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Frederik Swennen *Editor*

Contractualisation of Family Law - Global Perspectives

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Frederik Swennen
Editor

Contractualisation of Family Law - Global Perspectives

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Chapter 1
Private Ordering in Family Law: A Global Perspective

Frederik Swennen

Abstract This chapter describes and analyses the perpetual pendular movement of family law between status and contract from a global perspective. It focuses on substantive and procedural family law with regard to parents and children and with regard to life partners. The conclusions of the analysis are quite ambivalent. Firstly, whereas family law is clearly moving towards contract with regard to old family formations, the contrary is true for new family formations. Surrogacy and same-sex partnerships for example crystallise as new statuses. Secondly, the movement towards contract is rarely considered to be contractualisation *pur sang*, with civil effect. Pacts, agreements, arbitration awards and instruments alike with regard to domestic relations indeed are not considered to be as binding upon the parties or the courts as contracts in general. Thirdly, the movement towards status not necessarily witnesses family law exceptionalism vis-à-vis private law. States indeed increasingly intervene in private law relations in general. In sum, the high permeability of the demarcations between the State, the family and the market impedes a categorial approach – which may be a desirable outcome all in all.

Introduction

Subject and Objectives

This paper aims at drawing the global lines of convergence and divergence with regard to contractualisation in family law. It tries to scan the blurred lines between (the exceptionalist nature of) family law on the one hand and general characteristics of private and public law on the other hand. The division between status and contract is often not clear-cut and this chapter wants to shed some light on the many shades of grey.

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We will analyse contractualisation from a legal-technical perspective in both substantive (Section "Substantive family law") and procedural (Section "Court jurisdiction") family law. The former refers to substantive arrangements about formation, content and dissolution of family formations, while derogating from the default legal regime. The latter encompasses the validity of procedural arrangements and the possibilities to oust state court jurisdiction. Section "Main features of family law" will first present the main features of family law systems throughout the world. Conclusions will be drawn in section "Conclusions". One of the conclusions will be that private ordering is a better, softer, denominator than contractualisation for recent evolutions in family law. We have used that better denominator in the title of this chapter.

Our legal-technical approach may complement the theoretic research into the nature of family law from legal-historical, economic and ideological perspectives (for example Brinig 2000; Halley 2011a, b; Marella 2006). We did not intend to take any of those stances.

Methodology

Drawing on preliminary research (Swennen 2013), a topic breakdown was proposed to national reporters. Taking into account their feedback, a questionnaire of 28 questions, both general and specific, was distributed. Twenty seven reports where submitted.[1] The current chapter is based on these reports and some additional sources.

[1] **Argentina** *Graciela Medina* Universidad de Buenos Aires | *Ursula C. Basset* Pontificia Universidad Católica **Belgium** *Yves-Henri Leleu* Université de Liège & *Nicole Gallus* Université Libre de Bruxelles **Brazil** *Luiz Edson Fachin* Federal University of Parana **Burundi** *Gervais Gatunange* Université du Burundi **Cameroon** *Yannick Serge Nkoulou* Université de Ngaoundéré **Canada (Québec)** *Christine Morin* Université Laval **Canada (Common Law)** *Robert Leckey* McGill University **Croatia** *Branka Rešetar* University of Osijek & *Ivana Milas Klarić* University of Zagreb **Denmark** *Ingrid Lund-Andersen* University of Copenhagen **England & Wales** *Jens M. Scherpe*, Gonville & Caius College, Cambridge & *Brian Sloan* Robinson College, Cambridge **Finland** *Sanna Koulu* University of Helsinki **France** *Hugues Fulchiron* Université Jean Moulin Lyon III **Germany** *Anne Röthel* Bucerius Law School Hamburg **Greece** *Dimitra Papadopoulou-Klamari* University of Athens **Ireland** *Maebh Harding* University of Warwick & *Louise Crowley* University College Cork **Italy** *Maria Rosaria Marella* University of Perugia **Malaysia** *Sridevi Thambapillay* University of Malaya **Poland** *Tomasz Sokołowski* Adam Mickiewicz University of Poznań **Puerto Rico** *Pedro F. Silva-Ruiz* **Portugal** *Rita Lobo Xavier* Catholic University of Portugal **Romania** *Marieta Avram & Cristina Nicolescu* Universitatea din Bucureşti **Scotland** *Jane Mair* University of Glasgow **Spain** *Carlos Martínez de Aguirre Aldaz* Universidad de Zaragoza **Taiwan** *Chung-Yang Chen* Soochow University Taipei **The Netherlands** *Katharina Boele-Woelki* University of Utrecht & *Merel Jonker* University of Utrecht **Turkey** *Kadir Berk Kapancı* Istanbul Bilgi University **USA** *Adrienne Hunter Jules & Fernanda G. Nicola* American University Washington College of Law.

Not all reports are included in this edited volume. The reports that were not included are available online on the congress website: http://www.iacl2014congress.com/.

A presentation of the results of the research according to the traditional divisions of legal systems in families has proved not to be functional. Similarities and differences in the different legal systems' family law follow other lines of division on which this chapter is based.

Main Features of Family Law

What Is Family Law?

In all legal systems, family law can be situated at the intersection of private law and public law,[2] and in many systems it is still influenced by religious and customary norms.[3] For that reason family law is qualified as a particular field of law, in-between social security law and the market. It is a space for private solidarity, not subject to commodification (Halley and Rittich 2010; Marella 2006).[4]

Family law in the narrow sense is considered a part of private or civil law, insofar it concerns the formation, exercise and dissolution (and some 'ancillary issues'[5]) of 'nuclear' family formations of two types: parents and children on the one hand and life partners on the other.[6] Family formations in the extended family are rarely mentioned.[7] This chapter mainly concerns family law in the narrow sense. It also encompasses (civil) family proceedings.

Family in its broad sense is considered a part of public law, insofar it concerns the effects of (private law) family formations in different branches of public law, for example social security law, tax law, labour law, criminal law, migration law.[8]

The distinction between private and public family law however is not always clear-cut,[9] e.g. with regard to child protection law.

[2]For example Denmark; Poland; Québec.

[3]For example Burundi; Cameroon; Scotland; Taiwan.

[4]Italy.

[5]USA.

[6]For example Belgium; Canada (Common Law); Croatia; Finland; Germany; Greece; Netherlands; Puerto Rico; Romania; Scotland.

[7]See *Burden v United Kingdom*, (App. 13378/05), 28 April 2008 [GC], ECHR 2008-III.

[8]For example Canada (Common Law); Scotland.

[9]Denmark; Poland.

Constitutionalisation

Different forms (and phases) of constitutionalisation of family law – with quite different currents – can be distinguished.

In a first phase, a closed system of family law existed – and in some legal systems still exists. Under such system, a *numerus clausus* of family relations is constitutionally[10] or otherwise protected, by so-called institutional guarantees.[11] Under those guarantees, a minimum protection must apply to certain family formations (for example marriage) and can neither be repealed nor be applied to other family formations (for example registered partnership).

Whereas *formation* and *dissolution* of family formations are regulated by imperative norms,[12] the State usually abstained from intervening in the *exercise* of those formations. The content of the relation parent-child and (formerly) husband-wife was left to family autonomy – that is: the father-husband until well in the twentieth century – with minimal State intervention. The *internal* dimension of the family is thus protected through a non-interventionist approach under which State interference must be justified.[13] Some Constitutions more particularly explicitly protect the right for parents to provide for the education of their children[14] (under State control however, see hereinafter).

Institutional protection is also provided for the *external* dimension of the family, which is protected as entity – yet not as a legal person[15] – in different branches of public law. This external dimension of family formations is more strongly protected in legal systems where constitutional protection of the family[16] (and marriage)[17] exists and particularly so where the government has a duty to develop a socio-economic family policy.[18] In systems where no constitutional protection of the family exists, private family law merely 'affects' public family law.[19] One example is the reduction of social security benefits in function of private law family solidarity

[10]Burundi; Greece; Turkey.

[11]Germany: art. 6(1) Basic Law; Ireland; Portugal.

[12]For example Croatia; Greece.

[13]Portugal; Malaysia.

[14]Burundi: art. 30 Constitution; Germany, art. 6(2) Basic Law; Ireland, art. 42 Constitution; Malaysia, art. 12(5) Constitution; Poland, art. 48 and 53.3 Constitution; Romania, art. 48 Constitution.

[15]Romania.

[16]Brazil: art. 226 Constitution; Cameroon: Preamble to the 1996 Constitution; France: Preamble to the 1946 Constitution; Spain: art. 39 Constitution.

[17]Croatia; Germany: art. 6(1) Basic Law; Greece: art. 21 Constitution; Ireland: art. 41 Constitution; Poland.

[18]Finland: art. 19 Constitution; Poland: art. 71 Constitution; Portugal; Turkey: art. 41 Constitution.

[19]Belgium; Denmark; Finland.

(support duties).[20] For this reason, also private family law is sometimes considered to concern public policy.[21]

A second phase of constitutionalisation is the constitutional review of family law in the narrow sense. Almost all legal systems provide for a system whereby a Constitutional Court,[22] the Supreme Court,[23] or even any Court,[24] may assess the compatibility of norms of family law with *constitutional civil rights*, upon petition by the parties in a case. This had led to various *para legem* reforms in family law. Other legal systems only organise an (*a priori*) assessment if so required by the executive branch.[25] In some legal systems, it is impossible for the judiciary to constitutionally review legislation.[26]

In a third phase, judicial review of family law is carried out in function of *international human rights instruments*. The traditional divide between monist[27] and dualist legal systems, concerning the direct applicability of human rights instruments, seems to fade away. Most dualist legal systems either have incorporated human rights instruments in their national law[28] or anyhow allow judicial interpretation of national law in function of international instruments to some extent.[29] International and regional human rights bodies in either case gain influence.[30]

The second and third phases of constitutionalisation have caused quite discordant evolutions in family law.

On the one hand, States have taken a non-interventionist stance. Family law is no longer a *numerus clausus* system in most legal systems and new family formations are also protected legally or even constitutionally. With regard to the *internal dimension* of the family, autonomy is interpreted individually rather than collectively.[31] The emancipation of formerly dependent family members allows relaxing the laws on formation and dissolution of family relations. The institutional protection of the *external dimension* of the family also seems to have diminished, without having disappeared. Individualisation in socio-economic branches of public law (particularly social security law and tax law) however has not yet been achieved.

[20] Canada (Common Law); Denmark.

[21] For example Québec.

[22] Belgium; Croatia; France; Germany; Poland; Portugal; ROC (Taiwan); Romania; Spain; Turkey.

[23] Brazil; Ireland; Malaysia; USA.

[24] Argentina; Canada (Common Law); Denmark; Finland; Greece.

[25] Cameroon.

[26] Netherlands.

[27] Belgium; Brazil; Cameroon (except vis-à-vis the Constitution); Croatia; France; Germany; Greece; Netherlands; Poland; Portugal; ROC (Taiwan); Spain; Turkey.

[28] Burundi; Denmark; England & Wales; Ireland; Malaysia; Romania; Scotland.

[29] Canada (Common Law); England & Wales; Finland.

[30] For example Argentina; USA.

[31] For example Greece; Puerto Rico; Romania.

On the other hand, interventionism has increased. The individualisation of family relations has caused the State to more actively interfere with the *internal dimension* of the family.[32] Rather than leaving the exercise of family formations to party autonomy, the State intervenes to secure dignity[33] and to palliate unequal positions.[34] This is particularly the case in parent-child relations,[35] in the light of the extraordinary success of the Convention of the Rights of the Child (see the Chapter on that Convention in this edited volume) and the focus on children rights' protection in many legal systems.[36] The direct applicability of the CRC is controversial however.[37] The State in some legal systems also comes to the rescue of the weaker party in relations between life partners.[38] This evolution applies to both private and public family law. The criminalisation of domestic violence is the foremost example.[39] This evolution towards increasing State interventionism could be functionally described as new application of the *parens patriae*-doctrine, even though it would not strictly reflect the particular nature of that doctrine in common law systems (Wirth 2011)

With Glendon (2006), one may conclude that the State withdraws from the classic areas of regulation (formation and dissolution of family relations) and more actively intervenes in new areas (exercise of family relations).

Incongruities

The abovementioned evolutions have not yet been tackled in a congruent way in many legal systems.

Firstly, incongruities exist within private family law, for example in the legal regulation of new family formations in comparison to the former *numerus clausus*.

Secondly, private family law sometimes is incongruent with public family law. Sometimes, family formations are only taken into account either in private family law or in public family law, or are taken into account subject to different conditions.[40] For example *de facto* cohabitation sometimes is not regulated in

[32]For example Brazil; Ireland.

[33]USA.

[34]Denmark; Poland.

[35]Poland.

[36]Belgium: art. 22 *bis* Constitution; Croatia; Denmark; Finland: art. 19 Constitution; Greece: art. 21 Constitution; Ireland: Twenty-First Amendment of the Constitution (Children) Bill 2012; Poland: art. 72 Constitution; Romania: art. 49 Constitution; Scotland; Spain: art. 39 Constitution.

[37]Belgium; France.

[38]Germany: BVerfG 103, 89.

[39]Croatia; Greece; Ireland; Taiwan; USA.

[40]Finland; Québec; Romania.

private family law, but taken into account with regard to social benefits.[41] The other way round, the organisation of absence of leave in labour law[42] for example does not always take into account the realities of recomposed families.

Thirdly, (vertical or horizontal) multi-level governance of families also causes incongruities. In many legal systems, vertical multi-level governance implies that different governmental levels are competent to regulate private *versus* public family law,[43] or even share competences in both private and public family law.[44] This may also lead to incongruent court orders.[45] In other legal systems, family formations are governed differently at a same level according to religion or ethnicity ('horizontal multi-level governance').[46]

Substantive Family Law

A Bird's Eye View

Contract: Private Autonomy

The principle of private autonomy governs private law in most legal systems, meaning that contractual freedom is the basic assumption.[47] Contracts may not derogate from imperative legal provisions nor may they infringe public policy (*ordre public*) or the *bona mores*.[48] The nature of the sanction depends on the interest that is protected.[49] More generally, a covenant of good faith and fair dealing applies throughout all (pre- and post)contractual phases. Some legal systems provide so explicitly in general,[50] whereas other legal systems include specific obligations. Examples are the duty of information in the pre-contractual phase, the prohibition of abuse of rights in the phases of execution and performance of a contract and the prohibition of exoneration clauses in the post-contractual phase.[51] Particularly relevant for this chapter is that some legal systems provide for the revocability (subject to damages), if not the invalidity, of contractual clauses

[41] Finland; Netherlands; Québec.

[42] Portugal.

[43] Belgium; Scotland; USA.

[44] Canada (Common Law); England & Wales; Spain.

[45] Canada (Common Law).

[46] Cameroon; Malaysia.

[47] For example Greece; Taiwan.

[48] Belgium; Canada (Common Law); Croatia; Denmark; England & Wales; Finland; France; Germany; Greece; Ireland; Netherlands; Portugal; Puerto Rico; Québec; Romania; Spain; Taiwan; Turkey.

[49] Belgium; Netherlands.

[50] Germany: '*Treu und Glauben*'; Québec.

[51] Portugal; Puerto Rico.

pertaining to family rights.[52] Examples are terms and conditions in contracts that would encourage or discourage family formation (for example not to (re)marry) or family behaviour (for example chastity) and that are considered void (see hereinafter).[53]

In light of the aforementioned trend of constitutionalisation, State interventionism in private law is increasing. A '*social public order*' ('*ordre public social*') seems to emerge, under which the State imperatively protects either general interests or the private interests of the weakest party in a contractual relation.[54] The foremost areas of State intervention are consumer law, tenancy and labour law.[55]

Status: No Private Autonomy

Further reaching and contrary to private law in general, private autonomy is even not the basic assumption in private *family* law. Under the qualification of *status* – as opposed to "contract", private family law is traditionally withdrawn from the realm of private autonomy[56] in two respects.

On the one hand, most legal systems consider private family law as imperative law as a whole, and to derogate by contract from rules on formation and dissolution of family formations is not accepted. This prohibition also applies to the basic rules on the exercise (content) of those formations.[57]

The prohibition applies in both directions.

Firstly, *opting in* family law was prohibited, and still is to some extent. The principle of a *numerus clausus*[58] of family formations has long stood in the way of the validity of contracts between cohabiting partners with regard to their pecuniary rights and duties. Such contracts were considered *contra bona mores* because they would organise sexual relations ('*pretium stupri*').[59] Today, cohabiting partners still may not opt in the personal rights and duties of spouses or registered partners, such as cohabitation and fidelity.[60] Opting in pecuniary rights and duties however is generally accepted.[61]

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[52]Portugal; Turkey.

[53]Canada (Common Law); Croatia; Portugal.

[54]Finland: '*welfarist contract law*' or '*social civil law*'; Portugal; Romania: '*ordre public économique*'.

[55]Germany; Greece.

[56]For example: Belgium; Cameroon; Finland.

[57]Brazil; Croatia; France; Malaysia; Netherlands; Poland; Portugal.

[58]Comp. Greece; Turkey.

[59]England & Wales; Italy; Romania; Scotland.

[60]Belgium.

[61]Canada (Common Law); Belgium; Romania; Scotland.

Secondly, *opting out* family law is not allowed either.[62] Systems influenced by the *Code napoleon* for example explicitly provide that in their (prenuptial) contracts on (matrimonial) property, spouses or registered partners may not derogate from the core of statutory rights and obligations between them or from the norms on parental responsibility.[63]

Only few legal systems accept greater party autonomy as a starting point.[64]

On the other hand, there is great restraint to consider family agreements between parents (and children) or life partners – where allowed – as binding contracts *pur sang*.[65] The **Scottish** report qualifies this evolution as "*consensualisation*" of family law. Generally, such family agreements are referred to with a different legal terminology than that used in contract law in general.[66] Remarkably, the qualification as "non-law" (Carbonnier 2013) of family agreements more strongly applies to families going concern than to dissolved family formations, where agreements are considered to be binding more easily.[67]

Mapping Family Law Exceptionalism

It is not an objective of this chapter to research the origins and *rationale* of family law exceptionalism (hereto for example Nicola 2010). The analysis hereinafter may rather serve as a mapping of the seemingly growing number of derogations from the exceptionalist position, at the least in the context of old family formations,[68] whereby

- either opting in or out private family law is allowed
- or family agreements on the content of family relations are considered legally binding contracts.

The growing acceptance of the general private law principle of party autonomy in family law of course also implies the application of the general limits to contractual

[62]Greece.

[63]For example Belgium: art. 1388 and 1478 CC; Cameroon: art. 1388 CC; France: art. 1388 CC; Portugal: art. 1618, 2° and 1699 CC; Puerto Rico: art. 1268 CCPR and *Albanese D'Imperio v Secretary of the Treasury*, 223 F 2d 413 (1955) (single joint tax return); Québec: art. 391 Civil Code; Romania: art. 332 para 2 CC.

[64]Canada (Common Law); Spain; Scotland. To a lesser extent: Malaysia; Netherlands.

[65]England & Wales; Finland; Germany; Greece; Romania; Scotland: *Radmacher v Granatino* [2010] UKSC 42, retrieved at http://www.bailii.org/uk/cases/UKSC/2010/42.html on 24 October 2014; Taiwan.

[66]Germany.

[67]Belgium; England & Wales: *Merritt v Meritt* [1970] EWCA Civ 6, retrieved at http://www.bailii.org/ew/cases/EWCA/Civ/ on 21 June 2014, as distinguished from *Balfour v Balfour* [1919] 2 KB 571 and also see Greece.

[68]France; Greece.

freedom.[69] Firstly, the principle of dignity[70] and the best interest of the child for example serve as general parameters for State control of contractual freedom, usually through judicial discretion.[71] Some legal systems for example explicitly forbid corporal punishment of children in application thereof.[72] In other systems such punishment is still explicitly allowed.[73] Secondly, the theory of undue influence for example is a parameter for State intervention in (ex-)spousal relations.[74] Some legal systems more generally safeguard the 'fair balance' between spouses.[75]

Parents and Children

Introduction

'Parents and Children'

The first subject area for which we will map private ordering is vertical (or intergenerational) family law, of which only the relation between parents and children will be researched as the most relevant part. We will not elaborate other intergenerational relationships. Hereinafter, we will subsequently discuss

- legal parenthood,
- parental responsibility and the exercise thereof, and
- maintenance obligations.

Whereas those three aspects of the law on parents and children are closely linked with each other, they nevertheless are based on different assumptions and different persons may qualify as parents as a consequence.[76]

[69] Brazil.

[70] France; Spain. Comp. Puerto Rico.

[71] Belgium; Canada (Common Law); England & Wales; France; Ireland; Poland; Romania; Scotland; Spain; Turkey.

[72] Denmark.

[73] Taiwan.

[74] Belgium: Supreme Court 9 November 2012, www.cass.be; Canada (Common Law); Croatia; Denmark; England & Wales; Portugal; Scotland.

[75] For example Romania: art. 332 para 2 CC; Spain: art. 66 CC. Comp. Puerto Rico: 31 L.P.R.A. § 3552 (Westlaw).

[76] For example Croatia; Finland; Scotland.

Legal Parenthood

General

Definition The legal parents of a child are the persons from whom he descends in the first degree in terms of legal kinship.[77]

Both *filiation* (in the narrow sense) and *adoption* qualify as bases for legal parenthood.[78] In some legal systems[79] adoption is considered to be a kind of filiation (in the broad sense), besides filiation based on blood. Adoption is accepted in all many legal systems, yet only some legal systems have both strong and weak adoption.[80]

The best interest of child serves much less as a decision parameter with regard to filiation than with regard to adoption. The reason is the assumption that the establishment of filiation vis-à-vis the biological parents is in the best interest of a child *per se*.[81]

Filiation (in the Narrow Sense)

Between *Status* and Contract The rules on filiation are imperative, as part of one's *status*. Transfers of parenthood are outside the "*perimeter*"[82] of contractual freedom.[83] The link to public policy ('*ordre public*') for example is very clear in **Denmark**, where the regional state administration will itself institute parentage proceedings in case paternity is not registered at birth.

In many legal systems, the imperative rules are at the least flavoured with a taste of self-determination, for example in the context of voluntary acknowledgement.[84] Such forms of merely intentional parenthood however cannot be considered as contractualisation, for they are either unilateral, or non-enforceable or subject to State intervention.[85] The **Canadian** reporter thus refers to intention and autonomy "*rather than using the language of contract*".

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[77] For example Romania.

[78] For example Malaysia.

[79] For example Québec, art. 522 *et seq.* CC.

[80] For example Belgium; Burundi.

[81] Portugal.

[82] Romania.

[83] Brazil; Cameroon; Canada (Common Law); Croatia; France; Germany; Greece; Ireland; Malaysia; Netherlands; Québec; Romania; Taiwan.

[84] France.

[85] Germany; Romania; Spain.

Many legal systems also accommodate agreements on parenthood to some extent, for example in the context of (medically assisted) artificial reproduction techniques.[86] Contracts on (first) motherhood – for example in the context of surrogacy – are less accepted than contracts on fatherhood or second parenthood though. These agreements, "*however contractual in its core*" according to the report on **England & Wales**, mostly are not considered to be civil contracts[87] because the only comprise the exercise of statutory options. They are strictly controlled and do not allow the parties to organise parenthood themselves.[88] For example, **Belgian** sperm donors may opt to donate non-anonymously, but the establishment of legal family ties between them and the children conceived with their sperm is never allowed.[89]

Sometimes, the intentional and biological parents may informally agree on the role the biological parents may play in the life of the child; but such agreements are not directly enforceable.[90]

First Parent: Mother The basic assumption in almost all legal systems is that the *mother* is the (legally) female person who gave birth to a child: *mater semper certa est*.[91] Only in **Ireland** it is still debated whether genetic motherhood should not prevail over birth motherhood as the basis for maternity.

Only some Western legal systems[92] allow *surrogacy agreements*, whereby the maternity of the birthmother is either transferred to the genetic or intentional mother, or waived in favour of a single man or gay couple. As a consequence of such agreement, the presumption of parenthood will not be applied to the birthmother's partner, but to the prospective parent's (male or female) partner. Surrogacy agreements are not always enforceable in case the surrogate mother refuses to cede the child or the prospective parents refuse to accept the child.[93]

The judicial approach towards the consequences of informal surrogacy agreements, in systems where surrogacy is not explicitly regulated or even explicitly forbidden, is quite divergent. Such agreements will usually not be validated for the purposes of establishing parenthood.[94] Adoption would be necessary in these cases.

[86] Québec; France.

[87] Scotland.

[88] Scotland; France.

[89] Belgium: art. 27 and 56 Act on Medically Assisted Reproduction 2007.

[90] Belgium; Finland; Netherlands.

[91] Belgium; Brazil; Burundi; Cameroon; Canada (Common Law); Finland; England & Wales; Germany; Greece; Poland; Scotland; Turkey; USA.

[92] Canada (Common Law); England & Wales; Greece; USA.

[93] Canada (Common Law); England & Wales; Netherlands; Scotland; USA.

[94] Belgium; Germany. See however the Ireland report: the issue will be resolved in the best interest of the child.

Various approaches also exist with regard to the recognition of surrogacy in private international law.[95]

Most Western legal systems accept *ovum donation*,[96] after which the birthmother and not the genetic mother will be considered the legal mother in application of the *mater semper certa est*-rule. One step further is *ovum sharing*[97] in a lesbian couple, in which case the genetic mother will be the second parent (see hereinafter) of her genetic child to whom the gestational mother has given birth. Ovum sharing seems less acceptable than ovum donation, for there usually is no medical indication for it.

Second Parenthood "Contenders"[98] for second parenthood are manifold in Western legal systems. In other systems, the traditional rule of paternity of the husband still and almost exclusively applies.

In all legal systems, a legal presumption of paternity applies to the (legally) male husband of the mother at the time of the birth or of the conception of the child: *pater is est quem iustae nuptiae demonstrant*.[99] He probably is the genitor of the child – in the light of the duty of fidelity – or at the least has chosen to be the parent. The presumption of paternity generally is rebuttable.[100] Self-determination applies to some extent in this regard. The father appointed in application of the presumption may decide not to rebut his parenthood, even if he knows he is not the genitor. In some legal systems, the genitor himself moreover may not contest the paternity of the husband. The father appointed in application of the presumption also is excluded from contesting his paternity in many legal systems in case he has agreed to donor insemination.[101]

In some legal systems this presumption also applies to the (legally) male registered partner[102] of the mother.

Further away from biological foundations, a presumption of second motherhood,[103] second female parenthood[104] or co-motherhood[105] applies to the female spouse or female registered partner of the mother in some Western legal systems

[95]See *Labassée v France*, (App. 65941/11), 26 June 2014 [5th section], ECHR; *Menneson v France*, (App. 65192/11), 26 June 2014 [5th section], ECHR. Also see Argentina.

[96]See the overview in *S.H. and others v Austria*, (App. 57813/00), 3 November 2011 [GQ], ECHR 1879, § 35.

[97]USA.

[98]Term used in the USA report.

[99]For example Belgium; Brazil; Burundi; England & Wales; Finland; Germany; Ireland; Poland; Scotland; Turkey; USA.

[100]For example Belgium.

[101]For example Denmark; England & Wales; Finland; Poland; Spain.

[102]Canada (Common Law); Greece; Netherlands.

[103]Netherlands; Québec; Spain.

[104]England & Wales; Scotland.

[105]Belgium; Denmark.

('*parens is est*').[106] In these cases, the foundation of parenthood is social,[107] or even merely intentional, rather than biological.[108] This also why legislatures apparently wrestle with semantics in this regard.

Voluntary acknowledgment of parenthood is possible in case the *mater semper certa est*- (or *parens is est*-) rule cannot be applied.[109] In most legal systems, acknowledgment is not subject to any proof other than a confirmation by the other parent. Other systems require a biological[110] or social[111] proof of parenthood.[112] In **Taiwan**, implicit acknowledgment moreover results from financially maintaining a child as a parent. Such parenthood is further reaching than the *in loco parentis*-doctrine in other legal systems.[113] The decision to voluntarily acknowledge a child even if there is no biological or social foundation for parenthood is protected to some extent. For example the mother who consents to the acknowledgement of a child by a man whom she knows is not the genitor, cannot contest his paternity later under **Belgian** law. As mentioned above, this can hardly be considered as contractualisation. The same applies to the decision of a child to (no) rebut a parenthood presumption or to (not) use his veto against an acknowledgement.[114]

Acknowledgement as "route to parenthood"[115] *de facto* mostly applies to determine male paternity.

There is no uniform application of the rules on acknowledgment in the few systems where same-sex parenthood exists. In the **Netherlands**, the female partner of the birthmother can acknowledge a child as second mother; in **Belgium** the same is possible under the term "co-mother". In both legal systems, acknowledgement as a second parent is not possible for the male partner of the father; he must adopt the child. In the **USA**, the male partner of the father can be appointed as second parent.

Some legal systems also contain specific provisions regarding (medically assisted) artificial reproduction techniques, in which case the intentional parents are appointed as legal parents and whose parenthood cannot be rebutted.[116]

Some systems also apply this in favour of the single parenthood of the mother. The **Canadian** and **Irish** reporters however refer to case law whereby the known

[106] England & Wales; Scotland.

[107] Canada (Common Law); Netherlands.

[108] Croatia; Portugal; Spain; USA.

[109] Belgium.

[110] Finland; Portugal.

[111] France.

[112] Brazil.

[113] For example Canada (Common Law).

[114] Comp. Belgium; Burundi.

[115] Scotland.

[116] Denmark; England & Wales; Greece; Québec; Finland; Romania; Spain; USA. A reform is also underway in Argentina.

donor was nevertheless recognised as the father.[117] The same applies in **Denmark** in case of 'informal' insemination.[118] In **Finland**, the parties to artificial insemination may agree that the donor to a single mother will be considered to be the father.[119]

Third Parenthood Only **Canada (Common-Law)** and the **USA** accept triple parenthood, whereby the birthmother, the intentional second male or female parent and the genitor are considered the legal parents, subject to their agreement thereto.[120]

Transfers and Waivers Beside the abovementioned contractual transfers or waivers, a legal parent in all legal systems cannot waive or dissolve his parenthood otherwise than giving the child up for adoption (see below).[121] Only the **Finnish** reporter mentions one out-court possibility for a married couple to transfer the husband's paternity to the biological father, subject to the agreement of all parties concerned.[122]

The possibility to give birth discretely or anonymously only exists in few legal systems,[123] and is forbidden in most.[124] In case of discrete birth, the identity of the mother may exceptionally be disclosed to the child if so decided after balancing the interests by an independent administrative or judicial body. In case of anonymous birth, the identity of the mother may never be disclosed to the child (or *vice versa*).

Adoption

Adoption All legal systems conceive adoption as a child protection measure, under strict State control. It is considered status rather than contract.[125] This applies to a lesser extent[126] to intra-family adoptions, aiming at composing or re-composing parenthood in new family formations.[127]

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[117] Canada (Common Law); Ireland.

[118] Denmark.

[119] Finland.

[120] Canada (Common Law) (British Columbia and Ontario); USA.

[121] For example Burundi, England & Wales; Ireland.

[122] See sections 2, 15(1), 16a and 34(3) Paternity Act 700/1975, retrieved at www.finlex.fi on 16 October 2014.

[123] France; Luxembourg. Proposals are also made in Belgium and in Brazil.

[124] Croatia; England & Wales; Germany; Poland; Portugal; Romania; Spain.

[125] Belgium; Brazil; Cameroon; Canada (Common Law); England & Wales; Finland; Germany; Greece; Italy; Portugal; Québec; Romania; Scotland; Spain; Turkey; USA.

[126] USA.

[127] For example by same-sex parents: *X. and others v Austria*, (App. 19010/07), 19 February 2013 [GQ], ECHR 148, § 100.

A contractual approach towards adoption may indeed endanger the child's dignity.[128]

Some legal systems however legally protect contractual forms of adoption. Firstly, courts seem to take into account informal adoption contracts when assessing whether formal adoption is in the best interest of the child.[129] Secondly, some forms of informal adoption seem to be recognised in **Canada (Common Law)**[130] and **Malaysia**.[131] Thirdly, some legal systems accommodate open adoption, in which case the parties agree on maintaining contact between the family of origin and the child.[132]

Parental Responsibility

Introduction

Context On the one hand, parental responsibility (also: parental authority,[133] custody[134] or guardianship[135]) implies rights and obligations with regard to the care for a child, which encompasses both the right to make educational choices ('legal custody', yet the other aspects of custody of course also are 'legal') and residence, contact and information rights ('physical custody').

On the other hand, parental responsibility encompasses the management of the child's property, which usually also comprises usufructary rights on the child's property.[136]

Again, the imperative nature of the legal regulation of attribution, exercise and content of parental responsibility is pointed at.[137] Agreements between the parents and between the parents and third parties however are possible to some extent. Such agreements are not considered to be contracts with civil effect.[138]

[128] Cameroon.

[129] USA.

[130] Customary contractual adoption forms of aboriginal peoples.

[131] Malaysia.

[132] England & Wales; Finland. This is the default system in Poland.

[133] Canada (Common Law).

[134] USA.

[135] Ireland.

[136] Belgium; Cameroon; England & Wales; France; Germany; Greece; Romania; Spain.

[137] For example Belgium; Brazil; Croatia; France; Germany; Ireland; Netherlands; Portugal; Romania; Spain.

[138] Germany; Poland.

Attribution and Exercise

Default Position The default position is the attribution of parental responsibility to the legal parents.[139] This attribution is sometimes guaranteed constitutionally[140] and stripping a parent from his parental responsibilities is under strict scrutiny by the courts.[141]

The mother of a child always has parental responsibility.

In most legal systems, the second parent will acquire parental responsibility in case parenthood is established at the time of the birth of the child or soon after, or in case (s)he is (still) partnered to the mother. Some legal systems do not automatically vest the second parent with parental responsibility in other cases.[142] The **European Court of Human Rights** has found that this is discriminatory vis-à-vis the father who is not married to the mother.[143] An agreement with the mother or a court order would be required in order to vest these parents with parental responsibilities.[144] Separation or divorce will not strip the second parent from his existing parental responsibility.[145]

Some Western legal systems provide for parental responsibility for persons who are not a legal parent, and particularly for *social* parents who were or are partnered with a parent[146] and for *biological* parents.

In the **Netherlands**, parental responsibilities can only be granted *as a whole* and cannot be granted to more than two persons, that is: the parent with sole parental responsibility and a stepparent. A State commission will advise on multi-parenthood by 2016.

In different common law and mixed legal systems and in **Finland**[147] the attribution of parental responsibility is also possible in part and without a maximum of two persons applying.[148] For example sperm donors may be vested with some parenting rights such as access and information.[149] Such system seems in line with

[139]Belgium; Brazil; Canada (Common Law); Croatia; France; Germany; Greece; Turkey; USA.

[140]Ireland: art. 41 Constitution.

[141]England & Wales; Ireland.

[142]Denmark; England & Wales; Finland; France; Germany; Ireland; Netherlands; Scotland.

[143]*Zaunegger v Germany*, (App. 22028/04), 3 December 2009 [5th section], ECHR, § 63.

[144]For example Scotland.

[145]Finland; France; Netherlands.

[146]England & Wales; France; Netherlands; Scotland (father of second female parent, not stepparent).

[147]Finland.

[148]Canada (Common Law); England & Wales; Scotland.

[149]USA [Contracting Assisted Reproduction Parentage].

recent case law of the **European Court of Human Rights**[150] and of the **Dutch** Supreme Court.[151] In **Canada (Common Law)**

> feminist scholars have criticized the obstacles to women's becoming 'autonomous mothers', including courts' willingness to attribute parental status or visitation rights to a man (other than an anonymous donor) on account of the genetic link between him and a child.[152]

Joint exercise of parental responsibility applies in most legal systems as the default system,[153] particularly for important educational decisions. In common law systems, persons vested with parental responsibility may act alone sometimes.[154] This is also the case in all legal systems for daily and for urgent matters. The courts may also decide on sole exercise of parental responsibility in the best interest of the child.

In **Cameroon**, only the father exercises parental responsibility over his marital children.[155]

Waivers & Transfers Waivers and transfers of parental responsibility (as a whole or in part) are generally not accepted[156] and often explicitly forbidden[157]:

> Article 376 **French** CC: "waiver or transfer of parental responsibility can have no effect".
>
> Section 2(9) Children [**England, Wales, Scotland and Northern Ireland**] Act 1989: "a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another".
>
> Article 1882 of the **Portuguese** Civil Code "parents can not waive the parental responsibilities nor any of the rights that it confers particularly".

For example it usually is not possible for parents to contract on parental responsibility in case they live together ('going concern'), for example so as to agree on sole instead of joint custody.[158]

A third party also cannot waive the qualification of standing *in loco parentis*.[159]

Only some legal systems however contain a *duty* to exercise e.g. residence or contact rights.[160]

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[150]For example *Ahrens v Germany* (App. 45071/09), 22 March 2012, ECHR.

[151]For example *Hoge Raad* 30 November 2007, ECLI:NL:HR:2007:BB9094, retrieved at www.rechtspraak.nl on 18 June 2014.

[152]Canada (Common Law).

[153]Belgium; Brazil; France; Netherlands; Greece; Puerto Rico; Québec; Taiwan; Turkey.

[154]England & Wales.

[155]Cameroon.

[156]For example Argentina; Belgium; Cameroon; Germany; Greece; Ireland; Netherlands; Poland; Portugal; Québec; Turkey.

[157]Romania: art. 31 (2) Act n° 272/2004 of 21 June 2004.

[158]Belgium; Canada (Common Law); Denmark.

[159]Canada (Common Law): *Doe v Alberta*, 2007 ABCA 50 [http://canlii.ca/t/1qhjr] (with regard to maintenance).

[160]For example Croatia; Poland.

(Cont'd). Parents Not Going Concern Transfers of parental responsibilities are accepted to some extent for parents not going concern. In case of separation or divorce, agreements on the attribution of parental responsibility are allowed[161] and sometimes even obliged.[162] The court will only impose an arrangement in case the parents do not reach an agreement. Agreements anyhow are under the scrutiny of State bodies (see hereinafter section "Court jurisdiction"). The **Dutch** reporters consider the parenting plan required upon separation quite contrary to contractual freedom, since the civil code *imposes* both the plan and its content.[163] Also the content of parenting plans is sometimes State determined. The **Italian** report points at the fact that imposing joint parental custody of course reduces the contractual freedom of the parents.

(Cont'd). Sharing and Delegating Besides, some legal systems accommodate so-called co-parenting agreements between parents and third parties[164] or openness agreements between adoptive parents and the biological parents (also see above),[165] sometimes subject to judicial approval.[166]

Some legal systems furthermore allow persons with parental responsibility to transfer the *de facto* custody or other aspects of parental responsibility to a third party.[167] The third parties concerned however would only acquire precarious privileges.[168]

Finally, delegation of parental responsibilities is also possible under court supervision.[169] Interestingly, in **France** also *shared delegation* is possible. This is a court order under which a parent or both parents share (part of their) parental responsibility with a third party, who can be a family member or other trustworthy next-of-kin, or a child protection service or institution.[170]

In all aforementioned cases, the relation between the third party and the child may be judicially protected against the will of the parents. The foundation thereof is

[161] For example Denmark; Finland; Greece; Malaysia; Portugal; Romania.

[162] In most cases when parents want to divorce by mutual consent (for example Argentina; France; Greece; Romania; Spain), but in the Netherlands in all cases of parental separation or divorce.

[163] Netherlands.

[164] England & Wales; USA.

[165] Canada (Common Law).

[166] Cameroon; France; Portugal; Romania.

[167] For example Belgium; England & Wales: s. 2(9) Children [England, Wales Scotland and Northern Ireland] Act 1989; Finland; Greece; Poland; Romania; Taiwan.

[168] For example Argentina; Québec.

[169] For example Denmark.

[170] France: art. 377 CC.

the family life that has been built up, rather than the agreement that existed between the parents and the third party.[171]

(Cont'd). Foster Care or Adoption Parents may give up their children for foster care or adoption; in some countries emancipation of the child is also possible.

What is decisive in these cases is the best interest of the child, and certainly not the right to self-determination of the parent(s).[172]

We will not further elaborate child protection law in this chapter.

Content

Religious and Philosophical Education Particularly the religious and philosophical education of children by their parents is explicitly protected in different legal systems. For example in **Belgian** and **Spanish** law, the parents' instructions on religious and philosophical education must be respected in case of guardianship resp. foster care. For example, article 32 of the **Irish** Adoption Act requires that the parents knowingly consent to adoption by an applicant who is not of the same religion (if any) as the parents and the child.

This emphasis on the religious and philosophical education by the parents may be out-dated in light of the rights of the child and has been severely criticised (for example Dawkings 2006).

Parenting Agreements Some legal systems explicitly or implicitly allow parents going concern to reach an understanding on future practices regarding their parental responsibilities.[173]

> For example the **Ontario** Family Law Act (R.S.O. 1990, c. F.3, s. 52 (1)) explicitly provides that "[t]wo persons who are married to each other or intend to marry may enter into an agreement in which they agree on [. . .] (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children;
>
> Article 376-1 of the **French** Civil Code more implicitly states that "the Family Court may [. . .] , take into consideration the pacts which the father and mother may have freely concluded between them [. . .]."

Such private arrangements also sometimes are encouraged, for example in (law-)packs in **Scotland** and in **England & Wales** and by the courts in **France**.[174] It however seems unusual for parents to conclude arrangements of this kind.[175]

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[171] See for example *Hokkanen v Finland,* (App. 19823/92), 23 September 1994 [Chamber], 19 EHRR 139, § 64.

[172] France; Spain.

[173] For example Burundi.

[174] France.

[175] France; Spain.

As aforementioned, the situation is different in case of separating or divorcing parents. These parents may, and sometimes must, reach an agreement on joint or sole parental responsibility and sometimes also on some educational choices and on the residence of the child.

Legal Nature of Parenting Agreements 'Family Constitutions' (McClain 2006), 'Domestic Contracts',[176] 'Family Pacts'[177] or instruments alike governing parental responsibility usually are not considered enforceable civil contracts.[178] For example article 4 of the **German** Act on the Religious Upbringing of Children provides that "*agreements on the religious upbringing of a child have no civil effect*".[179] Article 341 § 2 **Turkish** Civil Code even provides that such agreements are deemed void.[180] The **Scottish** Government explicitly indicates in the Parenting Agreement for Scotland pack that

> "it is important to remember that the Parenting Agreement itself is not a legal contract and is not intended to be enforced by the courts. By completing and signing the Parenting Agreement you are not making a legally binding commitment, this is not its purpose." The signature box specifies that "by signing above, you are simply confirming what you have jointly agreed and there is no legal commitment in doing so."[181]

The reasons therefore are the following.

Firstly, agreements cannot oust the jurisdiction of the courts to determine the best interest of the child.[182] In most legal systems, the agreement between the parents will only become enforceable if so ordered or homologated by court (see hereinafter section "Court jurisdiction"). In the light of the respect for family privacy, however

> a court order should not be made unless it would be better in all the circumstances of a case to make one

in **Scots** law.[183] The **English** report elaborates that sometimes issuing a court order, which endorses a parental agreement may be the better option.[184] The courts may also refrain from making agreements between the parents enforceable and issue a

[176]Canada (Common Law).

[177]France.

[178]Croatia; Finland; Germany; Greece; Ireland; Netherlands; Poland; Portugal; Scotland; Turkey; USA.

[179]Germany; Netherlands: *Hoge Raad* 20 May 1938, NJ 1939, 94; Poland.

[180]Turkey.

[181]Scotland: s. 1(5) Children Act 1989 and England & Wales.

[182]Canada (Common Law); England & Wales: *AI v MT* [2013] EWHC 100 (Fam); France; Germany: *Bundesgerichtshof* 11 May 2005, *FamRZ* 2005, 1741; Greece; Ireland; Spain. See also for Canada (Common Law) *Doe v Alberta*, 2007 ABCA 50 [http://canlii.ca/t/1qhjr], § 26 (with regard to maintenance).

[183]Scotland.

[184]England & Wales.

consent order[185] so as to allow them to petition the courts later without having to prove changed circumstances.

Secondly, the parents can always petition the court to review their arrangements in the light of changed circumstances or, even without changed circumstances, in the best interest of the child (see hereinafter section "Court jurisdiction").

Thirdly, parental agreements in some legal systems are not binding upon the child who is capable of forming his own views. This is particularly so with regard to religious and philosophical choices.[186]

Maintenance

Default Rules

Maintenance obligations – in kind or in money – exist towards children in all legal systems and are closely linked with public family law.[187] In some systems,[188] but not in other,[189] the obligation applies beyond the age of majority in favour of children who are still studying.

Legal parents have maintenance obligations whether or not they exercise parental responsibility. Third parties with parental responsibility sometimes also have maintenance obligations.[190] Furthermore, such obligations sometimes also rest on third parties with no parental responsibility, e.g. the genitors of the child or the stepparent.[191]

Contractual Arrangements

Because of the link with public family law, contractual arrangements can only concern modalities of the maintenance obligation, but not the obligation itself.[192] Parents in other words cannot shift their responsibility onto collective resources.[193] They also are stimulated to agree on child support rather than collecting it through State agencies (Skinner and Davidson 2009).[194]

[185] England & Wales; France.

[186] Denmark; Ireland: s. 17(2) Guardianship of Infants Act 1964; Romania; Scotland; Turkey.

[187] For example Scotland.

[188] Belgium; Puerto Rico; Turkey.

[189] Cameroon; France.

[190] Netherlands.

[191] Canada (Common Law); England & Wales; Ireland; Netherlands; Poland.

[192] Argentina; Germany; Malaysia; USA.

[193] Romania.

[194] England & Wales.

It is generally accepted that third parties may assume maintenance obligations by contract.

Partners

Introduction

Plan

The denominator "Husband and Wife" covers the law on private law relationships between adult socio-affective, romantic or sexual partners only in a minority of legal systems.[195] We have therefore chosen the neutral title "Partners". Hereinafter, we will first provide a short general overview of the three generally accepted types of relationships, before discussing private ordering of respectively formation, content and dissolution of (formal) relationships. We will not elaborate Living Apart Together (LAT)-relationships.

General Overview

Marriage

Marriage exists, under that name, in all legal systems and still is the foremost status, 'both qualitatively and quantitatively'.[196] It brings along imperative statutory intervention with regard to its formation, content and dissolution.

Some reporters point at a de-institutionalisation of marriage,[197] which becomes rather party than State centric.[198] For example, divorce-on-demand is now available in some legal systems (see hereinafter).

Besides, the general law on obligations and contracts is also increasingly applied to spouses in case marriage law would not sufficiently protect their interests, for example in order to compensate the contribution by one spouse in the other spouse's business or property[199] (see hereinafter).

A growing number of Western legal systems, and also **Brazil** following a Constitutional Court decision, have opened marriage to partners of the same sex in recent years.[200] This is not (yet) the case in the Eastern European, Middle- and Far-Eastern and African systems.

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[195]For example in Burundi; Cameroon; Malaysia; Poland; Romania; Taiwan.

[196]Belgium.

[197]France.

[198]USA.

[199]Belgium; France.

[200]Belgium; Brazil; Canada (Common Law); England & Wales; France; Scotland; The Netherlands; USA (*partim*).

Marriage is still reserved to two partners in all systems except in **Cameroon** and some of the **Malaysian** states, the latter under their respective Muslim Family Law Acts.

Registered Partnership

Registered partnership schemes are available in a majority of legal systems. A patchwork of regimes exists on which generally two different mindsets seem to apply.

On the one hand, legislatures have created registered partnership schemes as "*functional equivalent to [exclusively opposite-sex] marriage*"[201] and marriage law on formation, content and dissolution is (gradually) mirrored into the registered partnership.[202] Some of those regimes, but not all, are reserved to same-sex couples. Small, but symbolically important, differences with marriage seem to subsist, not only in the 'vertical' (parent-child) effect of registered partnership, but also in its 'horizontal' content.[203] Examples are the impossibility to opt for a common family name, the absence of a duty of fidelity and easier dissolution.

In some of those legal systems, marriage has also been opened to same-sex couples. The exclusively same-sex registered partnership thus became 'redundant' and has been abolished for future registration in **Denmark**,[204] and will probably be abolished in several states in the **USA**.[205] This is not (yet) the case in **England & Wales**, where the paradoxical result is that opposite-sex couples can only marry, but same-sex couples have a choice between marriage and civil unions.[206] Different opposite-sex couples have contended before the **European Court of Human Rights**[207] that this difference in treatment is discriminatory. Interestingly, the **Dutch** registered partnership – for both opposite-sex and same-sex partners, was deliberately upheld after the opening of marriage. Socio-legal research had shown that there was a societal demand for a non-symbolic alternative to marriage (Boele-Woelki 2007).

On the other hand, legislatures have conceived registered partnership schemes as 'mini-marriages', accessible for both opposite- and same-sex partners.[208] These

[201] England & Wales.

