *The Marriage Code: A commentary* (2nd edn, Norstedts Juridik AB 2010).
[34] Government Proposal, *Government proposition on the proposed Marriage Code* (Prop. 1986/87:1) 38. <http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/prop-1986871-om-aktenskapsba_GA031/?text=true> accessed 9 February 2014.
[35] Marriage Code (n 28) ch 11, s 3.

chapter 7, section 2, and includes among other things gifts from parties other than the spouse, inheritance, estate and pension.[36] Spouses may also within reason take clothes, personal gifts and property for private use out of the equation of marital property.[37] Afterwards, the remaining property is to be regarded as marital property and is to be divided equally between the parties.

Even though the general principle in Swedish divorce legislation is based on the idea of there being no financial ties between spouses post-divorce, certain exceptions have been made to this rule. Section 7, para 2 states that if a contribution of maintenance is needed for either spouse, 'that spouse shall be entitled to receive maintenance payments from the other spouse on the basis of what is reasonable in view of the latter's ability and other circumstances.'[38] Section 7, para 3, further states that if either spouse has considerable difficulty in supporting himself or herself after a marriage of long duration has been dissolved or if there are other extraordinary circumstances, that spouse may be entitled to a longer period of maintenance than that stated in section 7, para 2. Section 7, para 3, has given rise to a considerable amount of case law in Sweden and the notion of extraordinary circumstances has been discussed by the courts on several occasions.[39]

In *NJA 1998:238* the Supreme Court discussed the notion of extraordinary circumstances and held that there had to be an element of causation between a spouse's need for ancillary relief and the direct impact of the marriage on this need.[40] In this case the spouses had been married for 28 years. Prior to the marriage the wife held several jobs but once married, she gave these up to mind the home and care for the couple's two children. Since the early 1980's the wife had been ill for long periods of time and was granted early retirement pension in 1987. In 1998 when a divorce was granted between the parties the wife sought financial support from

[36] ibid ch 7, s 2.
[37] ibid ch 10, s 2.
[38] ibid ch 6, s 7. Section 7, para 2, only applies for a limited amount of time and seeks only to provide the needing spouse with maintenance for what might be regarded as a reasonable transition period.
[39] In *NJA 1984:493* it was held that a spouse who post-divorce only managed to find part-time work still was not eligible for ancillary relief from her former spouse. The Supreme Court calculated that the spouse's income plus the marital assets she had been distributed after the divorce gave her an income of 12 000 SEK/month and that this was over the limit of what might be reasonably seen as extraordinary circumstances.
In *RH 1998:31* the spouses had been marriage for 46 years. The wife had, during the majority of the marriage, stayed at home to look after the home and the couple's two children. The spouse was given property to the value of 300 000 SEK after the divorce, however due to the fact that she had not held employment for over 40 years her monthly pension scheme did not match what was held to be a reasonable living standard. The court therefore granted ancillary relief and the husband was bound to pay ongoing life-maintenance of 4000 SEK/month.
[40] *NJA 1998:238.*

her former husband. Whereas the husband earned up to 19200 SEK per month, the wife due to her inability to work had an income of only 9600 SEK. The High Court initially awarded the wife lifelong maintenance from her husband of 800 SEK per month. The case was appealed to the Supreme Court, which overturned the High Court's decision on the notion that they found no clear causation between the wife's inability to work and the marriage. This case demonstrates the restrictive approach taken by the Swedish court with regards to ancillary relief. The Supreme Court stated in *NJA 1998:238* that for there to even be a question of granting ancillary relief it must be clearly shown that the weaker party's need for relief has arisen directly as a consequence of the marriage itself.

In the Government proposition leading up to the 1987 Marriage Code, there was a strong emphasis on the importance of creating legislation that would be comprehensible enough for any common person to understand. In the written proposition it is stated that 'since family law impacts on everyone in society the rules governing it must be written in such a way that they are easily approachable to the common man and woman.' This was not only to make sure that there was widespread knowledge of the legislation, it was also to encourage settlement outside the courts, as parties are more largely incentivised to keep their disputes outside the courts if they comprehend the outcome of litigation.[41]

D IRELAND V SWEDEN

Both the Irish and the Swedish system of regulation on the notion of divorce and ancillary relief have been heavily influenced by the lawmakers' different priorities. The objectives sought by each of the jurisdictions are further reflective of the underlying moral and social policies in each state. There are several different factors to take into account when evaluating and comparing the Irish and the Swedish regulatory framework for divorce law and ancillary relief. Factors such as predictability, efficiency, consistency, knowledge and awareness all play an important role in evaluating the underlying policies governing each framework.

We have seen a clear unwillingness by the Irish legislators to clarify divorce law. This has led to uncertainty and vagueness in the notion of ancillary relief. Courts have been left only with the guideline of proper provision, which arguably renders no clear guidance at all, either for the judiciary itself or for the common person. The Irish legislators have effectively avoided addressing the challenging questions arising upon divorce, including the key issue of ancillary

[41] Government Proposal (n 34).

relief. Such unwillingness is highly unsatisfactory, leaving Irish divorce laws as an open-ended structure without provision of a clean break. Whilst the legislators in 1996 may have had a more legitimate basis for not imposing an overly restrictive regulatory framework, given the uncertainty among the Irish electorate on the notion of divorce, arguably this landscape has since changed.