[202] Finland; Germany; Ireland; The Netherlands; Scotland; USA. A same reform is underway in Croatia. Also see Canada (Common Law).

[203] Finland; Ireland; The Netherlands.

[204] Denmark.

[205] USA.

[206] England & Wales.

[207] *Ferguson and others v United Kingdom* (2011), pending.

[208] Belgium; Canada (Common Law); France.

schemes were rather contractual of nature.[209] They have fewer legal consequences in both private and public family law and hence formation and dissolution are also more leniently regulated.

Some reporters however point at a trend towards "*matrimonialisation*" of these schemes,[210] which is now considered to be a civil status indeed.

Cohabitation

In a minority of legal systems, cohabitation is still considered contrary to the *numerus clausus* of family relations.[211] For example a surviving partner cannot claim damages in tort law against the person responsible for the death of the other partner.

In some other legal systems, cohabitation is just ignored.[212]

A growing number of legal systems attach legal consequences to cohabitation in *public family law*, for example for tax purposes, in social security schemes or in provisions on protection against domestic violence.[213]

In *general private law*, cohabitation is taken into consideration for example in the context of employee benefits.[214]

A variety of approaches finally exist with regard to the *private family law* perspective towards cohabitation. Firstly, the application of the general law on obligations and contracts to cohabitants is accepted.[215] This means, on the one hand, that cohabitants may contractually organise their rights and obligations towards each other without risk of qualification of those arrangements as *pretium stupri* (reward for sexual relations) and thus void for public policy reasons *per se*:

> The fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services.[216]

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[209] France.

[210] France.

[211] For example Turkey.

[212] For example in Italy; Romania.

[213] Belgium; England & Wales; Finland; France; Portugal; Québec; Scotland; USA.

[214] USA.

[215] See however Italy.

[216] *Marvin v Marvin* (1976) 18 Cal.3d 660, retrieved at http://online.ceb.com/calcases/C3/18C3d660.htm on 24 April 2014. Also see Cameroon; Denmark; England & Wales; France; Italy; Québec.

In some legal systems, such cohabitation agreements are explicitly provided for.[217] On the other hand, in absence of an agreement, cohabitants can rely on general legal concepts such as unjust enrichment, without being barred therefrom on the basis of their relationship.[218] As the **Canadian (Common Law)** report puts it:

> "Love" does not justify a transfer that would otherwise be reversible as unjust and the services rendered will usually be valued in a market oriented way.[219]

Even more, the application of the general legal concepts is sometimes "*matrimonialised*" in order to better take into consideration the particular context of the relationship.[220] For example, a fiduciary or confidential relationship between the partners may be accepted more easily, or unjust enrichment may lead to a 50/50 division of acquired property by the family joint venture as if there was a marriage.[221]

> Restricting the money remedy to a fee-for-service calculation is inappropriate [...]. [I]t fails to reflect the reality of the lives of many domestic partners. [...] While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives.[222]

Secondly, some legal systems have introduced a default family law protection for cohabitants, which is either imperative,[223] or organised on either an opt-in or (controlled) opt-out[224] basis. The protection may be higher for cohabitants who reach thresholds that qualify them for (enhanced) protection, such as a minimum period of cohabitation or having a common child.[225] Interestingly, these cohabitation schemes are always based on "*approximations of marriage*",[226] even where not based on theories of common law marriage[227] or their continental counterparts. The **USA** report rightly question such paradigm. The legal protection so granted primarily concerns the property of the partners or one of them, and

[217] For example Greece.

[218] Belgium; France; Italy; Portugal; Puerto Rico; The Netherlands; USA.

[219] Canada (Common Law).

[220] Germany: BGH 9 July 2008, XII ZR 179/05, BGHZ 177, 193.

[221] Canada (Common Law): *Kerr v Baranow* 2011 SCC 10, retrieved at http://scc-csc.lexum.com/ on 24 April 2014.

[222] Summary of *Kerr v Baranow* 2011 SCC 10, retrieved at http://scc-csc.lexum.com/ on 24 April 2014.

[223] Brazil; Finland: Act 26/2011 on the Dissolution of the Household of Cohabiting Partners, retrieved at www.finlex.fi on 16 October 2014, particularly section 3; Portugal; Scotland; USA.

[224] Ireland.

[225] Finland; Ireland.

[226] USA.

[227] See on the difference Puerto Rico.

particularly the household home and assets. They may also concern compensatory payments.[228] Support obligations are more rarely applied,[229] as they still seem to be considered the exclusive core of the civil status acquired through marriage or registered partnership.[230]

Formation

Exempting from Mandatory Conditions?

Mandatory rules apply to the substantive and formal conditions to marry and, to a lesser extent, to enter into a registered partnership. Neither (future) spouses themselves nor third parties may exempt the spouses from respecting these conditions.[231] Not only the spouses but also State agents and all third parties concerned may usually petition the court to declare null and void a marriage concluded contrary to those conditions.[232]

Some substantive conditions apply in most legal systems, such as the conditions of competence and being of age – with a possibility of dispensation[233] – and impediments on the basis of kinship and affinity.

As a solemn contract, formal relationships must always be concluded before a public authority. This generally is the civil registrar, and in many systems[234] also or an agent of minister of recognised religious or philosophical organisations, at least for opposite-sex relationships.[235]

Adding Conditions?

Notwithstanding the abovementioned public interest in the formation of marriage and registered partnership, the fundamental freedom to marry or not to marry is linked to the contractual nature of entering into a marriage or a registered partnership.[236] In some legal systems, the freedom to marry is constitutionally

[228] For example in Finland.

[229] For example in Croatia.

[230] For example Denmark.

[231] See for example Argentina; Burundi; Canada (Common Law); Croatia; Québec; Ireland; Malaysia; Poland; Romania; Taiwan; Turkey; USA.

[232] For example Croatia; Québec.

[233] Abolished in The Netherlands in 2014.

[234] For example Brazil; Canada (Common Law); Croatia; Denmark; Greece; Portugal; Scotland; Spain.

[235] Denmark; Scotland.

[236] Germany; Portugal.

guaranteed.[237] All legal systems also particularly contain rules on the full and free consent of both spouses[238]: "*Consensus non concubitus facit nuptias*".[239] Some legal systems therefore strictly regulate marriage or dating agencies.[240]

However, contractual freedom is not accepted when it comes to limiting the freedom to marry or to enter into a registered partnership, or to adding substantive or formal conditions. This applies both to the (future) partners themselves and to third parties (see hereinafter).[241] One of the reasons is that the parties, by consenting, enter into a relationship which content is imperatively regulated and that they cannot freely dissolve.[242]

(Cont'd). (Future) Partners Betrothal is explicitly regulated in some legal systems,[243] always with the *caveat* that betrothal does not civilly oblige either party to subsequently enter into marriage (or a registered partnership). Article 267 **Romanian** Civil Code explicitly forbids penalty clauses in this regard.

Depending on the circumstances of the case, refusal of marriage following betrothal can give rise to a claim in damages. The same applies in legal systems where betrothal is not explicitly regulated.

In almost all legal systems, the parties cannot limit their or each other's freedom (not) to marry or to enter into a registered partnership by adding suspensive or resolutive conditions to their consent.[244] Such limitations are considered contrary to the right to self-determination.

Some legal systems explicitly prohibit this. Article 531 of the **Argentine** Civil Code forbids marriage, celibacy or divorce and separation as conditions to a contract. Under § 1311, 2nd sentence **German** Civil Code, the consent cannot be given under a condition or time limit. Article 45, 2nd sentence **Spanish** Civil Code thus provides that the condition, term, or mode of consent shall be void.

In other legal systems, such conditions would be considered null and void for public policy reasons, for example if they concern the payment of a dowry.[245]

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[237]For example France; Portugal.

[238]For example Belgium; Brazil; Cameroon; Germany; Spain.

[239]Scotland.

[240]France.

[241]Belgium; Canada (Common Law); USA.

[242]USA.

[243]Cameroon; Romania: art. 267 and 268 Civil Code; Scotland: s. 1 (1) Law Reform (Husband and Wife) (Scotland) Act 1984; Spain: art. 42–43 Civil Code.

[244]Belgium; Brazil; Greece; Poland; Portugal; The Netherlands; Turkey.

[245]Comp. Germany: Oberlandesgericht Hamm 13 January 2011, case N° I-18 U 88/10, *NJW-RR* 2011, 1197, retrieved at http://www.justiz.nrw.de/Bibliothek/nrwe2/index.php on 2 May 2014. Not so in Cameroon.

In **Cameroon**, conditions to a spouse's consent are however accepted, such as the condition of graduating or of giving birth to a living child.[246]

(Cont'd). Third Parties Third parties may want to directly or indirectly encourage or discourage a party to enter into a formal relationship, for example through conditions to a gift or bequest or as a resolutive clause in an employment contract. Conditions or clauses may also add substantive or formal conditions to entering into a formal relationship, for example the condition (not) to marry before reaching a certain age.

A marriage or registered partnership concluded contrary to the abovementioned conditions or clauses is perfectly valid if the imperative statutory conditions have been respected.[247]

However, in the "*external dimension*"[248] vis-à-vis the third party, the consequences of not respecting the conditions or clauses will differ. In some legal systems, the – mostly financial – sanctions may apply.[249] Article 268 (1) **Romanian** Civil Code for example explicitly provides for the restitution of gifts made in consideration of a betrothal or subsequent marriage, in case the engagement is broken. In most systems however, the abovementioned conditions or clauses would be considered to infringe on the freedom (not) to marry or to be otherwise contrary to public policy and will be null and void,[250] or at the least not enforceable. Some legal systems explicitly prohibit adding conditions and clauses with regard to marriage, for example in testaments.[251]

Content

Introduction

In all legal systems, marriage and registered partnership bring about legal consequences that are at least in part imperative. These consequences are more comprehensively regulated in continental legal systems and in systems based thereon, than in other systems. In either system, the mandatory regulation of the content of formal relationships is on its return. Now that divorce or partnership dissolution is socially more acceptable, partners rather opt for relationship dissolution than to litigate on their rights and obligations standing their formal relationship. Formal relationships

[246] Cameroon.

[247] England & Wales; Finland; Germany; Greece; Romania.

[248] Terminology in Romania.

[249] Belgium; Greece; Finland.

[250] France; England & Wales; Germany: Bundesgerichtshof 22 March 2004, case N° 1 BvR 2248/01, retrieved at https://www.bundesverfassungsgericht.de/entscheidungen.html on 2 May 2014; Romania.

[251] Argentina: art. 531 Civil Code; Portugal: art. 2233° Civil Code.

basically have become schemes that make accessible a minimal protection upon divorce or dissolution, which option is now more extensively regulated than formal relationships going concern.[252]

We will hereinafter look into private ordering of the personal resp. patrimonial mandatory content of formal relationships. We will not elaborate property relations between spouses (matrimonial property regimes) as such.

Personal Content

Overview In some legal systems, personal rights and obligations in formal relationships are not explicitly provided for.[253] The matter belongs to the private sphere of the partners. Other legal systems generally refer to a duty for the partners to establish a life community (*consortium omnis vitae*).[254] In some legal systems, this *consortium* is regulated more in detail, for example by obliging to spouses to cohabit, to fidelity and to assist each other. These regulations sometimes also contain some rights the partners may agree on, such as the location of their matrimonial home, a joint family name or the decision to have children or not.[255] The applicability of this imperative content may also depend upon the choice for a covenant marriage.[256] Is does not always equally apply to registered partners.[257]

No Opting Out or In Formal partners generally are not allowed to opt *out* personal rights and obligations wholly or even partly.[258] They would risk their marriage being considered null and void, for example as sham marriage not aimed at establishing a life community.

The parties' contractual freedom is limited to exercising the options provided for in the law.[259] Their agreement however would not be considered binding in civil law for the future, for example with regard to the decision to have children or not.[260] To consider such agreements binding would be an infringement on each partner's personality rights. Only the **Burundese** and **English** reports more convincingly refer to the parties' freedom to determine the content of their marriage; in **England &**

[252]Canada (Common Law); Germany; Scotland; USA.

[253]Canada (Common Law). This will also be the case in Argentina after a 2014 reform.

[254]Germany; Ireland.

[255]Belgium; Cameroon; Croatia; Poland; Québec; Romania; Spain; The Netherlands.

[256]For the USA for example in Louisiana: La. Rev. Stat. Ann. § 9:294.

[257]Belgium; France.

[258]For example Belgium; Croatia; France; Germany; Portugal; Québec; Spain; Turkey.

[259]For example Romania: art. 308 Civil Code.

[260]For example Germany: Bundesgerichtshof 21 February 2011, XII ZR 34/99, retrieved at http://www.bundesgerichtshof.de/DE/Entscheidungen/EntscheidungenBGH/entscheidungenBGH_node.html on 2 May 2014.

Wales the law contains no explicit personal rights and obligations. An arrangement whereby the spouses decide not to consume their marriage would therefore be valid if based on an objectively reasonable argument. Only in absence of such reason could the arrangement be found invalid for public policy reasons.[261]

One generally accepted exception to the above is a separation agreement, whereby the partners agree that they will not cohabit and regulate the financial consequences of that situation.[262] The **Cameroonian** report also refers to agreements between the husband and his different spouses on their alternating cohabitation.[263]

Informal partners are not allowed either to opt *in* all or some of the personal rights and obligations between formal partners. Such agreement would be considered an infringement on their personal liberty.[264] This view can make one think on the compatibility of the rights and obligations of *matrimonium* with the formal partners' freedom.

Formal partners also case cannot add personal rights and obligations to the legal ones.[265]

"Obligations That Do Not Oblige"[266] Personal rights and obligations generally are considered not to be enforceable or at least not enforceable in kind in case they are not executed.[267] They "*do not have a civil law character, but only family law features*".[268] Parties also may not contractually provide for enforceability. A partner anyhow could easily decide to withdraw from his obligations by petitioning for divorce.[269] Agreements on personal rights and obligations in any case are considered superfluous for the law itself already obliges the partners.[270]

The parties may make their arrangements binding upon each other *indirectly* by two means. Firstly, the non-respect of personal rights and obligations is indirectly taken into consideration by courts when deciding on the irretrievable breakdown of the marriage or registered partnership, and sometimes also when deciding on the consequences of divorce or dissolution of the partnership (see hereinafter).[271] For example, an ex-spouse can be excluded from post-divorce support on the basis of faulty behaviour. With a view of assessing that behaviour, the courts may take

[261] England & Wales: *Morgan v Morgan* [1959] P 92.

[262] Argentina; Germany; Ireland; Romania: art. 309 Civil Code; Spain; USA.

[263] Cameroon.

[264] Belgium.

[265] Portugal.

[266] Spain.

[267] Belgium; Canada (Common Law); Croatia; Finland; Greece; Ireland; Portugal; Scotland; Spain; The Netherlands; Turkey; USA.

[268] Poland.

[269] Croatia; Greece; Romania; Spain; Turkey.

[270] USA.

[271] Argentina; Canada (Common Law); USA.

into consideration documents in which the partners have explicitly formulated the expectations they have from their relationship, and in which they may have defined which behaviour would cause a breakdown of the marriage or registered partnership.[272] This may be considered a soft, indirect, form of private ordering. Secondly, the spouses may include "*Good Boy Bad Boy*"-clauses[273] that may serve as carrot or stick and that give access to or exclude from financial benefits, that can be used as liquidated damages clause, or even, where allowed, can serve as a penalty clause. The matter is of course controversial, for divorce and post-divorce support have long been considered the only applicable sanctions in case of non-respect of marital duties.[274] With the introduction of no-fault divorce and support, "*Good Boy Bad Boy*"-clauses may however have a new future.[275] Also, liquidated damages seem accepted in case of cohabitants, as a part of arrangements on the legal consequences of the exercise of their freedom to end cohabitation.

Patrimonial Content

Overview The right to consortium between the spouses and, to a lesser extent,[276] between registered partners, also implies the establishment of the household as economic entity. The law in almost all legal systems regulates the core of this entity, which regulation usually comprises the protection of the household home and furniture, a mutual financial support duty, a duty to contribute to the household expenses and several liability for those expenses. These rights and obligations are enforceable and the parties may not contractually deviate from their fundaments,[277] at the least not to limit them.[278] "*Good Boy Bad Boy*"-clauses (see above) are possible. Contractual freedom is more easily accepted in case of postnuptial or separation agreements in which the partners organise their separation. These agreements remain binding *rebus sic stantibus* (see hereinafter).[279]

Cohabitants are allowed to opt in the patrimonial protection[280] and, as mentioned above, the core protection sometimes also applies as a default regime in part.

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[272]Greece; Romania; USA.

[273]The term refers to "Good Boy Bad Boy", a 1985 video work by the American artist Bruce Nauman. The term "bad boy clauses" is used by the American reporters.

[274]For example for Spain: Tribunal Supremo 30 July 1999, ROJ STS 5489/1999 retrieved at http://www.poderjudicial.es/search/indexAN.jsp on 2 May 2014.

[275]Spain; Comp. Greece; Portugal.

[276]France; Québec.

[277]Belgium; Canada (Common Law); Denmark; Finland; France; Germany; Ireland; Poland; Québec; Scotland; The Netherlands: article 1:84 (3) Civil Code; Turkey; USA.

[278]Croatia.

[279]Ireland; USA.

[280]For example USA.

Non-financial Contribution to Household Expenses A topical issue is the duty of both partners to contribute to the household expenses according to their means. It is still mostly women who are homemakers and contribute to the household expenses in kind, whereas men mostly contribute in cash or in valuable contributions in kind such as providing a house, a car etc.[281] Whereas the latter contributions are economically valued, the homemaking is not.[282]

The default legal rules in many legal systems provide for an indirect compensation for the economic weaker party-homemaker upon the dissolution of the marriage or registered partnership, through the division of the matrimonial property (if any), through support obligations and, in some cases, through compensatory payments (see hereinafter).

The question however has arisen how formal partners can avoid one of them becoming economically dependent on the other or on compensatory measures. Particularly interesting could be to explicitly provide for a compensation of non-financial contributions in the household expenses standing the marriage or partnership, and not only at its dissolution, in a prenuptial agreement.

In some legal systems, such agreements are not accepted,[283] for the marriage or registered partnership itself obliges the partners to contribute in kind and this obligation may not be monetised; it is the classical argument of *status* versus contract. There is of course a remarkable difference with cohabitants, who are not obliged to contributions in kind and who may arrange for a market-oriented compensation of their contributions, as long as the compensation cannot be considered *pretium stupri* (see above). This issue really touches the very nature of family law as distinguished from the market on the one hand and from social security on the other hand.[284]

In other legal systems, formal partners are not allowed to conclude agreements on compensation while the marriage is going concern. Some of these systems by contrast generally provide for a compensatory payment upon the dissolution of the marriage,[285] and the parties are also allowed to settle at that stage. The same applies in other legal systems that *specifically* provide for compensatory payments for the partner who contributed to the business of the other partner.[286] In some systems, the general law on obligations, contracts and companies applies and the existence of a business partnership *sui generis* is accepted.[287]

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[281] See extensively Taiwan.

[282] Italy.

[283] For example Greece; The Netherlands.

[284] Italy.

[285] Finland; France; Germany; Greece; Ireland; Québec; Romania: art. 390 Civil Code; Spain; Taiwan.

[286] For example Finland: § 64 Marriage Act; Romania: art. 328 Civil Code.

[287] Belgium; France; Germany: Bundesgerichtshof 9 July 2008, XII ZR 179/05, BGHZ 177, 193, § 27; Portugal.

Only a minority of legal systems allow registered partners to conclude agreements on the compensation of their contributions in kind in the household, standing the relationship. For example,[288] article 1:84 section "Substantive family law" of the **Dutch** Civil Code explicitly provides that the spouses may derogate from the default rules on household expenses in a written agreement. Article 1003-1 of the **Taiwanese** Civil Code provides that

> [t]he payments for living expenses of the household will be shared by the husband and the wife according to each party's economical ability, household labor or other conditions unless otherwise provided for by law or mutual agreement.

The **Taiwanese** and **Italian** reports however point at the risk of bargaining inequalities, a.o. based on gender.

In some systems, partners can rely on agreements on the organisation of the household, whereby they had agreed that one of them is the homemaker and cannot be expected to gain a professional income.[289] These agreements are considered binding until a change of circumstances occurs.

Dissolution and Its Consequences

Dissolution

Overview: The Right to Divorce Divorce law has been liberalised throughout the world during the last decades. Firstly, no-fault divorce has by and large replaced fault divorce as foremost ground for divorce. No-fault divorce is generally available under the generic denominator "*irretrievable breakdown of the marriage*",[290] which can be proved or which is presumed after a period of separation or in case of a common request or a request by one spouse that is accepted by the other. In some legal systems, fault divorce subsists either beside no-fault divorce[291] or under the umbrella of the irretrievable breakdown of the marriage, as proof thereof.[292] Secondly, 'divorce-on-demand' has been introduced, that is: the conditions under which divorce is available upon simple request have been relaxed.[293] Divorce-on-demand by one spouse is more generally available after a period of separation or of reflection. These periods are shorter or not applicable in case the spouses jointly petition for divorce or in case one spouse accepts the request of the other. Divorce

[288] Also see Cameroon; Finland; Malaysia; Portugal; Turkey.

[289] For example Belgium: art. 301, § 3, para 2 and § 5 Civil Code; Germany.

[290] Belgium; Canada (Common Law); Croatia; England & Wales; Finland; Germany; Greece; Ireland; Malaysia; Portugal; The Netherlands; Scotland; USA.

[291] For example Puerto Rico; Taiwan.

[292] For example Belgium; Canada (Common Law); Québec; Scotland; USA.

[293] Belgium; Croatia; Denmark; Finland; Spain; The Netherlands. This will also be the case in Argentina after a 2014 reform.

by mutual consent is only available as separate ground for divorce in some legal systems[294] and, where it is possible, spouses are not always expected to reach an agreement on all the consequences of their divorce. Only some legal systems allow one spouse to apply for divorce without further conditions once the spouses have been married for a minimum period. Thirdly, the formal conditions for divorce have been relaxed. In a growing number of legal systems, 'out-court divorce' is now available either before the civil registrar or before the notary public.[295] The conditions may differ according to whether or not the spouses have minor children and to whether or not they have reached an agreement on the consequences of the divorce.[296]

Only the **Burundese**, **Croatian** and **Polish** reporters refer to so-called negative conditions for divorce. In some cases the courts may refuse or postpone the divorce in the interest of the children, the other spouse or for public policy reasons.

The conditions for the dissolution of a registered partnership generally are more liberal than for divorce,[297] and may have caused the liberalisation of divorce too.[298]

In some legal systems, separation from bed and board is still available. We will not elaborate this little used regime.

Private Ordering The increasing role of self-determination notwithstanding, contractual freedom with regard to the substantive and procedural conditions of dissolution of a formal relationship is rejected in unison[299]: "*divorce is regulated by law, not by the spouses*".[300] This applies both to the partners and to third parties.

(Cont'd). Partners The parties themselves are not allowed to either give up or condition their freedom to divorce under the legal conditions. This is for example explicitly forbidden in art. 230 of the **Argentine** Civil Code. In many legal systems they may however waive their right to apply for divorce on a certain ground *ex post*, for example by pardoning the other partner for his misconduct.[301]

Three states in the **USA** have introduced forms of covenant marriage, which precludes the spouses from applying for divorce on certain grounds. The **USA** report however does not consider covenant marriage as a form of contractualisation. The

[294] It is for example in Belgium; Croatia; Greece; Malaysia; Puerto Rico; Romania; Taiwan.

[295] Brazil; Denmark; Romania; Taiwan; The Netherlands.

[296] Denmark; Romania. Comp. Québec and The Netherlands with regard to the registered partnership.

[297] Belgium; The Netherlands.

[298] Spain.

[299] Brazil; Burundi; Canada (Common Law); Cameroon; Denmark; England & Wales; Finland; France; Germany: Bundesgerichtshof 9 June 1986, *BGHZ* 97, 304; Greece; Ireland; Poland; Portugal; Romania; Scotland; Spain; Taiwan; The Netherlands; USA.

[300] Romania.

[301] Germany; Greece; Romania.

parties' freedom is limited to opting in a legal regime, which they cannot modify.[302] The system of covenant marriages is interesting with a view of accommodating religious or philosophical minorities and could be considered as legal pluralism *light*. The **European Court of Human Rights**[303] and the **Argentine** Supreme Court[304] however have rejected such forms of pluralism on the ground that the States' obligation to protect individual freedom outweighs the individual's right to waive his freedom.

One could defend the possibility for formal partners to agree on liquidated damages or even penalty clauses (where allowed[305]) in case they would use their right to divorce under conditions or within a period further defined.[306] It is accepted that cohabitants may agree on such clauses, as long as they do not limit their freedom to end cohabitation.[307] Since divorce in many systems no longer can be considered a sanction, formal partners may also want to privately arrange the exercise of their right to dissolve the relationship in the way cohabitants may.

The other way round, parties cannot exempt each other from the legal conditions for divorce.[308] As mentioned above, the explicit formulation by partners of their expectations from their relationship may however be taken into account by the courts when assessing the irretrievable breakdown of the marriage. This is a soft form of private ordering.

(Cont'd). Third Parties With regard to the legal relationship with third parties, the abovementioned findings with regard to the formation of formal relationships apply *mutatis mutandis*.[309]

Consequences of Dissolution

Overview In most legal systems, a "*multi-pillar system*"[310] is applicable to regulate the legal consequences of divorce or dissolution of the registered partnership.[311] Different schemes provide for

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[302] USA.

[303] *Şerife Yiğit v Turkey*, (App. 3976/05), 2 November 2010 [GQ], ECHR and also see *Refah partisi and others v Turkey*, (App. 41340/98, 41342/98, 41343/98 and 41344/98), 13 February 2003 [GQ], ECHR.

[304] Argentina: Corte Suprema de Justicia de la Nación 5 February 1998, S.526.XXVI, retrieved at http://www.csjn.gov.ar/ on 22 October 2014.

[305] This is not the case for example in Finland; Germany: Bundesgerichtshof 19 December 1989, *NJW* 1990, 703.

[306] Portugal.

[307] Belgium.

[308] For example Argentina: art. 230 Civil Code.

[309] France.

[310] Germany.

[311] Belgium; Croatia; Finland; France; Poland; Romania; USA.

– property division – albeit that the human capital such as earning capacity in which the other partner may have invested usually is not included in property,[312]
– financial support,
– in some systems also compensatory payment,[313]
– pension splitting[314] and
– the rights on the household home and assets[315]
– in only a few systems damages.[316]

Those schemes are applied independently from each other, although the outcome of one scheme may of course influence the outcome of another one.[317]

In other legal systems, the aforementioned issues are dealt with as a whole in one scheme, for example of ancillary relief. The form of ancillary relief may be adapted to the specific case.[318]

Registered partners in a 'mini-marriage' and cohabitants in principle contractually arrange the consequences to their break-up.[319] As mentioned above, their situation nevertheless tends to institutionalise.

Contractual Freedom – Object Formal partners in most legal systems are fairly free to organise their shares in *matrimonial property*; the matter belongs to *patrimonium*.[320]

The same contractual freedom does not apply to a "*core*"[321] of rights and obligations that aim at compensating solidarity from the past and at safeguarding solidarity for the future. Particularly financial support and compensatory payments belong to a *matrimonium* on which no or little contractual freedom exists. In **English** case law, "*opting out of the fairness-strands of needs and compensation*"[322] is not easily accepted, even though private arrangements are easily allowed as long as those thresholds are not met.

Besides and as mentioned above, the general law of obligations and contracts is applied where *matrimonium* does not fairly compensate transfers in property or the contribution in kind by one partner to the wealth increase of the other. This may be particularly so in case the partners have opted for a separate property regime.

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[312]Italy.

[313]Finland; France; Germany; Greece; Ireland; Québec; Romania: art. 390 Civil Code; Spain; Taiwan.

[314]Germany; The Netherlands: art. 1:155 Civil Code.

[315]Germany.

[316]France: art. 266 Civil Code; Taiwan: art. 1056 Civil Code.

[317]Canada (Common Law); Finland; France; Poland; Portugal. More reluctantly: Denmark.

[318]England & Wales; Ireland; Scotland.

[319]Belgium.

[320]Scotland; USA.

[321]Germany: "*Kernbereich*".

[322]England & Wales.

(Cont'd) – Time Differences exist between legal systems regarding the moment from which partners may enter into an agreement. Most legal systems, but not all, allow formal parties to conclude prenuptial (or pre-registered partnership) agreements in which they may agree on both *patrimonium* and *matrimonium* rights and duties, even if they cannot wholly oust the courts' jurisdiction, at least with regard to *matrimonium* rights and duties.[323] More contractual freedom is allowed once the parties have entered into a formal relationship. They may then conclude postnuptial agreements, which mostly aim at organising a separation and then also are called separation agreements.[324] Only in some legal systems[325] parties are only allowed to conclude a divorce or dissolution settlement contract upon the dissolution of their relation.[326]

Within legal systems, differences also apply according to the object of the agreement. For example, agreements on property may be concluded already in prenuptial agreements, whereas agreements on support and compensatory payments are only possible in the framework of a divorce settlement.[327] Another example is the applicability of formal requirements to 'early agreements'.[328] Such requirements aim at preventing the weaker party from waiving his rights untimely. Once married or partnered, the partners are in fiduciary or confidential relationship and their transaction will not be considered as at arm's length.[329] Some legal systems seem to evolve towards a larger contractual freedom with regard to pre- and postnuptial agreements, to which court scrutiny will however apply at the time of the divorce (see hereinafter).[330]

(Cont'd) – Scrutiny Another way of protecting the weaker party is *ex ante* and *ex post* court scrutiny and jurisdiction, which we will elaborate in section "Court jurisdiction".

Court Jurisdiction

Plan

In section "Substantive family law", we have investigated private ordering in substantive family law. This paragraph concerns private ordering of the courts'

[323]For example England & Wales; Germany; USA.

[324]Canada (Common Law); Malaysia; Scotland; Spain: art. 90 Civil Code; USA.

[325]For example Belgium; Canada (Common Law); France; Québec: art. 423 Civil Code.

[326]In general: USA.

[327]For example Malaysia: s. 80 Law Reform (Marriage and Divorce) Act 1976; Québec; Romania; The Netherlands.

[328]Germany; Spain.

[329]USA.

[330]For example Germany; England & Wales; Spain.

jurisdiction with regard to the 'process' (Section "Plan") and 'product' (Section "Process: ADR") of conflict resolution in family law. The 'process' primarily concerns the courts' versus private jurisdiction to resolve family disputes where we will focus on Alternative Dispute Resolution (ADR). The 'product' refers to court scrutiny of the outcome of the process, both at the time of its execution in an agreement and at the time of its performance.

Process: ADR

General Remarks

ADR and Family Disputes

ADR is a form of contractualisation of the administration of justice – conceived as privatisation, this is contractualisation between citizens and not between a citizen and state courts.

In many legal systems ADR techniques are regulated particularly in family matters, with a view to fostering the intrinsic continuity of family relationships, even after the break-up of a couple.[331] The concern for continuity makes the receptiveness for ADR techniques less paradoxical than it seems in the light of family law exceptionalism.[332]

Beside ADR by a professional, the **Burundese**, **Cameroonian** and **Malaysian** reporters also refer to ADR by the family council or the *Bashingantahe* or *penghulu* (head of village).

Notwithstanding the legislatures' preference for ADR, many reports stress that ADR-techniques are not available in *status* matters[333] – with the exception of divorce (by mutual consent) in most legal systems and parenthood (particularly through surrogacy agreements) in some legal systems. But disputes on the *content* of the relationship between parents and children and between partners are preferably resolved through ADR techniques. Again, regulation of ADR techniques exists rather in the context of the dissolution of family formations than in the assumption of going concern.

We will hereinafter first draw the general framework of ADR techniques and subsequently consider their promotion by the State.

[331] Cameroon.

[332] Comp. USA.

[333] See more generally Greece; Turkey.

Legal Framework of ADR

Legal Framework

Some legal systems do not explicitly regulate ADR techniques (in the context of family disputes).[334] Other legal systems provide a legislative framework aiming at promoting the use of ADR techniques[335] or at the least charging the (family) courts to take into account agreements that parties may have reached through ADR.[336] The different ADR techniques represent a continuum, with blurred lines

- between the resolution of the dispute by the parties themselves or with the help from, or even by, a third party – for example Med-Arb[337] – and
- between out-court and in-court techniques.

Dispute Resolution by (Expert-Assisted) Parties Themselves

The least intrusive form of ADR is *attorney assistance* during the parties' negotiations. This technique is not explicitly regulated in most legal systems.[338] In some legal systems, the assistance by an attorney will be taken into account by the courts when scrutinising the agreements *ex post* (see hereinafter section "Process: ADR".).[339]

A somewhat more intense ADR technique is *collaborative law* (*convention de procedure participative*), for which a legal framework is available in the **French** civil code, particularly for spouses with a view of divorcing or separating (art. 2067 Civil Code). Collaborative law is also informally applied in other legal systems.[340]

Dispute Resolution with the Assistance of a Neutral Third Party

With regard to ADR with the assistance of a neutral third party, a distinction is usually made between

- mediation and conciliation on the one hand, and
- out-court and in-court ADR on the other hand.

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[334]For example England & Wales; remarkably also not in The Netherlands, which nevertheless "*considers itself as a leading country with regard to mediation*".

[335]For example Belgium; France; Portugal; Romania.

[336]Also see for France: art. 373-2-11° Civil Code.

[337]Canada (Common Law).

[338]Belgium; Finland.

[339]Canada (Common Law).

[340]Belgium; Germany; Québec; The Netherlands; USA.

The denominator *mediation* usually reflects a merely facilitating role of the third party, who will not himself provide the parties with advice and will not propose solutions himself. On the contrary, a *conciliator* may assume the latter roles. Out-court ADR refers to ADR which is applied outside the context of a pending action by a third party who is not a member of the court or its supporting services. As mentioned, the lines between these different forms are sometimes blurred.

In some legal systems, "*pre-trial* mediation"[341] is not only available on the market, but is also facilitated through specialised social welfare[342] or court services, sometimes at a reduced rate[343] or even free of charge.[344] *Pending court action*, some legal systems

- regulate the referral of the parties to mediation by the court,[345]
- provide in-court mediation services,[346]
- organise specific case management or settlement hearings[347] or even
- provide in-court mediation by specialised chambers or judges,[348] assisted by experts.[349] The specialised judge or chamber will not judge the case when no settlement is reached.

The action will be stayed awaiting the outcome of the mediation.[350] **Finland** and **Germany** also regulate *post-trial* "*enforcement mediation*" with a view of avoiding new court actions. For example, parties may appeal to specialised (in-court) mediation services, linked to social welfare or court services, in case of non-compliance with a visitation order concerning minor children in **Germany**.

Conciliation by (family) courts seems fairly widespread. In a first instance, a conciliation hearing or referral to a conciliator may be aimed at *reconciliation* and at getting the family 'back on track'.[351] Once family proceedings have started, a conciliation hearing usually is the (mandatory) first step towards resolving the dispute.[352] Other available forms of conciliation are comparable to in-court mediation be it[353] or not[354] by a specialised chamber or judge.

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[341] Portugal.

[342] Brazil; Croatia; Denmark; Ireland.

[343] Canada (Common Law); USA.

[344] For example Argentina; Denmark; Puerto Rico; Québec: in case there are minor children involved. Comp. Finland.

[345] For example Belgium; England & Wales; France; Germany; Poland; The Netherlands.

[346] For example Brazil; Canada (Common Law); Denmark; The Netherlands.

[347] Canada (Common Law); Ireland.

[348] For example Belgium; Canada (Common Law); Denmark; Québec.

[349] Finland.

[350] For example Denmark; Ireland; Portugal.

[351] Burundi; France; Greece; Malaysia; Poland.

[352] For example Cameroon; Canada (Common Law); Belgium; Finland; Germany; Québec.

[353] Belgium; Finland; Germany; Taiwan.

[354] France: art. 252 and 373-2-10 Civil Code; Poland.

Third Party Dispute Resolution

Resolution of family disputes by a third party may be achieved through arbitration,[355] or through a binding advice (*bindend advies*). The latter is not enforceable as an arbitral award and must be included in a settlement agreement (*vaststellingsovereenkomst*[356]) by the parties. Only the **Dutch** report refers to binding advice as ADR-technique and to the explicit regulation of settlement agreements in the civil code.

In view of the *status*-contract divide, some legal systems explicitly exclude family disputes from arbitration.[357] In other legal systems, arbitration is explicitly made available, albeit with the necessary safeguards for the weaker parties, for example in **Canada (Common-Law)** in order to avoid '*Shari'ah* awards' that are incompatible with state law.[358] In most legal systems, no explicit provisions on arbitration in family matters exist. Some reports state that arbitration is not available since parties may not freely dispose of their *status*.[359] These reports do not seem to consider the potential of arbitration in disputes concerning not *status* as such, but the content of family formations, such as maintenance.[360] Arbitration seems possible in that respect and all in all it is emerging in family disputes, even in absence of explicit regulation.[361] In South **Germany**, a specific Family Arbitration Court was created in 2006. Arbitration still is more easily accepted in family property regimes than it is with regard to personal rights and duties, such as contact and visitation rights.[362]

Promotion of ADR

Information on ADR

ADR in family matters is promoted in different phases of family disputes. In some legal systems, social welfare services will already provide information to their clients.[363] In other legal systems, also legal professionals – particularly attorneys – are obliged to provide information on ADR techniques.[364] Once a petition to court

[355] USA.

[356] The Netherlands: art. 7:900–906 Civil Code.

[357] Brazil: art. 852 Civil Code; Greece; Romania: art. 542 Code of Civil Procedure; Québec: art. 2639 Civil Code.

[358] Canada (Common Law).

[359] Croatia; Finland; France; Portugal; Taiwan.

[360] See also Greece.

[361] England & Wales; Finland; Germany; Scotland; The Netherlands.

[362] Turkey.

[363] Denmark; Finland.

[364] Canada (Common Law); England & Wales; Québec.

is made, some legal systems regulate information on ADR by the Civil[365] or Court Registrar.[366] Finally, many legal systems impose on the courts themselves to inform and to propose ADR to the parties at the first hearing.[367]

Mandatory ADR

Some legal systems have adopted norms on mandatory ADR.

Firstly, an ADR-clause may have been agreed between the parties, be it or not *ad hoc*. If that is the case, some legal systems require the parties to at least attempt ADR and will stay proceedings to that end.[368] In other legal systems, ADR-clauses are only *indirectly* imposed on the parties, for example by applying liquidated damages[369] or penalty clauses or by imposing the costs of court proceedings on the non-compliant party.[370] Other legal systems provide *no direct or indirect* enforcement of ADR-clauses,[371] for mandatory ADR is not considered desirable and ousting court jurisdiction is not accepted in family matters. The ADR-clause is merely a gentlemen's agreement in those systems.[372]

Secondly, in some legal systems mandatory ADR applies even if the parties did not agree on an ADR-clause. For example in **Germany**, applicants to the court must explain whether or not they tried ADR and whether or not ADR is contraindicated in the case at hand. Other legal systems impose that parties must have been informed on ADR by a professional,[373] or have attended an information session[374] or even had a first meeting[375] with a mediator either as a prerequisite for petitioning the court, or upon court order. A minority of legal systems furthermore obliges an attempt to effectively resolve their dispute through ADR in some cases.[376]

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[365] Portugal: art. 1774 Civil Code.

[366] Belgium.

[367] Belgium; England & Wales; France; Ireland; Poland; Portugal: art. 1774 Civil Code and art. 147°-D Act 314/78 of 27 October 1978, retrieved at http://www.pgdlisboa.pt/ on 9 June 2014; Puerto Rico; Turkey. Comp. Germany.

[368] Canada (Common Law); Belgium; Germany.

[369] For example in Germany.

[370] Comp. Germany.

[371] Greece; Ireland; Romania. Comp. Germany.

[372] France.

[373] Croatia; Ireland; Québec.

[374] Argentina; Canada (Common Law); England & Wales; Germany; Poland; Romania; Québec.

[375] Croatia; France: art. 255, 2° (with regard to divorce) and 370-2-10 (with regard to parental responsibilities) Civil Code; Puerto Rico; Taiwan.

[376] Argentina; Cameroon; Canada (Common Law); France: on an experimental basis Act n° 2011–1862, retrieved at http://www.legifrance.gouv.fr/ on 9 June 2014; Malaysia; Taiwan; USA.

Mandatory ADR never applies when it is manifestly contraindicated, for example in case of urgency proceedings or for other legitimate reasons that corrupt equal bargaining positions such as domestic violence and child protection cases.[377] Other legal systems reject mandatory ADR altogether for it is considered undesirable.

Mandatory ADR seems a negation of private ordering anyhow.

Product: Court Scrutiny

A Priori Scrutiny

Enforceability Without Court Scrutiny

The product of the ADR process is as enforceable as a judgment or court order in some legal systems. This is mostly the case for *arbitral awards*[378] and for settlement agreements in the form of a *notarial deed*.[379] The intervention of an arbitrator or a notary public may be considered as hallmark that guarantees that both process and product have been monitored. In other systems, the enforceability also applies to other agreements (that are recorded).[380]

Enforceability Subject to Court Scrutiny

In most legal systems however, *all* family agreements, including arbitral awards,[381] need to be approved (or homologated or ratified or included in a consent order or granted leave for enforcement) by an administrative[382] or judicial body in order to be enforceable.[383] This is particularly (but sometimes only)[384] so for agreements concerning (custody of) minor children.[385] As the **Irish** report puts it:

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[377] Argentina; Canada (Common Law); Taiwan; Turkey; USA.

[378] Canada (Common Law); Germany; Greece; Ireland; Portugal.

[379] Belgium; Croatia.

[380] Canada (Common Law); Denmark; Finland; England & Wales; Germany; Ireland; Portugal; Romania; Scotland; Taiwan.

[381] For example England & Wales insofar children are concerned.

[382] Denmark; Finland.

[383] For example Cameroon; Belgium; Brazil; England & Wales; France; Greece; Ireland; Poland; Portugal; Puerto Rico; Québec; The Netherlands; Turkey. In Malaysia, this is dependent on what the court may have determined.

[384] For example Germany: § 156(2) Act on Family Proceedings (FamFG), retrieved at http://www.gesetze-im-internet.de/ on 11 June 2014.

[385] Belgium; Brazil; Canada (Common Law); Croatia; Finland; Portugal; Romania; Turkey; USA. This is not necessarily so in Poland.

> lawmakers have long asserted the importance of the state's capacity to retain ultimate control over the resolution of family disputes. Although this conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract, such state involvement is permitted and even encouraged in family law given the underlying and inescapable issues of public policy that arise.[386] [. . .] In particular the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit.

We will now elaborate the different levels of court scrutiny that apply, depending on the process applied and on the subject matters of the agreement.

(Cont'd). Process Applied In order to promote ADR, some legal systems provide for proceedings *light* or for a lower level of scrutiny for the approval of family agreements achieved through ADR compared to other agreements.[387] This is particularly and naturally the case for agreements reached through in-court ADR.[388] In **Romania**, a whistle-blower's function applies to the out-court mediator: he must petition the court in certain circumstances in which the parties do not have equal bargaining positions or in which the child's interest is in danger.[389]

Different standards of scrutiny may also apply according to the moment on which the agreement was reached: closer scrutiny for example may apply to a prenuptial agreement than to a separation agreement.[390] Such different standards do not apply in all legal systems.[391]

(Cont'd). Subject Matters The administrative or judicial body will always screen the agreements for infringements of the public policy ('*ordre public*') or *bona mores*.[392] In some legal systems, this is the only scrutiny applying in order to receive leave for enforcement of an arbitral award.[393]

Agreements are not always further scrutinised insofar they concern the adults involved. In some systems, no scrutiny at all applies (to certain agreements).[394] In

[386]For example in the context of a marital breakdown dispute in *The State (Bouzagou) v Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 426 Barrington J noted that in the absence of an agreement between the husband and wife, the task of reconciling the rights of the individual members of the family was a matter for the courts to determine.

[387]Cameroon; Belgium; Denmark; France: Decree n° 2010–1395 of 12 November 2010, retrieved at http://www.legifrance.gouv.fr/ on 9 June 2014; Romania; Turkey.

[388]For example Belgium; Germany.

[389]Romania. Comp. Turkey.

[390]Québec.

[391]Scotland.

[392]Brazil; Canada (Common Law); England & Wales.

[393]Belgium; The Netherlands.

[394]Belgium; The Netherlands.

other systems, at least marginal scrutiny applies.[395] For example in **France**, the court will assess whether the interests of both spouses are preserved[396]; that is: whether the agreement is equitable.[397] Sometimes, scrutiny will be stricter insofar the agreements concern personal rights – particularly *status* – and support,[398] compared to agreements on property rights. In some legal systems, not only the product but also the process will be assessed, particularly whether the parties had equal bargaining positions and freely consented.[399] One of the assessment criteria may then be whether or not the parties have received independent legal advice.[400]

The highest level of scrutiny applies to agreements concerning minor children, and particularly with regard to personal aspects such as custody and visitation.[401] A continuum seems to apply with regard to the applicable scrutiny. At the one end, a *positive standard* applies, under which the courts just *may*,[402] but sometimes *must*,[403] take into consideration private arrangements that according to the court (evidently, in case marginal scrutiny applies) serve the best interest of the child.[404] At the other end of the continuum, a *negative standard* applies, under which the courts may only set aside such arrangements in case they (evidently) do not sufficiently preserve the best interest of the child or are (evidently) contrary to the best interests of the child.[405] In some legal systems, both standards are used for different agreements. However different the starting point, the outcome of both approaches seems comparable nevertheless. In some legal systems, the court will also scrutinise the process, for example the parents' free consent.[406]

(Cont'd). Consequences Usually, the administrative or judicial body will refuse to approve the agreement in case it infringes the applicable benchmark, and remit it to the parties[407] or the arbitrator.[408] Only rarely would a state body also have

[395] Finland; Puerto Rico; Scotland; Spain; Turkey; USA.

[396] France: art. 268 Civil Code.

[397] France.

[398] Finland.

[399] France: art. 232 Civil Code; Portugal. On gender inequalities see Italy; Taiwan.

[400] Canada (Common Law).

[401] For example England & Wales; Finland; Scotland.

[402] For example Finland; France; Greece; Portugal.

[403] France; Poland.

[404] Croatia; France; Québec.

[405] Belgium; England & Wales; France: art. 232 and 373-2-7 Civil Code; Germany; Ireland; Portugal; Romania; The Netherlands: only marginal scrutiny; Taiwan.

[406] France.

[407] Turkey.

[408] Canada (Common Law).

jurisdiction to modify the agreement at the applicant's request[409] or even *ex officio*.[410]

Controversy exists with regard to the binding effect of agreements that were not approved notwithstanding a requirement thereto.[411]

A Posteriori Scrutiny

Context Courts – or rarely administrative bodies – may be required to scrutinise a family agreement *ex post*. The courts' jurisdiction in this regard is very differently conceived throughout the world. Moreover, the courts' jurisdiction in family matters does not necessarily mirror a legal system's stance with regard to the binding effect of contracts in general private law. In some legal systems, the courts' jurisdiction to nullify or modify a family agreement is quite large compared to general contract law.[412] The traditional *status*-contract divide justifies such large competence. Yet in other legal systems, the courts' competence is quite limited vis-à-vis contract law in general.[413] One of the reasons is that the tenets of general contract law are more difficult to apply to family agreements. Unconscionability in divorce settlements is one example. Consideration can only be assessed taking into account the specific context of the case; the court *inter alia* may take into account that the unequal division of property is the price one spouse pays for a swift divorce or in order to avoid support payments.[414]

Levels of Scrutiny Different levels of court scrutiny apply according to whether the petition targets the circumstances of the *execution* of the contract, the circumstances of the *performance,* or the content of the agreement with regard of the *children*. A two-step standard applies in different legal systems with regard to the judicial review of an agreement on the basis of unfairness (in the broad sense) at the time the execution ('*sittenwidrigkeit*') or of the performance ('*treuwidrigkeit*') of the agreement.[415] In **Canada (Common-Law)**, this is the *Miglin v Miglin*-enquiry,[416]

[409]Canada (Common Law).

[410]Croatia; Malaysia: s. 80 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014: approval *subject tot conditions* is possible.

[411]For example Poland.

[412]Canada (Common Law): *Rick v Brandsema* 2009 SCC 10, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.

[413]Belgium; France; Germany; Scotland; The Netherlands.

[414]Belgium: Cass. 9 November 2012 (2 judgments), Justel N-20121109-7 and N-20121109-9, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014.

[415]England & Wales; Germany; The Netherlands: art. 1:158 Civil Code. Also see Taiwan: art. 1030–1 Civil Code.

[416]Canada (Common Law); Québec and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.

even though the Canadian Supreme Court may have determined a lower threshold for judicial review meanwhile.[417] In **England & Wales**, *Radmacher v Granatino* currently is the lead case, in which *needs* and *compensation* were determined as most important strands under the fairness test.[418] In **Germany**, the *Bundesverfassungsgericht* and the *Bundesgerichtshof* developed the two-step approach in subsequent cases on the basis of the Constitutional right to self-determination. They have determined two thresholds for judicial review: one procedural, which "triggers" judicial review, and one substantive, serving to determine the minimum required solidarity between ex-spouses. Hereto, an order of rank has been drawn of rights and obligations that concern the fundaments of post-divorce solidarity ('*Kernbereich*'). The more the agreement deviates from that *Kernbereich*, the higher the level of scrutiny will be.

Scrutiny of the Execution of the Agreement

Public Policy and Good Morals First, an assessment of the possible infringement of the public policy ('*ordre public*') or *bona mores* applies, for example with a view of nullifying a '*Shari'ah*-agreement' that is incompatible with state norms.[419]

No *consensus ad idem* A family agreement may be (partly) declared null and void on the basis that there was no *consensus ad idem* at the time of its execution. As mentioned above, this is not necessarily a one-to-one application of general contract law. Controversy for example has arisen over the effect of the nullification of a divorce settlement on the divorce itself.[420] The importance of stability of family relations has also been stressed in this regard.

One widespread ground for (partly) nullification is *abuse of circumstances and excessive benefit*.[421] Both conditions need to be fulfilled: inequality must exist both in the process and in the outcome.[422] On the one hand, abuse of circumstances refers to the unequal bargaining position of one party during the process (arm's length

[417]Canada (Common Law): *LMP v LS* 2011 SCC 64, retrieved at http://scc-csc.lexum.com/ on 19 June 2014.

[418]England & Wales: *Radmacher v Granatino*, UKSC 2009/0031, retrieved at http://www.supremecourt.uk/decided-cases/ on 19 June 2014.

[419]Canada (Common Law).

[420]Belgium: Cass. 16 March 2000, Justel N-20000616-10, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014; France: Cass. 6 May 1987, N° 87–10107, retrieved at http://www.legifrance.gouv.fr/ on 11 June 2014.

[421]Belgium: Cass. 9 November 2012 (2 judgments), Justel N-20121109-7 and N-20121109-9, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014; Brazil; Canada (Common Law): s. 93(3)(b) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014 and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Greece; Italy; Québec; Spain; Taiwan; The Netherlands; Turkey.

[422]Finland; Germany; Scotland: *Gillon v Gillon (No 3)* 1995 SLT 678 *at* 681 C-E.

principle). Such inequality will however only be taken into account in case it has led to excessive benefit for the other party or an excessive burden for the one party. On the other hand, also the unequal outcome as such is not sufficient; it must have been caused by abuse of circumstances – even though it seems that some courts accept a presumption to that effect. Unequal bargaining positions may be difficult to assess *ex post* otherwise than on the basis of the unequal outcome.[423] The inequality of the outcome moreover must be assessed at the time of the execution, without hindsight,[424] and not at the time of the performance of the agreement.

Other grounds on the basis of which *consensus ad idem* may be challenged are the fiduciary duty of disclosure[425] and the lack of qualitative assistance by an expert.[426]

Disrespect of ADR-Principles The validity of the agreement may also be disputed on the ground of non-respect of the principles of ADR, for example in case the mediator has been partial or did not safeguard equal bargaining positions between the parties.[427]

Scrutiny of the Performance of the Agreement

Context In cases where scrutiny of the execution of an agreement does not offer a solution, a party may also apply for judicial review on the basis of scrutiny of the *performance* of the agreement. Finality of agreements is one of the fundamentals of contract law. Exceptions to the principle of finality are however accepted in all legal systems, albeit to a quite different extent.[428]

Public Policy and Good Morals Public policy reasons may always justify the review of a family agreement, for example in case one of the parties would remain or become dependent on social security or social assistance regimes.[429]

Hardship In other legal systems, judicial review of an agreement is possible only in case of hardship, for example because performance would be unreasonable and unfair or contrary to good faith or because the agreement has become significantly

[423] Germany.

[424] Scotland.

[425] Canada (Common Law): s. 56(4)(a) Family Law Act RSO 1990, c F3, retrieved at http://www.e-laws.gov.on.ca/ on 11 June 2014 and s. 93(3)(a) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014; England & Wales; Ireland; Scotland.

[426] Québec: *Pelech v Pelech* [1987] 1 SCR801, retrieved at http://scc-csc.lexum.com/ on 11 June 2014 and *Hartshorne v Hartshorne*, 2004 SCC 22, retrieved at http://scc-csc.lexum.com/ on 2 May 2014; Scotland: *Gillon v Gillon (No 3)* 1995 SLT 678 *at* 681 C-E.

[427] Romania.

[428] See in general USA.

[429] Canada (Common Law): s. 33(4)(b) Family Law Act RSO 1990, c F3, retrieved at http://www.e-laws.gov.on.ca/ on 11 June 2014; Finland; Germany; Ireland; Québec; Spain; Turkey.

unfair.[430] Sometimes the courts will also take into account the circumstances of the case at the time of the execution of the agreement in order to assess its unfairness at the time of the performance.

Rebus sic stantibus In most legal systems, hardship is not (always) required. The doctrine of fundamental change of circumstances (*clausula rebus sic stantibus*) is easily accepted for some family agreements (between adults,) particularly concerning personal rights, support and compensatory payments, yet less or even not for agreements on property.[431] Variability of agreements in function of changed circumstances is generally considered fundamental, particularly for maintenance obligations.[432] The **Italian** report explains that this is the case because agreements between partners

> are presumed to be grounded in solidarity rather than in the allocation of risk.

Hence in some legal systems, the courts *in every case* maintain jurisdiction to award or vary support, whichever settlement the parties may have reached.[433] Conditions generally applicable are that the change of circumstances must be unexpected or unforeseeable and anyhow must occur independent from the will of the parties. In some legal systems, a strict view is taken on change of circumstances.[434] For example in *Miglin v Miglin*, the **Canadian** Supreme Court determined

> that a certain degree of change is foreseeable most of the time. [The parties] must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities [. . .] might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. [. . .] That said, we repeat that a judge is not bound by the strict Pelechstandard to intervene only once a change is shown to be "radical". [. . .] The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question,

[430]Canada (Common Law): s. 93(5) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014 and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Denmark: § 52 Marriage Act; Romania.

[431]Cameroon; Germany: § 313 BGB; Ireland; Romania; Spain; Taiwan; USA.

[432]Belgium; Canada (Common Law): *LMP v LS* 2011 SCC 64, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; England & Wales; Malaysia: s. 84 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014.

[433]Canada (Common Law); Croatia; Ireland; Malaysia; Portugal; Puerto Rico; USA.

[434]For example in England & Wales: reference to the "Barder criteria" as developed on the basis of *Barder v Barder* (*Caluori intervening*) [1988] AC 20; Finland.

> rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.[435]

In some cases, the court may not change certain clauses, for example the agreed duration of post-divorce support; it then only has competence to modify the amount of support payable.[436]

Initial Unfairness Exceptionally no change of circumstances or current unfairness is required. For example the **Canadian**, **Danish**, **Dutch** and **Finnish** courts may set aside or modify an agreement on maintenance in case of gross misjudgement of the statutory standards at the time of executing the agreement.[437]

Contractualisation Parties to a family agreement in some legal systems have some liberty to exclude, or to rather extend, courts' jurisdiction on the ground of fundamental change of circumstances.[438] Other systems do not allow waivers with regard to some aspects, for example post-divorce support.[439]

Scrutiny in the Best Interest of the Child

Different Approaches In some legal systems, parents may not be allowed to modify their agreement on the children by mutual consent without new judicial approval.[440] The courts may anyhow review all agreements in the best interests of the child in all legal systems.

No common ground exists with regard to the conditions and the level of scrutiny applying. In some legal systems, the "*yardstick*"[441] of the welfare of the child allows courts (or administrative bodies) to "generously" [442] review family agreements even in absence of a (fundamental) change of circumstances.[443] In other systems, the best interest of the child is only the underlying standard in case of review of an agreement based on a (fundamental) change of circumstances, which will be broadly

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[435] *Miglin v Miglin* 2003 SCC 24, par 89, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Québec.

[436] USA.

[437] Canada (Common Law); Québec: *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Denmark; Finland; Netherlands: art. 1:401(5) Civil Code.

[438] Belgium; Scotland: s. 16(1)(a) Family Law (Scotland) Act 1985, retrieved at http://www.legislation.gov.uk/ on 11 June 2014; The Netherlands: art. 1:158 Civil Code.

[439] Malaysia: s. 84 and s. 97 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014; Portugal. Partly in The Netherlands.

[440] USA.

[441] England & Wales.

[442] Canada (Common Law).

[443] Belgium; Denmark; France: art. 373-2-13; Germany; Ireland; Malaysia: s. 97 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014; Portugal; Taiwan.

interpreted.[444] Other legal systems take a third stance, in-between. They allow judicial review in the best interest of the child, as long as that would not undermine the stability and continuity of the circumstances in which a child is raised.[445] A time moratorium may be applied to untimely requests for review.[446]

In either case, the many existing standards of scrutiny often are quite vague[447] and may be conceived positively or negatively. In some systems, a higher level of scrutiny seems to apply than is the case for the initial approval of agreements. For example, full scrutiny instead of marginal scrutiny applies when reviewing an agreement.[448]

Contractualisation? As mentioned above in Section "Court Scrutiny"., family agreements regarding children "*are not intended to have contractual effect*".[449] The free revocability of agreements between the parents[450] nevertheless seems the exception. For example § 1 of the **German** Act on the Religious Upbringing of Children explicitly provides that "the agreement between the parents is revocable at any time". Mostly such agreements are considered to be binding for the parties.[451] The **Netherlands** even reinforces the binding effect by imposing 'parenting plans'. Revocability by a parent thus depends on the existence of a weighty reason.[452] Article 376-1 **French** Civil Code provides that

> the Family Court may [...], take into consideration the pacts [...], unless one of [the parents] substantiates weighty reasons that would justify him to revoke his consent.

The courts may however always vary agreements in the light of the abovementioned criteria: agreements are not binding upon them even if they would be for the parties themselves.[453]

Conclusions

Pendular Movement

The perpetual pendular movement of family law between *status* and contract (already Maine 1861) paradoxically went in both directions the last decades. On

[444] Finland; Québec; Romania; The Netherlands; USA.

[445] Finland; France; Ireland; Portugal.

[446] USA.

[447] Finland.

[448] For example in Belgium: art. 387*bis* Civil Code; Germany.

[449] Scotland.

[450] Finland; Germany; Greece; Ireland; Malaysia; Poland; Portugal; Scotland.

[451] Belgium.

[452] For example Croatia; Netherlands.

[453] For example Scotland.

the one hand, there is a convergent trend towards more room for private ordering in 'old' or traditional family formations. One example is the acceptability of pre- or postnuptial agreements, particularly in **England & Wales**. On the other hand, 'new' family formations tend to institutionalise, which is clearly a trend towards *status*. Examples are the crystallisation as statuses of surrogacy, of same-sex partnerships and so on.

The trend towards contract concerns the *content* of parenthood or partnerships than their *formation* and *dissolution*. Moreover, *procedural* contractualisation seems further reaching than *substantive* contractualisation. The acceptance of ADR in family disputes seems somewhat inconsistent with the exceptionalist position of substantive family law though.[454]

The trend towards status does not only concern the formation and dissolution of family relations but also their content. For example, we found remarkable convergence with regard to judicial review of nuptial agreements and divorce settlements on the ground of unfairness in section "Process: ADR".

Both evolutions to contract and to status can be explained as forms of constitutionalisation of family law. On the one hand, individualisation offers greater freedom for each family member both within and outside the *numerus clausus* of family relations. On the on the other hand, the freed individuals are placed directly under State control under the interventionist trend in private law in general al described in section "Main features of family law".

What's in a Word?

The working title for this chapter and for the session at the 2014 International Congress of Comparative Law was 'Contractualisation of Family Law'. That title was much criticised, in that the word 'contractualisation' cannot be used in its legal-technical meaning as enforceable rights and obligations with civil effect, with a view of describing trends in family law.[455]

Firstly, the limits of contractual freedom are considered more important than the freedom itself, and mostly freedom would be limited to exercising available legal options, for example with regard to surrogacy or covenant marriages. 'Intention' or 'autonomy' would therefore be better denominators than contractualisation.[456]

Secondly, a basic principle of contract law is the binding effect and finality of contracts, vis-à-vis both the parties and third parties, and vis-à-vis courts. Hence, many exceptions to this basic principle apply in family law.

'Private ordering' for these reasons is preferable over 'contractualisation' to describe current evolutions in family law. The word 'agreement' or 'pact' also are

[454] USA.

[455] For example Germany; Spain.

[456] Spain.

preferable over 'contract', or at the least would the word contract receive the epithet '*domestic*'. In sum, these instruments are characterised by a 'family law' rather than 'contractual' nature.

Exceptionalism?

The question however arises what makes a contract 'domestic' of nature and what distinguishes it from a contract regulated by general contract law. The many blurred lines between private ordering and contractualisation persist that justify questioning the blunt rejection of contractualisation.

Different reports[457] have also pointed at the interventionist approach of the State in other fields of private law as well, as form of constitutionalisation. There is no clear answer to the questions whether or not scrutiny is *stricter* and whether or not judicial review is *easier* in family settings compared to contract law in general. State interventionism in contract law in general anyhow makes family law less exceptional. It would be interesting to further research the differences in the levels of judicial review so as to determine what is the specific nature of 'domestic contracts'.

Marvin v Marvin Versus Borelli v Brusseau

The question first arises why contractual freedom should not be the basic assumption for parties to a family formation. This question is strikingly illustrated by the *Marvin* and *Borelli* cases, concerning cohabitants and spouses respectively.[458]

In *Marvin v Marvin*,[459] Michelle Marvin had been in a cohabitation relationship with Lee Marvin during six years, after which he compelled her to leave his household. While Michelle Marvin had given up her lucrative career, substantial real and personal property was acquired only in the name of Lee Marvin. Michelle Marvin claimed that

> she and defendant "entered into an oral agreement" that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." Furthermore, they agreed to "hold themselves out to the general public as husband and wife" and that "plaintiff would further render her services as a companion, homemaker, housekeeper and cook to … defendant."

The Californian Supreme Court accepted the validity of such agreement for

[457] For example Germany.

[458] Also see Italy.

[459] *Marvin v Marvin* (1976) 18 Cal.3d 660, retrieved at http://online.ceb.com/calcases/C3/18C3d660.htm on 24 April 2014.

> adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. (. . .) So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

We also have pointed at a trend towards 'matrimonialisation' of such contracts between cohabitants.

Surprisingly, spouses (and registered partners) are not "as competent as any other persons to contract respecting their earnings and property rights". Whereas postnuptial agreements and divorce settlements are increasingly accepted, contracts on efforts and earnings when going concern are only rarely qualified as civil contracts. The matter was discussed in the (in-)famous case of *Borelli v Brusseau*.[460] Hildegard Borelli was married to Michael Borelli in 1980 with an antenuptial contract excluding her from most of Michael Borelli's property. Michael Borelli then suffered severe heart problems and became concerned and frightened over his health.

> In August 1988, decedent suffered a stroke while in the hospital. "Throughout the decedent's August, 1988 hospital stay and subsequent treatment at a rehabilitation center, he repeatedly told [appellant] that he was uncomfortable in the hospital and that he disliked being away from home. The decedent repeatedly told [appellant] that he did not want to be admitted to a nursing home, even though it meant he would need round-the-clock care, and rehabilitative modifications to the house, in order for him to live at home."
>
> 651 "In or about October, 1988, [appellant] and the decedent entered an oral agreement whereby the decedent promised to leave to [appellant] the property listed [above], including a one hundred percent interest in the Sacramento property.... In exchange for the decedent's promise to leave her the property . . . [appellant] agreed to care for the decedent in his home, for the duration of his illness, thereby avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended. The agreement was based on the confidential relationship that existed between [appellant] and the decedent."
>
> Appellant performed her promise but the decedent did not perform his. Instead his will bequeathed her the sum of $100,000 and his interest in the residence they owned as joint tenants. The bulk of decedent's estate passed to respondent, who is decedent's daughter.

Unfortunately for Mrs Borelli, the Californian Supreme Court did not accept the oral agreement as a binding contract, for

> It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. [. . .]
>
> "Indeed, husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income."[. . .]
>
> When necessary, spouses must "provide uncompensated protective supervision services for" each other.
>
> Estate of Sonnicksen (1937) 23 Cal. App.2d 475, 479 [73 P.2d 43] and Brooks v.Brooks (1941) 48 Cal. App.2d 347, 349–350 [119 P.2d 970], each hold that under the above statutes

[460] *Borelli v Brusseau* 12 Cal. App.4th 647 (1993), retrieved at http://scholar.google.com/ on 21 June 2014.

> and in accordance with the above policy a wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy; and there is no consideration for the husband's promise. [. . .]
>
> [T]he duty of support can no more be "delegated" to a third party than the statutory duties of fidelity and mutual respect (Civ. Code, § 5100). Marital duties are owed by the spouses personally. [. . .]
>
> We therefore adhere to the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case. [. . .]
>
> The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.

We have described that different legal and contractual mechanisms allow spouses to claim compensation – even in absence of need – of their 'performance' during marriage, at the time of its dissolution. We claim that contracts on compensation should be allowed when going concern, in order to prevent litigation.

In sum, the 'matrimonialisation' of the contractual relationship between cohabitants could be complemented with a 'contractualisation' of the marital relationship between spouses or registered partners.

The **Italian** and **Taiwanese** reports however point at the paradox that contractual freedom would not necessarily enhance gender equality in relationships. The State must anyhow safeguard the equal bargaining positions of the partners. If not, mostly women would be worse off in case they waive their default legal protection compared to when no contractual freedom would be allowed.

A commodification of the content of family formations also would have a much greater impact than the issues discussed in this chapter, and would also concern intergenerational solidarity and the relation between family law and social security law. The core question here is who should provide for *fraternité* as a safety net under *liberté* and *égalité*.

Balfour v Balfour Versus Meritt v Meritt

In the course of this chapter, we repeatedly pointed at the greater contractual freedom at the moment of dissolution of the family relation compared to the relation going concern. This is both the case for the relation between parents and children and between partners; and both with regard to substantive and procedural contractualisation.

In our opinion, the justification cannot be that the family relation is winded up at the time of its dissolution; those relations are intrinsically continuous, both between parents and children and between partners, for example with regard to post-divorce support.

A striking example of this discussion is offered in the *Balfour* and *Meritt* cases.

In *Balfour v Balfour*,[461] the husband had promised his wife to send monthly payments of £30,00 from Ceylon, where he resided for work, while his wife would stay in England for health reasons. After their divorce, the question arose whether the 'contract' was enforceable. The court of appeal found that it was not, for no intention to create legal relations existed. The lack of consideration was also considered important. The contract therefore was of a purely domestic nature.

In *Meritt v Meritt*,[462] the husband had left the house to live with another woman. Afterwards, the spouses discussed the arrangements to be made in the husband's car, whereby the husband

> wrote these words on a piece of paper:- "In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property into your sole ownership. Signed, John Merritt. 25th May, 1966".

Denning LJ distinguished the case from the domestic arrangements in Balfour:

> It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

He therefore referred to his previous opinion that

> when husband and wife, at arms' length, decide to separate, and the husband promises to pay a sum as maintenance to the wife during the separation, the Court does, as a rule, impute to them an intention to create legal relations.

In sum, we claim that parties in family formations going concern may conclude enforceable contracts in case their intention thereto is clear and in case consideration remains within the contractual sphere allowed under their status. The **England & Wales** report however warns not to overrate the *Meritt* case, since the *Hyman*[463] principle, that parties may not oust the court jurisdiction beforehand, was confirmed in the 2010 *Radmacher* case.[464]

Court Jurisdiction

Parties in a family formation generally are not allowed to waive a core of rights and obligations arising out of their *status* as parents or partners. The lack of (valid)

[461] *Balfour v Balfour* [1919] 2 KB 571

[462] *Merritt v Meritt* [1970] EWCA Civ 6, retrieved at http://www.bailii.org/ew/cases/EWCA/Civ/ on 21 June 2014.

[463] *Hyman v Hyman* [1929] AC 601.

[464] *Radmacher v Granatino* [2010] UKSC 42, retrieved at http://www.bailii.org/uk/cases/UKSC/2010/42.html on 24 October 2014.

consideration therefore makes the arrangement domestic rather than contractual of nature.

We have also repeatedly pointed at the impossibility for parties to a domestic arrangement to oust the courts' jurisdiction and have pointed at court scrutiny and at the possibilities for judicial review of (family) arrangements. On the one hand, scrutiny is possible on the ground of unfairness (in its broadest sense) at the time of the execution or the performance of the agreement. Scrutiny is even stricter when it concerns children. On the other hand, the *clausula rebus sic stantibus* is broadly applied to family law agreements. Family law seems somewhat exceptional in this regard.

We therefore assert that, given the courts' jurisdiction to review family arrangements, greater contractual freedom may be accepted for the parties to a family formation going concern. For example, arrangements on parental responsibilities could be considered binding for the parents themselves.

"Good Boy Bad Boy"

One reason to exclude a contractual approach towards breach of contract in family relations is that family law was considered to offer its own particular remedies, for example fault divorce. Increasing repeal thereof causes family law agreements to be the only contracts where no fault-based remedies exist. So-called "Good Boy Bad Boy"-clauses may be proposed as ways to substitute the above-mentioned evolution.

ADR

ADR-techniques are increasingly promoted, and sometimes imposed on parties, as ways of dissolving family disputes. ADR in family disputes usually implies the intervention of a neutral third party – mediator of conciliator – with a view of enabling the parties to reach a settlement. More State attention may however be had for two other types of ADR. On the one hand, not all parties need a neutral third party, and forms of collaborative law could be promoted given the positive first experiences with these techniques. On the other hand, parties should not always be forced to litigate in case they do not reach a settlement even with the help of a neutral third party. Arbitration seemingly is an underestimated technique, which can be broadly applied to (the content of) family formations.

Parens Patriae

These conclusions have mainly drawn on family relations between adults. Private ordering of parenthood – for example with surrogacy agreements – remains the

exception throughout the world. Also, agreements on parental responsibilities and on maintenance are under strict scrutiny. This close monitoring can be justified under the *parens patriae* doctrine as functionally defined in Section "Main features of family law". One of the points of interest has been whether, and to what extent, *parens patriae* also applies to the weaker party in family relations between adults, be it or not under the label of protection of dignity.

In sum, even if family law exceptionalism would be on its return (again), it is increasingly substituted by State interventionism in private law in general.[465]

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[465] Germany.

Chapter 2
La Contractualisation des Relations Familiales au Burundi

Gervais Gatunange

Abstract The introductory section of this chapter generally situates family relationships in Burundi's law. The Code of Persons and the Family mainly governs family relationships. But the Constitution also contains relevant provisions that protect marriage as the fundament of the family, which is considered to be the natural basic unit of society. Accordingly, the Criminal Code contains not less than 33 provisions that aim at the repression of crimes against the family.

The chapter then elaborates Burundi's substantive family law. It first deals with the law on parents and children, which generally is imperative. Agreements are however required to a limited extent in case the law requires the consent of the parties concerned, e.g. with regard tot extra-marital or adoptive filiation. The same logic governs the law on marriage and divorce, the former and the latter only being allowed within the statutory framework.

In family proceedings, particularly divorce, the emphasis is put on the conciliation of the spouses by the family council which, moreover, generally still has a prominent role in family relationships.

In sum, contractualisation of family law in Burundi is limited, for the imperative regulatory framework strictly confines private ordering.

Aperçu Général

Il nous paraît utile pour la clarté des développements qui vont suivre de dire un mot d'introduction sur l'état de la législation qui régit la matière du droit de la famille.

Le droit de la famille est une des branches principales du droit civil, à côté du droit des biens et du droit des obligations. Il est régi par la loi depuis la promulgation du premier Code des Personnes et de Famille (CPF) le 15 janvier 1980. Avant cette promulgation, la matière relevait de la coutume, du moins telle qu'elle était interprétée par la jurisprudence des cours et tribunaux.[1] Le législateur se proposait

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« d'unifier et moderniser le droit burundais en la matière en s'inspirant d'autres législations modernes et en consacrant en même temps les meilleures traditions coutumières du Burundi » (préambule). Il sera modifié le 28 avril 1993 pour répondre au besoin qui se faisait sentir de « promouvoir les droits de la personne humaine, notamment en mettant fin aux dispositions jugées anachroniques, qui discriminent la femme, et en renforçant la protection de l'enfant, en vue de son développement harmonieux » (préambule). Par ailleurs, les dispositions relatives à l'adoption furent modifiées et développées par la loi sur l'adoption promulguée le 30 avril 1999. Cette loi fait suite à l'adhésion du Burundi, le 6 juin 1998, à la Convention sur la protection des enfants et la coopération en matière d'adoption internationale signée à la Haye, le 29 mai 1993.

Des dispositions de la Constitution sont également consacrées à la protection de la famille. Ainsi, l'article 29 garantit la liberté de se marier et le droit de choisir son ou sa partenaire. Mais il interdit le mariage entre deux personnes de même sexe. L'article 30 affirme de son côté que la famille est la cellule de base naturelle de la société, le mariage en étant le support légitime. A ces titres, ils sont placés sous la protection particulière de l'Etat. Le même article reconnaît aux parents « le droit naturel et le devoir d'éduquer leurs enfants ».

Notons que la Constitution réserve une place de choix aux droits de l'homme auxquels elle consacre le Titre II intitulé : « De la charte des droits et des devoirs de l'individu et du citoyen ». Il s'inspire largement des instruments internationaux pertinents. Ces instruments consacrent des principes comme l'intérêt supérieur de l'enfant et les principes d'égalité et de non discrimination qui ont un impact direct sur le droit de la Famille.

Par ailleurs, les principaux instruments internationaux relatifs aux droits de l'homme sont incorporés dans la Constitution : « Les droits et devoirs garantis entre autres par la Déclaration universelle des droits de l'homme, les pactes internationaux relatifs aux droits de l'homme, la Charte africaine des droits de l'homme et des peuples, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes et la Convention relative aux droits de l'enfant font partie intégrante de la Constitution de la République du Burundi » (art.19 Const.). Cette disposition est d'un grand intérêt lorsque l'on sait la place éminente qu'occupent les conventions internationales dans la hiérarchie des normes au Burundi.

De façon générale, la Constitution dispose en son article 292 que les conventions internationales prennent effet, en principe, après leur ratification. Elles sont hiérarchiquement supérieures aux lois nationales. Le législateur burundais fait application de ce dernier principe à plusieurs reprises dans des lois particulières. Ainsi, l'article 12 du Code du Travail (Loi du 7 juillet 1993) dispose que « les conventions ratifiées l'emportent sur une disposition légale de contenu différent ». De même, aux termes de l'article 3 du Code de la Sécurité sociale (Loi du 16 juin 1999), « Toute convention de l'Organisation internationale du Travail relative à la Sécurité sociale et ratifiée par le Burundi fait autorité et l'emporte sur une disposition légale nationale de contenu différent ». Le constituant burundais ne se prononce pas sur le rapport hiérarchique existant entre la Constitution et

les conventions internationales, mais pour éviter des contradictions éventuelles, lorsqu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de ratifier cet engagement ne peut intervenir qu'après amendement ou révision de la Loi fondamentale (art. 296 Const.).

En principe donc, les tribunaux peuvent appliquer directement les conventions ratifiées relatives aux droits de l'homme, exactement comme s'il s'agissait de lois nationales. Mais il faut garder à l'esprit la distinction classique entre les droits civils et politiques, immédiatement applicables, et les droits économiques et sociaux qui sont d'application progressive.

Dans le même ordre d'idées de la protection de la famille, le Code pénal burundais (C.pén.) du 29 avril 2009 ne consacre pas moins de 33 articles à la répression des infractions contre l'ordre des familles (art. 505 à 537 C.pen.).

Droit Matériel de la Famille

Parents et Enfants

Nous allons passer en revue les règles qui régissent la détermination de la filiation, l'autorité parentale ou tutélaire, le droit de garde, l'obligation alimentaire et l'établissement de la parenté par contrat.

Détermination de la Filiation

En matière de filiation légitime, l'on applique la présomption selon laquelle l'enfant a pour père le mari de sa mère (art.196 CPF.). Mais il ne s'agit pas d'une présomption absolue car le père prétendu peut, dans certains cas, désavouer l'enfant que la loi lui attribue (art. 197–211 CPF.).

En cas de filiation naturelle, l'enfant ne jouit pas de la présomption de paternité. Il peut, soit être reconnu volontairement par son père naturel, soit intenter une action en recherche de paternité et prouver le lien de sang qui l'unit au père prétendu (art.214 CPF.).

Pour ce qui est de la filiation maternelle, aux termes de l'article 213 du Code des Personnes et de la Famille, « l'enfant naturel a pour mère la personne à laquelle l'acte de naissance attribue cette qualité ». Elle s'établit par le fait de l'accouchement.

En matière de filiation adoptive, il faut distinguer selon qu'il s'agit d'adoption simple ou d'adoption plénière. Selon la loi sur l'adoption, l'adoption plénière confère à l'enfant une filiation qui se substitue à sa filiation d'origine. L'adopté cesse d'appartenir à sa famille par le sang. Dès lors, l'adopté a les mêmes droits et les mêmes obligations que l'enfant légitime envers l'adoptant (art. 34). Mais contrairement à l'adoption plénière, l'adoption simple laisse subsister les liens entre l'enfant et sa famille d'origine. L'adopté y conserve tous ses droits, notamment

ses droits héréditaires (art. 42). Cependant, l'adoptant est seul investi à l'égard de l'adopté de tous les droits découlant de l'autorité parentale, y compris le droit de consentir au mariage de l'adopté, s'il est mineur (art. 43).

Autorité Parentale ou Tutélaire

Aux termes de l'article 284 du Code des Personnes et de la Famille, « L'autorité parentale est l'ensemble des droits que la loi accorde aux père et mère sur la personne et sur les biens de leurs enfants mineurs et non émancipés ». Le père et la mère sont mis sur un même pied d'égalité. Le principal droit sur la personne du mineur est le droit de garde. Les pouvoirs sur les biens sont le droit d'administration légale qui autorise les père et mère à gérer les biens, meubles et immeubles, de leurs enfants et la jouissance légale qui leur permet de percevoir les revenus de ces biens (art. 288–297 CPF.).

Si l'un des parents décède ou est autrement empêché, l'autre parent exerce l'autorité parentale. Ce n'est qu'en cas de décès ou d'empêchement du dernier des parents que la tutelle s'ouvre. La tutelle est alors testamentaire si le dernier des parents à désigné le tuteur par testament. Mais celui-ci doit être approuvé par le conseil de famille. A défaut de tutelle testamentaire ou si un tel tuteur n'est pas approuvé par le conseil de famille, le conseil de famille donne au mineur un tuteur de son choix. Celui-ci exerce la tutelle sous le contrôle du conseil de famille. S'il est défaillant, le conseil de famille peut le destituer et pourvoir à son remplacement (art. 300–305 CPF.).

Sous réserve de la surveillance du conseil de famille, le tuteur a les mêmes droits sur la personne de l'enfant que ses parents. Mais pour ce qui est des droits sur les biens, le tuteur n'a pas la jouissance légale et il doit avoir l'autorisation du conseil de famille pour accomplir des actes de disposition (art. 314 CPF.).

Droit de Garde

Les époux, qu'ils aient la garde ou non, continuent à exercer conjointement les autres attributs de l'autorité parentale, comme le choix de l'éducation ou de la religion de leurs enfants. Une convention sur les modalités d'exercice de ce droit serait valable si et aussi longtemps qu'elle est conforme à l'intérêt supérieur de l'enfant, à l'ordre public et aux bonnes mœurs.

En ce qui concerne la garde de l'enfant, le Code des Personnes et de la Famille prévoit des régimes différents selon qu'il s'agit de divorce pour cause déterminée ou de divorce par consentement mutuel. Dans le premier cas, des dispositions conventionnelles ont peu de place dans la mesure où, le juge décide de la garde de l'enfant qu'il peut confier au père, à la mère ou à une tierce personne, à la demande de l'un des époux, d'un membre de la famille, du Ministère public ou même d'office. Par ailleurs, cette décision est provisoire, c'est-à-dire qu'à même demande, elle peut être modifiée, à tout moment, si l'intérêt de l'enfant l'exige (art. 184 CPF.). Mais

en cas de divorce par consentement mutuel, ce sont les parents eux-mêmes qui font des propositions relativement à la garde de l'enfant, propositions qui doivent être agréées par le juge (art. 190 CPF.).

Obligation Alimentaire

L'obligation alimentaire n'existe qu'entre époux, entre enfants et père et mère, entre les autres ascendants et leurs descendants (art. 134 CPF.). L'obligation alimentaire est successive. Une personne dans le besoin doit d'abord s'adresser à son conjoint. A défaut de conjoint ou de conjoint solvable, elle doit actionner les enfants et si ceux-ci n'existent pas ou ne sont pas en mesure de payer, elle doit s'adresser aux père et mère. A défaut de père et mère, ce sont les autres ascendants, c'est-à-dire les grands-parents et arrière-grands-parents qui doivent être mis à contribution. Enfin à défaut de ces derniers, ce sont les autres descendants, c'est-à-dire les petits-enfants et les arrière-petits-enfants qui devront payer (Art. 135 CPF.). Mais en réalité la solidarité familiale va bien au-delà de ce cercle fermé de parents. A cet égard, le Code de sécurité sociale (Loi du 16 juin 1999), en son article 4, est encore plus restrictif dans la mesure où seuls ont la qualité d'ayants droit, le veuf ou la veuve, les enfants, sous certaines conditions, et les descendants directs.

Établissement de la Parenté par Contrat

S'agissant de l'établissement ou de l'exclusion de la parenté par contrat, il y a lieu de distinguer selon le genre de filiation. Dans les cas où la loi exige le consentement de la mère naturelle ou des parents adoptifs, des arrangements sont souvent inévitables.

En matière de filiation légitime, la part de la volonté dans l'établissement de la parenté est inexistante. L'on applique la présomption légale de paternité et quand bien même elle ne correspondrait pas à la réalité, le père biologique ne pourrait pas reconnaître un enfant avant son désaveu par le père légitime. L'article 218 du Code des Personnes et de la Famille est, en effet, catégorique à ce sujet: « L'enfant adultérin de la femme mariée ne peut être reconnu par son auteur qu'après désaveu par le mari de sa mère ».

Mais en matière de filiation naturelle, même si, formellement, il n'y a pas de contrat entre le père et la mère de l'enfant ou leurs familles, il n'en reste pas moins vrai que la volonté des parties joue un grand rôle dans l'établissement de la parenté. D'abord le père naturel peut reconnaître son enfant devant l'officier de l'état civil. Mais l'article 219 du Code des Personnes et de la Famille subordonne la validité de la reconnaissance au consentement simultané de l'enfant s'il est majeur, de sa mère s'il est mineur, de son tuteur s'il est interdit ou mineur orphelin de mère. Il est vrai qu'en cas de refus de la mère ou du tuteur de consentir à la reconnaissance, un recours est ouvert devant le tribunal compétent du domicile du représentant de l'enfant (art. 220). Dans sa décision, le juge est guidé par l'intérêt supérieur de l'enfant (art. 221 CPF.).

La part de la volonté est encore plus accentuée dans la filiation adoptive. La Loi sur l'adoption dispose qu'elle est prononcée par le Tribunal de Grande Instance à la requête de l'adoptant (art. 27). Mais les père et mère doivent consentir l'un et l'autre à l'adoption. Le consentement de l'autre suffit si l'un des deux est décédé ou dans l'impossibilité de manifester sa volonté ou s'il a été déchu de l'autorité parentale (art. 11). Lorsque les père et mère de l'enfant sont décédés ou lorsqu'ils sont dans l'impossibilité de manifester leur volonté ou encore s'ils ont été déchus de l'autorité parentale, le consentement est donné par le conseil de famille, après avis de la personne qui prend soin de l'enfant (art. 13). Notons que le tribunal peut prononcer l'adoption en cas de refus abusif de consentement à l'adoption opposé par les parents ou par le conseil de famille (art. 18) Enfin, l'adopté âgé de plus de 13 ans doit consentir personnellement à son adoption plénière (article 8, al. 3)

Notons que l'autorité parentale est d'ordre public car elle constitue une des bases de la famille. Elle échappe donc à la volonté des parties et elle est hors commerce. Celui qui la détient ne peut donc y renoncer, la céder en totalité ou dans tel ou tel de ses attributs. De même, les relations familiales étant d'ordre public, les parties, en l'occurrence les parents et les enfants, ne pourraient pas mettre fin à leur relation par convention.

Partenaires

Seul le mariage civil est reconnu (art. 87 CPF.), à l'exclusion du concubinage et des mariages religieux ou coutumiers. Il en est de même en matière de sécurité sociale. L'article 14 du Code de Sécurité sociale dispose, en effet, que le concept « ayant droit » désigne, entre autres, le conjoint survivant « non divorcé ni séparé de corps, à condition que le mariage ait été contracté et inscrit à l'état civil »

Conditions de Formation du Mariage

Les dispositions relatives aux conditions de fond et de forme de formation du mariage sont impératives. Leur modification par les parties serait nulle et de nul effet.

Concernant les conditions de fond de formation du mariage, l'on distingue les conditions positives, à savoir la différence de sexes, l'âge minimum (vingt et un ans pour l'homme et dix-huit ans pour la femme), le consentement des époux et le consentement éventuel des parents ou du conseil de famille, en cas de minorité et les conditions négatives consistant dans l'absence d'empêchement résultant de la parenté, d'un mariage antérieur non dissous ou du délai de viduité, c'est-à-dire le délai de dix mois imposé à la femme, veuve ou divorcée, pour contracter un nouveau mariage (Art. 88–103 CPF.).

Notons que la dot, symbole de l'alliance entre les familles des époux[2] n'est plus une condition de formation du mariage : « La validité du mariage ne peut être conditionnée par le versement d'une dot, même dans le cas d'un engagement écrit

du futur époux » (art. 93 CPF.). De façon générale, les familles des époux restent à l'arrière-plan, contrairement au mariage coutumier qui met davantage l'accent sur l'alliance des familles. Dans le Burundi traditionnel comme ailleurs en Afrique, « L'union de deux époux était d'abord l'alliance de deux maisons[3] »

Pour ce qui est des conditions de forme, il importe de rappeler que le mariage est un acte solennel. Le seul consentement des époux ne suffit pas pour le réaliser. Il faut le concours effectif de l'officier de l'état civil qui « reçoit de chacun la déclaration qu'ils veulent se prendre pour mari et femme et prononce qu'ils sont légalement unis par les liens du mariage » (art. 117 CPF.).

Le mariage régulier crée des droits et des devoirs réciproques, à savoir les devoirs de cohabitation, de fidélité, de secours et d'assistance. Une convention portant sur des prestations découlant des devoirs nés du mariage comme les devoirs de secours et d'assistance serait valable aussi longtemps qu'elle serait jugée juste et équitable. Mais une disposition dispensant des devoirs de cohabitation et de fidélité pourrait être dénoncée à tout moment par l'une des parties pour contrariété à l'ordre public.

Dissolution du Mariage

Le mariage régulièrement formé ne peut être dissous que conformément à la loi. Les dispositions relatives aux conditions de fond et de forme de dissolution du mariage sont également d'ordre public. Les époux ne peuvent pas les modifier par contrat.

A cet égard, les époux peuvent divorcer, soit pour cause déterminée, soit par consentement mutuel.

Dans le divorce pour cause déterminée, seules sont admises comme causes de divorce les fautes graves commises par l'un des conjoints envers l'autre, à savoir l'adultère, les excès et sévices, l'injure grave et la condamnation pour un fait entachant l'honneur (art. 158–159 CPF.).

Le divorce par consentement mutuel se réalise par la manifestation persistante de la volonté des deux époux de mettre fin à leur union. Mais Il ne suffit pas que les époux veuillent, de commun accord divorcer, il faut en plus que la vie commune soit devenue insupportable et que le maintien du lien conjugal soit devenu intolérable (art. 187 CPF.). Le juge n'est donc pas passif. Il n'est pas là seulement pour recueillir l'accord des époux et en vérifier éventuellement la sincérité, il doit s'assurer que le lien conjugal est irrémédiablement rompu. Le juge doit, par ailleurs, recueillir l'avis du conseil de famille avant toute décision quant au fond (art. 194 CPF.).

Le Code des Personnes et de la Famille est, à cet égard, moins libéral que la coutume qui admet le divorce-répudiation à l'initiative du mari ou de la femme : « Le divorce n'exige pas une procédure spéciale. Que l'initiative vienne du mari ou de la femme, cela seul suffit[4] »

Pension Alimentaire

En cas de divorce pour cause déterminée, c'est l'époux coupable qui est condamné à payer une pension alimentaire à l'époux innocent, à condition que le premier ait

les moyens de la payer et que le second soit dans le besoin (art. 183 CPF.). La part de la convention semble donc limitée, compte tenu des tensions qui caractérisent ce genre de divorce.

Mais en cas de divorce par consentement mutuel, le juge homologue l'accord des époux après avoir vérifié s'il est conforme à l'intérêt des enfants et à l'équité (art. 192 CPF.).

Droit Procédural de la Famille

Juridiction

Les Notables de la Colline

Dans la culture burundaise, en cas de conflit, qu'il s'agisse de conflit familial ou autre, le premier réflexe des parties au différend est de saisir le conseil des sages (les *Bashingantahe*) de la colline pour tenter la conciliation des parties.[5]

Les *Bashingantahe* sont des notables choisis pour leur intégrité morale, leur sens de l'équité afin de résoudre les différends qui surgissent sur la colline entre parents et voisins. Ils jouissent d'une grande autorité morale et leurs conseils sont généralement suivis par les parties.

Le problème de sa modernisation[6] sinon de sa réhabilitation[7] se pose tout de même et des chercheurs suggèrent de s'inspirer du modèle de l'Ombudsman suédois[8]

De son côté, la Loi du 20 avril 2005 portant organisation de l'administration communale reconnaît le rôle des *Bashingantahe* dans la résolution des conflits. L'article 37 alinéa 2 dispose, en effet, que « Sous la supervision du chef de colline ou de quartier, le conseil de colline ou de quartier a pour mission d'assurer sur la colline ou au sein du quartier, avec les Bashingantahe de l'entité, l'arbitrage, la médiation, la conciliation ainsi que le règlement des conflits de voisinage ». Cela dit, des rivalités ont parfois été observées entre les élus locaux et les Bashingantahe, ce qui a poussé l'Administration à confectionner un *Guide des relations entre les Sages/Bashingantahe et les élus locaux*, en 2006[9]

Le Conseil de Famille

En droit de la famille, le conseil de famille joue un rôle de premier plan dans la résolution des conflits. Aux termes de l'article 371 du Code des personnes et de la Famille, « Le conseil de famille est une institution créée au sein de la famille pour veiller à la sauvegarde des intérêts de chacun de ses membres dans les cas prévus par la loi. Dans ses décisions, il doit être guidé par l'esprit d'*ubushingantahe* caractérisé essentiellement par l'abnégation, la probité et l'impartialité ». Il est composé des père et mère de l'intéressé, de ses frères et sœurs majeurs, d'au moins deux de ses parents choisis soit dans la ligne paternelle, soit dans la ligne maternelle suivant

l'ordre de proximité, d'au moins deux personnes connues pour leur esprit d'équité, cooptés par les membres du conseil de famille des 3 premières catégories (art. 373 CPF.). Le président du conseil de famille est élu par ses membres (art. 372 CPF.).

Le conseil de famille intervient aussi bien dans le divorce pour cause déterminée que dans le divorce par consentement mutuel, mais à des titres divers.

Il faut noter que la spécialité de la procédure en divorce pour cause déterminée réside dans le souci du législateur d'éviter le divorce autant que possible. Un accent particulier sera donc mis sur la tentative de conciliation. Celle-ci a d'abord lieu devant le conseil de famille, ensuite devant le juge.

Avant d'introduire l'action en divorce, l'époux demandeur doit provoquer une réunion de conciliation groupant les époux et leurs conseils de familles respectifs (art. 160). En matière de divorce par consentement mutuel, le tribunal doit demander l'avis du conseil de famille avant toute décision au fond (art. 194 CPF.).

Procédure de Conciliation Devant les Tribunaux

Si les conseils de famille ne réussissent pas à concilier les époux, une autre tentative de conciliation est faite devant le juge : « A la première audience, le juge entend les parties en personne sans l'assistance de leurs conseils et à huis clos. Il leur fait des observations qu'il croit convenables en vue de la réconciliation des époux » (art. 164 CPF.). Le Code des Personnes et de la Famille essaie ainsi de créer un climat psychologique favorable à la réconciliation. Le législateur consacre ainsi une procédure que les tribunaux appliquaient bien avant la promulgation du Code.[10]

Contrôle

Si les notables de la colline réussissent dans leur tentative de conciliation, la procédure s'arrête là et tout rentre dans l'ordre. C'est en réalité à ce niveau que les chances de conciliation sont les plus grandes. Mais en cas d'échec, la procédure suit son cours devant le conseil de famille qui jouit d'une large marge de manœuvre, le tribunal se contentant de vérifier si la tentative de conciliation a eu lieu. En cas d'échec à ce niveau, le juge a en réalité peu de chances de réussir là où conseil de famille et les notables de la colline ont échoué. Il lui reste à essayer de sauvegarder l'intérêt légitime des enfants et des époux pendant l'instance de divorce et après avec la possibilité pour l'époux qui ne serait pas satisfait, d'interjeter appel ou de se pourvoir en cassation.

Conclusion

D'après la coutume burundaise, les relations familiales sont du domaine de la convention entre les familles. Mais le Code des Personnes et de la Famille a considérablement réduit ce rôle en mettant l'accent sur leur caractère d'ordre public.

Comme il fallait s'y attendre, la coutume résiste remarquablement au droit écrit.[11] Encore qu'on pourrait mieux appréhender la réalité en termes de complémentarité qu'en termes de concurrence. De fait, dans la mentalité burundaise, un mariage parfait est celui qui est célébré selon les trois formes, coutumière, religieuse et civile, la première forme mettant en exergue le pacte conclu entre les familles des époux, les deux dernières privilégiant l'engagement personnel des époux. Les cérémonies de mariage ne laissent apparaître d'ailleurs aucune rivalité.

La célébration du mariage coutumier est précédée par la remise de la dot au cours d'une cérémonie grandiose qui réunit tout ce que les deux familles comptent comme parents, voisins amis et connaissances. Le jour du mariage, l'officier de l'état civil reçoit l'échange des consentements des époux devant une poignée de parents et amis intimes car la sobriété de la cérémonie ne se prête pas à plus de solennité ; la cérémonie qui suit, à l'église, est beaucoup plus rehaussée et la journée est clôturée par la cérémonie coutumière qu'aucun proche ne doit rater, où le père de la mariée la remet solennellement, comme promis lors de la remise de la dot, au père du mari.

En cas de différend, la coutume et la loi civile se rejoignent d'ailleurs pour ce qui est du rôle imparti aux familles dans la mesure où le Code des Personnes et de la Famille reconnaît aux conseils de famille respectifs un rôle important dans la tentative de conciliation, à l'instar de la coutume. La dissolution n'est cependant plus une affaire des familles mais des tribunaux bien que l'on observe, même à ce niveau, une survivance de la coutume, les époux répugnant à saisir les tribunaux et préférant divorcer selon la coutume, situation que la loi ne reconnaît pas et que les tribunaux qualifient de séparation de fait, sans effets juridiques. Ici encore, un peu plus de réalisme et moins de dogmatisme de la part de la loi civile rapprocherait sensiblement les deux droits qui ne sont pas si différents, si l'on va au fond des choses. La coutume reconnaît qu'à côté des situations idéales, conformes à la tradition, il y a des situations moins « catholiques » comme les mariages de fait, les séparations de fait, etc., qu'il ne faut pas ignorer, ce qui permet de les encadrer par des arrangements entre les intéressés et leurs familles.

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Chapter 3
La Contractualisation Mesurée du Droit Camerounais de la Famille: La Liberté Contractuelle, Ombre Portée de l'Ordre Public Familial

Yannick Serge Nkoulou

Abstract This chapter researches the scope of the contractualisation of family relationships in Cameroon's law. It reveals that the role of private autonomy is limited in the regulatory framework of substantive family law. Much as autonomy almost has no role vis-à-vis personal relations, it is central with regard to property relations between spouses. Private ordering is prominently present in family proceedings, due to the survival of traditional institutions of alternative dispute resolution in conflicts between family members. In sum, Cameroon's substantive family law is much more confined by public policy than is the case for family proceedings.