Irish divorce law fails to proceed as predictable, efficient or consistent due to its broad parameters. The legislation also does not provide a clear guidance of rules for the common person, which results in little common knowledge and awareness of rules and regulations. As noted by Crowley, where lawmakers create a system of regulation, which identifies the aims and objectives of that process, the manner in which these goals are achieved becomes less critical. The current operation of Irish divorce law lacks both purpose and objective and can operate neither predictably nor fairly.[42]

It could be argued that legislation covers a broader amount of cases and that by giving a large scope of judicial freedom to the Irish courts, each specific case can be determined in light of its own facts. The positive effects of such an approach is that extraordinary circumstances in each case will come to light and be evaluated by the courts prior to the granting of ancillary relief. However, a judgment is sometimes not broad or abstract enough to be applied to subsequent cases as a general rule. The apparent risk is that the ratio in each case will be strictly limited to the specific issue and therefore will not be able to serve as good precedent. It has been argued that the Irish system, dependent entirely upon judicial determinations, lends itself to undirected social and legal decision-making in a policy vacuum.[43]

The implementation of Brussels IIbis has further highlighted the large uncertainty in the Irish system of ancillary relief.[44] Buckley notes that the Irish approach to provision is potentially heavily undermined by Brussels IIbis, which focuses on a harmonization of family law throughout the European community.[45] This new regime is one of automatic enforcement and gives the courts broad jurisdiction to hear divorce-matters in a wide range of situations,

[42] Crowley (n 13) 240.
[43] ibid 239.
[44] Brussels IIbis was implemented in Ireland by the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005.
[45] L-A Buckley, 'European Family Law: The Beginning of the End for "Proper" Provision?' (2012) (2) Irish Journal of Family Law 31.

including where the applicant has been 'habitually resident' in the relevant territory for at least a year.[46]

As Buckely notes, this may encourage forum shopping and reward the spouse who litigates first, as it provides a clear incentive to take advantage of what might be considered a more favourable marital property regime in a certain Member States.[47] This is specifically problematic in situations where Irish couples are resident in other Member States than Ireland. Through Brussels IIbis, an Irish spouse can avoid the discretionary approach taken by the Irish courts and make an application to a more 'favourable' court in the Member State where he or she resides. Once a court in a particular Member State is seized of the case, it has exclusive jurisdiction and courts in other Member State may not entertain the same claim. This provision creates what may be referred to as a 'race to litigate', which undermines all kinds of judicial efforts to encourage mediation, negotiation and settlement.[48]

Arguably, the rule-based approach in Sweden allows for more certain outcomes in divorce proceedings. Moreover, this system incentivises parties to negotiate to a larger extent, as they have a better understanding of what the outcome of their case will be. A framework whereby parties prior to, during and post marriage have a clear idea of what outcomes to expect not only creates a framework without grey areas, but also induces compliance within society. As noted by the Government proposition leading up to the 1987 Marriage Code there was a strong emphasis on the importance of a rule-based approach, which would be generally comprehensible for society.[49]

While the rule-based system in Sweden allows for certainty, efficiency and uniformity to a much larger extent than the discretion-based system in Ireland, it may be argued that there is larger scope for fairness within the latter framework. As noted in *NJA 1998:238* there is very limited scope for spouses to receive ancillary relief post-divorce in Sweden and the applicant must establish a clear causation between his or her needs for relief and the marriage prior to the granting of any ancillary relief. The presumption of individualism in section 7, para 1, of the Marriage Code[50] still remains the basic principle in Swedish divorce law, a principle that may not always reflect fairly on the circumstances of each case.

[46] Brussels IIbis art 3.
[47] Buckely (n 45) 33.
[48] ibid.
[49] Government Proposal (n 34).
[50] Marriage Code (n 28) ch 6, s 7.

With this said, the rule-based system in Sweden does allow the spouses a clean break. In fact, the system emphasises the notion of individualism even prior to the marriage so that the parties are well set individually in the case of marital breakdown. This notion of a clean break is, as we have seen, rare in Ireland, where the most common form of ancillary relief is the granting of ongoing maintenance.

E CONCLUSION

A regulatory system should ideally create a framework that achieves predictability, efficiency and consistency, whilst still remaining open for judicial discretion in cases where extraordinary circumstances call for it. While it is difficult to evaluate what the best practice may be, evaluating different approaches provides a useful tool for identifying the impact and consequences of each practice. The Irish discretionary-based system lacks many of the ideal components to a successful regulatory framework, a framework that the Swedish rule-based system has proven to comply with. The Irish legislator's failure to establish clear objectives and goals within Irish divorce law has placed the current regulatory system in a vacuum, whereby spouses are not given the opportunity of a clean break.