Aperçu Général de la Contractualisation et du Système Juridique Camerounais

Contractualisation du Droit

La contractualisation apparaît comme une des tendances majeures du droit contemporain. Elle peut être définie comme le phénomène par lequel les sujets de droit interviennent, par l'expression de leur volonté, dans l'élaboration, la modification, voire l'adaptation des règles qui leur sont applicables ainsi que les procédés de

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résolution des litiges qui les opposent.[1] Aucun domaine du droit n'échappe à ce phénomène, que ce soit le droit pénal,[2] le droit des droits de l'homme,[3] le droit du travail,[4] voire le droit de la famille.[5] L'expansion matérielle du phénomène se fait d'ailleurs parallèlement à un rayonnement géographique, car la contractualisation du droit se manifeste dans quasiment tous les systèmes juridiques. L'analyse comparative du phénomène se justifie dès lors amplement pour compléter la perspective diachronique qui a souvent prévalu dans l'étude de la part de l'autonomie de la volonté des sujets de droit dans la création et l'application des règles qui les gouvernent.

Une brève présentation du système juridique camerounais permet de comprendre la spécificité de son droit de la famille et le cadre particulier dans lequel se déploie sa contractualisation dans ce pays.

Le Système Juridique Camerounais

Au Cameroun coexistent trois pouvoirs exerçant chacun des fonctions et des missions distinctes : le pouvoir législatif, le pouvoir exécutif et le pouvoir judiciaire.

Le pouvoir législatif est organisé par le titre III de la Constitution du 18 janvier 1996. Il est exercé par un parlement bicaméral constitué de l'Assemblée nationale et du Sénat.[6] Le parlement a pour mission de légiférer d'une part et de contrôler l'action du gouvernement d'autre part. C'est à ce premier titre que le pouvoir législatif est appelé notamment à intervenir en droit de la famille. A cette occasion il examine et adopte des propositions de lois ou des projets de lois, selon que l'initiative du texte est le fait des parlementaires ou du gouvernement.

Le pouvoir exécutif est quant à lui incarné par le Président de la République. Ce dernier définit la politique de la nation dont le gouvernement est chargé de la mise

[1] Chassagnard-Pinet S, Hiez D (2007) *Approche critique de la contractualisation.* LGDJ, Paris ; Chassagnard-Pinet S., Hiez D (2008) *La contractualisation de la production normative,* Dalloz, Paris.

[2] Alt-Maes, F (2002) La contractualisation du droit pénal : mythe ou réalité ? *Revue de science criminelle et de droit pénal comparé*, 3 : 501–515; Tulkens F, Van De Kerchove M (1996) La justice pénale : justice imposée, justice participative, justice consensuelle ou justice négociée ? in Gérard Ph, Ost F., M. Van De Kerchove (dir.), *Droit négocié, droit imposé ?* Publication des Facultés Universitaires Saint-Louis*,* Bruxelles, p. 529–579.

[3] Hennebel L, Lewkowicz G, La contractualisation des droits de l'homme. De la pratique à la théorie du pluralisme politique et juridique. In : Xifaras M, Lewkowicz G et al (2009) *Repenser le contrat* Dalloz, Paris, p. 221–244.

[4] Bessy C (2007) *La contractualisation de la relation de travail,* LGDJ, coll. « Droit et Société », Paris.

[5] Fenouillet, D, De Vareilles-Sommières, P (2001) La contractualisation de la famille, Economica, coll. « Études juridiques », Paris.

[6] Article 14 e la constitution.

en œuvre.[7] Le gouvernement a à sa tête un Premier ministre qui en dirige l'action. Le chef du gouvernement est également chargé de l'exécution des lois et exerce le pouvoir réglementaire.[8]

Il existe enfin un pouvoir judiciaire prévu par le titre V de la constitution. Exercé par la Cour suprême, les Cours d'appel et les tribunaux,[9] il est chargé de rendre la justice. Son indépendance, à la fois vis-à-vis du pouvoir exécutif et du pouvoir législatif est garantie par le Président de la République.

Le fonctionnement de toutes ces institutions est régulé par un organe juridictionnel spécial : le Conseil constitutionnel. Ce dernier est principalement chargé du contrôle de la constitutionnalité des lois et des règlements internationaux. Il s'agit d'un contrôle *a priori* et limité. Il s'effectue en effet avant la promulgation du texte querellé, sa saisine étant réservé à un il résulte de cette pluralités des pôles d'exercice du pouvoir, une diversité des sources du droit, spécialement en droit de la famille.

Les Sources du Droit de la Famille au Cameroun

La constitution en vigueur au Cameroun est issue de la loi n° 96/06 du 18 janvier 1996 portant révision de la constitution du 02 juin 1972.[10] Fidèle à la tradition africaine, le Préambule de la constitution du 18 janvier 1996, qui fait partie intégrante de la constitution, énonce que « La nation protège et encourage la famille, base naturelle de la société humaine ». Cette protection de la famille par le texte placé au sommet de la hiérarchie des normes juridiques est également assurée au niveau législatif.

Aux termes de l'article 26 de la constitution, sont du domaine de la loi, notamment, l'état et la capacité des personnes, les régimes matrimoniaux, les successions et libéralités. En tout état de cause, les lois applicables en matière familiale sont diverses.

Tout d'abord, en raison du double héritage colonial franco-britannique du Cameroun, continuent d'être appliqués au Cameroun,[11] outre le code civil dans sa

[7] Article 5 de la constitution.

[8] Article 12 de la constitution.

[9] Article 37 de la constitution.

[10] Elle a elle-même été partiellement révisée par la loi n° 2008/001 du 14 avril 2008.

[11] Le fondement général de cette survivance est l'Art. 68 de la constitution « La Législation résultant des lois et règlements applicables dans l'Etat fédéral du Cameroun et dans les Etats fédérés à la date de prise d'effet de la présente Constitution reste en vigueur dans ses dispositions qui ne sont pas contraires aux stipulations de celle - ci, tant qu'elle n'aura pas été modifiée par voie législative ou réglementaire ».

version rendue applicable en Afrique équatoriale française, les lois anglaises les lois d'application générale en vigueur en Angleterre avant le 1er janvier 1900.[12]

Ensuite, le législateur national est intervenu pour régir certains aspects du droit de la famille à travers l'Ordonnance du 29 juin 1981 portant organisation de l'état-civil et certaines dispositions relatives à l'état des personnes physiques. Une législation uniforme et complète est envisagée à travers l'Avant-projet de code des personnes et de la famille qui est encore en préparation.

Par ailleurs des dispositions du code pénal protègent spécifiquement la famille ou plus généralement ces membres. Ainsi le chapitre V du code pénal camerounais est consacrée aux atteintes contre l'enfant et la famille. On peut citer notamment les articles 337 (avortement), 358 (abandon de foyer) et 361 (adultère) du code pénal.

Le droit de la famille au Cameroun est surtout caractérisé par la survivance des règles coutumières qui régissent la plupart des aspects des relations familiales.[13] Il existe à cet effet à peu 250 coutumes correspondant au nombre d'ethnies peuplant le Cameroun. Ces coutumes restent applicables en droit de la famille tant qu'elles ne sont pas contraires à l'ordre public. Leur effectivité est assurée par des juridictions traditionnelles (tribunal coutumier, Tribunal de premier degré*, Customary courts* et *Alkali courts).*

La jurisprudence est également une source importante du droit de la famille au Cameroun. Le juge, par son office, contribue à suppléer au silence de la loi sur certaines questions relatives au droit de la famille et à adapter la législation lorsqu'elle ne paraît plus adéquate. Le juge, au fil des solutions qu'il donne aux affaires qui lui sont soumises fait évoluer la coutume ou bien contextualise le code civil.

Les règles d'origine internationale, sont enfin d'un apport non négligeable dans la construction du droit camerounais de la famille. Plusieurs instruments internationaux relatifs aux droits de l'homme ont été ratifiés par le Cameroun dont certaines dispositions intéressent la famille et les rapports entre ses membres. On peut citer notamment :

- la déclaration universelle des droits de l'homme[14]
- la Charte africaine des Droits de l'Homme et des Peuples[15]
- la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes[16]
- la convention internationale des droits de l'enfant.[17]

[12] Article 11 de la *Southern Cameroon High Court Law* de 1955.

[13] Fometeu J (1995) Nul n'est censé ignorer la . . . coutume » (Chronique d'humeur à propos d'une législation d'un genre particulier). LexLata 17:12 ; Akomndja Avom V (2001) L'énonciation de la coutume en droit camerounais de la famille : leurre ou réalité ? RASJ, 2, vol. 2 : 97 ; Bokalli V E (1997) La coutume, source de droit au Cameroun. RGD 28 : 37.

[14] Visée par le préambule de la constitution.

[15] V. préambule de la constitution.

[16] Adoptée le 18 décembre 1978 et ratifiée par le Cameroun le 23 août 1994.

[17] Adoptée le 20 novembre 1989 et ratifiée par le Cameroun le 11 janvier 1993.

Au regard de l'article 45 de la constitution du Cameroun, ces instruments internationaux, une fois régulièrement ratifiés ont une valeur supérieure aux lois internes, exception faite de la constitution. Leur applicabilité est subordonnée à leur approbation ou ratification et à leur publication. Une fois entrés en vigueur, les traités et accords internationaux en question sont d'application directes et peuvent être invoquées par les justiciables devant le juge ou être appliquées d'office par celui-ci.

La multiplicité de ces sources du droit laisse-t-elle une certaine marge de manœuvre à la volonté des parties dans l'organisation de leurs relations familiales et dans la résolution des conflits qui peuvent en résulter ? En d'autres termes quelle est la part du contrat, de la convention dans le droit substantiel et processuel de la famille au Cameroun. Cette contribution entend relever que, d'une manière générale, la contractualisation du droit de la famille est mitigée. Si celle du droit substantiel de la famille est contrastée (2), celle du contentieux familial semble être encouragée (3).

La Contractualisation Contrastée du Droit Substantiel de la Famille

Traditionnellement, le droit de la famille est assez rétif au phénomène contractuel.[18] Il s'agit là d'un domaine où le statut prédomine sur le contrat. La liberté contractuelle y trouve des limites générales posées par l'article 6 du code civil aux termes duquel : « On ne peut déroger par des conventions particulières aux règles qui intéressent l'ordre public et les bonnes mœurs ». Cette disposition est particulièrement intéressante en droit camerounais de la famille car elle permet non seulement de faire obstacle à certaines conventions ou à certaines clauses contractuelles, mais encore d'écarter certaines coutumes qui ne paraissent pas conformes à ces impératifs.

En dehors de cette limitation générale de la liberté contractuelle en droit de la famille, il en existe d'autres qui sont spécifiques à certaines conventions particulières. Il en est ainsi des articles 1388 et suivant du code civil.[19] La liberté contractuelle est également restreinte de manière particulière dans le domaine

[18]Lewkowicz G, Xifaras M (2009) Droit et philosophie face aux nouvelles pratiques contractuelles », in M. Xifaras et G. Lewkowicz et al, *op. cit.* p. 2.

[19]Art. 1388. - Les époux ne peuvent déroger ni aux droits qu'ils tiennent de l'organisation de la puissance paternelle et de la tutelle, ni aux droits reconnus au mari comme chef de famille et de la communauté, ni aux droits que la femme tient de l'exercice d'une profession séparée, ni aux dispositions prohibitives édictées par la loi.

Art. 1389. - Ils ne peuvent faire aucune convention ou renonciation dont l'objet serait de changer l'ordre légal des successions, soit par rapport à eux-mêmes dans la succession de leurs enfants ou descendants, soit par rapport à leurs enfants entre eux: sans préjudice des donations entre vifs ou testamentaires qui pourront avoir lieu selon les formes et dans les cas déterminés par le présent Code.

des rapports patrimoniaux entre époux au Cameroun car leur méconnaissance par certaines des sources du droit de la famille (*common law* et droit coutumier) ne permet nullement aux époux d'organiser à leur guise le sort de leurs biens pendant et après le mariage.

Nonobstant cette dernière réserve, la contractualisation des rapports patrimoniaux de famille est particulièrement marquée en regard de celle des rapports extrapatrimoniaux

La Contractualisation Marquée des Rapports Patrimoniaux de Famille

Les rapports verticaux de famille sont organisés dans le cadre de la puissance paternelle. Cette institution recouvre les droits et obligations relatifs aussi bien à la personne de l'enfant qu'à son patrimoine.

Les Rapports Patrimoniaux de Type Vertical

Relativement aux biens, la puissance paternelle se manifeste à travers le pouvoir d'administration et la jouissance légale des biens de l'enfant par le parent qui en a l'exercice.

Si ces droits reconnus ainsi aux parents sur les biens de l'enfant sont importants, ils n'en sont pas moins exclusifs de charges. La puissance paternelle impose en effet des obligations de nature patrimoniale aux parents. Ceux-ci doivent entre autres fournir une pension alimentaire à l'enfant en cas de besoins ou lui fournir des subsides.

La Jouissance des Biens de l'Enfant

Relativement aux biens, la puissance paternelle se manifeste à travers le pouvoir d'administration et la jouissance légale des biens de l'enfant par le parent qui en a l'exercice.[20]

Toutefois le donateur ou l'auteur du legs du bien, peut soustraire par l'expression de sa volonté les biens donnés ou légués au mineur du cadre de l'administration et de la jouissance du titulaire de la puissance paternelle et en confier la gestion à un tiers.[21]

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[20] Art. 384 c. civ. – *« Le père durant le mariage, et, après la dissolution du mariage, le survivant des père et mère, auront la jouissance des biens de leurs enfants jusqu'à l'âge de dix-huit ans accomplis, ou/jusqu'à l'émancipation qui pourrait avoir lieu avant l'âge de dix-huit ans ».*

Celui des père et mère qui exerce la puissance paternelle aura la jouissance légale des biens de son enfant légalement reconnu, dans les mêmes conditions que les père et mère légitimes,

[21] Article 389 du code civil.

Les Devoirs Incombant aux Parents

Les parents sont tenus de fournir des aliments à leurs enfants mineurs. Cette obligation ne peut faire l'objet de dérogation car elle est d'ordre public. Ainsi la femme concourt avec le mari à assurer la direction matérielle de la famille, à élever les enfants et à préparer leur établissement.[22] De même, dans le cadre de la filiation adoptive, l'adoptant doit des aliments à l'adopté s'il est dans le besoin.[23]

La Dévolution Successorale

Les règles de la dévolution successorales sont fixées par la loi. Elles sont en partie de nature supplétive de volonté. Ainsi, il est possible d'y déroger au moyen soit d'une donation entre vifs,[24] soit par testament[25] à condition de ne pas entamer la réserve héréditaire, sous peine de réduction de ces donations et legs.[26]

En revanche, certaines règles successorales sont d'ordre public et ne souffrent aucune dérogation. C'est en ce sens que va la jurisprudence lorsque, se fondant sur l'article 6 du code civil, elle prononce la nullité de la clause testamentaire visant à écarter les filles de la jouissance des biens.[27]

Les Rapports Patrimoniaux de Type Horizontal

Les rapports patrimoniaux des époux relativement aux biens consistent en la contribution aux charges du ménage, à la gestion des biens pendant le mariage au sort de ces biens après le mariage.

La Contribution aux Charges du Ménage

Les époux sont tenus à des obligations patrimoniales du fait du mariage. Le mariage réalise en effet, en dehors de la communauté de vie, une communauté d'intérêt entre les époux ; ceux-ci forment une unité économique. Les rapports pécuniaires qui s'établissent ainsi entre le mari et la femme constituent le régime matrimonial. Il y a un aspect impératif ou primaire du régime matrimonial qui consiste en l'obligation respective de chaque époux de contribuer aux charges du ménage.

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[22] Article 213 du code civil.

[23] Article 355 du code civil.

[24] Art. 894 du code civil.

[25] Art. 895 du code civil.

[26] Art. 921 du code civil.

[27] CS Arrêt n° 12/L du 20 février 1997, aff. Manga Dibombe Richard c/ Mlle Muna Dibombe.

En principe, les époux contribuent aux charges du mariage en proportion de leurs facultés respectives. Cette obligation incombe à titre principal au mari. La femme n'en est pas pour autant dispensée et s'acquitte de sa contribution aux charges du mariage par ses apports en dot ou en communauté et par les prélèvements qu'elle fait sur les ressources personnelles.

Toutefois, les époux peuvent régler les conditions de cette contribution par contrat de mariage. Il s'agit d'une convention par laquelle les époux, avant la célébration du mariage, fixent la propriété et la gestion de leurs biens pendant le mariage et le sort de ceux-ci en cas de dissolution de l'union. Le contrat de mariage est la preuve de la portée large reconnue aux pouvoirs des volontés individuelles sur les effets patrimoniaux du mariage. Cette portée n'est pas pour autant absolue. Aux termes de l'article 1388 du code civil, « Les époux ne peuvent déroger ni aux droits qu'ils tiennent de l'organisation de la puissance paternelle et de la tutelle, ni aux droits reconnus au mari comme chef de famille et de la communauté, ni aux droits que la femme tient de l'exercice d'une profession séparée ».

La Gestion des Biens Pendant le Mariage

Quel que soit le type de régime matrimonial choisi par les époux, le mari en sa qualité de chef de la famille, a l'administration des biens du ménage. Quand les époux se seraient marié sous un régime de séparation des biens, Le mari conserve l'administration des biens meubles et immeubles de la femme, et, par suite, le droit de percevoir tout le mobilier qu'elle apporte en dot, ou qui lui échoit pendant le mariage, sauf la restitution qu'il en doit faire après la dissolution du mariage, ou après la séparation de biens qui serait prononcée par justice.[28] La même règle vaut a fortiori en droit coutumier.

Cette règle peut d'ailleurs être renforcée ou voir sa portée étendue par une stipulation expresse des conjoints. Ainsi un époux pourra confier à l'autre l'administration de ses biens personnels en dépit du choix du régime de la séparation des biens. Cette situation s'analyse en un contrat de mandat.[29]

Le Sort des Biens Après la Dissolution de l'Union

Le divorce ou le décès de l'un des conjoints entraine en même temps la fin du mariage et celle du régime matrimonial qui doit de ce fait être liquidé. Le sort des biens du mariage sera dès lors celui prévu par les règles supplétives du code civil ou par les règles coutumières ou, le cas échéant, par les stipulations du contrat de

[28] Art. 1531 du code civil.

[29] V. par exemple l'article 434 de l'avant-projet du code des personnes et de la famille: « Si pendant le mariage, l'un des époux confie à l'autre l'administration des biens personnels, les règles du mandat sont applicables ».

mariage. En effet, on déduit de l'article 301 du code civil que les époux peuvent convenir des avantages pour assurer la subsistance de l'un d'entre eux. Ce n'est qu'en l'absence de telles stipulations que le juge pourra lui accorder sur les biens de l'autre à titre de pension alimentaire.

La Contractualisation Modérée des Rapports Extrapatrimoniaux de Famille

Seront évoqués, tour à tour, les rapports extrapatrimoniaux lisant les parents et les enfants et ceux qui s'établissent entre les époux.

Les Rapports Extrapatrimoniaux Entre les Parents et Leurs Enfants

On envisagera la contractualisation de l'établissement de la filiation, celle de l'exercice de la puissance paternelle et celle de la disparition de la filiation.

L'Établissement de la Filiation

La parenté verticale, entendue comme le lien juridique unissant les parents et les enfants, en créant des droits et des devoirs spécifiques et réciproques repose techniquement sur la filiation naturelle ou adoptive. La qualité de parent est ainsi reconnue soit en raison de l'existence de liens de sang, soit, en dehors de ce lien biologique, par l'effet du mécanisme de l'adoption. La parenté est en outre légitime ou naturelle. Dans le premier cas, elle suppose l'union des père et mère par les liens du mariage. Dans le second cas en revanche, en l'absence d'un tel lien, alors qu'elle est établie par le seul fait de l'accouchement à l'égard de la mère, à l'égard du père, elle suppose une procédure de reconnaissance initiée par le prétendu père (reconnaissance volontaire) ou par l'enfant, voire par sa mère (action en recherche de paternité).[30]

D'une manière générale, la parenté ne peut pas être conventionnellement établie. Il en va ainsi même de la filiation adoptive. Aux termes de l'article 41 de l'ordonnance du 29 juin 1981, l'adoption d'un enfant se fait par jugement. Toutefois, la volonté de l'adoptant est prise en compte de même que celle de l'adopté ou, s'il est mineur, celle de ses père et mère, voire celle d'autres représentants de l'enfant, à l'instar du conseil de famille. Par conséquent, le contrat d'adoption doit être

[30] Article 46 de l'ordonnance de 1981.

homologué par le juge pour produire ces effets, ceux-ci ne courant qu'à compter du jugement ou de l'arrêt d'homologation.[31]

En dehors de l'adoption, il n'existe pas d'autres modalités conventionnelles d'établissement de la filiation. Les conditions de l'adoption, qui se caractérisent par un formalisme très poussé, pourraient néanmoins être plus allégées compte tenu du nombre sans cesse croissant d'enfants abandonnés à la naissance par leur parent et trouverait dans ce mécanisme un moyen d'être intégré dans une famille. En même temps, une contractualisation sans contrôle de la filiation adoptive constitue un risque sérieux de développement des transactions les plus attentatoires à la personne humaine (vente d'enfants, trafic d'êtres humains).

Il convient par ailleurs de signaler que, bien pratiqués d'ores et déjà dans certains établissements hospitaliers spécialisés sur le territoire camerounais depuis une dizaine d'années l'insémination artificielle avec utilisation des gamètes ou des embryons, ne bénéficie pas d'un encadrement légal spécifique.[32] L'autonomie de la volonté y trouve dès lors un terrain propice et des transactions plus ou moins orthodoxes se développent dans ce contexte.

L'Exercice de la Puissance Paternelle

Une fois établi, le lien de parenté crée un complexe de droits et d'obligations des parents à l'égard des enfants et réciproquement. Cet ensemble est qualifié, dans certains systèmes juridiques dans lesquels l'égalité des droits et des pouvoirs entres père et mère est consacrée d'« autorité parentale ». En droit camerounais, compte tenu de la suprématie encore admise du parent mâle, l'on utilise encore la terminologie du code civil de 1804 en parlant de « puissance paternelle ». Il en résulte que l'exercice de cette dernière dans un couple marié est confié exclusivement au père pendant le mariage.[33] Pour les enfants nés en dehors du mariage, la puissance paternelle est exercée conjointement par les deux parents, si la filiation est légalement établie à l'égard des deux.[34] Son exercice est exclusif lorsque l'enfant n'a été reconnu que par un seul des deux parents. En cas de désaccord, la puissance paternelle est exercée par le parent qui a la garde effective de l'enfant.

Dans son contenu, la puissance paternelle recouvre les droits et obligations relatifs aussi bien à la personne de l'enfant qu'à son patrimoine. Relativement à la personne de l'enfant, la puissance paternelle impose au parent qui en est investi une triple obligation de protection, d'entretien et d'éducation.

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[31] TPD de Meiganga. Jugement n°54/cc du 12 juin 1986. Aff. Mme veuve Bello Rajil née Asmaou Danna C/ Succession Bello Radjil. P.

[32] v. cependant le décret 2001/336 du 13 octobre 2001 portant organisation et fonctionnement du Centre Hospitalier de Recherche et d'application en Chirurgie endoscopique et reproduction humaine.

[33] Art. 373 du code civil.

[34] Art. 47 de l'ordonnance du 29 juin 1981.

En principe les règles d'exercice et de dévolution de la puissance paternelle sont d'ordre public. Celles-ci n'admettent dès lors pas de dérogation, même si exceptionnellement certains aspects de la puissance paternelle peuvent faire l'objet de conventions dans des conditions strictement limitatives. Il en est ainsi notamment de la possibilité de confier conventionnellement la garde de l'enfant à un tiers, sous réserve d'homologation judiciaire

Si la puissance paternelle ne peut ainsi être entièrement transférée par voie conventionnelle, en revanche, certains aspects de celle-ci peuvent faire l'objet de transaction.

Le devoir de garde et de surveillance peuvent en effet être organisés d'accord partie par les parents en cas de séparation, sous réserve de l'homologation judiciaire. On peut par ailleurs inférer de la jurisprudence sur la responsabilité du fait des dommages causés par l'enfant mineur que ces charges peuvent être conventionnellement confiées à un tiers (grands-parents, oncles et tantes, voire institutions éducatives[35]). Ce placement de l'enfant qui n'entraîne pas transfert de la qualité de parent est subordonné à une homologation judiciaire. Par ce biais, les parents se déchargent des devoirs de garde et de surveillance qui leur incombent normalement.[36]

La Disparition de la Filiation

La disparition de la filiation est à l'instar de son établissement soumise à des règles, pour l'essentiel, d'ordre public. S'agissant de l'exclusion de la parenté par voie conventionnelle, l'on note qu'aucune règle ne l'autorise expressément. Par conséquent, le lien de filiation entre les parents et leurs enfants ne peut être rompu que par des causes légalement admises, tel le désaveu. On pourrait seulement signaler la possibilité que la loi offre à l'adoptant de révoquer sa volonté d'adopter. Toutefois, comme en matière d'établissement de la filiation par ce moyen, une décision judiciaire est nécessaire.

Les Rapports Extrapatrimoniaux Entre les Époux

La contractualisation des rapports extrapatrimoniaux entre époux sera présentée à travers la constitution des rapports horizontaux (1), les devoirs de nature personnelle des époux (2) et de la dissolution desdits rapports (3).

[35]La cohabitation avec l'enfant mineur, condition préalable à la mise en cause des parents dont l'enfant a causé à autrui un dommage en application de l'article 1384 alinéa 4 du code civil est considérée comme faisant défaut lorsque la garde dudit enfant a été confiée par ses parents à un tiers. Cette jurisprudence atteste de la validité des conventions sur les pouvoirs de garde et de surveillance.

[36]La pratique est très courante au Cameroun et est la plupart du temps justifiée par le besoin de scolarisation en ville des enfants dont les parents vivent en zone rurale.

La Constitution des Rapports Horizontaux de Famille

S'il peut être contracté sous la forme monogamique ou polygamique (précisément polygynique), dans le système juridique camerounais, le mariage est l'union entre des personnes de sexes différents. L'article 53 (3) de l'ordonnance du 29 juin 1981 prévoit expressément qu'aucun mariage ne peut être célébré si les futurs époux sont de même sexe.

Le fait d'avoir des rapports sexuels avec une personne de son sexe constitue par ailleurs un délit,[37] il est même inconcevable qu'une union homosexuelle puisse se développer ouvertement, fut-elle fondée sur une convention entre les deux partenaires.

En dehors de cette prohibition d'ordre physiologique, d'autres conditions substantielles sont exigées pour la validité du mariage. Les époux doivent être majeurs, c'est-à-dire âgés de 21 révolus. A défaut, la fille âgée de 15 ans et le garçon de 18 ans pourront se marier avec le consentement de leurs parents. Quel que soit le cas, le consentement des futurs conjoints est requis. L'article 52 de l'ordonnance du 29 juin 1981 prévoit qu'aucun mariage ne peut être célébré si les époux n'y consentent pas. Ce consentement doit être donné librement et en toute connaissance de cause. Aussi, la contrainte ou la violence physique ou morale exercée sur les futurs époux ou leurs proches afin d'obtenir leur consentement ainsi que l'erreur sont-elles des causes d'annulation du mariage.

Il existe également des conditions d'ordre sociologique : il s'agit de la prohibition de la bigamie et celle de l'inceste. Le mariage est en outre une union solennelle qui nécessite l'accomplissement de certaines formalités. Il doit ainsi être célébré par un officier d'état-civil. Néanmoins, il existe des formes traditionnelles d'union conjugale qualifiées de mariage coutumier. Leur efficacité est subordonnée à la formalité de transcription dans les registres d'état-civil.

Le principe de la liberté matrimoniale domine la formation du mariage. En vertu de ce principe, chacun est libre de se marier ou de ne pas se marier, de choisir son partenaire et la forme de son union (polygamique ou monogamique). L'avant-projet du code des personnes et de la famille consacre explicitement le caractère contractuel des fiançailles en les définissant comme « une convention solennelle par laquelle un homme et une femme se promettent mutuellement le mariage ».[38] Ce principe de la liberté matrimoniale a ainsi une portée relativement large. Il justifie la prohibition de la pratique coutumière des « mariages forcés », c'est-à-dire des unions dans le cadre desquelles il est passé outre le consentement des futurs époux et notamment de la jeune fille. La nature contractuelle du mariage est ainsi mise en exergue à travers ce principe.

C'est ce même principe de la liberté matrimoniale qui constitue le fondement des aménagements conventionnels des conditions de formation du mariage. Ces conventions s'appuient généralement sur des pratiques traditionnelles. Ainsi, il peut être

[37] Art. 347 (bis) du code pénal.

[38] Art. 194 de l'avant-projet.

stipulé que le mariage ne sera célébré qu'à condition que le futur époux ait satisfait aux exigences de la dot coutumière ou que la future épouse ait achevé ses études ou qu'elle ait conçu un enfant. Toutes ces exigences supplémentaires aux conditions légales ne sont cependant valables que si toutes les parties concernées y consentent.

Les Devoirs de Nature Personnelle des Époux

Sur le plan personnel, c'est-à-dire au regard des rapports extrapatrimoniaux, le mariage confère des droits et impose des obligations réciproques aux époux. L'article 212 c.civ dispose à cet égard que « Les époux se doivent mutuellement fidélité secours et assistance ».

Le devoir de fidélité commande à chaque époux de garder son corps à la jouissance exclusive de l'autre. La forme la plus achevée de l'infidélité est l'adultère qui est à la fois une cause péremptoire de divorce[39] et un délit pénal.[40] Toutefois, dans ce dernier cas, et compte tenu de l'admission de la polygamie au profit de l'homme, l'adultère de l'homme et celui de la femme sont différemment définis. Alors que l'adultère de la femme est consommé lorsque celle-ci a des rapports sexuel avec un autre que son mari, il faut que l'homme ait, soit des rapports sexuels avec d'autres femmes que son ou ses épouses au domicile conjugal, soit des relations sexuelles habituelles avec une autre femme hors du domicile conjugal. Le mari polygame est ainsi, selon une expression répandue tenu à un devoir de « fidélités multiples ». En tout état de cause, l'obligation de fidélité est la conséquence du devoir de cohabitation liant les conjoints.

L'obligation de cohabitation est prévu à l'article 215 alinéa 1 du code civil qui dispose que « le choix de la résidence de la famille appartient au mari ; la femme est obligée d'habiter avec lui et il est obligé de la recevoir ». Cette obligation peut faire l'objet d'aménagements conventionnels quant à ses modalités d'exécution dans un foyer polygamique. Il n'est pas en effet rare que contractuellement le mari conclut avec ses différentes épouses un accord sur les conditions de sa cohabitation alternée avec chacune d'elles. Les époux sont, quel que soit le cas, incités à convenir de manière consensuelle d'une résidence commune car la femme dispose de la faculté de demander une résidence alternative si celle choisie par le mari présente pour elle-même ou pour les enfants un danger.

Les époux sont en outre tenus d'un **devoir d'assistance**. Ce devoir a trait aux soins personnels que peut nécessiter l'état physique ou mental de chacun des conjoints au regard de son âge ou de sa santé, au réconfort que doit lui rapporter l'autre face aux difficultés de l'existence. Il est assez proche du devoir de secours qui est l'obligation pour chaque époux de fournir à l'autre, en cas de besoin ce qui est nécessaire. Ces deux devoirs qui ont quelque peu un caractère pécuniaire peuvent faire l'objet de conventions entre les époux à condition que celles-ci les ne vident pas entièrement de leur nature affective.

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[39] Art. 229 (adultère de la femme, cause de divorce) et 230 (adultère du mari, cause de divorce).

[40] Article 361 du code pénal.

La Dissolution des Rapports Horizontaux de Famille

La dissolution du mariage peut être due soit à une cause naturelle (le décès de l'un des conjoints), soit à des causes juridiques tel le divorce. Parfois, la rupture définitive du lien matrimonial est précédée d'un relâchement de celui-ci par l'effet de la séparation de fait ou de la séparation de corps.

Les causes de divorces sont nombreuses compte tenu de la coexistence au Cameroun du droit moderne et du droit traditionnel. En droit écrit, l'on distingue les causes péremptoires de divorce, l'adultère et la condamnation à une peine afflictive et infamante[41]et les causes facultatives de divorce, notamment les excès, les sévices et les injures graves. En droit traditionnel, les causes communes de divorce aux deux époux sont les suivantes : l'adultère ; la violation de l'engagement de monogamie ; les mauvais traitements ; la sorcellerie ; le manque d'égard vis-à-vis des beaux-parents ; la condamnation du conjoint à une peine afflictive et infamante. Les autres causes varient selon que l'action est intentée par l'homme (la mauvaise conformation de la femme ; le refus d'accomplir ses obligations coutumières ; l'inconduite habituelle de la femme[42]) ou par la femme (l'impuissance du mari ; le refus d'entretenir de la femme ; les sévices graves, les injures graves.[43]

Il n'est pas permis aux époux de modifier par leur seule volonté ces causes de divorce car les causes péremptoires de divorces, une fois réunies conduisent au prononcé du divorce sans que le juge ne dispose du pouvoir d'en apprécier l'opportunité. Quant aux causes facultatives, elles ne conduisent au prononcé du divorce qu'à condition d'être suffisamment graves au point de rendre intolérable le maintien du lien conjugal.

En somme, le droit camerounais, aussi bien traditionnel que moderne opte pour la conception du divorce pour faute ou de divorce sanction. Le divorce par consentement mutuel n'est pas admis, ni même envisagé dans l'avant-projet de loi portant code des personnes et de la famille.[44]

En ce qui concerne **la procédure de divorce**, elle est marquée par une certaine prise en compte de la volonté des époux. En effet, le juge compétent en matière de divorce est tenu de tenter de concilier les parties. Ce n'est que lorsque la tentative de conciliation échoue que la procédure qui jusque-là est gracieuse passe à la phase contentieuse. En revanche, si la tentative de conciliation connait un succès, la demande en divorce devient caduque. En effet, selon la jurisprudence, la

[41]Articles 229, 230 et 231.

[42]Fanatisme religieux, négligence du foyer conjugal. CS Arrêt n°21/cc du 18 novembre 2004, affaire Mme Minoue née Hoho c/ Minoue Emmanuel.

[43]Dans la coutume bamiléké, le fait de traiter une femme de « femme stérile » est une injure grave, cause de divorce, Arrêt n°68 du 24 août 1978.

[44]Les causes de divorce y sont limitativement énumérées à l'article 246 : adultère, excès et sévices ou injures graves ; inconduite notoire notamment la dilapidation des biens ou l'abandon moral ou matériel du foyer ; condamnation du conjoint pour des faits portant atteinte à l'honneur et à la considération de l'autre conjoint ; séparation de fait continue d'une durée de 3 ans.

réconciliation des époux rend irrecevable toute demande en divorce, ou fait tomber la procédure déjà commencée quand elle intervient au cours de l'instance. Elle s'analyse en une fin de non-recevoir[45] L'exception tirée de la réconciliation peut être opposée en tout état de cause et invoquée pour la première fois en cause d'appel et même elle doit être au besoin suppléée d'office par le juge. Cette solution s'appuie sur l'article 244 du code civil qui dispose que : l'action en divorce s'éteint par la réconciliation des époux survenue, soit depuis les faits allégués dans la demande, soit depuis cette demande.

La Contractualisation Encouragée du Contentieux Familial

Le principal avantage de la contractualisation du contentieux relatif à la famille est celui de favoriser la collaboration entre les parents tout en permettant de maintenir les rapports entre eux, même en cas de rupture du mariage. La prise en compte de la volonté des parties lors de la résolution des conflits familiaux se manifeste à travers la contractualisation des règles de compétence d'une part et l'exécution des conventions relatives à ces litiges d'autre part.

La Contractualisation des Règles de Compétence

La multiplicité des modes alternatifs de résolution des litiges connus en droit camerounais implique d'en établir une typologie. La démarcation sera ainsi faite selon que les modes alternatifs de règlement des litiges familiaux font ou non intervenir un tiers.

Les Modes Alternatifs de Résolution des Conflits n'Impliquant pas un Tiers

Il s'agit de la transaction d'une part et du conseil de famille d'autre part. Ces deux modes de résolution des litiges peuvent intervenir soit dans le cadre d'une instance judiciaire soit en dehors.

La transaction est prévue aux articles 2044 à 2058 du code civil. Elle est définie comme le contrat par lequel les parties préviennent une contestation à naître ou terminent une contestation née au moyen de concessions ou sacrifices réciproques.

En règle générale, la transaction n'est possible que dans les matières où les parties ont la libre disposition de leurs droits. Ainsi, en droit de la famille, les parties ne peuvent transiger que pour les contestations intéressant leurs rapports patrimoniaux. Il s'agit notamment du partage successoral afin de mettre fin à

[45] Arrêt n° 11 du 29 novembre 1963 ; *Bull. des arrêts de la CS du Cameroun Oriental,* n°9, p. 669.

l'indivision successorale[46]ou du partage et de la liquidation de la communauté ayant existé entre les époux.[47]

Il est cependant loisible aux parties d'ajouter à la transaction une clause pénale sanctionnant au paiement d'une somme forfaitaire, celle des parties qui manquera de l'exécuter.[48]

Quant au conseil de famille, en dehors des missions consultatives qui lui sont dévolues par plusieurs dispositions du code civil, notamment en matière de tutelle,[49] il peut lui être reconnu des fonctions contentieuses. Ainsi en cas de conflit familial sur la dévolution successorale, le conseil de famille peut être appelé à statuer sur la qualité d'héritier [50] ou sur la désignation d'un administrateur de la succession.[51] Le recours au conseil de famille peut même être ordonné par le juge en vu de la résolution d'un point litigieux d'une procédure en cours. Mais plus fréquemment les parties recourent à cette technique spontanément, notamment en matière coutumière où elle apparaît comme le principal mode de résolution des litiges.

Les Modes Alternatifs de Résolution des Conflits Impliquant un Tiers

Les MARC impliquant l'intervention d'un tiers sont en nombre plus important. Il s'agit de la conciliation, de la médiation, voire de l'arbitrage.

La conciliation peut être judiciaire ou extrajudiciaire (conseil de famille). Dans certains cas, elle constitue une phase préalable et obligatoire au procès. Le conciliateur a pour mission essentielle d'inciter les parties à se rapprocher. Elle se distingue sur ce dernier point de la médiation car celle-ci suppose une intervention plus active du tiers qui assiste les parties dans la recherche de la solution mais ne dispose pour autant d'aucun pouvoir de trancher ou d'imposer sa solution. Le médiateur propose donc une solution que les parties sont libres d'accepter ou non.

Si la médiation est un MARC essentiellement extrajudiciaire et est très souvent tentée dans le cadre du conseil de famille, la conciliation quant à elle est soit judiciaire, soit extrajudiciaire.

Quant à l'arbitrage, c'est un MARC juridictionnel en ce sens que le tiers qui intervient dispose du pouvoir de trancher le litige en rendant une sentence. L'arbitrabilité du litige suppose qu"il ait pour objet des droits dont les parties ont la libre disposition.

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[46]Article 888 du code civil.

[47]Cour suprême – arrêt n°103/cc du 29 juin 2000 : aff. Mme Yondo née Dang Berthe Marie c/ Yondo Marcel.

[48]Art. 2047 du code civil.

[49]Cf. articles, 395, 396, 403, 404, 421, 446 du code civil.

[50]Cour d'Appel du Littoral. Arrêt n°1 03/1 du 14 novembre 2003, Aff. Eboa Ngongui François c/ Eyinga Kwa et autres.

[51]CS arrêt n°14/L du 21 novembre 2002. Aff. Oloa Michel c/ Oloa Balla & autres.

En droit de la famille, de manière traditionnelle, les droits sont indisponibles au nom de l'ordre public familial. Il faut toutefois distinguer entre les droits personnels, assez rétifs à la contractualisation, et les droits patrimoniaux qui eux sont relativement perméables au phénomène contractuel. Les MARC ne sont cependant pas totalement exclus des litiges mettant en cause des droits personnels à condition qu'ils soient mise en œuvre sous la houlette d'un juge. Ainsi, en matière de divorce, le juge a l'obligation de tenter de (re)concilier les parties.

S'agissant des droits patrimoniaux, les parties peuvent largement recourir aux MARC et peuvent au nom de la liberté contractuelle y insérer des clauses pénales.

L'Exécution des Conventions en Matière Familiale

On envisagera premièrement la force exécutoire des conventions en matière familiale avant de présenter les modifications dont elles peuvent être objet.

La Mise en Œuvre des MARC

On distinguera la force exécutoire des accords obtenus à la suite des MARC et celle des accords obtenus en dehors des MARC.

La Mise en Œuvre des Accords Issus des MARC

Les accords obtenus suite à la tenue d'un conseil de famille ne lient pas les parties. A défaut d'exécution volontaire par les parties, elles ont besoin pour produire leurs effets d'une homologation judiciaire. Il en est de même des accords obtenus à la suite d'une médiation ou d'une conciliation. Toutefois, la conciliation intervenue dans le cadre de la procédure de divorce a quant à elle autorité de la chose jugée car elle constitue une fin de non-recevoir à une autre demande de divorce intervenant pour la même cause entre les mêmes parties.[52]

S'agissant de la transaction, l'accord intervenu par ce moyen a à l'égard des parties autorité de la chose jugée en dernier ressort. Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion. Cependant, la transaction faite sur pièces qui depuis ont été reconnues fausses, est entièrement nulle.[53]

En ce qui concerne l'arbitrage, la sentence qui en résulte n'est susceptible d'exécution forcée qu"en vertu d'une décision d'exequatur rendue par le juge étatique. La loi 10 juillet 2003/009 du 10 juillet 2003, prise en application de l'AUA

[52] Arrêt n°11 du 29 novembre 1963; CS Arrêt n°78/L du 17 juin 1973, Aff. Dame Bediboume Elisabeth contre Nkano Dieudonné.

[53] Art 2052 et 2055 du code civil.

de 1999 désigne le président du TPI comme juge de l'exequatur. Sa décision jouit de l'autorité de la chose jugée (article 22 AUA).

Le président du Tribunal de première instance est saisi par une requête qui doit être accompagnée des pièces établissant l'existence de la sentence arbitrale. Le contrôle se borne donc à la vérification de la régularité formelle de la requête. L'exequatur est accordé ou refusé sans débat contradictoire entre les parties.

La Mise en Œuvre des Accords Hors MARC

Les accords intervenus entre les parties en dehors de modes alternatifs de résolution des conflits sont exécutoires en vertu de l'article 1134 du code civil aux termes duquel les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Il en est surtout ainsi de celles intervenus dans les matières ont totalement la libre disposition de leurs droits à l'instar du régime matrimonial.

En revanche, dans d'autres domaines, l'homologation du juge s'avère nécessaire. C'est le cas des accords concernant les modalités d'exercice ou de transfert de la puissance paternelle ou de ceux qui concernent le versement de la pension alimentaire.

La Modification des MARC

Les conventions relatives au droit de la famille, comme toutes les autres conventions doivent être formées conformément aux conditions posées par les articles 1108 et suivants du code civil qui exigent l'existence et l'intégrité du consentement, la capacité des parties, une cause et un objet conformes à l'ordre public et aux bonnes mœurs. En dehors de ces conditions de fond, des conditions de forme sont exigées pour certains types de convention, à l'instar du contrat de mariage qui suppose un acte authentique. L'inobservation de ces conditions entraine la nullité de la convention.

La rescision de certaines conventions peut également être prononcée pour cause de lésion. Il en est ainsi notamment du partage lorsqu'un des cohéritiers établit, à son préjudice, une lésion de plus du quart.[54]

En revanche, la révision judiciaire des conventions en cours est plus difficile en vertu de l'intangibilité des contrats à l'égard du juge. Néanmoins, le juge pourra intervenir pour réviser le montant de la pension alimentaire fixée conventionnellement par les parties car celle-ci doit tenir compte aussi bien des revenus du débiteur que des besoins du créancier.

Il en est de même de l'accord intervenu dans le cadre d'une transaction qui peut être révisé en cas d'erreur de calcul.[55]

[54] Art. 887 et 1079 du code civil.

[55] Article 2058 du code civil.

Conclusion

Au terme de ce tour d'horizon du phénomène de la contractualisation en droit camerounais de la famille, il ressort que la volonté des parties y trouve timidement sa place. Si elle est relativement éminente dans le domaine du contentieux familial, elle reste restreinte dans celui du droit substantiel de la famille en général, et particulièrement dans le cadre des rapports personnels des membres de la famille. Une évolution est néanmoins envisagée comme on a pu le relever à propos de la formation des fiançailles dans l'avant projet de code des personnes et de la famille.

D'une manière générale, l'on assiste paradoxalement à un reflux souhaitable de l'ordre public parallèlement à un renforcement nécessaire de l'emprise de l'Etat dans la réglementation des rapports sociaux. Cette double tendance est sans conteste le reflet du caractère contradictoire des aspirations des sociétés contemporaines.[56]

[56]Ropers C (2002) Reste-t-il un ordre public familial ? In : Pigache Ch. *Les évolutions du droit : contractualisation et procéduralisation*, Publications de l'Université de Rouen, Rouen.

Chapter 4
Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada

Robert Leckey

Abstract This paper surveys the place of contract or private ordering in the family law of the Canadian common-law provinces. While a certain space for legally effective private arrangements is evident respecting the vertical, parent-child relations of family law as well as the horizontal ones of adult intimate relations, there are limits. The common-law sources studied may not frame those limits as explicitly as the civil law's constraints based on public order and good morals. Yet principles such as the court's abiding jurisdiction to order support for a former spouse and the imperative of safeguarding the best interest of a child significantly constrain private ordering. On the matter of procedural contractualization or private ordering, the proliferation of programs and forms of dispute resolution complicates the picture. There is an impulse to foster out-of-court settlement of family disputes, balanced against certain controls. The overall observation is that efforts to protect vulnerable individuals and to assert the public interest in these common-law jurisdictions take the form of heightened scrutiny or review powers bearing on the products of private ordering, rather than the demarcation of zones in which contract is forbidden.

Introduction

This paper surveys the place of contract or private ordering in the family law of the Canadian provinces. It sets the stage, presenting the Canadian legal system, the place of family law within that system, and the effect of international human rights instruments. Then, it turns to the scope for contracting regarding the substance of family relationships. While a certain space for legally effective private arrangements is evident respecting the vertical, parent–child relations of family law as well as the horizontal ones of adult intimate relations, there are limits. The common-law sources studied may not frame those limits as explicitly as the civil law's constraints based on public order and good morals. Those limits are perhaps not the product of a fully theorized untouchable core of family life. Yet principles such as the

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court's abiding jurisdiction to order support for a former spouse and the imperative of safeguarding the best interests of a child pose significant constraints on private ordering. On the matter of procedural contractualization or private ordering, the proliferation of programs and forms of dispute resolution complicate the picture. The landscape of the Canadian common-law provinces reveals an impulse to foster out-of-court settlement of family disputes, balanced against certain controls. For example, special treatment of family matters in arbitration gestures to the resilience of what Halley and Rittich (2010) call "family law exceptionalism". The overall observation is that, by and large, efforts to protect vulnerable individuals and to assert the public interest in these common-law jurisdictions take the form of heightened scrutiny or review powers bearing on the products of private ordering, rather than the demarcation of zones in which contract is forbidden. Moreover, there are fluctuations—from province to province, from issue to issue, and over time—in the intensity of that judicial scrutiny.

General Overview

The Constitution of Canada consists of a set of instruments of various sources (imperial statutes passed by the Parliament at Westminster, imperial Orders in Council, federal statutes), unwritten principles, and constitutional conventions. It includes the Constitution Act, 1867, which instituted the federation, and the Constitution Act, 1982, Part I of which is the Canadian Charter of Rights and Freedoms. The Constitution Act, 1982, grounds judicial review of legislation by affirming the supremacy of the Constitution of Canada and stating that any law inconsistent with the Constitution is invalid to the extent of the inconsistency. Since the Charter contemplates reasonable limits on rights, only limits that are unreasonable or unjustifiable entail a law's unconstitutionality. Whilst lower decision makers, such as administrative tribunals, may decline to enforce a law that they adjudge to be unconstitutional, only courts may issue generally applicable declarations that a law is invalid. There is no specialized Constitutional Court.

There is a separation of powers between the three branches of government, although the distinctions are permeable. The legislative branch consists of the Parliament of Canada and the legislatures of the provinces. The Constitution Act, 1867, distributes legislative competence between those two orders.

As for the judiciary, there are several sets of courts, for all of which the Supreme Court of Canada is the tribunal of final appeal. Three sets of courts make up the judiciary: the federally appointed judges of general, original jurisdiction, who sit in the Superior Courts administered by the provinces; the federally appointed judges in the Federal Court, who adjudicate disputes relating to specified matters falling within federal legislative competence; and the provincially appointed judges, who sit in provincially created and administered inferior courts. The judges of the Superior Courts exercise the joint jurisdiction of common law or equity that result from what were once parallel structures in England, merged in the late nineteenth

century. Those equitable powers include the inherent *parens patriae* jurisdiction to rescue a child in danger or to bridge a legislative gap.[1] At least in the Canadian context, this jurisdiction is different from the legislative recognition in a variety of family statutes of the best interests of the child as the governing principle when making decisions about children. The judiciary enjoys constitutional protection of its independence and impartiality, though the intensity of the protection varies. Judges of the Superior Courts enjoy the securest tenure, under the Constitution Act, 1867.

Both the Superior Courts and the provincial courts deal with family matters, which can result in duplication and even inconsistent orders. Only the Superior Court has the power to dissolve marriages. In some jurisdictions within Canada, there are Unified Family Courts, staffed by judges with expertise in family law. Establishing these courts requires federal-provincial co-operation and has been occurring slowly.

The Constitution vests executive power in the queen, whom the governor general and the lieutenant-governors represent in Canada. As a matter of constitutional convention and political practice, the prime minister and a cabinet of ministers exercise executive power, at both the federal and provincial levels. The executive branch includes ministries and government agencies. Administrative tribunals, created by legislation, also form part of the executive branch of government. The tasks delegated to them may be regulatory, legislative, or judicial in character, or a combination.

Respecting legal traditions (Glenn 2014), public law across the federation derives fundamentally from the English common law. In nine of the provinces and in the three territories, the private law is from the same source, though substantially altered and supplemented by legislation. In the province of Quebec, the private law derives from the civil law of France and is set out in a Civil Code. This paper refers primarily to the family law of Ontario and British Columbia, the two most populous common-law provinces in Canada.

Scholars in the Canadian common-law provinces traditionally regard family law as a matter of private law, connected to the law of property and to the law of domestic relations. Some scholars, however, view family law as more akin to public law. They do so on account of its source in statute (as opposed to the judge-made common law of the fundamental law of contract or tort), the impact of public policies such as welfare and taxation, and the impact of judgments under the Canadian Charter of Rights and Freedoms (Harvison Young 2001).

The Constitution of Canada divides legislative authority relating to family law between the two orders of government within the federation. The Parliament of Canada has exclusive competence in relation to marriage and divorce.[2] The federal divorce power includes, ancillary to it, competence to regulate the custody of children and the maintenance owed to a former spouse and to children during divorce

[1] *AA v BB* 2007 ONCA 2, 83 OR (3d) 561 at para 27.

[2] Constitution Act, 1867, s. 91(26).

proceedings and following divorce. The provinces enjoy exclusive competence in relation to the solemnization of marriage in the province.[3] The provinces regulate the duties of married spouses during marriage, the division of family property on divorce, parental status and its incidents, and the economic relations of unmarried cohabitants in virtue of their power to regulate "property and civil rights in the province."[4]

Family relations affect taxation and social policy in numerous ways, although legislation and social policy rarely refer to the family as such (Leckey 2009b). Instead, law and policy target the conjugal cohabiting couple and the parent–child relationship. Although the income-tax regime system is notionally based on the individual taxpayer, the law requires individuals who are married or who live conjugally with another person for more than 1 year to declare that person as a married or as a common-law spouse, as the case may be (Young 2015). Negatively, for the taxpayer, means-tested tax credits will refer to the aggregate income of a taxpayer and his or her spouse. Positively, having a dependent spouse or child makes certain tax credits available.

Although there is no inheritance tax, on death the taxpayer's estate must pay capital gains tax on property not disposed of during life. A taxpayer may defer taxes otherwise payable on disposition of property by making a transfer to a spouse during his or her lifetime. Social security law presumes that married spouses and unmarried cohabitants support one another, reducing eligibility by the resources deemed to be available through a spouse. Family relations are relevant to a wealth of other regimes (e.g. arm's-length rules in bankruptcy law; a family category for sponsorship under immigration law).

The Constitution does not explicitly protect the family or the institution of marriage. Nevertheless, judgments under the Canadian Charter of Rights and Freedoms have granted significant constitutional status to family relations. Section 15 of the Charter guarantees the right to equal treatment before and under the law. The Supreme Court of Canada has applied that provision to conclude that it may be unconstitutionally discriminatory, based on marital status, for third parties to distinguish unmarried from married partners.[5] Conversely, a legislature may justifiably abstain from recognizing reciprocal rights and obligations on the part of unmarried couples in virtue of their not having manifested the choice to assume the legal entailments of marriage.[6] Courts have held that distinctions between same-sex and different-sex couples, including an opposite-sex requirement for marriage, discriminate unjustifiably based on sexual orientation.[7] Among other things, the

[3] Constitution Act, 1867, s. 92(12).

[4] Constitution Act, 1867, s. 92(13).

[5] *Miron v Trudel* [1995] 2 SCR 513.

[6] *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61.

[7] *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161 (CA).

equality right entails the right of same-sex couples to adopt.[8] It has also led to recognizing the right, where a child is born via assisted conception to a lesbian couple, of the birth mother's partner to register as a parent.[9] Courts have applied the Charter to conclude that interference with the parent–child relationship, as when the state takes a child into care, may affect a person's security of the person, guaranteed by section 7. Consequently, government agencies must ensure that, when they deprive someone of his or her security of the person, they do so in conformity with the "principles of fundamental justice" (see generally Bala and Leckey 2013).

Turning to the question of international law, Canada has a dualist approach. While the federal executive can bind Canada internationally by ratifying a treaty, Canadian courts will give that international law direct application only once legislation has incorporated it into domestic law. The power to implement international undertakings tracks legislative competence. In other words, only a province may implement an international undertaking in respect of matters within provincial competence (Brun et al. 2014, para VIII.117). Nonetheless, Canadian courts at times take account of international norms that the executive branch has ratified, but that the legislature has not implemented. Thus, in judicial review of a discretionary decision respecting deportation, the Supreme Court of Canada referred to the children's best interests as recognized by the Convention on the Rights of the Child (Brunnée and Toope 2004).[10]

Substantive Family Law

This overview makes it possible to turn now to the scope for private ordering and contract regarding the substance of vertical and horizontal family relationships. In general, before turning to family law, the Canadian common law of contract articulates the boundaries of substantive private autonomy less thoroughly than does Quebec civil law. In Canadian common law, for a long time there is no general duty of good faith in the conclusion of contracts or in their performance (McCamus 2012 Ch. 21). There is now a "general organizing principle" of good-faith contractual performance.[11] Courts may decline to enforce contracts based on illegality; for example, non-competition clauses may be unenforceable as restraints of trade, but in general there are few substantive limits on contract (Swan and Adamski 2012, pp. 983–987). The doctrine of unconscionability will render unenforceable a contract where a stronger party has exploited a weaker party's vulnerability, but that constraint does not arise from substance alone (Bigwood 2005; Swan and Adamski 2012, pp. 889–901).

[8] *Re K* (1995), 23 OR (3d) 679 (Prov Div).

[9] *Rutherford v Ontario (Deputy Registrar General)* (2006), 81 OR (3d) 81 (SCJ).

[10] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

[11] *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 495 at para 33.

No public policy precludes prenuptial agreements or other agreements by which spouses limit their duty of reciprocal support or the operation of regimes sharing the gain in property during their union. In contrast with the position under some civil-law systems, a contractual waiver of the duty to support one's spouse is not automatically null. Nevertheless, the courts maintain an overriding jurisdiction to order an individual to pay support to his or her former spouse and no private agreement can oust that jurisdiction. In Ontario, a provision in a marriage contract that purports to limit a spouse's rights regarding possession of the matrimonial home will be unenforceable.[12] So will be a clause in a separation agreement that stipulates chastity as a condition for receiving spousal support (but not one specifying contingencies on remarriage or cohabitation with another).[13]

The Parliament of Canada's Divorce Act provides that when a spouse or former spouse seeks a maintenance order against the other spouse, the court must take into consideration an agreement regarding spousal support.[14] Such agreements are neither automatically void nor automatically binding. Instead, in proceedings regarding support, such agreements, including instruments that purport to be a final waiver of support, will receive a variable weight. Specifically, the weight that such agreements command has oscillated over time. In 2003, the Supreme Court of Canada announced it would accord such waivers significant weight.[15] More recently, the Supreme Court may have backed away from that position (Leckey 2012; Rogerson 2004; see also Rogerson 2012).

Nothing in the common-law provinces or in federal law makes surrogacy agreements illegal, although they are not enforceable by damages or specific performance if the woman carrying the child changes her mind. However, federal law prohibits payment for surrogacy beyond compensation for expenses.[16]

There is no bar to non-married couples attaching to themselves by contract some or all of the rights and obligations entailed by marriage.

Parents and Children

Extra-judicially, the starting point for maternity is that the woman who gives birth to the child is legally the mother. A father declares himself on birth registration documents or the mother may declare him. The law may also presume his paternity, if he is married to the mother of the child or cohabiting with her.[17] Turning to judicial

[12] Family Law Act RSO 1990, c F3, s 52(2).

[13] Family Law Act RSO 1990, c F3, s 56(2).

[14] RSC 1985, c 3 (2d Supp), s 15.2(4)(c).

[15] *Miglin v Miglin*, 2003 SCC 24, [2003] 1 SCR 303.

[16] Assisted Human Reproduction Act SC 2004, c 2, s 6.

[17] See e.g. Children's Law Reform Act RSO c C12, s 8(1)1, 8(1)4.

establishment of parentage, provincial law provides that a court may declare an individual to be a child's mother or father (see generally Campbell 2007; Mossman 2012 Ch. 3).

Enactments in several provinces provide that a lesbian couple that has a child by assisted reproduction may register both women as the child's legal mothers. The law of British Columbia provides that three individuals—a couple who conceive a child by assisted conception and their genetic donor—may all become parents of the child where they have so agreed in writing prior to the child's birth.[18] In addition, a child may have one or two parents by adoption, of which the declaring judgment severs any prior bonds of kinship.

Where a lesbian couple conceived a child with a known donor and all three wished to parent the child, the Ontario Court of Appeal used its *parens patriae* jurisdiction to declare that a child had three parents: not only his mother and father, but also the mother's same-sex partner (LaViolette 2007).[19]

Parental status vests parents with the set of rights and duties equivalent to what the civil law calls parental authority. Parents must thus support the child and they have the rights and duties of custody (to decide the child's residence, to make decisions for the child). Legislation sets out that parents and children owe one another reciprocal alimentary duties. Enactments quantify the parent's support duty to the child, fixing contributions by the paying parent's income and the number of children (subject to agreement or to discretionary judicial variation). The cut-off dates for the parent's support duty to the child vary. For example, in Ontario, the parent is obligated, to the extent of his or her ability, to support an unmarried child who is a minor or who is studying full-time.[20]

It is not possible to vest a person with parental authority as a whole via contract. However, involvement in the life of a child can lead figures other than legal parents to assert some attributes of parental authority or to become subject to them. For example, federal and provincial law provides that a person other than a parent may apply for custody of a child or access to him or her. In addition, under the Divorce Act[21] and the family statutes of most common-law provinces, an individual may owe maintenance to the child of his or her spouse or former spouse. The condition for doing so is that he or she must have "stood in the place of a parent" towards that child (Rogerson 2001).

As for the contractual establishment or exclusion of legal parenthood, the rules vary. In some provinces, if a surrogate mother hands a child to the intending parents, the intending parent who has no genetic tie to the child will need to adopt the child to acquire parental status. In Alberta, the Family Law Act contemplates that the court will declare parentage on the part of intending parents of a child whom a surrogate

[18] Family Law Act SBC 2011, c 25, s 30.

[19] *AA v BB* 2007 ONCA 2, 83 OR (3d) 561.

[20] Family Law Act RSO 1990, c F3, s 31(1).

[21] RSC 1985, c 3 (2d Supp), ss 2(2), 15.1.

mother carried.[22] In contrast, British Columbia's Family Law Act provides an extra-judicial avenue for regularizing the parentage of a child carried by a surrogate mother.[23] It sets out conditions relating to a written agreement and a written consent to surrender the child. If followed, those conditions lead, by operation of law, to parental status for the intending parents and to no parental status on the surrogate's part.

Clinical insemination using anonymously donated sperm is legal. Where it occurs, it will be impossible to establish paternity on the part of the anonymous donor. While on some views constitutional rights or human rights ought to lead to a right to know one's genetic origins, in Canada, the constitutional guarantee of the right to security of the person, as judicially interpreted, includes no such right. Nor is it discriminatory for a province to erect an administrative scheme that helps to preserve information about the origins of adopted children while doing nothing for the children conceived by anonymous donations.[24]

The status of a man who provides gametes for a woman as a known donor is unclear. In some cases, courts have recognized a known donor as father (Kelly 2009). Canadian judges use the criterion of the best interests of the child, including at times the idea that a relationship with the genetic father advances those interests, rather than any theorized "right" on the child's part to know his genetic origins (cf. Besson 2007). Although using not the language of contract, but instead a lexicon of intention and autonomy, feminist scholars have criticized the obstacles to women's becoming "autonomous mothers." In particular, they have criticized courts' willingness to attribute parental status or visitation rights to a man (other than an anonymous donor) because of the genetic link between him and a child (Boyd 2007; Kelly 2012).

Individuals cannot effect an adoption and transfer of parental status by contract. Only a judgment can terminate parental status and confer parentage on an adopter or adopters. However, the law in several provinces contemplates that the adoptive parent(s) may conclude an openness agreement with a birth parent or other birth relative of the adopted child.[25] The legal and constitutional position is not wholly clear, but aboriginal customary adoption may constitute an exception to the proposition that only a judgment can change parentage via an adoption (Baldassi 2006).

There is no mechanism for anonymous birth equivalent to France's *accouchement sous X* (Lianos 2012).

[22] Family Law Act SA 2003, c F-4.5, s 8.1(2).

[23] SBC 2011, c 25, s 29.

[24] *Pratten v British Columbia (Attorney General)* 2012 BCCA 480, 357 DLR (4th) 660, leave to appeal to SCC refused, [2013] 2 SCR xii.

[25] See e.g. Child and Family Services Act RSO 1990, c C11, s 153.6(1).

Ontario law varies the scope of permissible contracting about children's upbringing based on the state of the parents' relationship. It adopts one approach with a view to the relationship between parents or future parents as a going concern. It provides for marriage contracts and cohabitation agreements by which the partners agree concerning the right to direct the education and moral training of their children, but not concerning custody of the children or access to them.[26] Once the adult couple is no longer intact, the scope for agreement expands. In a separation agreement, former married or unmarried partners may, in addition, agree on the right to custody of the children and access to them—including housing of the child.[27] In both scenarios, such domestic contracts are subject to formal requirements: they must be made in writing, signed, and witnessed.

Crucially, when it comes to any matter respecting the education, moral training, or custody of a child or access to him, the court may disregard any contractual provision where it is of the opinion that doing so would be in the best interests of the child.[28] That is, agreements regarding the child cannot oust the court's statutory obligation to make orders reflective of "a full and balanced consideration of all factors relevant to a determination of the child's best interests" (Payne and Payne 2013, p. 515). A prior parenting agreement is an important factor for a court to consider. It is not, however, "enforceable" in the sense of an ordinary civil contract.

Legal parents and persons who exercise parental authority over a child cannot dissolve the relationship with the child by unilateral juridical act or by bilateral agreement. Nor is there a legal means to dissolve the bond with a major child. Indeed, when interpreting the Divorce Act's provisions regarding the alimentary obligation of the *de facto* parent, such as a step-parent, the Supreme Court of Canada insisted that the adult's intention to sever the *de facto* relation with the child does not terminate the legal effects of their past relational interaction (Harvison Young 2000).[29]

Furthermore, it is not possible definitively to preclude the eventual recognition of a parent–child relationship by committing intention to writing. This proposition emerged from a case in which a pair of cohabitants—the woman having conceived a child via anonymous sperm, and both agreeing that the man should never become the child's father—sought assurance that their written expression of intention would have legal effect. The court refused, however, to foreclose the possibility that the best interests of the child might call for recognizing the man as a "parent" under provincial law, for example, for purposes of child support or custody (Cossman 2007).[30]

[26] Family Law Act RSO 1990, c F3, ss 52(1)(c), 53(1)(c).

[27] Family Law Act RSO 1990, c F3, s 54 (c).

[28] See e.g. Family Law Act RSO 1990, c F3, s 56(1).

[29] *Chartier v Chartier* (1998) [1999] 1 SCR 242.

[30] *Jane Doe v Alberta* 2007 ABCA 50, 404 AR 153, leave to appeal to SCC refused (*sub nom Doe v The Queen*), [2007] 2 SCR vi.

Partners

The primary horizontal relation of family law remains marriage. Under federal law, it is open to two individuals, of the same or different sexes, freed from the impediment of a subsisting marital bond or a closeness that offends the legislated prohibited degrees (lineal relationship or sibling by blood or adoption). As regulated by provincial law, a celebrant solemnizes marriage before witnesses. Minors require their parents' consent to marry. A marriage ceremony may be civil. In addition, in contrast to the separation of civil effect and religious ceremony established in jurisdictions such as France, the ministers or celebrants of recognized religious organizations perform religious marriages that are civilly valid. In all the common-law provinces, marriage entails an obligation of reciprocal support. Irrespective of who holds the title or who has signed the lease, both spouses are entitled to occupy the matrimonial home.

Regarding property, in all the common-law provinces, marriage does not affect title to the spouses' respective assets. In every jurisdiction, however, there are mechanisms for dividing matrimonial or family property (or its increase in value, depending on the province) when the marriage ends (Leckey 2009b, p. 8). Those regimes presume an equal division of the increase in property attributable to the marriage as a joint economic enterprise. To achieve this focus on the marriage as a joint economic enterprise, the regimes generally provide for deducting the value of property that the spouses held on marriage and for deducting gifts or inheritance during the marriage. In addition, it is separation, rather than dissolution, that ceases the patrimonial growth attributable to the marriage as a partnership.

The Parliament of Canada's Divorce Act governs dissolution.[31] There is no extra-judicial dissolution, nor is there dissolution "on demand." Judges of the Superior Court grant divorces. Thus, while it is possible to resolve the economic matters of breakdown by agreement or to submit those issues to binding arbitration, dissolution of the marriage and the consequent change in marital status arise only from a judgment. The sole basis for granting a divorce is "breakdown of marriage." There are two means of establishing that legally crucial fact. The "no-fault" avenue is for the spouses' to live "separate and apart" for at least 1 year prior to determination of the divorce proceedings. The "fault" avenue requires the spouse petitioning for divorce to establish that the other has committed adultery or treated the petitioner with intolerable physical or mental cruelty.[32]

Several of the common-law provinces have created registration regimes by which adults may opt into some or all of the rights and obligations of marriage. In Nova Scotia, registration subjects the couple to the full set of marital rights and obligations (including maintenance and equalization of matrimonial property on breakdown).

[31] RSC 1985, c 3 (2d Supp).

[32] Divorce Act RSC 1985, c 3 (2d Supp), s 8.

In Alberta, concluding an "adult interdependent relationship agreement" leads to a reciprocal maintenance obligation and a right to occupy the couple's home, but does not bring the regime of matrimonial property.

In addition, the nine common-law provinces subject unmarried cohabitants to a reciprocal obligation of support. The qualifying threshold varies (e.g. cohabitation for 2 or 3 years or less if the partners have a child together). In several provinces, the same threshold of cohabitation also triggers application of the regime of matrimonial property.

It is not possible to opt into or out of the substantive or formal conditions for entering into a relation (e.g. enforceable undertaking not to marry until the occurrence of certain conditions or without additional consents).

The elements that the civil law characterizes as extra-patrimonial have limited effect. An unconsummated marriage is voidable and may be annulled (Payne and Payne 2013, p. 31). As noted, adultery provides a path to "breakdown of the marriage" so as to justify dissolution. Basing "breakdown of the marriage" on 12 months' living separate and apart might implicitly sanction an obligation to live together, although the common-law provinces do not articulate the positive obligations of marriage explicitly as Quebec civil law does.

The conduct of married spouses respecting their extra-patrimonial rights and obligations produces little effect in financial terms. The Divorce Act specifies that the parties' conduct is irrelevant to a determination of maintenance.[33] Nevertheless, one party's conduct towards the other—for example, a sudden desertion after a long marriage that results in depression—may affect the other's needs and circumstances in a potentially relevant way.[34] The bases for derogating from the presumptively equal division of matrimonial or family property under provincial law are narrow and they do not include the parties' conduct in extra-patrimonial matters. A patrimonial valuation of some kinds of caring labour arises in respect of a dependant's claim for damages. Thus if a person is injured or killed by another's fault, the spouse (and children as well as other relatives) may claim damages under the law of civil liability or tort. Ontario law specifies that recoverable damages include a reasonable allowance for the loss of the value of services such as nursing or housekeeping.[35]

If the regimes dividing equally amongst married spouses the fruits of the marriage effectively value labour performed in the home, unmarried cohabitants who do not benefit from such equal division may seek remedies under the general private law. In particular, claims by former unmarried cohabitants under the doctrine of unjust enrichment may call for valuing unpaid housekeeping and care work. The courts have made plain that there is no obligation for one cohabitant to provide housekeeping services to the other. "Love" does not justify a transfer that would otherwise be reversible as unjust. Housekeeping services have given rise to

[33] RSC 1985, c 3 (2d Supp), s 15.2(5).

[34] *Leskun v Leskun* 2006 SCC 25, [2006] 1 SCR 920.

[35] Family Law Act RSO 1990, c F3, s 61(2)(d).

a reversible unjust enrichment, as measured by the substitute cost of purchasing those services in the market. The Supreme Court of Canada has indicated that relationships that were characterizable as a "joint family venture" can give rise to robust sharing on breakdown under the law of unjust enrichment. In some circumstances, unjust enrichment may lead to an equal division of the wealth generated by one party whilst benefiting from the other's unpaid contributions (Leckey 2012; McInnes 2011).[36]

To my knowledge, it is not possible to opt into or out of the substantive or formal conditions for dissolving a relation. There is no "covenant marriage," for instance, as known in a few of American states. Nor is there any recognition of additional potentially legally binding constraints, such as the consent of a family council. Indeed, Canadian law attempts to diminish the likelihood that one spouse would impede the other spouse's religious remarriage, for instance by refusing to take the steps to bring about a religious dissolution. In this way, under the Divorce Act, a spouse who has declined to take the steps within his power to bring about a religious dissolution suffers impediments in civil litigation.[37]

It is possible to conclude a separation agreement dealing with post-divorce support. The parties may also resolve their division of property by separation agreement. A judgment of divorce may incorporate a separation agreement or minutes of settlement, in which case the agreement acquires henceforth the status of a judicial order. While there are some bases for setting aside a contractual division of property (see below), such an agreement is final. The courts do not retain an abiding jurisdiction to vary such agreements. By contrast, the court always has jurisdiction to order support or to vary support, despite a separation agreement or previous court order (see below). This presentation of the scope and limits of private ordering in relation to the substance of family relationships leads, as well, to the question of the opportunities for such ordering in matters of process.

Procedural Family Law

Jurisdiction

This section addresses the resolution of disputes by a variety of extra-judicial means or avenues of alternative dispute resolution (ADR), including arbitration, for civil disputes generally and then, more narrowly, in the family context.

At the general level, negotiation and settlement of disputes outside formal processes such as adjudication is common (Abrams and McGuinness 2010, paras 14.8, 14.3). Even where one party has initiated litigation, processes upstream of adjudication encourage parties to reach a settlement: pre-trial conferences, case

[36] *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269.

[37] RSC 1985, c 3 (2d Supp), s 21.1; see also Family Law Act RSO 1990, c F3, ss 2(4), 2(5), 2(6).

conferences, or settlement conferences (Abrams and McGuinness 2010 at para 14.120). Generally, a master conducts these types of conferences, or a judge. If it is a judge, that judge will not preside over the eventual trial if the parties fail to settle.[38] In Ontario, the rules require holding a pre-trial conference, unless the court orders otherwise.[39] In British Columbia, a settlement conference may take place if the parties so jointly request at any stage of the trial, or if a judge so orders of his or her own initiative at a case-planning conference.[40] The case-planning conference itself may be ordered any time after expiry of the pleading period.[41]

Although the province maintains a list of approved mediators, parties may agree to a mediator who does not appear on that list.[42] In British Columbia, in addition to the authority to order a settlement conference, a judge may order parties to a case-planning conference to attend a mediation session, or "any other dispute resolution process," and make orders directing the conduct of that process.[43] There is also mandatory mediation in Saskatchewan and discretionary authority to order parties to attend mediation in Yukon Territory as well as in Newfoundland and Labrador.

Arbitration is a formal, out-of-court process by which a third party, to whom the parties have referred their dispute and whose decision they agree ex ante to accept, resolves a dispute. At common law, courts recognize and enforce private parties' agreement to submit their dispute to arbitration. In all provinces, legislatures have imposed limits on agreements to arbitrate and the process of arbitration (Abrams and McGuinness 2010, para 9.127).[44] In Ontario, for example, court intervention is legislatively limited to assistance of the arbitration, ensuring that it is conducted in accordance with agreements, preventing unfair treatment of parties involved, and enforcing awards (Abrams and McGuinness, 2010, para 9.128). As discussed above, the in-court processes involve judicial mediation and case management.

Turning from ADR generally to family matters, negotiation is the normal means of settling family disputes (Payne and Payne 2013, p. 136). "[S]ince well over 90% of divorce cases are resolved without a trial, it is clear that these other methods of resolving disputes are, in fact, the primary means of reaching settlements in family law matters" (Mossman 2012, p. 346). Parties settle their family disputes in this way with the law's approval and encouragement. Under the Divorce Act, any lawyer acting on behalf of a spouse in dissolution proceedings is obligated to discuss with the client the advisability of negotiating and settling privately the

[38]Rules of Civil Procedure RRO 1990, Reg 194, s 50.10; Supreme Court Civil Rules BC Reg 168/2009, s 9-2(3).

[39]Ontario Rules s 50.02.

[40]BC Rules ss 5-3(1)(o), 9-2(1).

[41]BC Rules s 5-1(2).

[42]Ontario Rules s 24.1.08.

[43]BC Rules s 5-3(1)(o).

[44]See e.g. Arbitration Act 1991 SO 1991, c 17.

matters that might be subject of a support order.[45] British Columbia's new Family Law Act expresses an explicit purpose "to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court."[46] Parties may agree to alternate means of dispute resolution, including before such a dispute arises; options include mediation and arbitration (Payne and Payne 2013, pp. 140–154).[47]

Ontario requires attendance at an information program for parties involved in most family proceedings. This program provides information about the legal process and "may include information on such topics as, the options available for resolving differences, including alternatives to going to court."[48] In Ontario, except in cases concerning child protection, the judge in family proceedings must hold at least one conference (case, settlement, trial management, or a combination).[49] The purposes of these conferences include "exploring the chances of settling the case."[50]

In addition to the in-court, judicially aided dispute resolution that these conferences provide, a judge may order the parties to attend an intake meeting for court-affiliated mediation services.[51] In British Columbia, any "family dispute resolution professional" consulted by a party to a family dispute is under an obligation to discuss with the party the advisability of different types of dispute resolution, and to inform the party of facilities and resources that may be available.[52] The legislation defines "family dispute resolution professional" broadly. The term includes a family justice counsellor; a parenting coordinator; a lawyer advising a party in relation to a family law dispute; a mediator conducting a mediation in relation to a family law dispute, if he or she meets requirements in the regulations; and an arbitrator conducting an arbitration regarding a family law dispute if he or she meets the requirements in the regulations.

Focusing on arbitration relating to family law, the starting point is that an agreement to refer a dispute to family arbitration binds the parties (see generally Payne and Payne 2013, pp. 154–160). As Payne and Payne say (2013, p. 154), "The use of binding arbitration has recently emerged in Canada as a viable alternative to contested litigation as a means of resolving spousal disputes respecting property division, support, and child custody and access on marriage breakdown or divorce." In British Columbia, such an agreement is subject only to the province's Family Law Act. Under section 6 of that statute, it does not matter whether or not there is "consideration" for that undertaking, whether a family dispute resolution

[45] RSC 1985, c 3 (2d Supp), s 9(2).

[46] SBC 2011, c 25, s 4(b).

[47] Sections 6(a)-6(b)(ii).

[48] Family Law Rules O Reg 114/99, s 8.1.

[49] Sections 17(1), 17(4), 17(5), 17(6), 17(7).

[50] Sections 17(4)(a), 17(5)(a), 17(6)(a).

[51] Family Law Rules O Reg 114/99, s 17(8)(b).

[52] Family Law Act SBC 2011, c 25, s 8(2).

professional was involved, or whether that agreement was filed with a court. In Ontario, such an agreement to arbitrate a family dispute binds the parties only if they reached it after the dispute had arisen, rather than in advance.[53] For a family arbitration award to be enforceable, the formal requirements set out in the Arbitration Act 1991 must be satisfied. Additionally, the parties must have received independent legal advice before entering into the arbitration agreement.[54]

In the early 2000s, the prospect that Muslims would use the Arbitration Act 1991 to resolve family disputes using their religious family law triggered a crisis (Korteweg and Selby 2012; Mossman 2012, pp. 363–364; see also Razack 2007). As a legislative response, the legislature of Ontario set further constraints on family arbitration. An arbitrator must now conduct a family arbitration in accordance with "the law of Ontario or of another Canadian jurisdiction," on pain of the decision's invalidity.[55] Precluding recourse to non-state law in this fashion does not guarantee that the outcomes of family arbitration will be substantively fair. The reason is the degree to which the law of Ontario and of other Canadian jurisdictions permits significant derogation from the statutory default distributions by the wholly "secular" process of private ordering (Macklin 2013).

Mediation and arbitration may combine in a form called "med-arb," where if mediation fails after a fixed period, the mediator then acts as an arbitrator giving a binding decision (Payne and Payne 2013, pp. 160–161). The Ontario Court of Appeal has recognized this process as valid in the family context, despite an apparent prohibition in the Arbitration Act 1991.[56]

Court Scrutiny

Arbitration awards do not need *a priori* homologation or court approval to be enforceable. A party may apply to the Superior Court to enforce a family arbitration award (although agreements regarding family arbitration remain subject to the judicial controls discussed in the preceding section). If the award meets the requirements, and the period for appeal has expired, the court will make an order on the award's terms. If the award contains an unusual remedy over which the court lacks jurisdiction, the court may give a different award on the applicant's request. Alternatively, the court may remit the award to the arbitrator, who may then award a different remedy.[57] With leave of the court, a party may appeal an arbitration award

[53] Family Law Act RSO c 1990, c F3, s 59.4.

[54] Family Law Act RSO c 1990, c F3, s 59.6.

[55] Arbitration Act 1991 SO 1991, c 17, ss 1 "family arbitration," 2.1, 2.2.

[56] *Marchese v Marchese* 2007 ONCA 34, 35 RFL (6th) 291 at para 6.

[57] Family Law Act RSO c 1990, c F3, s 59.8; see also Arbitration Act RSBC 1996 c 55, ss 29–30.

on a question of law. If the arbitration agreement so provides, a party may also appeal an arbitration award on a question of mixed fact and law.[58]

Without any need for court approval, an agreement arising from mediation, including in family matters, can be drafted into a formal contract to which the parties agree (Payne and Payne 2013, pp. 151–152).

In the common-law jurisdictions, domestic contracts take legal effect without needing a court to confirm or homologate them. They are enforceable so long as they meet formal requirements ("A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed").[59] This position contrasts with the requirement, under Quebec civil law, that a court must homologate a separation agreement before it takes effect.

A court may set aside a contract in family matters—declaring it null and of no effect—on the ordinary bases for setting aside any agreement under the common law of contract (e.g. unconscionability, duress). The Supreme Court of Canada has also suggested that the common law's doctrine of unconscionability has been adapted to the family setting and may be triggered more easily (Leckey 2009a).[60] In addition, family legislation provides additional bases for setting aside a marriage contract or domestic contract. For example, in Ontario, a court may set aside a domestic contract where one party failed to disclose significant assets or debts to the other or where a party did not understand the contract's nature or consequences.[61] Like Ontario's regime, British Columbia's statute provides that a court may set aside an agreement respecting property division based on circumstances at the time of its formation: if a spouse failed to disclose significant assets or debts or if a spouse did not understand the proposed agreement's nature or consequences. In addition, the law in that province contemplates that a court may set aside such an agreement if "a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress."[62]

In British Columbia, a court may set aside an agreement respecting spouses' property division if satisfied that the agreement is "significantly unfair." The court should assess the agreement's unfairness by considering the time that has passed since the parties made the agreement; the extent to which the spouses, in making the agreement, sought to achieve certainty; and the degree of the spouses' reliance on their agreement. This possibility operates even where none of the circumstances described in s 93(3) for setting aside an agreement based on the circumstances of its formation existed at that earlier time.[63] This discretionary scope for setting aside an

[58] Arbitration Act 1991, s 45.

[59] Family Law Act RSO 1990, c F3, s 55(1).

[60] *Rick v Brandsema* 2009 SCC 10, [2009] 1 SCR 295.

[61] Family Law Act RSO 1990, c F3, s 56(4).

[62] Family Law Act SBC 2011, c 25, s 93(3).

[63] Family Law Act SBC 2011, c 25, s 93(5).

agreement on property in British Columbia contrasts with the greater finality that the laws of Ontario and of other common-law provinces accord to agreements dividing property.

By contrast with adult partners' agreements regarding the division of property on relationship breakdown, agreements regarding spousal support are more susceptible to effective alteration by a court on the basis that unforeseen circumstances have produced unfairness. The Supreme Court of Canada's test for review of final waivers of spousal support calls the judge, on receipt of an application for support inconsistent with such a waiver, to undertake a two-step inquiry. First, the court looks to the circumstances of the agreement's negotiation and execution. It determines whether one party was vulnerable and the other party took advantage of that vulnerability. Scrutiny at this stage also includes whether the agreement's terms, at its formation, complied substantially with the general objectives of the Divorce Act (including equitable distribution of the economic fallout of marriage breakdown, certainty, finality, and autonomy). Second, turning to the moment when one spouse has applied to the court for support beyond the entitlement under the agreement, the court asks whether the agreement still reflects the parties' original intention and whether it still complies substantially with the legislative objectives (Rogerson 2003).[64]

In a case concerning applications for varying judicial orders to pay support under the Divorce Act,[65] the Supreme Court of Canada retreated from its voluntarist approach in *Miglin v Miglin*. The Court appeared to reduce the weight it would accord to agreements between the spouses regarding support. The Court held that an agreement containing general terms, such as a general statement of finality, provides relatively little guidance as to the parties' intentions and expectations for the future (Leckey 2012; Rogerson 2012).

In addition, a court may order support in a way inconsistent with a contractual agreement limiting or waiving a claim to spousal maintenance where the claimant qualifies for support from the state social security system.[66] There is a general sense that the individual's duty to support his or her former spouse comes before the state's obligation to support its citizens through general redistributive programs (Leckey 2008).[67]

Religiously inflected marriage contracts are contentious. A salient example is a Muslim's undertaking to grant a Mahr to his wife if the marriage ends. Canadian courts have enforced such contracts in some cases, but in others, the court cited an agreement's religious character as reason for declining to enforce it (Fournier 2010, Ch. 2).

[64] *Miglin v Miglin* 2003 SCC 24, [2003] 1 SCR 303.

[65] *LMP v LS* 2011 SCC 64, [2011] 3 SCR 775.

[66] See e.g. Family Law Act RSO 1990, c F3, s 33(4)(b).

[67] *Bracklow v Bracklow* [1999] 1 SCR 420.

As noted above, agreements regarding the support of children by their parents, their education, or their custody and access to them are always subject to the court's power to order otherwise in the best interests of the child.

Conclusions

As one might expect in a common-law jurisdiction, the overall approach tends to be pragmatic, remedial, and effects-driven. Instead of articulating clear high-level principles such as public order or the impossibility of transactions regarding civil status, as under the civil law of Quebec and of other jurisdictions, the common-law provinces constrain the scope for contract and private ordering with less drastic measures. Rather than a principled prohibition, there is generally a wide scope for domestic contracts (marriage contracts, separation agreements) and for agreements regarding the upbringing of children, but the court retains jurisdiction to set aside a domestic contract, to order maintenance inconsistent with a previous arrangement, and to make orders respecting children in their best interests. In other words, there is broad scope for private ordering, but judicial review of the results of such ordering varies in intensity.

Stepping back from the focus on the positive law, however, one might think that the lawyers' account of constraints on private power fails to tell the whole story. For example, whether spouses' entitlements flow directly from the default rules enacted to regulate family affairs, or whether spouses have concluded an agreement of some kind, external factors condition the outcomes in this area. Think of asymmetrical and varying knowledge of rights and duties, ability to access and pay for legal advice, tolerance for risk, and energy and willingness to face potential conflict. Consider, too, religious and social norms about appropriate family interactions, which may fall unevenly across men and women. Whether it is a question of enforcing default norms in court, or of reaching settlement extra-judicially, the abiding problems with access to justice, understood broadly, give serious reason to doubt that families' most vulnerable members receive the justice that legislative drafters and judges conceive for them.

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Chapter 5
Contractualisation de l'Union de Fait et Institutionnalisation du Mariage: Choix Pour les Familles Québécoises

Christine Morin

Abstract This chapter provides an overview of the situation of Quebec families and of the contractualisation of family relationships. On the one hand, it aims to highlight the differences in the legal treatment of 'horizontal relationships' (between couples) and its impact on the partners. On the other hand, it aims at explaining the repercussions of those differences in treatment on 'vertical relationships (between parents and children) and the sometimes perverse effects on partners' children.

Under Quebec law, all children are formally equal, that is to say: they have the same rights and obligations regardless of the circumstances of their birth. Most of the legal norms that establish a parent-child relationship are of public order anyhow.

Conversely, the Quebec legislature leaves much liberty to couples with regard to the ordering of their relationship, at least in case they have not entered into marriage or a civil union. The provisions of the Quebec Civil Code indeed distinctly treat couples depending on the type of union. Whereas the legislature imposes several imperative rules on spouses or registered partners, having regard to the public order, it does not on *de facto* cohabitants, having regard to respect for liberty and autonomy of the partners. If this difference in treatment of relationships necessarily has effects on the couple, it also has implications for the children, whose situation is dependent on their parents' choice.

L'auteure remercie Louis Turgeon-Dorion, étudiant au doctorat à la Faculté de droit de l'Université Laval, pour sa collaboration à la recherche. La recherche est à jour au 1er juin 2014. Ce texte porte sur la contractualisation du droit de la famille au Québec. Il présente l'état du droit québécois en répondant au questionnaire préparé par le rapporteur général, le professeur Frederik Swennen. En ce qui a trait au droit des autres provinces canadiennes – de common law –, nous renvoyons le lecteur au rapport du professeur Robert Leckey.

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Introduction

Dès l'adoption du premier code civil en 1866 – le *Code civil du Bas Canada* –, le législateur québécois s'est intéressé à la famille et aux relations entre ses membres. Il a ainsi prévu différentes règles visant à règlementer la relation entre les époux (rapports horizontaux) et d'autres régissant la relation entre les parents et leurs enfants (rapports verticaux), plusieurs de ces règles étant d'ordre public.

Avec le temps, un bon nombre de ces normes fixant les relations familiales ont évolué, notamment à la suite de l'adoption du nouveau *Code civil du Québec* (ci-après « C.c.Q. ») en 1991, mais le législateur québécois n'a jamais cessé de se préoccuper de la famille. Il s'est cependant toujours abstenu de la définir.

On remarque que les normes prévues dans le Code civil traitent distinctement les différents types de rapports horizontaux. Le législateur établit ainsi des distinctions selon que les conjoints sont mariés, unis civilement ou de fait. Dans les deux premiers cas, nous verrons que le législateur québécois impose, au nom du respect de l'ordre public, alors que dans le dernier cas, il s'abstient de le faire, au nom du respect de la liberté et de la volonté des conjoints.

Si cette différence de traitement dans les rapports conjugaux a nécessairement des effets sur les membres du couple, elle peut aussi avoir des répercussions pour les enfants. Dans ce cas, force est d'admettre que la situation des enfants est tributaire des choix de leurs parents.

Ce texte propose un état des lieux de la situation des familles québécoise et de la contractualisation des relations familiales. Il a pour but de mettre en évidence les différences dans le traitement juridique des rapports horizontaux et leurs impacts sur les conjoints. Plus encore, il cherche à signaler les répercussions de ces différences de traitement dans les rapports verticaux et leurs effets, parfois pervers, pour les enfants.

La Reconnaissance d'une Variété de Familles Québécoises

La situation du Québec est distincte de celle des autres provinces canadiennes à plusieurs égards, notamment en droit de la famille. Avant d'entrer dans le cœur du sujet, il est donc utile de rappeler certains faits et de relever quelques statistiques sur le Québec et le Canada, afin de mieux comprendre la réalité québécoise en matière de conjugalité et de relations familiales.

Réalité Sociale

Il existe trois types d'unions conjugales au Québec : le mariage, l'union civile et l'union de fait (union libre). Ces différentes unions sont toutes largement acceptées socialement, mais seules les deux premières sont soumises à un régime particulier prévu par le *Code civil du Québec*.

La fréquence de l'union libre représente une différence marquée entre le Québec et le reste du Canada. Même si l'union libre est en hausse dans l'ensemble des provinces et territoires canadiens, ce mode de vie est plus largement répandu au Québec que dans le reste du Canada. En 2011, 37 % des personnes en couple vivaient en union libre au Québec, comparativement à 20 % dans l'ensemble du Canada. Les données détaillées par province et territoire précisent que la fréquence de l'union libre au Québec se compare avec celle observée dans les trois territoires canadiens, mais qu'elle contraste grandement avec celle enregistrée dans les autres provinces. Seul le Nunavut affiche une fréquence d'union libre plus élevée (44 %) que le Québec. Les Territoires du Nord-Ouest suivent le Québec de près avec 36 %, de même que le Yukon avec 31 % (Canada. Institut de la statistique du Québec 2012).

Selon le gouvernement canadien, la proportion des couples québécois vivant en union libre est également plus élevée que dans plusieurs pays pour lesquels des données récentes sont disponibles, notamment la Suède, la Finlande, la Nouvelle-Zélande et le Danemark (Canada. Statistique Canada 2008).

Plus de la moitié des enfants québécois naissent de parents non mariés. En effet, la proportion de naissances issues de parents non mariés était de 63 % au Québec en 2011, niveau semblable à celui des trois années précédentes. Cette part a dépassé 60 % en 2006 et est supérieure à 50 % depuis 1995 (Canada. Institut de la statistique du Québec 2012).

Si, dans les faits, il est difficile de distinguer les couples ou les familles dont les conjoints sont mariés ou unis civilement de ceux qui ne le sont pas,[1] juridiquement leur situation est fort différente tel que nous le verrons ci-après. Cette différence est particulièrement évidente lorsque survient une rupture ou au moment où l'un des conjoints décède sans avoir laissé de testament.

Mentionnons par ailleurs que les familles monoparentales sont nombreuses au Québec. En 2006, 27,8 % des familles québécoises étaient monoparentales (Canada. Ministère de la famille et des aînés 2011). Les familles dites « recomposées » le sont également. Elles représentent 10,7 % des familles avec enfants (biparentales et monoparentales) ou 14,2 % des familles biparentales (Canada. Ministère de la famille et des aînés 2011). De plus, un enfant peut avoir deux parents de même sexe, soit deux pères ou deux mères (C.c.Q., art. 522, 523 et 539.1). Il existe donc une large variété de profils familiaux dans la population québécoise.

Environnement Juridique

En ce qui a trait au droit positif québécois relatif au mariage, à la filiation, au divorce et aux droits successoraux, il se retrouve principalement dans le *Code civil du Québec* et dans certaines lois fédérales. Il n'existe aucun « droit religieux » relativement à ces sujets.

[1] Pour une étude comparative de la situation factuelle des couples mariés et de fait, voir : Belleau 2007.

Au Québec, le mariage est un « contrat solennel » (C.c.Q., art. 374) qui naît de l'échange des consentements des époux lors d'une célébration publique, mais il s'agit également d'une « institution sociale » qui a des conséquences d'ordre public (*Droit de la famille – 091179*, 2009). Le mariage est un acte civil, bien qu'il puisse être célébré religieusement

La Constitution canadienne dispose que le mariage relève à la fois du gouvernement fédéral et des gouvernements provinciaux. Plus précisément, la *Loi constitutionnelle de* 1867, à ses articles 91 et 92, prévoit que le Parlement du Canada a compétence législative exclusive en matière de mariage et de divorce, mais que la législature de chaque province a compétence exclusive pour légiférer relativement à la célébration du mariage ainsi qu'en matière de propriété et de droits civils (effets du mariage).

Les principales conditions de fond du mariage – qui relèvent du gouvernement fédéral – ont trait à l'âge minimal pour se marier, à l'interdiction de la polygamie, aux degrés de parenté prohibés entre les époux et aux consentements requis.

En ce qui a trait à l'âge prescrit pour se marier, la loi fédérale prévoit que : « Nul ne peut contracter mariage avant d'avoir atteint l'âge de seize ans. » (*Loi d'harmonisation no 1 du droit fédéral avec le droit civil*, 2001, art. 6). Le *Code civil du Québec* (loi provinciale) ajoute que lorsque les époux sont mineurs, le titulaire de l'autorité parentale ou le tuteur du mineur doit consentir au mariage (art. 373).

Relativement à l'interdiction de polygamie, la loi fédérale dispose expressément que : « Le mariage est, sur le plan civil, l'union légitime de deux personnes, à l'exclusion de toute autre personne » (*Loi sur le mariage civil,* 2005, art. 2). Il est par conséquent impossible qu'un individu soit marié à plus d'une personne à la fois, ce qui signifie qu'un premier mariage doit être dissout avant qu'une seconde union puisse être contractée (*Loi d'harmonisation no 1 du droit fédéral avec le droit civil*, 2001, art. 7.). La polygamie est d'ailleurs un crime en vertu du droit criminel canadien (*Code criminel,* 1985, art. 293).[2]

Pour ce qui est des degrés de parenté prohibés pour se marier, la loi prévoit que : « Est prohibé le mariage entre personnes ayant des liens de parenté, notamment par adoption, en ligne directe ou en ligne collatérale s'il s'agit du frère et de la sœur ou du demi-frère et de la demi-sœur » et que « le mariage entre personnes apparentées prohibé par le paragraphe 2 (2) est nul » (*Loi sur le mariage (degrés prohibés),* 1990, art. 2(2) et 3(2)). Autrement dit, la loi fédérale interdit le mariage entre parents en ligne directe à tous les degrés, de même que le mariage entre parents en ligne collatérale s'il s'agit de frère/sœur ou demi-frère/demi-sœur. Tous les autres cas sont juridiquement possibles.

La loi prévoit également que : « Le mariage requiert le consentement libre et éclairé de deux personnes à se prendre mutuellement pour époux »(*Loi*

[2] À propos de la bigamie, voir : Canada. Ministère de la Justice 2006.

d'harmonisation no 1 du droit fédéral avec le droit civil, 2001, art. 5). Les deux époux doivent donc consentir personnellement et leur consentement doit être intègre (C.c.Q., art. 1399).[3]

La différence de sexe des époux n'est plus une condition du mariage, formellement depuis 2005, puisque l'article 2 de la *Loi sur le mariage civil* (2004) prévoit que : « Le mariage est, sur le plan civil, l'union légitime de deux personnes [...] », sans préciser que celles-ci doivent être de sexes différents. Cette norme s'applique dans l'ensemble des provinces et territoires canadiens.

Par contre, vu le principe de la liberté de religion qui est protégée par la Charte canadienne, l'article 3 de la *Loi sur le mariage civil* (2005) prévoit également que : « Il est entendu que les autorités religieuses sont libres de refuser de procéder à des mariages non conformes à leurs convictions religieuses. » Le Code civil réitère le même principe : « Aucun ministre du culte ne peut être contraint à célébrer un mariage contre lequel il existe quelque empêchement selon sa religion et la discipline de la société religieuse à laquelle il appartient. » (C.c.Q., art. 367)

Depuis 2002, une deuxième forme d'union conjugale confère un statut particulier aux conjoints québécois. Il s'agit de l'union civile.[4] Cette nouvelle forme d'union a été créée par le gouvernement du Québec à l'époque où le mariage entre conjoints de même sexe était prohibé. Le but du gouvernement provincial était alors de favoriser l'égalité entre les conjoints hétérosexuels et homosexuels. Comme le législateur québécois n'avait pas la compétence législative requise pour permettre le mariage entre conjoints de même sexe, il a adopté cette nouvelle forme d'union tout à fait semblable au mariage.

Les conditions requises pour s'unir civilement sont les mêmes que pour se marier : même échange de consentements des conjoints lors d'une célébration publique, même interdiction de la polygamie et mêmes degrés de parenté prohibés.[5] Les conjoints peuvent être de même sexe ou de sexes différents. L'unique distinction par rapport aux conditions du mariage concerne l'âge minimal pour s'unir civilement qui est de 18 ans (C.c.Q., art. 521.1).

Quant aux couples qui ne sont ni mariés ni unis civilement, ils ne sont pas visés par les dispositions du Code civil. Leur union est *de facto*, non officialisée par une célébration ou un enregistrement quelconque.[6] Par contre, leur relation est généralement reconnue dans la législation sociale (ex : loi sur les impôts, loi sur les accidents de travail et les maladies professionnelles, loi sur les régimes de retraite, loi sur l'assurance-automobile, etc.).[7]

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[3] Mentionnons également que le mariage par procuration est interdit.

[4] Cette union a été introduite par la *Loi instituant l'union civile et établissant de nouvelles règles de filiation* (2002).

[5] Comme l'union civile est une création du gouvernement du Québec, les conditions sont prévues aux articles 521.1 à 521.19 du *Code civil du Québec*.

[6] Confirmé par la Cour suprême du Canada : *Québec (Procureur général)* c. *A.*, 2013.

[7] L'art. 61.1 de la *Loi d'interprétation* prévoit : « Sont des conjoints les personnes liées par un mariage ou une union civile. Sont assimilés à des conjoints, à moins que le contexte ne s'y oppose,

Si cette absence de normes impératives régissant la relation des conjoints de fait a l'avantage de leur permettre de contractualiser leur relation selon leurs besoins et leurs désirs – contrairement aux conjoints mariés ou unis civilement –, elle peut cependant avoir des effets négatifs, notamment pour leurs enfants.

De l'Égalité Formelle à l'Égalité Réelle

Rappelons qu'en vertu du droit civil québécois, « la bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son extinction » (C.c.Q., art. 1375). Autrement, le principe de la liberté contractuelle ne connaît qu'une limite : l'ordre public (Baudouin et Jobin 2005, n° 81).[8] Comme l'expliquent plusieurs auteurs (Baudouin et Jobin 2005 ; Goldstein et Mestiri 2003), il est difficile de cerner le contenu de l'ordre public parce qu'il s'agit d'une notion floue qui prend différents aspects et qui est susceptible de varier selon les époques.

Au Québec, le législateur régit la plupart des rapports verticaux par des règles d'ordre public. Par contre, l'ordre public intervient différemment dans les rapports horizontaux selon que les conjoints sont mariés, unis civilement ou dans une union libre.

Institutionnalisation de Certains Rapports Horizontaux

En matière de droit de la famille, le législateur québécois interdit aux conjoints mariés ou unis civilement de déroger au chapitre du *Code civil du Québec* qui porte sur les effets du mariage ou de l'union civile (art. 391). Dubreuil et Lefebvre (1999) indiquent que l'ordre public assure ainsi à tous les conjoints mariés ou unis civilement un cadre législatif minimal composé de droits et d'obligations sur lequel ils ne peuvent librement transiger. Outre ces dispositions qui sont d'ordre public, les conjoints mariés ou unis civilement disposent de la liberté contractuelle qui leur permet notamment de choisir leur régime matrimonial (C.c.Q., art. 431).

Les conjoints mariés ou unis civilement sont soumis à certaines règles impératives relatives à la formation, au contenu et à la dissolution de leur union. D'abord, en ce qui a trait à la formation du mariage ou de l'union civile, il faut savoir qu'il est

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les conjoints de fait. Sont des conjoints de fait deux personnes, de sexe différent ou de même sexe, qui font vie commune et se présentent publiquement comme un couple, sans égard, sauf disposition contraire, à la durée de leur vie commune. Si, en l'absence de critère légal de reconnaissance de l'union de fait, une controverse survient relativement à l'existence de la communauté de vie,celle-ci est présumée dès lors que les personnes cohabitent depuis au moins un an ou dès le moment où elles deviennent parents d'un même enfant. »

[8]L'art. 9 du *Code civil du Québec* prévoit que : « Dans l'exercice des droits civils, il peut être dérogé aux règles du présent code qui sont supplétives de volonté; il ne peut, cependant, être dérogé à celles qui intéressent l'ordre public ».

impossible de déroger aux conditions prévues par la loi. Cette impossibilité existe tant pour ce qui concerne le fond que la forme. En effet, le Code civil prévoit expressément que le mariage ou l'union civile qui n'est pas célébré suivant les prescriptions de la loi peut être frappé de nullité à la demande de toute personne intéressée, sauf au tribunal à juger suivant les circonstances (C.c.Q., art. 380 et 521.10).

Ensuite, pour ce qui est des règles qui s'appliquent pendant le mariage ou l'union civile, le Code civil prévoit qu'il est « permis de faire, par contrat de mariage, toutes sortes de stipulations, sous réserve des dispositions impératives de la loi et de l'ordre public » (art. 431).[9] Comme mentionné précédemment, la relation des conjoints mariés ou unis civilement est soumise à différentes mesures législatives d'ordre public qui sont prévues au livre « De la famille », dans le Code civil.[10]

Certaines de ces dispositions ont surtout trait aux aspects extrapatrimoniaux ou personnels de la relation des conjoints. C'est le cas des droits et des devoirs des conjoints en matière de respect mutuel, de fidélité, de secours, d'assistance et d'obligation de faire vie commune,[11] qui sont tous d'ordre public (C.c.Q., art. 391 à 400 et 521.6).[12] Les conjoints mariés ou unis civilement ne peuvent déroger à ces droits et devoirs ni autrement les modifier (C.c.Q., art. 391).

D'autres dispositions du Code civil concernent les aspects patrimoniaux de la relation et sont aussi imposées à ces mêmes conjoints.[13] C'est le cas des règles en matière de protection de la résidence familiale, de patrimoine familial, de prestation compensatoire et d'obligation alimentaire (C.c.Q., art. 391, 401–430 et 521.6).

À la suite du mariage ou de l'union civile, la loi prévoit une certaine protection de la résidence familiale et des meubles qui servent à l'usage du ménage (C.c.Q., art. 401 à 413). En raison de cette protection,le conjoint propriétaire ou titulaire de

[9]La même règle s'applique à l'union civile (C.c.Q., art. 521.8).

[10]Ce chapitre correspond aux articles 365–521.19 du Code. Sur le sujet, voir : Morin (2008-1). Pour une étude comparative de la situation factuelle des couples mariés et de fait, voir : Belleau (2007).

[11]L'obligation de faire vie commune n'oblige pas les époux à cohabiter. Comme l'a souligné la Cour supérieure, « la vie commune permet des accommodements qui répondent aux impératifs professionnels ou personnels des conjoints. II est ainsi possible de faire vie commune en ne vivant pas ensemble. Tout repose sur l'intention des époux, sur la qualité de leur relation et de leurs besoins ». (*Droit de la famille - 3690*, 2000, p. 7). Le Code civil prévoit d'ailleurs à l'article 82 : « [les] époux et les conjoints unis civilement peuvent avoir un domicile distinct, sans qu'il soit pour autant porté atteinte aux règles relatives à la vie commune. »

[12]Certaines de ces dispositions ont cependant aussi des incidences patrimoniales, notamment la contribution aux charges du mariage.

[13]Les conjoints mariés avant le 1er juillet 1989 avaient jusqu'au 31 décembre 1990 pour renoncer à l'application du patrimoine familial. Depuis, les conjoints ne peuvent renoncer au patrimoine familial, sauf au moment d'un décès ou d'un jugement de divorce, de séparation de corps ou de nullité du mariage ou de l'union civile (C.c.Q., art. 423).

droits sur la résidence familiale ou les meubles qui servent à l'usage du ménage doit parfois obtenir le consentement de son conjoint pour pouvoir transiger relativement à ces biens.

En vertu des règles relatives au patrimoine familial, les conjoints doivent partager la valeur de certains biens qui ont été acquis pendant l'union et dont l'un des conjoints est le propriétaire, au moment où la relation prend fin. Les biens dont la valeur doit être partagée sont énumérés dans le Code civil : les résidences de la famille ou les droits qui en confèrent l'usage, les meubles qui les garnissent ou les ornent et qui servent à l'usage du ménage, les véhicules automobiles utilisés pour les déplacements de la famille, les droits accumulés durant le mariage au titre d'un régime de retraite et les gains inscrits, durant le mariage, au nom de chaque époux en application de la *Loi sur le régime de rentes du Québec* (chapitre R-9) ou de programmes équivalents (C.c.Q., art. 416 et 521.6).

Pour ce qui est des règles en matière de prestation compensatoire, elles visent à pallier les injustices qui peuvent découler de la relation conjugale lorsqu'un conjoint a enrichi l'autre conjoint pendant l'union, à son détriment (C.c.Q., art. 427). Chaque conjoint a le droit de réclamer le paiement d'une prestation compensatoire à l'autre conjoint en compensation de son apport en biens ou en services à l'enrichissement de son patrimoine (C.c.Q., art. 427).

Les conjoints mariés ou unis civilement sont aussi tenus à une obligation alimentaire l'un envers l'autre (C.c.Q., art. 585 à 596).

Par ailleurs, le principe d'égalité entre les conjoints dans le mariage et l'union civile entraîne des conséquences impératives pour ceux-ci (C.c.Q., art. 392). Chacun des conjoints doit ainsi conserver son nom et exercer ses droits civils sous celui-ci (C.c.Q., art. 393). Les conjoints assurent ensemble la direction morale et matérielle de la famille (C.c.Q., art. 394). Ils exercent ensemble l'autorité parentale et assument ensemble les tâches qui en découlent (C.c.Q., art. 394). Ils doivent choisir de concert la résidence familiale (C.c.Q., art. 395) et contribuer aux charges de leur union à proportion de leurs facultés respectives (C.c.Q., art. 396).

Dans la mesure où les dispositions impératives de la loi sont respectées, les conjoints mariés ou unis civilement sont, par ailleurs, libres de prévoir différentes ententes et de choisir leur régime matrimonial (C.c.Q., art. 431). À défaut de le faire, la loi prévoit qu'ils sont soumis au régime matrimonial de la société d'acquêts en vertu duquel la valeur de certains biens acquis pendant l'union devra être partagée à la fin de celle-ci (C.c.Q., art. 432).

On observe que le Code civil exclut la contractualisation de plusieurs aspects non patrimoniaux de la relation des couples mariés ou unis civilement qui constituent des droits et des devoirs impératifs pour tous ces conjoints (art. 391). On observe également qu'il exclut la contractualisation de certains rapports patrimoniaux entre les conjoints mariés ou unis civilement au début de leur union, en les empêchant de se soustraire à la protection de la résidence familiale, au patrimoine familial, à la prestation compensatoire et à l'obligation alimentaire (C.c.Q., art. 423 al. 1). En revanche, le Code civil accepte normalement la contractualisation à la fin de l'union en permettant alors aux conjoints de renoncer à leurs droits ou à la protection de la loi (art. 423 al. 2).

La dissolution du mariage peut avoir lieu à la suite du divorce des conjoints ou du décès de l'un d'eux (C.c.Q., art. 516).[14] Le divorce ne peut être obtenu qu'en cas d'échec du mariage, échec qui n'est établi que dans les cas prévus par la loi (*Loi sur le divorce*, 1985, art. 8 (2)).[15]

S'ils ne souhaitent pas dissoudre leur mariage, les époux peuvent opter pour une séparation de corps (C.c.Q., art. 493 à 515). La séparation de corps délie les époux de l'obligation de faire vie commune, emporte séparation des biens des conjoints s'il y a lieu et peut donner ouverture au droit à des aliments, mais elle ne rompt pas le lien du mariage (C.c.Q., art. 507, 508 et 511).

Pour ce qui est de l'union civile, elle se dissout également par le décès de l'un des conjoints, par un jugement du tribunal ou par une déclaration commune notariée lorsque la volonté de vie commune des conjoints est irrémédiablement atteinte (C.c.Q., art. 521.12). Ce dernier type de dissolution est cependant exclu lorsque les intérêts des enfants communs des conjoints sont en cause. Dans ce cas, la dissolution doit être prononcée par le tribunal (C.c.Q., art. 521.17).

L'union civile se dissout également par le mariage des mêmes conjoints, mais cette dernière dissolution n'emporte comme conséquence que la rupture du lien d'union civile, ce qui signifie que les effets de l'union civile sont maintenus. Ils sont alors considérés comme des effets du mariage subséquent. Le régime d'union civile des conjoints devient ainsi le régime matrimonial des époux, à moins que ces derniers décident d'y apporter des modifications par contrat de mariage (C.c.Q., art. 521.12 al. 2).

Lors de la dissolution du mariage ou de l'union civile, un juge peut être appelé à se prononcer relativement aux ententes conclues entre les anciens conjoints. La Cour suprême du Canada a expliqué que pour qu'une convention soit valide, notamment en matière d'aliments, elle doit avoir été consentie librement et volontairement et ne pas être lésionnaire (Tétrault 2011, p. 831–832). Elle doit également avoir été conclue alors que les parties bénéficiaient de l'avis d'un conseiller juridique indépendant (*Hartshorne* c. *Hartshorne*, 2004 ; *Pelech* c. *Pelech,* 1987). Un auteur souligne que, bien que l'ordre public permette au tribunal de refuser d'entériner une convention qui ne protègerait pas suffisamment l'intérêt d'un conjoint, le juge doit soupeser cet élément avec le droit des parties de disposer des conséquences de leur rupture selon leur volonté (Tétrault 2011).

De leur côté, les conjoints qui vivent en union libre ne sont pas visés par ces dispositions législatives d'ordre public qui régissent spécifiquement le mariage et l'union civile. Les conjoints de fait sont libres d'aménager leurs rapports patrimoniaux ou non patrimoniaux à leur convenance, notamment par convention.

[14]L'article 8 de la *Loi sur le divorce* (1985) prévoit qu'il existe trois motifs pour obtenir un jugement de divorce : la séparation des époux depuis un an ; l'adultère commis par l'un des époux (infidélité) ; la cruauté physique ou mentale faite par l'un des époux envers l'autre rendant la vie commune impossible lorsque la cruauté devient intolérable par l'époux qui la subit.

[15]Il n'existe pas de divorce par consentement mutuel en droit québécois.

La seule exception est que toute entente – qu'elle concerne des conjoints mariés, unis civilement ou en union de fait – est soumise au respect de l'ordre public général et de la *Charte des droits et libertés.*[16]

Pour ce qui est de la fin de la relation des conjoints de fait, comme ils n'ont pas institutionnalisé leur union, ils peuvent y mettre fin à leur convenance, sans être astreints à des formalités. Libres pendant l'union, ils le sont également lorsque celle-ci prend fin. Chacun conserve ses biens et personne ne se doit rien, à moins d'avoir stipulé certains engagements dans un contrat en bonne et due forme.

Certains conjoints de fait qui n'ont pas pris le soin d'aménager contractuellement les effets patrimoniaux de leur relation peuvent donc se retrouver démunis financièrement puisqu'en ce qui les concerne, il n'existe ni résidence familiale, ni patrimoine familial, ni régime matrimonial, ni prestation compensatoire, ni même obligation alimentaire.

Ordre Public dans les Relations Verticales

Lorsqu'il est question des relations parents-enfants, le *Code civil du Québec* dispose que « tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance » (art. 522). Tous les enfants québécois ont donc, en principe, les mêmes droits, quel que soit le statut matrimonial de leurs parents. Plusieurs de ces droits sont d'ailleurs d'ordre public.

Il existe différentes façons d'établir la filiation selon qu'il s'agisse d'une filiation par le sang, de la filiation d'un enfant né d'une procréation assistée ou d'une adoption. On ne peut cependant transiger relativement à la filiation et seuls les moyens ci-dessous décrits permettent de l'établir (*Droit de la famille - 3444*, 2000 (C.A.) ; D.-Castelli et Goubau 2005, p. 307–308).

La filiation par le sang se prouve par l'acte de naissance, la possession d'état, la présomption de paternité du mari ou du conjoint uni civilement ou la reconnaissance volontaire.

L'acte de naissance constitue la meilleure preuve de la filiation. La loi prévoit cependant que seuls le père ou la mère peuvent déclarer la filiation à leur égard, sauf si la conception ou la naissance survient pendant un mariage ou une union civile. Dans ce cas, l'un des conjoints peut déclarer la filiation de l'enfant à l'égard de l'autre parent (C.c.Q., art. 114). Il s'agit donc d'une première distinction dans le traitement des enfants selon l'état civil de leurs parents puisqu'un conjoint de fait ne peut déclarer la paternité ou la maternité de son partenaire.

À défaut d'une déclaration dans l'acte de naissance, la loi prévoit que la possession constante d'état suffit pour établir la filiation (C.c.Q., art. 523). Cette dernière s'établit « par une réunion suffisante de faits qui indiquent les rapports de filiation entre l'enfant et les personnes dont on le dit issu » (C.c.Q., art. 524).[17] Il

[16] La Charte québécoise garantit certains droits et libertés fondamentaux à toute personne.

[17] Voir : *Droit de la famille-09358,* 2009 QCCA 332.

faut par ailleurs savoir qu'il est impossible de réclamer une filiation qui est contraire à celle qui est établie par l'acte de naissance et qui est confirmée par une possession d'état conforme à ce titre, tout comme il est interdit de contester la filiation de celui qui a une possession d'état conforme à son acte de naissance (C.c.Q., art. 530). La filiation ne correspond donc pas nécessairement à la vérité biologique en droit québécois.

Une seconde différence existe relativement à l'établissement de la filiation des enfants selon le statut conjugal de leurs parents en matière de présomption de paternité. En effet, le Code civil prévoit que l'enfant qui est né pendant le mariage ou l'union civile de personnes de sexe différent ou dans les 300 jours après sa dissolution ou son annulation est présumé avoir pour père le conjoint de sa mère (C.c.Q., art. 525). Une telle présomption ne s'applique toutefois pas si les conjoints vivent en union libre.

Pour ce qui est de la filiation des enfants nés à la suite d'une procréation assistée, le Code prévoit qu'elle s'établit, comme une filiation par le sang, par l'acte de naissance. À défaut de ce titre, la possession constante d'état suffit. Celle-ci s'établit par une réunion suffisante de faits qui indiquent le rapport de filiation entre l'enfant, la femme qui lui a donné naissance et, le cas échéant, la personne qui a formé, avec cette femme, le projet parental commun. Cette filiation fait naître les mêmes droits et obligations que la filiation par le sang (C.c.Q., art. 538.1).

Il y a projet parental avec assistance à la procréation lorsqu'une « personne seule ou des conjoints ont décidé, afin d'avoir un enfant, de recourir aux forces génétiques d'une personne qui n'est pas partie au projet parental » (C.c.Q., art. 538). La procréation n'a pas à être médicalement assistée. Elle peut intervenir directement entre des individus, y compris à la suite d'une relation sexuelle.[18] Par contre, le contrat de mère porteuse est interdit au Québec.[19]

Soulignons que l'existence d'un projet parental permet de faire prévaloir la volonté des participants au projet sur la réalité biologique en établissant une filiation d'origine pour un enfant dépourvu de tout lien biologique à l'égard d'un des participants au projet.[20] Sauf situations exceptionnelles, l'établissement d'un lien de filiation entre l'auteur de l'apport et l'enfant né à la suite de la procréation assistée est impossible.[21]

[18] Voir : C.c.Q., art. 538.2 ; D.-Castelli et Goubau 2005, p. 228 et suiv.

[19] L'article 541 du *Code civil du Québec* dispose que « Toute convention par laquelle une femme s'engage à procréer ou à porter un enfant pour le compte d'autrui est nulle de nullité absolue ».

[20] Voir : *Règlement sur la procréation assistée*, D.O.R.S./2007-137.

[21] Le *Code civil du Québec*, à son article 538.2 al. 2, énonce que « [. . .] lorsque l'apport de forces génétiques se fait par relation sexuelle, un lien de filiation peut être établi, dans l'année qui suit la naissance, entre l'auteur de l'apport et l'enfant. Pendant cette période, le conjoint de la femme qui a donné naissance à l'enfant ne peut, pour s'opposer à cette demande, invoquer une possession d'état conforme au titre. »

En ce qui a trait à l'adoption, le droit québécois ne connaît actuellement qu'un type d'adoption : l'adoption plénière fermée (C.c.Q., art. 577).[22] L'adoption ne peut avoir lieu que dans l'intérêt de l'enfant et aux conditions prévues par la loi, notamment à la suite du consentement des parents ou lorsque l'enfant a été déclaré admissible à l'adoption (C.c.Q., art. 543 à 584).

Il est possible d'adopter un enfant qui vit au Québec ou ailleurs dans le monde. La *Convention sur la protection des enfants et la coopération en matière d'adoption internationale*[23] s'applique au Québec qui l'a ratifiée en 2006 en adoptant la *Loi assurant la mise en œuvre de la Convention sur la protection des enfants et la coopération en matière d'adoption internationale*. L'adoption d'enfants domiciliés au Québec a nécessairement lieu en collaboration avec la Direction de la protection de la jeunesse, alors que l'adoption internationale relève du Secrétariat à l'adoption internationale du ministère de la Santé et des Services sociaux. L'adoption ne peut avoir lieu entre des particuliers sans l'intervention de l'un de ces organismes.

La liberté contractuelle est donc formellement exclue en matière de filiation puisqu'on ne peut établir la filiation que conformément aux critères établis par le *Code civil du Québec* (Tétrault 2005, p. 1093).[24] En ce qui a trait à l'adoption, la loi prévoit expressément qu'elle ne peut avoir lieu qu'aux conditions prévues par la loi (*Droit de la famille - 3444*, 2000 (C.A.) ; D.-Castelli et Goubau 2005, p. 307–308).

Une fois que la filiation d'un enfant est établie, ce sont les père et mère qui exercent ensemble l'autorité parentale (C.c.Q., art. 600). L'autorité parentale du père et de la mère à l'égard de leur enfant implique qu'ils ont le droit et le devoir de garde, de surveillance et d'éducation de leur enfant (C.c.Q., art. 599 al. 1). Ils doivent également le nourrir et l'entretenir (C.c.Q., art. 599 al. 2). L'enfant demeure sous l'autorité de ses parents jusqu'à sa majorité (18 ans) ou son émancipation (C.c.Q., art. 153 et 598). Il ne peut quitter son domicile sans leur consentement (C.c.Q., art. 602). Par ailleurs, l'enfant doit respect à ses père et mère, et ce, à tout âge (C.c.Q., art. 597).

Un parent ne peut transférer contractuellement son autorité parentale à un tiers de façon permanente (C.c.Q., art. 599 à 601 ; *Droit de la famille - 3444*, 2000 (C.A.) ; D.-Castelli et Goubau 2005, p. 307–308). Il peut cependant déléguer certains aspects de son autorité, soit la garde, la surveillance ou l'éducation de l'enfant (C.c.Q., art. 601). Malgré une délégation de certains de ses droits, D.-Castelli et Goubau (2005) mentionnent que le titulaire de l'autorité parentale continue d'assumer les droits et

[22] Mentionnons que le gouvernement du Québec a récemment déposé un projet de loi qui modifie certaines règles en matière d'adoption et qui vise, entre autres, à permettre l'adoption sans rupture du lien de filiation d'origine et l'adoption ouverte (*Projet de loi n° 47 : Loi modifiant le Code civil et d'autres dispositions législatives en matière d'adoption, d'autorité parentale et de renseignements personnels,* 2013). Il pourrait donc y avoir des changements dans la législation québécoise en matière d'adoption, à court ou à moyen terme.

[23] Voir : *Convention du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale*.

[24] Soulignons que le Code civil prévoit cependant la reconnaissance volontaire de paternité : C.c.Q., art. 526 et suiv.

les devoirs que lui confère l'autorité parentale. Il conserve ainsi le droit et le devoir de surveiller l'entretien et l'éducation de l'enfant, et ce, peu importe qui exerce la garde (C.c.Q., art. 605 ; *C.(G.)* c. *V.-F.(T.),* 1987, par 67–68). En cas de séparation, les parents peuvent aussi s'entendre relativement à la garde de l'enfant (D.-Castelli et Goubau 2005, p. 307–308 ; Guillet 2012, p. 203).

La négligence grave des parents en matière d'autorité parentale peut entraîner des sanctions : l'intervention de la Protection de la jeunesse, la déchéance de l'autorité parentale[25] ou encore la déclaration d'admissibilité à l'adoption de l'enfant (D.-Castelli et Goubau 2005, p. 309). Il est impossible d'autrement « dissoudre » la relation qui existe entre un parent et son enfant.

Les parents ont également une obligation alimentaire à l'égard de leurs enfants. Cette obligation alimentaire est réciproque puisque la loi dispose que les parents en ligne directe au premier degré se doivent des aliments (C.c.Q., art. 585).[26] L'obligation alimentaire entre époux, conjoints unis civilement et parents au premier degré est également une mesure d'ordre public (C.c.Q., art. 585). Soulignons qu'il n'existe aucune distinction relative à l'obligation alimentaire entre un parent et son enfant selon le statut conjugal des parents.

Un créancier d'aliments ne peut renoncer à réclamer des aliments pour l'avenir (*Ruel* c. *Thomas,* 1982 ; D.-Castelli et Goubau 2005, p. 374), mais il peut choisir de ne pas en réclamer.[27] Les règles en matière de survie de l'obligation alimentaire après le décès sont au même effet (C.c.Q., art. 414 et 684 ; Morin 2008-1) et la clause testamentaire qui prévoit que le légataire doit renoncer à réclamer des aliments est réputée non écrite (C.c.Q., art. 757 ; *Droit de la famille* - 2060, 1994 (C.S.)).

Enfin, dans toutes les décisions relatives à un enfant, les parents doivent constamment veiller au meilleur intérêt de celui-ci et au respect de ses droits (C.c.Q., art. 33). Au Québec, la Cour suprême a confirmé que la notion « d'intérêt de l'enfant » est devenue la pierre angulaire de toutes les décisions qui doivent être prises à son endroit (*C.(G.)* c. *V.-F.(T.)*, 1987, p. 269–270). Dans toutes les ententes des conjoints qui concernent un enfant, les décisions doivent ainsi être prises dans son intérêt et dans le respect de ses droits (art. 33) et elles peuvent être révisées à tout moment par le tribunal, si les circonstances le justifient (art. 612). C'est aussi ce que prévoit la *Loi sur la protection de la jeunesse* à son article 3. De même, le *Code de procédure civile* oblige le tribunal à s'assurer que l'intérêt de l'enfant est protégé (art. 815.5). Comme ces dispositions sont d'ordre public (Tétrault 2005, p. 1237), les tribunaux refuseront d'entériner une entente où les droits des enfants ne sont pas respectés (*Droit de la famille - 07734*, 2007, par. 13–14).

On constate ainsi que lorsqu'il s'agit des relations verticales, la situation juridique de tous les enfants est donc formellement la même, quels que soient les

[25] La déchéance de l'autorité parentale emporte cependant dispense de l'obligation alimentaire pour l'enfant, à moins que le tribunal n'en décide autrement (C.c.Q., art. 609).

[26] Pour un exemple où un enfant a dû payer une pension alimentaire à un parent âgé dans le besoin : *Droit de la famille* - 1259, 1989 (C.S.).

[27] Pour les enfants mineurs, voir : D.-Castelli et Goubau 2005, p. 374.

circonstances de leur naissance ou le statut conjugal de leurs parents. On remarque également que plusieurs mesures destinées à protéger les enfants sont d'ordre public.

Malgré cette égalité formelle des enfants, on note cependant que concrètement, il existe toujours des distinctions. Outre certaines règles relatives à l'établissement de la filiation, le bien-être matériel des enfants à la suite d'une rupture du couple dépend largement du type d'union de leurs parents. En effet, comme les conjoints de fait sont libres d'aménager leurs relations comme ils l'entendent, le partenaire le moins fortuné peut se retrouver dans une situation fâcheuse sur le plan économique à la suite d'une rupture ou d'un décès. Immanquablement, les enfants en subiront des contrecoups lorsque leur garde sera confiée à ce conjoint défavorisé économiquement. La situation de l'enfant dont les parents sont mariés ou unis civilement est alors nettement préférable lorsque survient une rupture ou un décès puisque son parent le moins fortuné bénéficie de différentes mesures de protection d'ordre public prévues par le Code civil en matière de résidence familiale, de patrimoine familial, de régime matrimonial, de prestation compensatoire et d'obligation alimentaire entre conjoints mariés ou unis civilement.

Conclusion

La Cour suprême du Canada a confirmé la constitutionnalité des dispositions du Code civil qui portent sur la protection de la résidence familiale, le patrimoine familial, la prestation compensatoire, la société d'acquêts et l'obligation alimentaire dont l'application est réservée aux conjoints mariés ou unis civilement (*Québec (Procureur général)* c. *A.*, 2013). Ce faisant, elle a confirmé la légitimité de l'objectif du législateur québécois de promouvoir le respect du libre choix et de l'autonomie des conjoints qui ne sont ni mariés ni unis civilement. Le droit québécois peut, conséquemment, permettre la contractualisation ou l'interdire selon que les conjoints sont mariés, unis civilement ou simplement unis de fait.

À la suite de cette décision de la Cour suprême, le Gouvernement du Québec a créé un Comité consultatif sur le droit de la famille (Québec 2013). Ce comité a pour mandat d'évaluer l'opportunité de revoir l'ensemble du droit de la famille québécois et, dans l'affirmative, de proposer au ministre de la Justice les éléments qui devraient être revus, tels la conjugalité, la parentalité, la filiation et le droit successoral. Comme les membres du comité ont conclu à l'unanimité qu'une révision globale du droit de la famille québécois s'impose, un second rapport contenant des propositions de modifications législatives devrait être rédigé d'ici 12 à 18 mois.

Il sera intéressant d'observer si les propositions du comité accroissent ou, au contraire, diminuent la liberté contractuelle des différents membres de la famille. Le droit québécois continuera-t-il à permettre ou à interdire la contractualisation de certains aspects des relations horizontales en fonction du type d'union choisi par le couple?

Étant donné les répercussions importantes qui découlent de ce choix des parents pour leurs enfants, on peut s'attendre à certaines modifications législatives destinées à mieux protéger concrètement tous les enfants, quels que soient les circonstances de leur naissance et le type d'union de leurs parents.

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Chapter 6
Two Steps Forward and One Backwards in the Autonomy of the New Croatian Family Law

Ivana Milas Klarić and Branka Rešetar

Abstract This chapter offers an analysis of the place of the principle of party autonomy, i.e. suppletive rules, as well as of the opposing imperative rules in Croatian family law. Considering the reform of family law in the Republic of Croatia, the authors compare the status of the principle of party autonomy and the possibility of agreements prior to the adoption of the 2014 Family Law with the solutions incorporated in the new regulations. The principle of party autonomy and imperative rules are first shown in the context of the relationship between parents and children and then in the context of the relationship between adults: spouses, life (extramarital) partners (cohabitants) and partners in a same-sex union. This overview stresses the relevant novelties in the respect for autonomous decision-making when it comes to persons with disabilities.

Introduction

Until its reform in the year 2014, the Croatian Family Act had been characterized by the compulsoriness of its rules and a lack of party autonomy, particularly with regard to the family relationships between parents and children as well as between adults with disabilities. However, the judicial practice had, unlike the legislators, recognized the importance of respecting party autonomy and accordingly, the courts mostly honoured it. Hence, agreements of family members were integrated into concrete judicial decisions to a fair extent.

The new Family Act vastly turns to party autonomy, particularly due to the influence of contemporary tendencies which are encompassed by the work of the

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Commission on European Family Law[1] and the UN Convention on Rights of Persons with Disabilities.[2]

Strengthening of party autonomy and encouragement of agreement between family members are laid down in the preamble of the 2014 Family Act. For instance, one of the introductory principles of family law includes the principle of resolution of family disputes by agreement, according to which encouragement of such resolution belongs to the tasks of all those who provide families with assistance or decide on family matters.[3] This principle refers to the action of administrative and judicial bodies and the action of those who provide family members with aid beyond courts, e.g. in alternative dispute resolution.

Not only that its fundamental principle and a number of other special provisions govern party autonomy, the new Family Act also introduces new mechanisms, the goal of which is to entice and help parties reach an agreement such as mandatory counselling prior to judicial proceedings and family mediation.

The aim of this paper is to present the legal regulation set forth by the new Family Act in areas in which party autonomy and agreement are permitted as well as new procedural mechanisms that provide the parties with assistance in order to reach an agreement. The presented relationships belong to the field of family law and include parents and children, spouses, life (extramarital) partners (cohabitants) and same-sex partners. The party autonomy or mandatory rules applicable to these relationships govern their formation, content and dissolution.

Before coming to the central topic of this paper – party autonomy and mandatory rules in Croatian family law, the readers can get basic information about the Croatian legal system and the place of family law therein.

General Overview of the Croatian Legal System and Family Law Therein

Since 1990, Croatia has been, according to the Croatian Constitution, a democratic and unitary state with a parliamentary system of constitutional democracy. The Constitution also provides an extensive list of human rights mostly derived from international instruments such as the European Convention for the Protection of

[1] The Commission on European Family Law is constituted of experts of family and comparative law coming from all the EU Member States and from other European countries, whose work is focused on harmonization of European family law. The results of their work reflect in the Principles on European Family Law applied in various fields of family law, which can serve as a role model for national legislators when seeking new harmonized regulations. The Principles on Divorce and Maintenance between Former Spouses as well as the Principles on Parental Responsibilities were used by the Croatian legislator as guidelines for a reform of Croatian family law (Boele-Woelki et al. 2004, 2007).

[2] Adopted on 13 December 2006 during the 61st session of the General Assembly by Resolution A/RES/61/106.

[3] Art. 9 of the 2014 Family Act.

Human Rights and Fundamental Freedoms (1950). The government in Croatia is based on the principle of the separation of powers stipulated by the Constitution. The executive power is in the hands of the prime minister, the legislative power is vested in the unicameral parliament – Sabor and the judicial power is exercised by an independent and impartial judiciary. The Croatian president performs duties of protocol and participates in the shaping of the foreign policy and he is also the supreme commander of the Croatian Army.

Croatian courts dealing with civil and family law are organized in three levels pursuant to a certain hierarchy. At the first level, there are municipal courts appearing as ordinary courts of general jurisdiction. At the second level, there are county courts which pass judgments with respect to appeals against decisions made by municipal courts. Finally, the Supreme Court represents the top of the hierarchy and caters for uniform application of law and equality of all citizens.

Croatia has also a separate Constitutional Court, the duty of which refers to the protection of the constitutional order. Its position formally goes beyond the judicial power. The judges of the Constitutional Court have the power to rule in cases concerning the conformity of laws and regulations with the Constitution and in individual cases comprising violation of constitutional rights (Uzelac 2002).

The judicial power provided by the constitution is bound only by law primarily originating from the constitution, statutes enacted by the parliament as well as by other written legal documents based on statutory provisions. Court decisions are not regarded as direct sources of law; however, lower courts tend to follow the opinion of higher courts, although they are not legally bound to do so.

In compliance with the Constitution, ratified international agreements are directly applicable and superior to regular statutory law. Courts in Croatia hesitate to directly apply the provisions of international instruments unless they are explicitly integrated into the national law (Uzelac 2002).

Family law is a special branch of law in the Croatian legal system. The legislation referring to family law is detached from the legislation based on private law since there is no civil code in Croatia. The fundamental task of family law is to ensure, within the legal system, legal presumptions for formation, content, exercise and dissolution of family relationships as well as legal consequences of their formation and dissolution. The legal rules of family law are currently known for their imperative character (*ius cogens*) while the rules permitting party autonomy (contracting) are fewer (Alinčić 2007).

The entire content of family law refers, in a narrower sense, to the following: (a) marriage, (b) informal cohabitation, (c) relationship between parents and children and measures foreseen for the protection of children, (d) adoption, (e) custody (guardianship) over disabled people, (f) maintenance, (g) family relationships considering property law and (h) procedural rules in judicial proceedings initiated based on family law. All these institutes are governed by the 2014 Family Act.[4]

[4]The new Family Act was passed on 6 June 2014, entered into force on 1 September 2014 and was published in the Official Gazette no. 75/2014. The solutions of the new Family Act (2014) resulted

Family law in a broader sense also encompasses other regulations such as the 2014 Act on Same-Sex Civil Unions, the 2012 Act on Medically Assisted Reproduction, the 2009 Act on the Protection from Domestic Violence etc.

Family, marriage and informal cohabitation as well as children and adults who are not capable of taking care of themselves (disabled people) are directly protected by the Constitution.

Substantive Contractualisation in Family Law

Introduction About Contractualisation in Family Law

By the adoption of the 2014 Family Act, legal regulations had been, according to the 2003 Family Act,[5] predominantly of a cogent character. Few rules were featured by their dispositive nature. Freedom of contract was reflected mainly in the ability to conclude a nuptial agreement and was virtually the only example of derogation from cogency.

Furthermore, until the adoption of the 2014 Family Act, the family legislation had governed only the maintenance that exists under the law. Nevertheless, maintenance could be contracted under the general provisions of civil law as well (lifelong maintenance contract or contract for maintenance until death) (Klarić 2009). Albeit the old Family Act 2003 did not prohibit the former maintenance explicitly, some theoreticians frequently pointed out the dilemma on the admissibility of contracting certain aspects within the institute of maintenance, thereby calling upon such possibilities in comparative legislation (Alinčić 2007). Even though this was a matter of maintenance from the sphere of family law, our standpoint included the thesis that certain aspects of contractualisation should not be excluded solely for the fact that the issue at hand dealt with such maintenance. In this sense, our view also suggested that contracts could be used to determine maintenance in an amount higher than the one prescribed by the law.

The 2014 Family Act grants a higher level of recognition of party autonomy concerning regulation of family relationships, both from the viewpoint of family relationships between adult family members and with respect to children.

A relevant novel regarding enhancement of one-party autonomy relates to the fact that the 2014 Family Act provides for the introduction of advance directives into the Croatian legal system. They would pertain to the possibility that a part of the decisions on parental guardianship, the appointing of a guardian, special guardian as well as upon deciding on health and the ones that cannot be made by a guardian, but rather solely by the court, if there is no advance directive (abortion, life support).

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from reform changes in the field of the protection of children's rights and rights of persons with disabilities.

[5]Official Gazette no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11.

It is important to stress that guardianship for adults (disabled/incapacitated persons) within the Croatian legal system – albeit being a status and not a family matter – is governed by the Family Act (Milas Klarić 2010).

The below lines deal with strengthening of party autonomy in compliance with the 2014 Family Act, i.e. the possibility of agreement between adult family members (spouses', cohabitants and same sex cohabitants) and the possibility of agreement in relationships involving children.

Relationship Between Parents and Children

The term of legal parents in the Croatian legal system is based on the status of the child in the family. Legal parents mean the man and the woman who are registered as the child's parents in a register of births – parental affiliation. Parental affiliation by both mother and father can be established by presumption whereas parenthood may be affirmed by recognition and by a judicial decision.[6] The status of family relationships following adoption has been completely equalized with the relationship between parents and their child, which is based on the biological origin of the child. (Hrabar 2007) the Croatian legal system is not familiar with the possibility of contractualisation when it comes to establishment of a relationship between a parent and the child.

Under the Croatian legal system, only legal parents are provided with the right and duty of parental responsibility (Hrabar 2007). If a child has no parents or if they are not capable of exercising their parental authority, the child shall be provided with a custodian (guardian) based on a decision of a public centre for social welfare or the exercise of parental responsibility shall be entrusted to another natural person following a court decision. It implies that other individuals or institutions are to be enabled to exercise the entire or partial parental responsibility instead of or together with the parents.[7]

The definition of parental authority refers to the responsibilities, duties and rights of parents aimed at protection of the welfare of the child and its personal and property interests.[8] In Hrabar's opinion, "parental authority is introduced to help children exercise their rights and to provide parents with legal legitimacy and a legal foundation towards third parties to take care of their child." (Hrabar 2007). The 2014 Family Act sets forth the duties of parents to take care of the child's life, health, upbringing and education, to maintain the child, to manage with the child's property and to represent the child. The 2014 Family Act introduces a novel in the contents of parental responsibility, which is reflected in supplementation of the act with the explicit legal right and liability of parents to contact with the child

[6] Art. 58.-73. of the Family Act 2014.

[7] Art. 102 and Art. 224 of the 2014 Family Act.

[8] Art. 91 paragraph 1 of the 2014 Family Act.

and with specification of the child's residence which is in line with the ban of changing residence without an approval of the non-resident parent if the move would affect their contact with the child.[9] According to Family Act 2014 the alimony obligation is foreseen to be detached from the contents of parental responsibility and is proposed to be designated as an independent institute – maintenance.

These new solutions in the 2014 Family Act originate from the Principles of European Family Law Regarding Parental Responsibilities (Boele-Woelki et al. 2007).

Pursuant to the 2014 Family Act legal parenthood shall not be contractually established or excluded. The Croatian legal system anticipates no possibility of anonymous or discrete birth, agreements on artificial insemination or open adoption agreements.

In compliance with the 2012 Act on Medically Assisted Reproduction, use of embryos includes the possibility of spouses or informal cohabitants to provide another couple with frozen embryos if the former do not want to use them themselves. Such a donation shall be anonymous.[10]

Pursuant to the 2014 Family Act, it is not possible to contractually vest a certain person with parental authority as a whole, or aspects thereof.

Still, the 2014 Family Act enables a parent to make an expression of willingness, according to which a particular person will be granted parental responsibility after the death of the former. However, a decision on the person who is to exercise the parental authority shall be made at court, respecting the will of the deceased parent unless it is contrary to the welfare of the child. In any case, the court shall investigate and take account of the will of the child if possible.[11]

According to the 2014 Family Act, there is no possibility to make an agreement which would generate civil effects regarding the child's education, particularly after the divorce. Also, it is not possible to make an agreement on religious upbringing or further education of the child if it would bring to consequences in the field of civil law.

The Family Act 2014 institutes the liability of parents, after divorce or in case of an extramarital child, to make a plan on joint parental responsibility. A plan on joint parental responsibility or a judicial decision based on a parents' agreement on the relevant elements of the plan on joint parental responsibility represents a legal ground for joint exercise of parental responsibility. A plan on joint parental responsibility shall contain: (a) child's residence, (b) realization of the contact with the non-resident parent, (c) mode of exchange of the information on the child, (d) mode of resolution of possible disputable issues and (e) amount of maintenance.[12]

If parents do not make a plan on joint parental responsibility, the court shall, following an application of a parent, make a decision on the exercise of sole parental

[9] Art. 95 and 96 of the 2014 Family Act.

[10] Art. 18 of the 2012 Act on Medically Assisted Reproduction, Official Gazette No. 86/2012.

[11] Art. 116 paragraphs 5 and 6 of the 2014 Family Act.

[12] Art. 104 and 106 of the 2014 Family Act.

responsibility and the other (non-resident) parent shall have the right to: (a) exercise contact with the child, (b) be provided with relevant information on the child, (c) participate in the decision-making process about important personal rights of the child such as child's confession and (d) change of the child's residence on occasions when the new residence is far away from the child's old residence. The court has the right to restrain any right of the non-resident parent by means of its ruling.[13]

On the grounds of the plan on joint parental responsibility, parents shall be entitled to agree upon other issues which they find relevant for the child such as the education, upbringing, religious, contact with other persons and similar. This parents' agreement shall be binding, though in case of a dispute and a lack of plan on joint parental responsibility, the court will be expected to make a respective decision taking the child's will into consideration. It is still to be seen what will be the implications of the plan on joint parental responsibility for the Croatian judicial practice.

An agreement on the family home (housing) of the child in case of a pending divorce belongs to one of the novels of the 2014 Family Act which foresees legal protection of the family home based on a court's ruling. If it comes to a marriage contract in that sense and bearing in mind the new institute of legal protection of the family home, a family home for the child in case of divorce could be contracted in the future.[14]

The 2014 Family Act does not foresee any possibility of dissolution of the parent-child relation in contract.

To sum up, the 2014 Family Act has, to some extent, expanded the party autonomy of parents with respect to their children: parents are entitled to declare which person would be the most eligible guardian of the child in case of their death, they can freely draw up a plan on joint parental responsibility and agree on family matters which they find relevant concerning their child and are permitted to contract protection of the family home in the event of divorce.

Relationship Between Spouses, Informal Cohabitants and Same Sex Partners

The Croatian family legislation recognizes two forms of unions: the marital and the extramarital – informal cohabitants. Outside the Family Act 2014, a special regulation (Act on Same-Sex Partners 2014) governs the same-sex union (presumptions, registration and effects).

[13] Art. 105 paragraph 6 and Art. 112 of the 2014 Family Act.

[14] Art. 46 of the 2014 Family Act.

Contractualisation Between Spouses

Formation and Dissolution of Marriage

Marriage as an institute of family law in the Croatian legal system is governed by Part Two of the Family Act.[15] Marriage is defined as a life union between woman and man that is governed by law. It is entered into in the civil or religious form with civil effects. In its civil form, a marriage is entered into before a registrar and before a minister of a religious community that has regulated legal relations in this sense with the Republic of Croatia.[16] Entering into marriage requires the fulfilling of presumptions for the existence and the validity of a marriage. The presumptions for the existence of marriage are the gender diversity (meaning that it is not possible to enter into a same-sex marriage), the declaration of consent to enter into marriage and that the marriage was entered into before an authorized registrar/minister of a religious community. The failure to fulfil the presumptions for the existence of marriage results in the marriage not being entered into. This is then an "attempt" of entering into marriage and it is possible to start a proceeding to determine whether the marriage exists or not. This is a civil proceeding and the right of action is of the (alleged) spouses, the social welfare centre or persons who hold a legal interest.

The presumptions for the validity of marriage/impediments to marriage must be fulfilled at the time of entering into marriage. The presumptions include: age of majority, legal capacity,[17] the ability to reason, the absence of kinship (unlimited in the direct line and up to the fourth degree in the collateral line of descent) and the (simultaneous) non-existence of another marriage. Some of the said impediments to marriage are regulated as removable, i.e. the court may under certain presumptions allow entering into marriage (age of minority following the age of 16, deprivation of legal capacity).

The law admittedly provides for the so-called removable impediments to marriage (minority at 16 years of age, the deprivation of legal capacity). However, in such cases the law regulates the presumptions precisely (the decision is made by the court in a non-contentious proceeding if the entering into marriage is in the interest of a minor or person deprived of legal capacity). The proposal to enter into marriage in case of impediments to marriage is to be submitted by the person whose "side" the impediment exists on (a child over 16, a person of legal age deprived of legal capacity). The law prescribes the action of a court, the holder of the right to

[15] Art. 12-57 of the 2014 Family Act.

[16] The Catholic Church was the first religious community that entered into an agreement with the Republic of Croatia on recognition of the legal effects of marriages which are concluded in a church. Official Gazette International Treaties no. 2/1997.

[17] Marriage can be concluded by a person deprived of the capability to work unless such a person is deprived of the right to declare their will referring to their strictly personal matters. On such an occasion, such a person can enter into marriage if they are given approval for such by the court (Art. 26 of the 2014 Family Act).

action and the legal consequences in case of entering into marriage contrary to the presumptions for validity (annulment).

Upon the deciding on the entering into marriage of two minors/persons deprived of legal capacity, the court is obliged to obtain the opinion of a legal representative (parent/guardian) of the child or the guardian of the person deprived of legal capacity respectively as well as – in both cases – the opinion of the social welfare centre. Albeit the court is obliged to obtain these opinions, it is not bound by them upon deciding on the case. Should the court allow the marriage, the legal representatives may appeal the decision of the court.

The law provides for the possibility of convalidation of a child marriage and of a person deprived of legal capacity (the so-called convalidation by law – the coming of age or the restoring of legal capacity). Convalidation is also possible by court order in case of a previous marriage ceasing to exist when bigamy is an impediment to marriage.

Dissolution of marriage may occur due to: (a) death, (b) declaring a missing marital spouse dead, (c) annulment and (d) divorce. Annulment and divorce are marital disputes.

Annulment may occur due to impediments to marriage. Divorce may be filed for by one spouse due to serious and permanent disruption of marital relations or due to the cessation of a marital union longer than 1 year. Both marital spouses may petition for a no-fault divorce without citing the presumptions. The legal effects of divorce that pertain to marital spouses are private-legal (the option of changing the last name), property-legal and support.

The presumptions for divorce are the serious and permanent disruption of marital relations, the cessation of a marital union for a period of over 1 year and the petition for a divorce by agreement. The latter implies that the parties do not state and the court does not determine the reasons for divorce.

In case of divorce by lawsuit or by mutual agreement, marital spouses are obliged to go through mandatory counselling in a social welfare centre if they have underage children together (Alinčić 2007; Rešetar and Berdica 2013).

One provision excludes the possibility of a husband filing a complaint for divorce for the duration the wife's pregnancy and up to a year from giving birth. In theory, this provision is explained as the protecting of the woman and the child (Alinčić 2007). However, divorce is not entirely impossible. The complaint may be filed for by the woman and both spouses may petition for a no-fault divorce by agreement. This is the only provision of the Family Act that expressly differentiates between man and woman and is justified by the need to protect the woman during pregnancy and 1 year from giving birth. However, it is possible to contemplate this provision in the context of gender discrimination.

One might assume that conclusion of marriage as a relationship comprised by family law is based on party autonomy whereat enhancement of party autonomy on the occasion of conclusion of marriage between persons deprived of the capability to work appears as a novel of the 2014 Family Act.

In terms of termination of marriage by divorce, this Act permits, like all the other relating contemporary systems, unilateral or no-fault divorce.

Content of Marriage

The legal effects of marriage are: (a) the regulation of personal relations, (b) the regulation of property relations and (c) the duty to support.

The Family Act 2014 governs the personal right and duties of marital spouses (equality, faithfulness, assistance, respect, maintaining of harmonious marital and family relationships). Marital spouses may not negotiate the said relationships, but may decide jointly on the place of residence, on having and raising children and on the last name. Additionally, legal consequences of entering into/dissolution of marriage involve the governing of the property relations and support.

Personal relations are partly regulated by cogent norms (*ius cogens*) in the sense of equality, faithfulness, mutual assistance, mutual respect and the maintaining of harmonious marital and family relationships. Marital spouses may not negotiate the said relationships, but may decide jointly on the place of residence, on having and raising children and on the last name. The said implies that the contracting of the contrary would be inadmissible. However, legal sanctions for the violation of such duties have not been provided for and in case a marital spouse violates the said duties, the only sanction is the possibility of divorce if one of the spouses wants it.

Upon entering into marriage, future marital spouses may agree on the last name. A personal name change is possible under a special regulation (Personal Names Act) at all times. One of the effects of marriage dissolution by annulment or divorce is the possibility to change the last name.

The personal right and duty the marital spouses do not have to agree on but rather decide independently on is the decision on the choice of work and profession.

Marital spouses decide mutually on having and raising children as well as on performing the family duties and the place of residence. In case the spouses cannot come to an agreement, the only possible sanction is divorce in case one of the spouses wants it.

Maintenance between spouses is also a legal effect of marriage. It is regulated as an institute so that spouses who do not have enough means of livelihood or cannot obtain them from their property and is not capable to work or cannot find a job has the right to maintenance from their spouse. The spouse holds the right to action for the duration of the marriage as well as following marriage dissolution. The court may reject the request to support a spouse if the maintenance constitutes clear injustice for the other spouse. The court may decide that the duty of maintaining a spouse shall last up to 1 year. In particularly justified cases, the court may prolong the obligation to support. The right to support ceases to exist when the divorced spouse or the spouse from the annulled marriage who exercises the right enters into a new marriage or cohabitation.

The regulation of property relations is a legal effect of marriage. Property relations of spouses are governed by the provisions that pertain to property relations. The default legal property system distinguishes between (a) community property and (b) separate property and regulates the content and the effect in detail. The freedom to contract is possible by way of nuptial agreement which may be concluded before marriage, during marriage and following marriage dissolution.

Prenuptial contract, as a rule – governs relations on the existing and future property differently than the default legal property system. There is no limitation to dispositiveness aside from the exclusion of application of foreign law. Seeing as how the institute of the nuptial agreement was introduced into the Croatian legal system (or restituted, following a decade of the socialist regime) only in 2003, the nuptial agreement provisions should be standardized more precisely (currently, there are three provisions). It is precisely the nuptial agreement that represents the strongest expression of the autonomy of will and the possibility of contracting. The only limitation of the autonomy of will under a nuptial agreement is represented by the provision on the prohibition to contract foreign law (Majstorović 2005).

What also seems to be a novel introduced by the 2014 Family Act is that spouses are entitled to make an agreement on maintenance in case of divorce. They can agree on the amount of maintenance, the modes of meeting the liability of maintenance and the duration and termination of the liability of maintenance settlement. Such an agreement shall be made in writing and approved by the court.

Contractualisation Between Informal Cohabitants

An (extra marital) informal cohabitation is also governed by the Family Act 2014. It is defined as a life union of an unmarried woman and unmarried man that lasts for at least 3 years or shorter if a child was born in it.[18] This is thus an informal *de facto* union that does not require registration. The legal effects of the extramarital union involve the regulation of property relations and maintenance. The legal regulation of the said effects is identical to those of the marital spouses with a few exceptions (e.g. extramarital spouses may ask for support only after the union has been dissolved as opposed to marital spouses who may ask for it even during marriage).

Another novel instituted by the 2014 Family Act is its non-specific provision, according to which all the rights held by spouses shall be granted to extramarital partners (cohabitants) too. In this light, the legal effects and content of marriage have been equalized with those of cohabitation. The goal of the legislator was to eliminate the discrimination against cohabitants with respect to spouses, which had seemed to exist until the adoption of the 2014 Family Act.[19] Furthermore, the legislator wished to protect the weaker side in this relationship.[20]

[18] Art. 11 paragraph 1 of the 2014 Family Act.

[19] The provisions on "reinforcement" of the effects of cohabitations emerged, in our opinion, from the need for their particular "harmonization" with the rights of same-sex partners which have expanded by the adoption of the 2014 Act on Same-Sex Civil Unions. This has inflicted a kind of a mess on the existing legal system by acknowledging almost identical legal effects to different, judging by their form, life partnerships and resulted in the possibility of registration of a life partnership between persons of the same sex while the same possibility is not granted to cohabitants. They are, after expiration of the legally prescribed time period, *ex lege* recognized the effect identical to those of marriage (and the effects very similar to those of register same-sex unions).

[20] Art. 11 paragraph 2 of the 2014 Family Act.

This principle of equalization of the rights of spouses and cohabitants is very likely to represent a law in book but not a law in action in the future since other legal effects of informal cohabitations are governed by regulations of other legal areas (inheriting, rights from pension and health insurance etc.). The biggest difficulty of cohabitations stems from the informality thereof, which causes the large number court proceedings for determining the existence/duration of informal cohabitations (Alinčić 2007).

It can be concluded that respect for party autonomy in the sense of legal equalization of marriages and cohabitations occurs to be controversial in the area of regulation of cohabitations. Indeed, there is a provision (the 2014 Family Act copied it from the previous legislation) stipulating that cohabitation shall obtain a status similar to that of marriage with respect to maintenance and regulation of property relations after 3 years period of its existence (or sooner if the cohabitants have a common child). The 2014 Family Act has supplemented this provision with the assertion that cohabitation shall be equalized with marriage regarding personal and property relations in order to equalize the rights of cohabitants in all the other fields of law with those of spouses.

What arises doubts from the viewpoint of party autonomy is equalization of marriage as a formal life partnership and cohabitation as an informal life partnership in almost all legal aspects. The question is what is then the purpose of marriage and what will happen with the party autonomy of those cohabitants who do not want their common life to have legal effects?

Contractualisation btw. Same-Sex Partners – Formation, Dissolution and Content

The same-sex union is governed by a special regulation – The Life Partnership Act 2014.[21]

The Life Partnership Act 2014 differentiates between the informal life partnership and the life partnership.

Life partnership is defined as a family life union of two persons of the same sex that have entered into a life partnership relation before a competent body in accordance with the provisions of the said Act while informal life partnership is denoted as a family life union of two persons of the same sex who have registered their partnership with a competent body under the condition that the union lasts at least 3 years and since its beginning, has met the requirements prescribed for effectiveness of life partnerships. Such a time period is identical to the legal prerequisite for existence of an extramarital union pursuant to the family legislation.[22]

[21]The Act was published in the Official Gazette no. 92/2014.

[22]Generally, the prerequisites for the emergence, effects and termination of a life partnership originate from the legislative regulation of marriage whereas informal life partnerships are regulated similarly to extramarital unions in the 2014 Family Act.

The existence of an informal life partnership is proven in the same way and under the same conditions as the extramarital union and in case of a dispute between partners; the existence of the informal life partnership is proven before the competent court. The Act also envisages that the effects of the Life Partnership Act 2014 be applicable to the informal life partnerships as well.

The presumptions necessary for entering into a life partnership involve that the persons planning to enter into a life partnership be of the same sex, that they have expressed consent to enter into a life partnership and that the life partnership was entered into before a registrar.[23] The right of action for the purpose of determining the existence or the non-existence of a life partnership is of every person that has legal interest in it and of the social welfare center.

The Act also governs the presumptions for the validity of a life partnership. These are: the age of majority, the legal capacity in part of the declarations that pertain to the strictly personal states and the ability to reason, the absence of kinship (unlimited in the direct line and up to the fourth degree in the collateral line of descent) and the (simultaneous) non-existence of another life partnership or marriage.[24] The presumptions are thus nearly identical to the ones for the validity of marriage. Life partnership would be entered into before a registrar and would dissolve upon the death of a life partner or upon declaring a missing life partner dead, upon annulment and upon termination.

The presumptions necessary for the dissolution or termination of a life partnership are nearly identical to the ones for marriage (the application of provisions on marital disputes are secondarily invoked). In addition, the law governs that judicial proceedings relating to disputes over life partnerships which are not encompassed by this Act shall be subject to the provisions of a special act regulating family relationships.

The legal effects are personal rights and duties (party autonomy instituted through the provision on the possibility of surname choice, which is the same in the Family Act), maintenance[25] and regulation of property relations.[26] The Act also provides for the right to inherit, governs the tax, pension, social welfare and health insurance status.

The effects of the same-sex union provided for by the Act are virtually identical to those for marital spouses and include the regulation, personal relationships (surname choice), of property relations (with the possibility to regulate property relations by way of a contract) and support. The law does specify the duty to assist, but this is not an actionable effect.

[23] Art. 2. of the Life Partnership Act 2014.

[24] Art. 8-12. of the Life Partnership Act 2014.

[25] The same doubts (like with spouses) about the possibility of party autonomy in regard to the institute of maintenance have remained or in other words, it is still not clear whether the viewpoints toward the possibility of contractualisation (contractual exclusion) of maintenance differ or not.

[26] Almost identical to a marriage contract/agreement on the regulation of the property relations between cohabitants.

Procedural Family Law and Application of Alternative Dispute Techniques

Traditional Alternative Dispute Resolution Techniques "Dressed Up in New Clothes"

The tradition of conciliation of spouses in case of divorce in the Croatian legal system is longer than 60 years. The goals of the so-called conciliation or mediation between spouses have varied by the time and once they included conciliation aimed at keeping the spouses in the marriage while on other occasions, they involved facilitation of an agreement on the legal consequences of divorce with respect to the children. Social workers were expected to provide spouses with assistance before initiation of divorce proceedings in order to facilitate an agreement on the resident parent, contact with the child, the non-resident parent and the alimony (Alinčić 1999; Majstorović 2007; Čulo Margaletić 2011).

The Croatian legal system involves the Conciliation Act 2011[27] regulating mediation in civil, commercial and labour disputes. Before adoption of the 2014 Family Act, legal theory had used to assume different points of view toward the possibility of application of the 2011 Conciliation Act 2011 to family matters. This did not concern Majstorović who find application of the 2011 Conciliation Act inappropriate for family matters (Majstorović 2007), in Korać's view, there was no obstacle for implementation of extrajudicial resolution of matrimonial property matters in line with the Conciliation Act (Korać 2005). The most comprehensive scientific basis for regulation of family mediation in the Croatian legal system has been elaborated by Čulo Margaletić in her doctoral thesis, indicating solutions de lege ferenda (Čulo Margaletić 2011).

The Family Act 2014 governs two extrajudicial proceedings in the context of resolution of family matters: mandatory counselling[28] and family mediation.[29] The mandatory counselling refers to providing parents, children over 14 years of age and other family members with counselling prior to initiation of judicial proceedings in regard with exercise of parental responsibility and contact with the child. Mandatory counselling takes place at a social welfare centre. Such counselling is aimed at providing family members with information on the advantages of agreement on the child, judicial proceedings and assistance when reaching an agreement such as the plan on joint parental responsibility without implementation of family mediation.[30]

The Family Act 2014 sets forth family mediation which could be organized not only within the system of public social welfare centres but also by trained family mediators. Family mediation is voluntary, only the first informative meeting prior

[27] Official Gazette No 18/2011.

[28] Art. 321-330 of the 2014 Family Act.

[29] Art. 331-344 of the 2014 Family Act.

[30] Art. 321 and 330 of the 2014 Family Act.

to the divorce involving minor children has a binding power in order to promote extrajudicial resolution of family disputes.[31] The education of family mediators is currently in progress in Croatia.

By means of a plan on joint parental responsibility, parents will be able to make an agreement on resolution of future disputes concerning exercise of parental responsibility within the scope of family mediation. Since plans on joint parental responsibility require verification of the court as to obtain enforcement power, the parents' agreement thereupon needs to have power of enforcement too.[32] However, due to the voluntariness of family mediation, it is beyond any doubt that only attendance of the first meeting of family mediation needs to be obligatory.[33]

The Croatian legal system encompasses arbitration as one of the methods of extrajudicial ADR techniques which facilitate resolution of disputes by a third party. Arbitration is governed by the Arbitration Act 2001.[34] Arbitration is applied primarily in commercial matters, particularly confronting Croatian companies but also Croatian companies and individuals, and foreign companies and individuals (Uzelac 2002) Arbitration cannot be used as a way of resolution of family matters within the Croatian legal system.

Recognition/Court Scrutiny

Until the adoption of the 2014 Family Act, he Croatian legal system had not foreseen any possibility of extrajudicial ADR resolution of family disputes which would result in any kind of agreement. All the disputable family relationships were dealt with by court that in the principle takes account of and respects the parents' agreement.

The only form of extrajudicial agreement was, according to the previous legislation, marriage contract which freely governs matrimonial property relationships between spouses or domestic partners or partners in same-sex unions. Such a contract needs to be certified by a notary public in order to imply legal effects but no acknowledgement of the court is required. Marriage contracts come rarely into existence in Croatia.

The 2014 Family Act grants broad freedom to spouses beyond judicial proceedings. Hence, it foresees the possibility of conclusion of a plan on joint parental responsibility,[35] an agreement on contact with the child,[36] an agreement on child

[31] Art. 320 paragraph 3 of the 2014 Family Act.

[32] Art. 107 of the 2014 Family Act.

[33] Art. 320 paragraf 3 of the 2014 Family Act.

[34] Official Gazette No 88/2001.

[35] Art. 106. of the 2014 Family Act.

[36] Art. 122 of the 2014 Family Act.

maintenance[37] and an agreement on maintenance made between ex-spouses or ex-cohabitants[38] and it does not matter if these agreements are reached within family mediation or outside the scope of family mediation. As to make these agreements legally effective, they have to be verified by the court in non-contentious judicial proceedings. The 2014 Family Act 2014 does not foresee the conditions and standards of judicial review. Every agreement on ownership rights as well as on maintenance could be declared null and void on the ground of unequal bargaining positions according to the provisions of the law of obligations.

Every agreement anticipated by the 2014 Family Act can be amended on the grounds of unforeseen circumstances that result in unfair results.[39] The effect of such an amendment regarding the property and maintenance shall be *ex nunc* unless it entails decrease or increase of maintenance. In case of the latter, its effect shall be is *ex tunc*. Naturally, the effects of amendment of an agreement regulating the personal rights of the child in the field of parental responsibility and contacts shall still be deemed *ex nunc*.

According to the 2014 Family Act 2014, the court shall, following a petition of parents, approve a plan on joint parental responsibility if it is in "the best interest of the child".[40] It is assumed that an agreement on parental responsibility is itself in the best interest of the child. Otherwise, the court shall instruct the parents how to regulate the disputable issue.[41] In line with the 2014 Family Act, the court is empowered to, in divorce and paternity testing proceedings, *ex offo* determine the child's residence, contact with the non-resident parent and child maintenance even if the parents has not submitted an application for regulation of these issues or if their petitions are not in compliance with "the best interest of child".[42]

Conclusion

The Croatian system of family law has, primarily under the influence of international standards and mechanisms that have been signed and ratified by the Republic of Croatia and then under the influence of the Commission on European Family Law, experienced a great reform through the 2014 Family Act. This reform is most evident in the area of liberalization of regulation of the relationship between parents and children and has had effect on various possibilities of agreement between adults in terms of their relationships belonging to the field of family law.

[37] Art. 106 paragraph 2 of the 2014 Family Act.

[38] Art. 302 of the 2014 Family Act.

[39] Art. 107 paragraph 2 and Art. 285 of the 2014 Family Act.

[40] Art. 107 of the 2014 Family Act.

[41] Art. 465 of the 2014 Family Act.

[42] Art. 413 of the 2014 Family Act.

In the area of regulation of the relationship between parents and children, the 2014 Family Act enhances the autonomy of parents concerning regulation of legal relations with their children, which entails a higher level of parental responsibility. Hence, the autonomy regarding the relationship between parents and children is easily revealed by the parents' duty to thoroughly govern the manner of exercising their parental responsibility in circumstances in which they do not live together. A parenting plan serves as an efficient tool in this view. An agreement made between parents is a prerequisite for joint exercise of parental responsibility. The possibility of declaring the parents' will considering the most eligible person who would take care of the child in case of their death represents an important novel in this context. Here also appears the liability of the state to actively support agreement between parents and other family members, which can be reached through mandatory counselling and family mediation.

When it comes to the autonomy of adult family members (spouses, cohabitants and same-sex partners), the 2014 Family Act has expanded the area of freedom of contractualisation of their mutual relationships. Whereas the old family legislation used to recognize party autonomy only on the occasion of conclusion of marriage contracts, the new Act stretches the possibility of agreement to the institute of maintenance. Moreover, there is the possibility of making unilateral, legally effective declaration of will in regard to decisions on parental guardianship, appointment of a guardian or special guardian as well as to decisions on health and decisions that cannot be made by a guardian, but rather solely by the court, if there is no advance directive (abortion, life support).

What is also a great novel with regard to the new Act is full equalization of the status of married persons with the status of cohabitants on a non-specific level. Such a solution was encouraged by the intention of the legislator to fully equalize spouses with cohabitants (unregistered life partners) with respect to their rights and liabilities in order to avoid discrimination against the latter. On such an occasion, the legislator neglected the fact that it is an informal life partnership with no legal effects that often represents their true will. Therefore, it is possible to assert, from the perspective of persons living in an informal life partnership, that the new solutions may be regarded as one step behind in terms of the respect for their autonomy and way of life. On the other hand, the 2014 Family Act is certainly a step or two forward when it comes to enhancement of party autonomy and the possibility of agreement in family matters involving adults only as well as adults and children.

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Chapter 7
Contracts in Danish Family Law – In the Cross Field Between Civil Law and Public Law

Ingrid Lund-Andersen

Abstract The institution of marriage is regarded as a contract between two consenting individuals. Some of the effects of marriage have both private and public law aspects. Danish family law finds itself in between civil law, which is mandatory, and private law, primarily based on contract law. This article describes and analyses the relevant provisions in relation to contracts between spouses that are either entered into during marriage or after legal separation or divorce. It deals with contracts concerning property relations, contractual obligations to pay maintenance to the other spouse and agreements relating to children. It also considers the need to provide a safety net for the weaker party so that he or she is not exploited by a party who is economically or mentally stronger. Unfortunately, there is a growing number of cases where parents cannot agree and thus there is a growing number of lawsuits on the termination of joint custody and on visitation rights. Developments in Denmark have seen a move away from the former control of family agreements and to a greater focus on legal advice and guidance.

General Overview

Family Law in the Danish Legal System

The Danish legal system is shaped by a Scandinavian collaboration and a common legal tradition in the Nordic countries. The Danish legal system is characterised by being neither a civil law system, as in Germany and France, nor a common law system as the legal systems in UK and US. It is somewhat of a hybrid of the two.

In Denmark the civil law is not assembled into a collection of laws contained in one book. It is, however, codified, but in separate laws. At the same time the civil

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law is, for a great part, established through case law. It is duly noticed that the courts are not (formally) bound by their prior judgments, but the rulings play an important part in interpreting legislation.

The overall distinction in the Danish legal system is *civil* law and *public* law. It is noticed, that the law of commerce is not, as opposed to many other legal systems, separated from the civil law. The civil law includes all disputes between individuals and private corporations, concerning property rights and the law of contracts, torts, family law and law of succession. Public law consists of criminal, constitutional and administrative law. The distinction, as will be the case in many legal systems, between civil and public law is not perfectly clear.

Family law finds itself at a crossroad in the Danish justice system. It is (traditionally) classified as a part of the civil law, but, as opposed to the classical civil law case, the parties do not dispose of the case.

The division of power is institutionalised in the constitution.[1] The legislative power lies with the Parliament and the Government, the judiciary power lies with the courts and finally the executive power is held by the Government.

The judiciary system is divided into a hierarchical system, consisting of 24 so called city courts, and two superior courts and finally a supreme court. This hierarchical court system handles both civil law and public law cases, including criminal law. There exist a number of permanent special courts, which handles cases of a certain nature, which demands special knowledge, e.g. the National Income Tax Tribunal.

The judiciary system operates after the two-tier principle. There is not a Constitutional Court in Denmark. Constitutional questions are handled by the ordinary courts. The courts may assess legislation and have done so on rare occasions.

The sources of law can be categorised as a hierarchical system. In the highest level is the constitution, which, to name a few examples, governs the system of government, matters of the royal family and contains a number of human rights. Additionally, the constitution contains provisions for the legislative process and legitimacy.

Legislation, the next level of the law hierarchy, derives its legitimacy from the constitution. On the even lower level there is a great amount of legislative acts, called orders or departmental notices.

The constitution contains no rules regarding family law, which means that the family institution is not constitutionally safeguarded, and that the legislative power is rather free in regulating the family law. In 1992, the European Convention on Human Rights (ECHR) was incorporated in Danish law. Relevant for family law is article. 8 (the right to a family life) and article 12 (the right to get married).

[1] Act No. 169 of 5 June 1953.

The marriage as an institution is regarded, legally speaking, as an agreement and a contract between two consenting individuals.[2] Yet, some of the effects of marriage has both a civil and a public law aspect; e.g. that the spouses have a mutual duty to support and maintain each other throughout the marriage.[3] This is first and foremost a civil law duty. However, it is also a public law duty, thus if a spouse fails in supporting and maintaining the other spouse, and the other spouse therefore must apply for financial support to the social security authorities, the spouse is liable for the support provided by the authorities.

The family law in Denmark is thoroughly regulated, but is also to a limited extent formed by case law. I most situations court decisions must be seen only as an interpretation of the legislation.

There is no court in Denmark dealing only with family law. Family law cases are dealt with by the ordinary judiciary system, although, many of the cases are settled administratively by the State Administration.[4]

In many of the family law cases the parties do not dispose of the case, which means that it is the court that has the responsibility for elucidating the case. This includes cases on paternity, matrimony and custody.[5] The reason being that the interests of the third party, namely the child, have to be observed. This procedural principle is normally applied and confined to criminal law cases.

The legislation on family law has a federal character, in the sense that it does not apply for Greenland and The Faroe Islands.[6] Only by royal decree can it become effective in Greenland and The Faroe Islands.

Marrying another person and having children has a great number of effects regarding taxes and social security, advantages and disadvantages respectively.

Married couples are taxed as a unity, which means that the personal tax relief in their income can be transferred from one spouse to another. This is an economic advantage for married people.

As regards social security – if you have a spouse – your social security and the amount will depend on your spouse's income. This is deduced from the above mentioned principle, according to which the spouses must financially support one another.

Being a single parent and having children will include the right to a number of social security services.

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[2] It is stated that the parties shall when asked by the marriage authority declare their willingness to marry each other, after which they are pronounced man and wife, see section 20 of the Formation and Dissolution of Marriage Act.

[3] Section 2 of Act No. 56 of 18 March 1925 governing the legal effects of marriage (Danish Act on the Legal Effects of Marriage).

[4] The State Administration belongs to and refers to the Ministry for Economic Affairs and the Interior.

[5] See Chapter 42 and 42 a of the Danish Administration of Justice act.

[6] Greenland and the Faeroe Islands are self-governing regions under the Danish Crown.

International Conventions

The relevant international human rights instruments, that concern Denmark, are The European Convention on Human Rights (ECHR)[7] and a number of human rights conventions under the UN.

ECHR is incorporated into Danish law by a legislative act which means that it is directly applicable. Individuals can, themselves, take legal action if their rights, safeguarded by the ECHR, are violated. The cases are handled by the European Court of Justice. However, the case has to be brought before the Danish judiciary system before the European Court of Justice will take on the case.

Denmark has ratified most of the pivotal conventions on human rights under the UN, except for the freedom of movement. The conventions are legally binding for Denmark which means that individuals can take legal action if any of the rights safeguarded by the conventions are breached. The cases can be brought before the Danish courts or administrative authorities in Denmark.

Denmark has ratified 4 conventions which enables individuals to file a complaint directly to the UN.[8]

Danish Contract Law

Engaging in a contract with another person or a legal entity is regulated in the legislative act, Danish Contracts Act.[9] Section 1 of the act states that offers and acceptance of offers are binding for the consigner. The pivotal point is giving or receiving an offer.

It is noted, that this, in most cases, presupposes legal capacity, which, according to Danish Guardian Act,[10] is possessed by everyone above the age of 18 and adults, who are not under guardianship and declared incapable of acting legally.[11]

An exception to the age limit of 18 is made in the Guardian Act in respect of young persons under 18 who enter into marriage before they reach that age. Young persons under 18 cannot marry unless they have obtained permission from the State Administration. When they have this permission to marry, they automatically

[7]Convention of 4 November 1950.

[8]These four conventions are: International Covenant on Civil and Political Rights, International Convention on the Elimination of Racial Discrimination, Convention to Eliminate All Forms of Discrimination against Women and Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[9]Consolidation Act No. 781 of 26 August 1996.

[10]Consolidation Act No. 1015 of 20 August 2007.

[11]However, the ward can engage in contracts with regard to income stemming from his or her own personal work, gifts, legacy etc., and pocket money, which is given to the ward for his/her free disposal. As concerns income derived from personal work, only young persons over the age of 15 can dispose of this.

acquire legal capacity unless the State Administration, when granting the permission to marry, makes it a condition that a young person under 18 remains a minor and a ward.

It is stated in Danish Contracts Act, that if an authority is given, the principal is immediately bound by the transactions made by the proxy. This is merely the principal rule; there exist a number of exemptions to this.[12]

There are certain limitations for engaging in a contract, which means that the acceptance of an offer under certain circumstances can be invalid. These limitations are as follows:

if the person giving a declaration of intention is:

1. being, or threatened of being, subjected to violence,
2. being subjected to any other form of compulsion,
3. deceited into agreeing,
4. exploited, due to financial, personally or mentally difficulties,

In addition to the above mentioned a person is not bound by the declaration of intention if:

1. the declaration is made due to a typing error or any other mistake.
2. the person, who, at the time he received the declaration, knew or should have known, that the contract, if enforced, would conflict with ordinary integrity.

The final provision is sort of an accumulating regulative, which states that contracts, that are simply unfair or conflicting with decent behaviour or good morals, are void.

Substantive Family Law

Contracts Between Spouses Concerning Property Relations

In Denmark marriage does not necessitate the formation of special contracts regarding property. Danish law takes a deferred community of property within marriage as the statutory basis.[13] The general law of community property will therefore be applied where no contracts are formed.[14]

[12]E.g. the principal is not immediately bound by transactions made by the proxy, which go beyond the boundaries of the authority.

[13]See more about Danish matrimonial property law Godsk Pedersen's account in: R. Blainpain R (ed.) (2011), International Encyclopaedia of Laws, Family and Succession Law, Denmark, Kluwer Law International, The Nederlands, and Lund-Andersen I (2008), Danish national report on Property relationship between spouses, http://ceflonline.net/country-reports-by-jurisdiction.

[14]The essential meaning of community of property only shows when one of the spouses dies or in the event of legal separation or divorce. Where the community is terminated, each spouse is to cede that half of the community property which he or her owns, while receiving half of his or

Until 1 October 1990, a contract for separate property included the division of matrimonial property both during the spouses' lifetime (upon a legal separation or divorce) and in the event of the death of one of the spouses. Since October 1990 it has also been possible to enter into contracts for separate property, which are only to be effective during both spouses' lifetime, called "divorce separate property". It remains possible to make contracts for separate property to be effective if one of the spouses dies. By a marriage settlement spouses can also enter into contracts for separate property covering part thereof, or for specific assets to be held as separate property, so that the assets are held as partly separate property and partly community property, cf. section 28 of the Legal Effects of Marriage Act. Further, it is possible to enter into a fixed-term contract providing for separate property, e.g. for 5 years.

Gifts between spouses require a formal marriage settlement to be valid, cf. section 30 of the Legal Effects of Marriage Act. However, ordinary gifts that are not out of proportion to the donor's economic situation are excepted from this rule.

In order to be valid between the spouses and in relation to a third party, a marriage agreement on property rights must be in writing, signed by both spouses, and registered in the register of marriage settlements according to sections 35 and 37 of the Legal Effects of Marriage Act. The registration takes place at the civil court. Having been registered, the marriage settlement is valid from the date on which the application for registration is received by the court office. A marriage settlement may be formed prior to the marriage itself or during the marriage. A marriage settlement cannot be revoked without adherence to certain requirements as to form. But it may, at any time, be changed or abolished by another registered marriage settlement.

In October 1990, the rule on requirement for approval of certain of the spouses' agreements was repealed.[15] The requirement related to marriage contracts according to which a spouse's belongings should be transferred to the other spouse free of charge. The contract could include both gifts and agreements for separate property. The purpose was primarily to defend the wife's interest as the supposed weaker party. For many years, the approval requirement had been criticized for being patronizing towards the wife. Instead, the marriage committee proposed to introduce mandatory guidance before contracting all marriage contracts in order to prevent exploitation. Unfortunately, rules on mandatory guidance were never introduced.

As a marriage settlement is a contract between two persons, the Danish Contracts Act applies to pre-nuptial and post-nuptial agreements. The settlement can be set aside by a court if one of the conditions for invalidity (duress, fraud, lack of capacity etc.) is fulfilled. Fraud can be committed either by the other spouse or by a third party. A marriage settlement can be declared invalid if a third party has acted fraudulently, even if the other spouse has acted in good faith. Further, if it would

her spouse's share of the community property in return. Since a spouse is not liable for his or her spouse's debts, only half of a favourably balanced share of the community property may be ceded.

[15]The State Administration operated as the approving authority.

be unreasonable to maintain the contract, a marriage settlement can be set aside or modified on grounds of unfairness under the Danish Contracts Act.

Parents and Children

Parental Responsibility

The legal relationship between the parents and the child is regulated in the Parental Responsibility Act.[16] The act includes among others the question about custody.

Section 1 of the act states initially that children and young people under the age of 18 are subject to custodial care unless they are married.

If the parents are married to each other when the child is born or they marry later on, they will automatically have joint custody over the child, cf. section 6. Are the parents separated at the time of the birth, the mother will have sole custody, unless the separated husband is recognised as the father or his paternity is established by a court order.

Parents, who are not married to each other, have joint custody if they have submitted a declaration that they will jointly care for and assume responsibility for the child or they have made an agreement about joint custody, cf. section 7. If a man is considered to be the father, the parents have joint custody if they have or have had joint address within the 10 months immediately preceding the birth of the child. In all other cases the mother has sole custody.

Parents can always by agreement settle the custody arrangement, except in cases where the parents live together and/or are married; in these cases the custody will automatically be joint.

If non-cohabitating parents have joint custody, but disagree about the custody, the court will decide whether joint custody should continue or one parent should be granted sole custody.

Parents, who have joint custody, but do not live together, can agree that one of them shall have sole custody, cf. section 10. Conversely, the parents cannot agree on sole custody to one of them if they live together or if they are married. Sole custody can be transferred from one parent to the other. The State Administration must be notified of the agreement in order for it to be valid.[17] If a custody case has been brought before the court, notification can be made to the court. The parent, who makes the renunciation of custody, can at any time reapply for custody.

Custody can be transferred to an individual or individuals other than parents, by an agreement approved by the State Administration, cf. section 13.Custody can

[16]Consolidation Act No. 1073 of 20 November 2012.

[17]Previously, all custody agreements should be approved by the State Administration.

be transferred to a married couple jointly, including the other parent and his/her spouse. If a custody case has been brought before the court, the court can approve the agreement.

An agreement on dissolving the parent-child relationship cannot under any circumstances be made between the parent and the (major) child. The reason is probably being that the question about custody is not a matter between the child and parent, but rather a question between the two parents. The child is, in this relation, regarded as an individual in need of protection and caretaking, and not an autonomous part.

The parent(s) or the holder(s) of custody shall according to the Parental Responsibility Act section 2 take care and provide for the child and can make decisions regarding the child's personal life in accordance with the child's interests. Furthermore, it is stated that the child has the right to be treated with respect and must not be subjected to corporal punishment or humiliating treatment. Not just from the parent(s), but from anybody.

This question of the housing of the child is left with the parents to decide, also upon divorce or separation. If the parents have joint custody and the parents have agreed on, with whom the child shall reside, it is the parent, with whom the child resides, that decides where in the country the child should have its place of residence.

If the parents have joint custody, and the parents cannot agree on, with whom of the two the child should reside, it is decided by the court, cf. section 17. The court can change an agreement or a decision about the child's place of residence.

It would probably be a violation of the child's rights according to the Convention of the Rights of the Child and The European Convention on Human Rights, if parents were to conclude a contract that would bind the child in terms of marriage and education.

The question about circumcision is an on-going global debate about the conflict between the UN Convention of the Rights of the Child on the one hand and the rights of European Convention on Human Rights to freedom of religion on the other. It is noticed that section 71 of the Danish constitution (also) safeguards the right to personal liberty. The religious ritual circumcision of boys is not banned in Denmark, but is, however, not allowed at state hospitals. Circumcision of boys has to take place by a medical doctor at private clinics or there must be a doctor in attendance during the procedure when using assisting to surgery in a private home.[18] Circumcision of boys under 15 years old should not be performed without the existence of an informed consent of the custodial parent. If there is joint custody, both parents must be informed and give consent to the action execution. Boys at the age of 15 years may give informed consent to circumcision.

According to section 245 a of the Penal Code,[19] which was introduced in 2003, the persons who cause bodily harm by cutting away or otherwise removing

[18]See Directions No. 9199 of 2 April 2014 from the Danish Health and Medicines Authority.

[19]Consolidation Act No. 871 of 4 July 2014.

female external sexual organs either partially or completely can be punished with imprisonment up to 6 years. If the bodily harm was grievous, the sentence can rise to 10 years, cf. section 10. Parents cannot conclude contracts allowing female circumcision.

Child Maintenance

According to Chapter 2 of the Children's Maintenance Act[20] there exist a right and duty to respectively receive and pay child support if the parents do not live together. A divorced couple/parents can agree on, whether there should be child support, and if so, the amount to be paid.

If they disagree, it will be decided by the State Administration. Then the amount is dependent on the ex-parents' separate income. Chapter 2 applies to all children whether born within or out of wedlock.

Paternity and Maternity

Matters of paternity and maternity are regulated in the Children Act.[21] When a married woman gives birth to a child, her husband will normally be regarded the father of the child and the paternity is registered in connection with the registration of the birth of the child, cf. section 1.

Access to smooth registration of paternity has been introduced regarding children born of an unmarried woman, cf. section 2. The rule is that the man will be regarded the father of the child if he and the mother declare in writing that they will jointly take responsibility and provide for the child. The declaration is made by filling a form called "care and responsibility declaration" which the midwife gives to the unmarried mother. The declaration is to be signed by both parents personally. The declaration is valid even though the parents do not live together or do not have the same address. It is not required that the man in question is the genetic father to the child. Registration can take place even if the mother has cohabited with another man within 10 months before the giving birth. The decisive factor is that she has not been married to him.

If paternity is not registered in connection with the birth, the State Administration will institute affiliation proceedings.

In situations where a woman has been inseminated by a health official or someone acting under the responsibility of a health official, her spouse or partner is regarded as the father of the child, if he has consented in the treatment, cf. section 27. The consent shall be in writing and in it he shall declare that he will be the father of the child.

[20]Consolidation Act No. 1044 of 29 October 2009.

[21]Consolidation Act No. 18 of 10 January 2014.

A man, who has donated semem, cannot be judged or regarded as the father to the child of a woman artificially inseminated with his semen by a health official, unless the woman is his spouse or partner. Exceptions can be made, if the man has given his consent to a certain woman receiving the treatment and the child evidently has been conceived with this particular treatment. The consent has to be in writing and in it he shall declare that he will be the father of the child.

If the semen has not been donated to artificial insemination by a health official semen, the donor is regarded the father, unless the insemination has been proceeded without his knowledge or after his death.

The woman, who gives birth to the child that has been conceived as a result of the insemination, is regarded as the mother, cf. section 30.

A new Act has introduced rules on co-motherhood.[22] The female spouse or the registered partner of the woman, who has given birth to a child, is put on the same footing as the biological father. If the donor is not known, both mothers will be registered as parents from the birth of the child. Is the donor known, the mother, her female partner and the donor can decide whether the co-mother or the donor is to be the other of the two legal parents.[23]

An agreement stating that a woman who gives birth to a child has to give up the child to another person is invalid (surrogate motherhood), cf. section 31.

In Act on Artificial Insemination the regulation of the insemination is specified.[24] It is stated that there cannot be established artificial insemination, unless the ovum stems from the woman giving birth or the semen stems from her partner, cf. section 5. Furthermore, it is stated that a woman cannot be artificially inseminated if she is above the age of 45, cf. section 6.

Adoption is granted by an administrative decree issued by the State Administration. The legal effects of adoption are, among others, that the legal relationship to the biological parents lapses, and the legal ties to the adopting parents set in, see more in detail Adoption Act.[25] The adopting parents obtain exactly the legal position of biological parents.

Where the person to be adopted has reached the age of 12, the decree shall be granted only after obtaining the consent of the person to be adopted, except where obtaining consent is considered to be detrimental to the best interests of the child, cf. section 6. The consent of the parents is to be obtained where the person to be adopted is under the age of 18 years and is a minor, cf. section 7. Where one of the parents does not hold the custody, cannot be found or is, by reason of insanity, mental deficiency or any similar condition, incapable of managing his or her own affairs, only the consent of the other parent is required.

[22] Act No. 652 of 12 June 2013 with effect from 1. December 2013.

[23] It is possible that Denmark is the first country in the world where such an agreement can be entered.

[24] Consolidation Act No. 923 of 4 September 2006.

[25] Consolidation Act No. 392 of 22 April 2013.

An adoption decree may be revoked by the Minister of Justice when the adopter and the adopted child so agree. Where the child is a minor under 18 years of age, the adoption decree may be revoked if the adopter and the original parents of the adopted child so agree, and revocation is in the best interests of the child. If the adopted child has reached the age of 12, the consent of the child must also be obtained.

Partners

Marriage

Marriage and to some extend also unmarried cohabitation are recognised partnerships according to Danish law.[26]

In 1989, Denmark was the first country in the world to introduce a Registered Partnership Act for same-sex couples.[27] In June 2012, Denmark introduced same-sex marriage with the same legal status as married couples of the opposite sex apart from a few exceptions.[28] Previously registered partnerships may be converted into marriage if the registered partners request hereof. A registered partnership that is not converted is still effective, but since 15 June 2012 it is no longer possible to register a registered partnership.

To be legally valid, a marriage must be voluntary, between two single persons who are over 18 and capable of marrying and not closely related. These conditions are laid down in Chapter 1, sections 1–11(b) of the Marriage and Matrimonial Causes Act.[29] A marriage cannot take place, unless the conditions for entering into marriage are fulfilled. It is not possible to opt out of the conditions.

A person must normally be over 18 to marry. Young persons under 18 cannot marry unless they have the permission of the State Administration. In the same way, a young person under the age of 18 who has not been married before cannot

[26]Cohabiting partners, who are not married, do not have the obligation in the private law to financially support one another, which is a pivotal aspect of the marriage. On the other hand, when a couple is presumed a cohabitant, a number of social benefits fall away, as their financial situation is assessed jointly. Upon termination of the cohabitation the division of property is based on case law. The financially weaker party can make a claim for compensation if the financially stronger party has obtained unjust enrichment and the relationship has lasted for more than around 3 years.

[27]Act No 372 of 7 June 1989 with effect from 1 October 1989. The Act is described by Lund-Andersen I (2003) The Danish Registered Partnership Act. In: Boele-Woelki K, Fuchs A (eds.) Legal Recognition of Same-Sex Couples in Europe, Intersentia, Antwerp – Oxford – New York, p. 13–23.

[28]Act No. 532 of 6 June 2012 with effect from 15 June 2012. Provisions laid down in the Danish legislation containing gender specific rules for one of the parties in a marriage do not apply to a marriage between two persons of the same sex. Neither do provisions laid down in international treaties unless special agreements are made on this.

[29]Consolidation Act No. 1052 of 12 November 2012.

marry without the consent of the parents. If one of the parents is either deceased, mentally ill, mentally disabled, without share in the parental authority, or if his consent cannot be obtained except without considerable difficulty or delay, then the consent of the other parent is sufficient. A person who is under guardianship according the Guardianship Act or who has been deprived of his legal capacity to act cannot marry except with the consent of the guardian.

Closely related persons cannot marry under Danish law. The Danish Marriage and Matrimonial Causes Act defines closely related persons firstly as persons in the direct ascending or descending line as well as brothers and sisters. Further, bigamy is not allowed according to Danish law. A marriage which infringes these provisions can be annulled, cf. section 23.

Divorce

A new reform, which is effective of July 1st 2013, changes the rules for dissolving the marriage.[30]

According to section 29 of Marriage and Matrimonial Causes Act the spouses can claim legal separation or divorce, if they agree about it.[31]

It is still, however, possible to file for separation, and the separation period is now reduced to 6 months if the spouses do not agree about getting a divorce, cf. section 30.[32]

Other grounds for divorce are: after living apart for a period due to disagreement between the spouses (section 32); one of the partners was unfaithful to the marriage (section 33)[33]; domestic violence (section 34); bigamy (section 35) or child abduction (section 36).

Maintenance

Under the Legal Effects of Marriage Act section 2 'man and wife shall, according to their individual means, contribute towards maintenance of the family in a fashion appropriate to the spouses' living conditions. Should the duty to contribute towards maintenance of the family be neglected, the duty can be provided for by the

[30] Act No. 647 of 12 June 2013.

[31] Up until July 2013, a divorce had to be preceded with a period of separation. A spouse had the right to separation, if the spouse did not want to continue the marriage. After 1 one year of separation, a spouse had the right to divorce, but if they agreed about getting a divorce, they obtained it after a period of only 6 months' separation.

[32] Legal separation is regarded as a transitional period between married life and divorce. The effects lapses if the spouses resume their life together. The separated couple cannot enter into another marriage until the marriage is finally dissolved with a divorce.

[33] I.e. committed adultery or has participated in a similar sexual relationship, unless the other spouse consented to this, or renounced his or her right to obtain a divorce for this reason at a later stage.

State Administration. This, however, will hardly be relevant as long as the spouses live together. What is relevant is that the duty remains after factual separation on the grounds of disagreement.

To make sure that the spouses are able to purchase the everyday necessities, a rule in the Legal Effect of Marriage Act section 11 stipulates joint liability for purchases made on credit. Under this rule, each spouse is entitled to make such contracts as to obtain the necessities of life and to provide for the children and be jointly liable for it when still in marital cohabitation. The wife's rights are more wide-ranging than that of her husband in that she may make it to his duty as well as hers to maintain her special needs.

The spouses have to submit an application for legal separation or divorce to the State Administration. Separation or divorce by administrative license is only granted in cases, where the spouses agree about the duty of maintenance after dissolution of the marriage, cf. section 42 of Marriage and Matrimonial Causes Act. The agreement must fix whether or not maintenance payments are payable, by whom and for how long. The spouses may refer the question of amount to the decision of the State Administration. As regards division of property the spouses need not agree on this issue to obtain separation or divorce by administrative license.

If the spouses cannot reach an agreement about maintenance, the whole case is referred to the court which decides if there is to be a duty for a spouse to pay maintenance contributions to the other spouse and for how long, cf. section 50 of Marriage and Matrimonial Causes Act.

Provisions on the distribution of property do (probably) not influence maintenance after divorce unless the property is substantial.

Procedural Family Law

Jurisdiction

Alternative Dispute Resolution in General

Denmark does not have a comprehensive, national regulation of alternative dispute resolution (ADR). Mediation is practiced in many areas in Denmark—legal as well as non-legal.[34]

In 2008, Court-connected mediation of civil cases was made a permanent feature of the Danish judicial system in all courts except the Supreme Court by an addition

[34]The description on alternative dispute resolution in Denmark is based on Adrian L (2013) Regulation of Dispute Resolution in Denmark: Mediation, Arbitration, Boards and Tribunals. In: Steffek F, Unberath H (eds) Dispute Resolution: ADR and Access to Justice at the Crossroads, Hart Publishing Pty Ltd, Oxford and Portland, Oregon, p. 115–133.

(Chapter 27) to the Danish Administration of Justice Act.[35] All courts except the Supreme Court are obliged to provide mediation services in civil actions, and judges and attorneys with special training in mediation can serve as mediators.[36] Mediation is offered to parties after filing of the case. Participation is voluntary and the parties can withdraw from the process at any time—no 'punishment' is imposed either for declining mediation or for not reaching a solution in mediation. The process is confidential for all involved, and mediators are exempt from the general duty to give evidence if the case proceeds in court. Mediation is offered free of charge and can take place at any point in time during the adjudicative process, but in most instances mediation takes place soon after the case is filed.

When mediation is accepted by the parties, the legal proceedings are brought to a halt. As a general rule, mediator action such as providing suggestions for solutions or evaluating the merit of the case occurs on a very limited basis, this being possible only when the parties ask for such input and the mediator finds it appropriate. Attorneys may attend mediations, but the parties and not the lawyer play the principal role in the process. Should the case not be resolved in mediation, the mediator cannot participate as judge or attorney in the case, and information about what has transpired in mediation cannot become part of the subsequent litigation unless the parties agree to it. If the case is resolved in court-connected mediation, the parties can choose to make it enforceable by requesting that the agreement be added to the court records.[37] Otherwise, the parties' agreement is binding in the same manner as any private agreement made in Denmark. Unless the parties decide otherwise, they each carry their own expenses occurring from mediation.

In 2003, a group of lawyers have formed an organisation called Danish Mediator Lawyers.[38] Although the bulk of their cases concern legal disputes, they offer mediation in other areas as well. The organisation appoints mediators upon request, which is once a month on average. The overall framework for mediations conducted by mediator lawyers is outlined in a standard contract that all parties sign prior to entering mediation, as well as in a set of ethical guidelines covering the conduct of mediators. Accordingly, mediation is voluntary and confidential for all involved.

The role of the mediator lawyer is to assist the parties in resolving the dispute themselves. The parties may bring their lawyers to the mediation, but they are required to attend personally. The mediator must be neutral and impartial, and cannot act as advisor to the parties or make any decisions regarding the conflict. The Danish Mediator Lawyers have adapted a rule that governs court-connected mediation as well, stating that mediators are not obliged to evaluate the strengths

[35]Consolidation Act No. 1139 of 24 September 2013.

[36]Mediators are administratively appointed to each case from the court's panel of mediators.

[37]If they do so, the legal effect of the mediated agreement is equated with the legal effect of settlements made in the course of adjudication and can be accordingly enforced.

[38]Danish Mediation Lawyers (Danske Mediatoradvokater), H. C. Andersens Boulevard 45, 1553 Copenhagen V, Denmark.

and weaknesses of the legal aspects of the case or to intervene if the parties arrive at a solution that is different from the likely outcome of adjudication or arbitration.

The fee for the mediation has to be reasonable, and the general rule is that each party cover his or her expenses and pays half of the fee for the mediation.

Alternative Dispute Resolution in Family Law Matters

The State Administration is the entry point for resolving disputes regarding custody, visitation, residence and other disagreements between parents who no longer live together. If no agreement is reached by the parents, the State Administration makes administrative decisions about visitation rights, whereas custody and residence matters are referred to court if the parents are unable to arrive at an agreement at the State Administration level. The primary tool for resolving these matters are administrative meetings with parents conducted by a lawyer alone or a lawyer working in tandem with either a psychologist or social worker with expertise in children. If these meetings do not result in agreement, the parents are offered mediation or counselling by a child expert.

Mediation in family matters was introduced nationwide in 2001 as a pilot project and it was evaluated in September 2004. Based on the positive evaluation of the pilot project, the service continued and was incorporated in the Parental Responsibility Act in 2007. The legislation is rather brief, stating that the State Administration offers parents and children mediation if they disagree on custody, residence or visitation, as well as in other situations where there is a need for mediation, cf. section 32.

Mediation is defined as an alternative to third-party decisions which aims to assist parents in negotiating an acceptable solution. The mediator has to be neutral and to work in a facilitative rather than evaluative manner; consequently, the mediator cannot make any ruling in the case if the parties do not reach an agreement. Mediation is confidential as far as the mediators are concerned. They are covered by the general rule of confidentiality covering civil servants. Moreover, an additional rule of confidentiality is imposed on the mediators as they are not allowed to pass on information from the mediation to colleagues working on the case legally, and likewise their colleagues are barred from requesting information from the mediators unless the parties agree to it.

There is no confidentiality rule governing the parties, but parties often make a good faith agreement whereby confidentiality is a part of the mediation. Mediation is offered free of charge and is voluntary. It is up to the parties to enter mediation and they can terminate their participation at any point in time.

The parents must participate in the mediation personally and may bring a lawyer or someone else, but commonly choose not to. If the parties reach an agreement concerning custody and visitation, the parties can choose to make the agreement enforceable.

So far, attention has been given to disputes over children. However, separation and divorce are dealt with by the State Administration, too. If the spouses are unable to come to an agreement to the central terms of the separation or divorce by

themselves or with the assistance of a case officer, they may be offered mediation, see section 41 of the Marriage and Matrimonial Causes Act. Mediation in these matters is provided by the State Administration in exactly the same manner as described above in disputes concerning children, and sometimes both matters are combined in the mediation. If the parties still cannot agree regarding the conditions of the divorce, the case is turned over to the courts for decision.

Arbitration

The Arbitration Act, which was passed in 1974, covers arbitration by agreement.[39] Arbitration agreements can be made with respect to future as well as to existing conflict and are legally binding. Hence, a court will reject hearing a case with an arbitration stipulation. With a few notable exceptions, most of the regulations in the Act are non-mandatory.

The parties cannot decide on the applicability of the Act, the matters that can be decided by arbitration, the relationship between arbitration and adjudication or the enforceability of the award, but, other than that, the parties of the dispute are free to make their own decisions as to most other aspects of the arbitration. They can decide on the composition and authority of the tribunal, the requirements of the award, cost and security, etc. In principle, a court of justice cannot review an arbitration award and setting aside an arbitral award is, in general, possible only in a very limited number of situations.

These techniques on arbitration are not applied in family law matters.

Scrutiny by the Court or by the State Administration

A Priori Review

Agreements reached through ADR do not need to be conformed a priory by a State court.

The State Administration must be notified of agreements between parents with regard to custody.[40] If custody shall be transferred to an individual or individuals other than the parents, the agreement has to be approved by the State Administration, cf. section 13 of the Parental Responsibility Act. For example, the custody may be transferred jointly to one of the parents and the spouse in a second marriage. If a custody case has been brought before the court, the court can approve the agreement.

[39] Act No. 553 of 24 June 2005.

[40] See 2.2.1.

A Posteriori Review

Where the spouses have divided the property privately by entering into an agreement on the division of property, they can freely set aside or adjust the general rules as long as they agree to do so.

A private agreement between the spouses can be amended or set aside according to section 58 of the Danish Marriage and Matrimonial Causes Act. Where, with a view to judicial separation or divorce, the spouses have entered into an agreement on the division of their property, maintenance obligations or other terms, such agreement may be altered or declared null and void by the judgment of a court, in the event that the agreement is considered to have been unfair for one of the spouses at the time when it was concluded. Contracts covered by this rule will often imply a waiver which the spouse later regrets. It justifies a special protection rule that the time up to a divorce often is characterized by great mental tensions.

Special provisions exist in the Danish Marriage and Matrimonial Causes Act on modifying agreements or decisions on maintenance. According to section 52 an agreement made by the spouses on the maintenance obligation or on the amount of maintenance payable may be altered by the judgment of a court, where, due to materially altered circumstances, it would be unreasonable to uphold the agreement. If the original decision was made by the court, it may be amended later by a new court decision if the circumstances have altered, and there are significant reasons for making a new decision, cf. Section 53. Similarly, the State Administration may make a new decision about the amount of maintenance contributions if this is indicated by the circumstances of the case.

Further, family agreements can be modified according to the Danish Contracts Act.[41] As stated in section 36 (1) a contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it. The same applies to other juristic acts. In making this decision, regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances.

Maintenance contributions to the children are laid down in the Children's Maintenance Act. According to section 17 an agreement on child support made by the spouses may be altered by the State Administration – but not by a judgment of a court – if the agreement is against the welfare of the child. This will be the case if the parents agree on that one of the parents do not pay child maintenance or pay less the amount which would be fixed by the State Administration. The agreement would be modified ex nunc. The parents have primary responsibility towards the social welfare authorities to maintain their child. The maintenance contribution is fixed according to the welfare of the child and the financial circumstances including the earning ability of the parents.

[41] As regards marriage settlements, see 2.1.

Closing Considerations

Family law finds itself at a crossroad between public law, which is mandatory, and civil law, which has contracts as the primary source. Consequently, rules on formation and dissolution of marriage are mandatory whereas there is more room for spouses' agreements on economic matters.

During the marriage, there is considerable freedom of contract on property rights provided that the formalities for marriage settlements are respected. In 1990, the freedom of contract options was extended by a reform which at the same time abolished the approval requirement. Today, it has become common that spouses seek legal advice before entering into a marriage settlement since the area is very complex. When spouses have concluded a contract on property matters, it may be disregarded under the general rules of contract law.

In connection with the dissolution of a marriage, spouses can freely agree on division of property, maintenance obligations or other terms. However, these agreements are subject to a special assessment under section 58 of the Marriage Act and the agreement may subsequently be modified or set aside, taking into account the circumstances of the agreement, particularly a potential exploitation of a spouse in a mentally weak state or the lack of legal guidance. This means that there is strapped a safety net under the weaker party so that he or she is not being exploited by the stronger party who is economically or mentally superior.

As regards agreements relating to children, it is presumed that what the parents can agree on is the best for the child. Unfortunately, there are increasingly cases where parents cannot agree. Therefore, there are many lawsuits about termination of joint custody and cases on visitation rights. It is often stressed that there is a need for more legal guidance of parents as well as a need for more mediation offers in order to avoid that the children are suffering from their parents' conflict.

The development in Denmark has been a move away from prior control of family agreements to a focus on legal advice and guidance. In the conflictual cases mediation is often given a praiseworthy attempt before the case is turned over to the courts.

Chapter 8
Contractualisation of Family Law in England & Wales: Autonomy vs Judicial Discretion

Jens Martin Scherpe and Brian Sloan

Abstract While agreements between family members will not necessarily amount to a formally valid contract in English Law, there is considerable scope for 'contractualisation' or 'private ordering' in a broad sense in the English family justice system. Moreover, the Government is seeking to encourage people to make agreements governing finances and the care of children on relationship breakdown, as an alternative to potentially costly court proceedings. That said, in both adult and child law the possible extent of contractualisation is limited by the general principle that private agreements cannot exclude the jurisdiction of courts. The court therefore retains the ultimate ability to protect the vulnerable in a paternalistic fashion, for example with reference to its statutory powers to do what is 'fair' between former spouses and civil partners and its obligation to treat a child's welfare as its 'paramount' consideration in matters concerning upbringing. Ironically, this leads to a situation where parties to an agreement cannot usually be sure of the true effect of that agreement until it is considered in the course of proceedings that it was often designed to avoid.

General Overview

Family law in England and Wales is largely the product of statute, as interpreted and applied by the courts. In areas where neither Parliament nor the Welsh Assembly have legislated, the applicable law is the 'common law' developed by the judiciary over time (see Slapper and Kelly 2014 for general information about the legal system in England and Wales).

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While a large measure of freedom is afforded to parties contracting about family matters in principle, they may face difficulty in meeting the requirements of a valid contract due to the familial context in which the agreement has been reached.[1] In order to be enforced as such in English Law, a contract must represent an agreement between parties with capacity (see, eg, Peel 2011, ch 12) consisting of an offer and an acceptance (see, eg, Peel 2011, ch 2). The arrangement must be of sufficient certainty (see, eg, Peel 2011, [2–078]–[2–102]), and it must be supported by consideration (see, eg, Peel 2011, ch 3). The parties to an apparent contract must also intend to create legal relations (see, eg, Peel 2011, ch 4). An otherwise valid contract could be rendered unenforceable due to illegality, which is a doctrine that applies to contracts that are contrary to public policy of various kinds (see, eg, Peel 2011, ch 11). A contract could also be set aside on grounds such as duress, undue influence or its being an unconscionable bargain (see, eg, Peel 2011, ch 10), misrepresentation (see, eg, Peel 2011, ch 9), or mistake (see, eg, Peel 2011, ch 8).

Even if their dealings do not amount to a valid contract, parties to familial relations may still be able to engage in 'private ordering' in a broader sense by agreeing on a certain matter. That said, English Law tends to take a rather paternalistic view in family law, leaving much of the substance of a decision to the discretion of the courts. While this – in theory – allows for a fair outcome in all cases, it comes at the price of significant uncertainty. This also explains why English family law does not generally allow parties to contract *conclusively* out of the existing legal rules (where these exist) and thus the judicial discretion: Parliament gave jurisdiction with discretion to the courts, and it is not for two private parties then to oust the jurisdiction of the courts by private agreement.

This chapter considers the validity of, and the weight given to, agreements involving both children and adults in detail, covering both substantive and procedural aspects. In doing so, it highlights the tension between autonomy and paternalism in English family law.

Substantive Family Law

Parents and Children

It a basic principle of English law that 'the court's jurisdiction to determine issues . . . concerning the welfare and upbringing of the children, cannot be ousted by agreement'.[2] In deciding such issues, moreover, a court must treat the welfare of the child as the 'paramount' consideration (taking the child's own views into

[1] See, eg, *Balfour v Balfour* [1919] 2 KB 571. Cf, eg, *Merritt v Merritt* [1970] 1 WLR 1211.

[2] *AI v MT* [2013] EWHC 100 (Fam), [2013] 2 FLR 371, [12] (Baker J).

account where appropriate),[3] so that there will be cases where a court cannot simply approve an agreement between parents or even weigh up the merits of the parents' own arguments alone where they are in dispute. Before discussing these principles, it is necessary to consider parenthood and parental responsibility, which are distinct, and the extent to which they are subject to contractualisation in English Law.

Legal Parenthood

Establishment of Parenthood in Cases of Natural Parenthood and Assisted Reproduction

The default position in English Law is that a child's mother is the woman who gives birth to the child.[4] This position can be varied only by adoption[5] or a parental order made by virtue of a surrogacy arrangement.[6] The determination of the child's other parent is more complex. Subject to adoption or a parental order, a child's father is usually the person who has inseminated the mother, but this is subject to a number of exceptions. There is a presumption that the mother's husband is the child's father,[7] albeit one that is now readily rebuttable via DNA testing,[8] which will usually be ordered in respect of a child in the event of a dispute.[9] The mother's husband is nevertheless treated as the father even if the sperm used to create the embryo was provided by another man, unless it is shown that the husband did not consent to 'the placing in her of the embryo or the sperm and eggs or to her artificial insemination'.[10] It is also possible that the mother's non-marital male partner can become the child's father in the context of assisted reproduction, notwithstanding the fact that someone else is the genetic father. This is occurs when the mother has been treated in a licensed clinic and the 'agreed fatherhood conditions' are met (on which see below).[11]

Parenthood can also be conferred from birth on a 'second female parent' (in addition to the mother) in the context of assisted reproduction, with the provisions for female civil partners and same-sex spouses of the mother[12] and informal female

[3] Children Act 1989, s 1.

[4] Human Fertilisation and Embryology Act 2008, s 33(1) and for the common law *The Ampthill Peerage* [1977] AC 547.

[5] Adoption and Children Act 2002, s 67.

[6] Human Fertilisation and Embryology Act 2008, s 54.

[7] See, eg, Human Fertilisation and Embryology Act 2008, s 38(2).

[8] Family Law Reform Act 1969, Part III and s 26.

[9] See, eg, *Re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89.

[10] Human Fertilisation and Embryology Act 2008, s 35.

[11] Human Fertilisation and Embryology Act 2008, s 36.

[12] Human Fertilisation and Embryology Act 2008, s 42.

partners[13] essentially mirroring those for marital and non-marital male partners of the mother respectively. It is also possible for a child born through assisted reproduction not to have a second parent of any kind. This occurs where a sperm donor consented to the use of his sperm for the creation of the embryo[14] and no-one else is treated as the second parent by virtue of the provisions already considered.

Legal parenthood can thus be contractually established in a broad sense in the context of assisted reproduction. That said, there is no absolute right to assisted reproduction treatment. For example, the relevant legislation expressly provides that '[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth'.[15] Even so, this welfare test does not seem to be particularly important in practice (cf Smith 2010, 51).

As explained above, a spouse or civil partner of a mother does not become a parent in the context of assisted reproduction if he or she did not consent to the treatment, and a partner who is not married to or in a civil partnership with the mother must satisfy the agreed fatherhood or second female parenthood conditions in order to become a parent under the law of assisted reproduction. Those conditions require the father or second female parent to give to the person responsible for supervising the licensed treatment a notice that he or she 'consents to being treated' as the father or second female parent of 'any child resulting from treatment provided to [the mother] under the licence'.[16] The woman who is to give birth must also give the responsible person 'a notice stating that she consents' to the intended father or second female parent 'being so treated'.[17]

The agreed parenthood conditions require that neither party has given a further notice withdrawing consent,[18] and the woman who gives birth has not given a subsequent notice that someone else is to be treated as the father or second female parent.[19] A valid notice must be 'in writing and must be signed by the person giving it',[20] or signed at the direction of that person and in the presence of that person and two witnesses if he or she is unable to sign.[21] The mother and father or second female parent must not be within the prohibited degrees of relationship with respect to each other.[22]

[13]Human Fertilisation and Embryology Act 2008, s 43.

[14]Human Fertilisation and Embryology Act 2008, s 41.

[15]Human Fertilisation and Embryology Act 1990, s 13(5).

[16]Human Fertilisation and Embryology Act 2008, s 37(1)(a), s 44(1)(a).

[17]Human Fertilisation and Embryology Act 2008, s 37(1)(b), s 44(1)(b).

[18]Human Fertilisation and Embryology Act 2008, s 37(1)(c), s 44(1)(c).

[19]Human Fertilisation and Embryology Act 2008, s 37(1)(d), s 44(1)(d).

[20]Human Fertilisation and Embryology Act 2008, s 37(2), s 44(2).

[21]Human Fertilisation and Embryology Act 2008, s 37(3), s 44(3).

[22]Human Fertilisation and Embryology Act 2008, s 37(1)(e), s 44(1)(e).

Sperm donors who validly consent to the use of their sperm for the creation of an embryo in the context of a licensed clinic can effectively contract out of legal parenthood. If consent is withdrawn before the embryo is implanted, the embryo is destroyed after a 12-month 'cooling off' period.[23]

Surrogacy

Surrogacy is contractual at its core, but it is tightly controlled in English Law and welfare considerations are applicable.[24] Indeed, it is an offence to do a range of acts relating to a surrogacy arrangement on a commercial basis,[25] unless the act is performed by the commissioning parents or the intended surrogate.[26]

Even where they are made lawfully, surrogacy arrangements are not enforceable as contracts *per se*.[27] Instead, English Law provides for the making of a 'parental order' in order to confer parenthood on the commissioning parents, and to extinguish the default parenthood of the surrogate and any non-applicant who would otherwise have it.[28] A number of stringent requirements must be satisfied before such an order can be made. There must be two applicants for the order (ie commissioning would-be parents), and they must be husband and wife, civil partners, or people 'living as partners in an enduring family relationship'[29] (which includes two men or two women married to each other) who have reached the age of 18.[30] The gametes of at least one of the applicants must have been used to bring about the creation of the embryo that was carried by the surrogate.[31] The child must have his or her home with the applicants at the time of the application,[32] and the Human Fertilisation and Embryology Act 2008 suggests that the application must be made within 6 months of the child's birth.[33] Provided they can be found and are capable of giving it,[34] the consent of the surrogate mother and any non-applicant who is the child's legal parent

[23]Human Fertilisation and Embryology Act 1990, sch 3. See, generally, *Evans v United Kingdom* [2007] 1 FLR 1990.

[24]Human Fertilisation and Embryology (Parental Orders) Regulations 2010/985, r 2.

[25]Surrogacy Arrangements Act 1985, s 2. See also s 3.

[26]Surrogacy Arrangements Act 1985, s 2(2).

[27]Surrogacy Arrangements Act 1985, s 1A.

[28]Human Fertilisation and Embryology Act 2008, s 54.

[29]Human Fertilisation and Embryology Act 2008, s 54(2).

[30]Human Fertilisation and Embryology Act 2008, s 54(5).

[31]Human Fertilisation and Embryology Act 2008, s 54(1).

[32]Human Fertilisation and Embryology Act 2008, s 54(4).

[33]Human Fertilisation and Embryology Act 2008, s 54(3). But see *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam) for possible extensions of this time limit.

[34]Human Fertilisation and Embryology Act 2008, s 54(7).

must be obtained,[35] and the surrogate's consent is ineffective if given less than 6 weeks after the birth.[36] By contrast with adoption (on which see below), there is no scope for the court to dispense with the need for consent on the basis of the child's welfare. Finally, when making the order the court must be satisfied that 'no money or other benefit has been given or received by either of the applicants' in consideration of the making of the order, consent to it, the handing over of the child or the making of arrangements relating to the order.[37] That said, the payment of reasonable expenses is excepted, and the court can authorise the making of other payments (and, particularly for international surrogacy cases, do so quite regularly: see Gamble and Ghevaert 2011, 504).[38] If the requirements for a parental order are not met, the longer and less contractual process of adoption must be followed in order to transfer legal parenthood.

Adoption

Adoption, which by definition confers legal parenthood on the adopter(s) of a child, does have contractual elements. A child can in principle be adopted by one person,[39] a married[40] or civil partnership[41] couple, or 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'.[42] The minimum age for an adoptive parent is 21,[43] unless one of the prospective adopters is already the child's parent.[44] The parents or guardians with parental responsibility are able to consent to a child's placement for adoption by an agency, including to placement with particular prospective adopters.[45] The child's existing parents or guardians are also able to give advance consent to the final adoption itself.[46]

[35] Human Fertilisation and Embryology Act 2008, s 54(6).

[36] Human Fertilisation and Embryology Act 2008, s 54(7).

[37] Human Fertilisation and Embryology Act 2008, s 54(8).

[38] Human Fertilisation and Embryology Act 2008, 54(8). For authorisation of payments see eg *Re C (Parental Orders)* [2013] EWHC 2408 (Fam), [2014] 1 FLR 757 and *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106.

[39] Adoption and Children Act 2002, s 51, which imposes conditions in relation to prospective sole adopters who are married or in a civil partnership.

[40] Adoption and Children Act 2002, s 144(4)(a).

[41] Adoption and Children Act 2002, s 144(4)(aa).

[42] Adoption and Children Act 2002, s 144(4)(b).

[43] Adoption and Children Act 2002, s 50(1); 51.

[44] Adoption and Children Act 2002, s 50(2).

[45] Adoption and Children Act 2002, s 19.

[46] Adoption and Children Act 2002, s 47.

That said, the adoption cannot be finalised without a court order following a minimum period of co-residence involving the child and the adopters,[47] and notice to and assessment by a local authority where the child was not placed by an adoption agency.[48] In any case, it is an offence[49] *inter alia* for parents to take steps including 'handing over a child to any person other than an adoption agency with a view to the child's adoption by that or another person',[50] unless they are acting in pursuance of a court order,[51] one or more of the prospective adopters are 'parents, relatives or guardians' of the child,[52] or the prospective adopter is 'the partner of a parent of the child'.[53] Analogously with surrogacy, there is also an offence of agreeing to make, making or receiving a payment relating to the adoption of a child,[54] with the exception of reasonable expenses.[55]

The court, moreover, technically makes its determination on whether to make an adoption order on the basis of the child's welfare and not parental consent *per se*.[56] It nevertheless seems inherently unlikely that a court would refuse to make the order where all relevant parties support the adoption. In spite of the availability of consensual adoptions, however, it should be emphasised that adoption is now seen in England and Wales primarily as a means of securing a permanent home for children who have been compulsorily removed from the care of their parents due to their having suffered or being likely to suffer significant harm (see Harris-Short 2012 for discussion). The consequence of this is that adoption orders are often made without the consent of the relevant parents, on the basis that the child's welfare 'requires' that the need for their consent be dispensed with.[57]

Post-adoption contact (including indirect contact such as the exchange of cards and letters) can be agreed between the birth family and the adopted relatives, and indeed a court is unlikely to order such contact in the *absence* of such agreement (see Sloan 2014 for discussion).

[47] Adoption and Children Act 2002, s 42.

[48] Adoption and Children Act 2002, s 44.

[49] Adoption and Children Act 2002, s 93.

[50] Adoption and Children Act 2002, s 92(2)(e).

[51] Adoption and Children Act 2002, s 92(1).

[52] Adoption and Children Act 2002, s 92(4)(a).

[53] Adoption and Children Act 2002, s 92(4)(b).

[54] Adoption and Children Act 2002, s 95.

[55] Adoption and Children Act 2002, s 96.

[56] Adoption and Children Act 2002, s 1.

[57] Adoption and Children Act 2002, s 52(1)(b).

Exclusion and Termination of Legal Parenthood

Except as regards sperm donation (on which see above),[58] legal parenthood cannot be excluded where it would otherwise exist in the absence of adoption or a parental order. There is no right to an anonymous birth in English Law (see Marshall 2012 for discussion), and (at least) the mother is under a duty to register the child's birth with herself as the mother.[59]

The only means by which parenthood can be terminated are adoption and parental orders. These have been discussed above and, as Bainham (2005, 132) notes, outside of them 'parenthood is for life'. A person cannot be the subject of an adoption application once he or she reaches the age of 18.[60]

Parental Responsibility

Nature and Exercise

'Parental responsibility' ('PR') is distinct from legal parenthood. It is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.[61] While both are often held by the same people, not all fathers necessarily have parental responsibility. Moreover, it can be held by more than two people and the acquisition of parental responsibility by one person does not in itself cause it to be terminated in respect of anyone else.[62] The Children Act 1989 expressly provides that '[w]here more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility' unless legislation on a provides otherwise on a particular issue[63] or they are purporting to act inconsistently with a court order,[64] though the judiciary have generated a duty of *consultation* between all holders of PR on certain important matters (Herring 2013, 426–427).

[58] NB that egg donation does not confer legal parenthood *per se* in any event.

[59] Births and Deaths Registration Act 1953, s 2, cf s 10 and also Welfare Reform Act 2009, sch 6.

[60] Adoption and Children Act 2002, s 49(4).

[61] Children Act 1989, s 3(1).

[62] Children Act 1989, s 2(6).

[63] Children Act 1989, s 2(7).

[64] Children Act 1989, s 2(8).

Acquisition of Parental Responsibility by Parents

Parental responsibility is conferred automatically on all mothers,[65] as well as on fathers married to the mother[66] and second female parents in a marriage or civil partnership with the mother.[67] In such cases, only adoption can terminate parental responsibility (and transfer it to the adoptive parents).[68] Fathers and second female parents who are not in a marriage or civil partnership with the mother do not automatically have parental responsibility, and are vulnerable to having it removed by court order even when they do acquire it.[69] They can acquire it by several means, some of which are contractual in nature.

One method by which a parent who is not in a marriage or civil partnership with the mother can obtain PR is by agreement with that mother.[70] The 'parental responsibility agreement' must be made using a prescribed form,[71] and recorded in the Principal Registry.[72] The more straightforward acquisition of parental responsibility by registration on the child's birth certificate is also contractual in nature, since the mother's co-operation with the registration is currently in substance vital (without a court order).[73]

Parents who are not in a marriage or civil partnership with the child's mother can also acquire PR via an order of the court,[74] which is much less likely to be the result of an agreement between the parties.

Acquisition of Parental Responsibility by Non-parents

There is a basic statutory rule that '[a] person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another', even if such a holder 'may arrange for some or all of it to be met by one or more persons acting on his behalf'.[75] Nevertheless, parental responsibility can effectively be conferred contractually on non-parents in some circumstances.

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[65] Children Act 1989, s 2(1), s 2(2)(a) and s 2(2A)(a).

[66] Children Act 1989, s 2(1).

[67] Children Act 1989, s 2(1A).

[68] Adoption and Children Act 2002, s 46.

[69] Compare Children Act 1989, s 2(1) and s 2(1A) with s 2(2)(b) and s 2(2A)(b).

[70] Children Act 1989, s 4(1)(b), s 4ZA(1)(b).

[71] Children Act 1989, s 4(2), s 4ZA(4). See Parental Responsibility Agreement Regulations 1991/1478, sch 1, as amended.

[72] Parental Responsibility Agreement Regulations 1991/1478, r 3.

[73] Children Act 1989, s 4(1A), 4ZA(2). Births and Deaths Registration Act 1953, s 10(1)(a)-(c), s 10A(1)(a)-(c). Cf Welfare Reform Act 2009, sch 6.

[74] Children Act 1989, s 4(1)(c), s 4ZA(1)(c).

[75] Children Act 1989, s 2(9).

Parental responsibility can be conferred on a step-parent, ie a non-parent who is in a marriage or civil partnership with a parent, provided that the parent him- or herself has parental responsibility. This can occur by agreement of all parents of a child with parental responsibility,[76] and this agreement is expressly classed as a 'parental responsibility agreement' with the same formality and recording requirements as for a parent who has not automatically acquired PR.[77] A step-parent can also acquire PR via court order,[78] and the parental responsibility of a step-parent can be brought to an end only via court order.[79]

Parental responsibility can also be conferred via guardianship,[80] which governs who is to have the responsibility of looking after a child in the event of parental death. Guardians may be appointed by a parent with PR,[81] and a guardian or special guardian can appoint someone to take the appointor's place after his death.[82] The appointment must be made by will,[83] or in other dated writing that is signed either by the appointor or by someone at his direction with witnesses if he or she is incapable.[84] Analogously with a will, the later appointment of a guardian by the same person in respect of the same child revokes the earlier appointment unless it is clear that the appointment of an additional guardian was intended.[85] Revocation can also occur by a signed and dated instrument,[86] by destruction of the appointing instrument with the intention to revoke it,[87] or by dissolution or annulment of the relevant marriage or civil partnership if the appointee was in such a relationship with the appointor unless a contrary intention appears in the document.[88]

The appointment of a guardian takes effect on the appointor's death if either the child is left with no parent with PR,[89] or there was a child arrangements order naming the appointor as a person with whom the child was to live in force immediately before the appointor's death[90] (provided that order was not also made for the benefit of a surviving parent),[91] or the appointor was the child's last surviving

[76]Children Act 1989, s 4A(1)(a).

[77]Children Act 1989, s 4A(2).

[78]Children Act 1989, s 4A(1)(b).

[79]Children Act 1989, s 4A(3).

[80]Children Act 1989, s 5(6).

[81]Children Act 1989, s 5(3).

[82]Children Act 1989, s 5(4).

[83]Children Act 1989, s 5(5)-(5)(a).

[84]Children Act 1989, s 5(5)(b).

[85]Children Act 1989, s 6(1).

[86]Children Act 1989, s 6(2).

[87]Children Act 1989, s 6(3).

[88]Children Act 1989, s 6(3A), s 6(3B).

[89]Children Act 1989, s 5(7)(a).

[90]Children Act 1989, s 5(7)(b).

[91]Children Act 1989, s 5(9).

special guardian.[92] Guardians can also be appointed by court order in the same circumstances, even where a guardian had been otherwise appointed.[93] A guardian can disclaim his appointment by signed writing 'within a reasonable time of his first knowing that the appointment has taken effect'.[94] Guardianship can be terminated by court order.[95]

Special guardianship is distinct from guardianship in not being linked to the death of the parent, and allows a non-parent to be given PR[96] and to *exercise* it 'to the exclusion of any other person with parental responsibility for the child (apart from another special guardian)'.[97] It might be useful where a child lives with a non-parent but adoption is considered inappropriate. Special guardianship is conferred by court order,[98] which limits its contractual features.

Parental responsibility is also given to those who have the benefit of a child arrangements order naming that person as one with whom the child should live (for the duration of the order),[99] those granted an emergency protection order in relation to the child,[100] and local authorities who have taken the child into compulsory state care.[101] Courts, rather than agreements, play a central role in the latter two protective processes.

Financial and Material Support for Children

There are various ways through which a person may be made financially liable for a child. For example, non-resident legal parents (irrespective of whether they hold parental responsibility) can be made liable via an application to the Child Maintenance Service by the 'person with care'.[102] Courts also have jurisdiction to make orders for financial provision for children (or to give the force of a court order to a private arrangement) in certain circumstances, both in respect of legal parents and in respect of spouses and civil partners of a parent who have treated the child as a 'child of the family' but are not themselves parents of the child.[103]

[92] Children Act 1989, s 5(7)(b).

[93] Children Act 1989, s 5(1)-(2).

[94] Children Act 1989, s 6(5).

[95] Children Act 1989, s 6(7).

[96] Children Act 1989, s 14C(1).

[97] Children Act 1989, s 14C(1)(b).

[98] Children Act 1989, s 14B.

[99] Children Act 1989, s 12(2).

[100] Children Act 1989, s 44(4)(c).

[101] Children Act 1989, s 33(3).

[102] See, generally, Child Support Act 1991, as amended.

[103] See, eg, Child Support Act 1991, s 8; Children Act 1989, sch 1.

Policy underpinning the system of child maintenance in England and Wales is currently dominated by contractualisation. This has led to concerns that the interests of children will be prejudiced for the sake of administrative efficiency (see, generally, Wikeley 2007). The Child Maintenance Service is a statutory body responsible for the payment of maintenance by a 'non-resident' legal parent to support a child.[104] It can require the non-resident parent to make payments, based on a formula applied to the non-resident parent's income upon application by a parent with care. But the Government's policy is to encourage 'family-based arrangements', and one way that it has done this is by introducing charges for the use of the Child Maintenance Service (Child Maintenance Options 2014).

It is expressly provided in the Child Support Act 1991 that '[n]othing in [it] shall be taken to prevent any person from entering into a maintenance agreement',[105] which is defined as 'any agreement for the making, or for securing the making, of periodical payments by way of maintenance . . . to or for the benefit of any child'.[106] That said, '[w]here any agreement contains a provision which purports to restrict the right of any person to apply' to the Child Maintenance Service 'for a maintenance calculation', the Act declares 'that provision shall be void'.[107] Even where the relevant agreement is embodied in a consent order approved by a court (on which see section "Court scrutiny"), the consent order cannot prevent an application to the Service unless the order has been in force for 'less than the period of one year beginning with the date on which it was made'.[108]

It has been seen that the courts have residual roles in supporting children in a material sense, which includes making of capital and property provision (as distinct from regular maintenance) by non-resident parents, and in ordering provision by non-parents who treated the child as a 'child of the family' in relation to a marriage or civil partnership.[109] The welfare of minor children also remains the 'first' consideration in proceedings between adults for relief on divorce or dissolution of a civil partnership,[110] and Baroness Hale has said that '[t]he invariable practice in English law is to try to maintain a stable home for the children after their parents' divorce'.[111] All of these court-based mechanisms can be the subject of a consent order, which are considered in the "Court scrutiny" section.

[104] See, generally, Child Support Act 1991, as amended.

[105] Child Support Act 1991, s 9(2).

[106] Child Support Act 1991, s 9(1).

[107] Child Support Act 1991, s 9(4).

[108] Child Support Act 1991, s 10(4)(aa).

[109] See, eg, Children Act 1989, sch 1.

[110] Matrimonial Causes Act 1973, s 25(1); Civil Partnership Act 2004, sch 5 para 20.

[111] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [128].

Decision-Making Concerning a Child's Upbringing

A significant issue in family law is how a child's time should be divided as between his or her (usually separated) parents. This can be the subject of 'child arrangements orders' made by a court under the Children Act 1989,[112] and there is set to be a statutory presumption that (except in limited circumstances) 'involvement' of both parents in the child's life will further the child's welfare.[113] Other significant issues surrounding upbringing (such as circumcision,[114] vaccination[115] and schooling)[116] can be the subject of 'specific issue orders' or 'prohibited steps orders' under the same Act.[117]

It should be noted, however, that the Family Justice Review (2011a, [5.3]) pointed to evidence that around 90 % of parents did not go to court to make arrangements for their children on separation, and the Children and Families Act 2014 imposes a general requirement that a person attends a 'family mediation information and assessment meeting' before relying on court-based family proceedings.[118] Moreover, the encouragement of mediation has been coupled with the near-withdrawal of legal aid to fund legal representation in private law family proceedings (see, eg, Hunter 2014).

Agreements concerning upbringing (whether made in mediation or otherwise) can be the subject of a 'consent order', through which an agreement made by the parties is approved and given the status of a court order (see further the "Court scrutiny" section). Strictly speaking, such an agreement cannot be safely considered binding until such an order is made. Herring (2011, 138) asserts that '[a]t the end of mediation it is common for the court to be presented with the agreement and be asked to formalise it by means of a consent order', even if the actual process of mediation on Parkinson's (2013, 201) account generally 'operates as a confidential process outside judicial scrutiny and control'.

It has nevertheless been recognised (Potter 2010, [1.3]) that '[c]ourt orders, even those made by consent, must be scrutinised to ensure that they are safe and take account of any risk factors'. Therefore, a court will not necessarily give effect to an agreement made between the parents if matters proceed that far,[119] since the court is obliged to treat the child's welfare as the 'paramount' consideration when making

[112]Children Act 1989, s 8.

[113]Children Act 1989, s 1(2A), to be inserted by Children and Families Act 2014, s 11.

[114]See, eg, *Re J (A Minor) (Prohibited Steps Order: Circumcision)* [2000] 1 FLR 571.

[115]See, eg, *Re C (A Child) (Immunisation: Parental Rights)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095.

[116]See, eg, *M v M (Specific Issue: Choice of School)* [2005] EWHC 2769 (Fam), [2007] 1 FLR 251.

[117]Children Act 1989, s 8.

[118]Children and Families Act 2014, cl 10. See Parkinson (2013, 203) for a discussion of the extent to which such meetings were already used in practice before the 2014 Act.

[119]See, eg, *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332.

a decision about his or her upbringing[120] and (as noted above) it is a basic principle that 'the court's jurisdiction to determine issues . . . concerning the welfare and upbringing of the children, cannot be ousted by agreement'.[121] Particular problems might arise where an agreement has been reached by parents whose relationship has been characterised by domestic violence (Craig 2007).

In *AI v MT*, however, the judge held that 'having regard to the parties' devout religious beliefs and wish to resolve their dispute through the rabbinical court, and acknowledging that it always in the interests of parties to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children . . . , the court would in principle be willing to endorse a process of non-binding arbitration'.[122]

Finally, account should be taken of the so-called 'no order' principle, which instructs that '[w]here a court is considering whether or not to make one or more orders under [the Children Act 1989] with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all'.[123] This is effectively a means of deference to parental decision-making, though sometimes the 'no order' principle can in fact be overridden by a court's desire to give effect to a parental agreement. In *Re G (Children) (Residence: Making of Order)*, it was recognised that 'where parents can agree future dealings with regard to the children, that is better for the children than having bitterly contested court proceedings',[124] and that 'the court should not be astute to go behind agreements carefully negotiated in difficult questions of this sort'.[125] On the other hand, it was held that the first instance judge in the case should 'have paid respect to the decision of the parents whose views were that an order would be beneficial to the management of their children's lives and that that management would be more beneficial with the order than without it'.[126]

Partners

Marriage and Civil Partnership

Baroness Hale has said that marriage is in some sense a contract, but that it also a status, meaning *inter alia* that 'the parties are not entirely free to determine all its legal consequences for themselves [and] [t]hey contract into the package

[120]Children Act 1989, s 1(1).

[121]*AI v MT* [2013] EWHC 100 (Fam), [12] (Baker J).

[122][2013] EWHC 100 (Fam), [12] (Baker J).

[123]Children Act 1989, s 1(5).

[124][2005] EWCA Civ 1283, [2006] 1 FLR 771, [12] (Ward LJ).

[125][2005] EWCA Civ 1283, [13] (Wall LJ).

[126][2005] EWCA Civ 1283, [13] (Wall LJ).

which the law of the land lays down'.[127] While she identified 'considerable freedom and flexibility within the marital package', she was in no doubt that 'there is an irreducible minimum'.[128] While her view influenced her decision to dissent in key respects in *Radmacher v Granatino* (on which see below), it will become clear that both aspects of marriage are indeed reflected in English Law.

Before proceeding with a discussion of marriage, it should be noted that England and Wales introduced civil partnerships in 2004 as a functional equivalent to marriage for same-sex couples, with surprisingly little controversy. Perhaps this was due to the fact that, somewhat curiously, the ability of unmarried couples (including same-sex couples) jointly to adopt children had been introduced 2 years earlier (via the Adoption and Children Act 2002, see also above) and thus the usually somewhat more controversial issue of same-sex parenting was not part of the discussions surrounding the Civil Partnership Act 2004. Civil partnership was intended to be 'marriage in almost all but name' (Hale 2004, 132), and with the reforms of the Human Fertilisation and Embryology Act 2008 (on which see above), which put same-sex couples on the same footing as opposite-sex couples, this was achieved.

Nevertheless, in 2013 the Marriage (Same Sex Couples) Act was passed, which opened up marriage to same-sex couples. Somewhat bizarrely (and certainly very different from all other jurisdictions bar Scotland which have taken a similar path) the 2013 Act left the Civil Partnership Act largely unchanged, leading to the internationally almost unique situation that in England same-sex couples are now privileged above opposite-sex couples because the former can choose between civil partnership and marriage and for the latter marriage is the only way to formalise their relationship.

Entry Into, and Conduct of, Marriage/Civil Partnership

The jurisdiction of England and Wales does not distinguish between a *régime primaire and secondaire* with regard to marriage/civil partnership relations. There are very few limitations on who can enter into a marriage or civil partnership, and those that exist are hardly surprising: complying with certain formalities, certain prohibited degrees (based on consanguinity and affinity), a minimum age of 16 and that neither party is already married or in a civil partnership. Failure to comply with any of those conditions renders the marriage/civil partnership void.[129] England and Wales still retain grounds for voidability of marriages,[130] namely absence of valid consent, respondent suffering from venereal disease at the time of the marriage, respondent pregnant by another person than the applicant, specific grounds relating

[127] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, [132].

[128] [2010] UKSC 42, [132].

[129] Matrimonial Causes Act 1973, s 11 and Civil Partnership Act 2004, ss 3 and 49.

[130] These can be invoked only by the spouses or civil partners themselves, and only while they both still are alive.

to a change of legal gender before or after the time of the marriage as well as non-consummation due to incapacity or wilful refusal.[131] Apart from the two consummation grounds (which also do not apply to same-sex marriages) and the venereal disease ground the same applies to civil partnerships.[132]

Although there are no express statutory provisions and there appear to be no conclusive modern precedents on these matters, agreements seeking to restrict access to marriage by contractual arrangements (for example by requiring the consent of specific persons) are likely to be void for public policy reasons (Peel 2011, [11–041]). This can be inferred from the fact that while there is in principle the need for parental consent for the marriage/civil partnership of a person not yet 18 years old,[133] a marriage otherwise validly concluded (ie not void or voidable according to the statutory provisions)[134] is nevertheless deemed a valid marriage. Thus if a marriage is valid even if it was entered into contrary to certain statutory requirements, this must *a fortiori* be true for contractual requirements.

In England and Wales marriage (or civil partnership) does not even change the proprietal relations of the spouses in general. Therefore – apart from the abovementioned difficulties of the spouses in proving that their agreement was intended to create legal consequences – the parties in principle can live their marriage/civil partnership as they see fit and consequently also agree contractually to certain matters, although there may well be public policy exceptions in certain cases.[135] That said, the enforcement of such agreements would probably in any event be an issue dealt with only in the context of divorce/dissolution.

There is, however, probably one exception. As mentioned above, non-consummation is one of the grounds for annulment of a marriage. In *Brodie v Brodie*[136] it was held that an agreement not to consummate the marriage violated public policy and was therefore void and could not be relied upon by either party. However, this was qualified later[137] so that if there was a good reason for the agreement such as old age, infirmity or physical impairment, an agreement to have merely a 'companionship marriage' (or civil partnership) would not be contrary to public policy and thus could successfully be relied upon by the respondent in nullity proceedings.

[131] Matrimonial Causes Act 1973, s 12.

[132] Civil Partnership Act 2004, s 50.

[133] Marriage Act 1949, s 3; Civil Partnership Act 2004, s 4.

[134] Matrimonial Causes Act 1973, ss 11-12.

[135] For example the right to claim restitution of conjugal rights was abolished by the Matrimonial Proceedings and Property Act 1970, and it is therefore to be presumed that any agreements seeking to enforce such a right would be contrary to public policy.

[136] [1917] P 271.

[137] Cf *Morgan v Morgan* [1959] P 92.

Divorce/Dissolution of Marriage/Civil Partnership: The Substantive Law

Divorce and civil partnership dissolution in England and Wales are in theory based on the irretrievable breakdown of the relationship, which needs to be proved using certain facts (behaviour by the respondent such that the applicant cannot reasonably be expected to live with the respondent, desertion for 2 years, separation for 2 years and consent to divorce, separation of 5 years and (for marriage only) adultery by the respondent and that the applicant finds it intolerable to live with the respondent).[138] However, in practice the so-called 'special procedure' essentially renders these conditions more or less meaningless, making divorce available on demand and certainly if the couple agree on the divorce.[139]

While again there are no express statutory provisions and no conclusive modern precedent on these matters, it is to be assumed that agreements facilitating access to divorce (or dissolution in case of civil partnership) would be considered void for public policy reason (see, eg, Peel 2011, [11–039]; see also Barton 2007). (Given the low threshold for divorce in practice, it is unlikely that such agreements would be concluded or invoked in the first place.) The same applies *a fortiori* for agreements restricting access to divorce, as the statute clearly stipulates under which circumstances the court must grant a divorce (or civil partnership dissolution). Hence an agreement that the couple live apart would not, for example, preclude a petition for divorce/dissolution based on the fact that the couple lived separately as required by section 1(2)(e) of the Matrimonial Causes Act 1973.

Divorce/Dissolution of Marriage/Civil Partnership: Property-Related Consequences

England and Wales, unlike continental European jurisdictions, do not have a matrimonial property regime and as a consequence do not distinguish between/have different approaches to different financial consequences of divorce (cf Miles 2011, 2012a, b; Scherpe 2011, 2012a, b). According to the statutory provisions,[140] the entire financial consequences of divorce are discretionary, so in principle the court is totally free to decide on any financial consequences of divorce, including redistribution of all property of the spouses (including pre-marital and inherited property), pensions and spousal maintenance. All of these are decided by the court together and there is no formal distinction between property, pensions and maintenance as there is in continental European jurisdictions (cf Scherpe 2012b). Alongside statutory factors,[141] the judiciary have developed an overall objective of

[138]Matrimonial Causes Act 1973, s 1 and Civil Partnership Act 2004, s 44.

[139]Introduced by Statutory Instrument 1991 No. 1247 (L.20).

[140]Matrimonial Causes Act 1973, Part II.

[141]Matrimonial Causes Act 1973, s 25.

'fairness' with strands of 'needs', 'compensation' and 'sharing' to guide the exercise of discretion.[142]

The same principles apply to all kinds of marital agreements, and the starting point for this is that the jurisdiction of the court to decide on these matters cannot be ousted.[143] This may change if the Law Commission's (2014) proposals on 'qualifying nuptial agreements' are implemented, but for the moment no agreement between the parties would preclude either of them from going to court and asking for a ruling on the matters regulated by the agreement in question. That said, in *Radmacher v Granatino* it was established that marital agreements (which the Court refers to as 'nuptial agreements') should be considered by the courts when exercising their discretion as follows:

> 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.[144]

This applies irrespective of whether they were concluded before or during the marriage. For so-called 'separation agreements' (ie agreements concluded between the spouses after the marriage has in substance ended) the lead authority is *Edgar v Edgar* in which it was held by Oliver LJ that:

> . . . in a consideration of what is just to be done in the exercise of the court's powers under the Act of 1973 in the light of the conduct of the parties, the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary.[145]

This is strikingly similar to the test now to be applied to marital agreements in general according to *Radmacher v Granatino* (in which *Edgar v Edgar* was expressly approved), so the question now really has shifted to when such agreements are deemed to be fair. Space precludes a detailed exposition of this complex issue, and it therefore must suffice to say that contracting out of sharing property is likely to be accepted by the courts when exercising their discretion, opting out of the fairness-strands of needs and compensation is distinctly less likely. According to *Radmacher v Granatino*:

> Of the three strands identified in *White v White* and *Miller v Miller*,[146] it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an

[142] See, in particular, *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

[143] *Hyman v Hyman* [1929] AC 601, recently confirmed in *Radmacher v Granatino* [2010] UKSC 42. Therefore sections 34-36 Matrimonial Causes Act 1973 are essentially without any practical relevance and in a Court of Appeal decision they were said to 'have been dead letters for more than thirty years' (*Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181, [134] (Wilson LJ)).

[144] [2010] UKSC 42, [75].

[145] [1980] 1 WLR 1410, 1424.

[146] The Supreme Court here refers to the seminal cases of *White v White* [2001] 1 AC 596 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

> ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.[147]

Hence, any agreements regarding post-divorce maintenance must meet these standards. It is very important to note that 'needs' in English law is interpreted much more generously and comprehensively than in most (if not all) continental European jurisdictions and certainly is not restricted to periodical payments or to what is necessary for mere subsistence (Law Commission 2014), and agreements leaving a spouse destitute and dependent on state benefits where the other party has the means to prevent that will certainly not be upheld.

As a result, the fate of any agreements on these matters is uncertain until the issue has been decided by a court (which may decide to embody the agreement in a consent order as described below), taking into account the individual circumstances of the case at hand.

Informal Cohabitation

Cohabitation outside marriage and civil partnership remains without a comprehensive legal framework in England and Wales, despite very strong recommendations by the Law Commission that a statutory framework covering property matters should be introduced (Law Commission 2007). Thus, with a few exceptions (for example in succession law and protection from domestic violence) cohabitants have to rely on the general law to regulate their relationships and/or resolve any disputes. This includes the possibility to enter into contracts, which are not therefore considered contrary to public policy *per se*[148] as there are no 'default rules' and hence no public policy expressed by Parliament. Indeed, Barton (2007, 79) highlights the fact that while 'spouses and civil partners are precluded from excluding the jurisdiction of the court over the division of assets on divorce or dissolution', '[c]ohabitation contracts are the less constrained because the legal shadow under which they are negotiated... is much smaller' and 'there are no equivalent rules regarding agreements regulating the ongoing relationship of the parties'.

That said, if an agreement were held to constitute 'a contract *for* sexual relations outside marriage' rather than 'a contract *between* persons who are cohabiting in a

[147] [2010] UKSC 42, [81].

[148] See, generally, Probert 2004 as well as Barton 2007.

relationship which involves such sexual relations',[149] it would be void for reasons of public policy (see Probert 2004 for discussion; see also Barton 2007, 92).

Similarly, where cohabitants make a declaration of trust as to the joint ownership of the family home that complies with the relevant formality requirements,[150] that declaration will be conclusive in the absence of fraud or a similar defect.[151] Where there is no such declaration or the declaration is inconclusive as to the respective shares of the parties, the 'common intention constructive trust' is often employed by the courts to resolve the matter.[152] As its name suggests, this trust is in principle concerned with the parties' intentions, but considerations of 'fairness' are also present (see, generally, Sloan 2015 for a discussion of the operation of the constructive trust in cases involving cohabitants).

Procedural Family Law

Jurisdiction

The Alternative Dispute Resolution techniques used in England and Wales vary widely and include, *inter alia*, mediation, arbitration, collaborative law and conciliation proceedings as well as lawyer-lawyer negotiation. Apart from arbitration,[153] there is almost no regulation of these ADR techniques, and relatively little integration between them and the courts. Mediation appears to be much favoured by the Government as it is perceived to be a cost-cutting tool. There are a few court-annexed mediation schemes, but participating in the mediation nevertheless remains voluntary (Scherpe and Marten 2013, 372 ff).

That said, the Civil Procedure Rules ('CPR' – Rules and Practice Directions by the Ministry of Justice) define as their overriding objective *inter alia* that the case be dealt with expeditiously and with as little expense as possible, which in turn is connected with the court's duty to encourage the parties to use an ADR procedure if the court considers that appropriate, and the court then has to facilitate such a procedure.[154] This can, for example, include so-called 'mediation orders' by the court, but in essence these are nothing but rather robust recommendations to mediate (Andrews 2013, 40) and cannot 'force' the parties to mediate. The courts also have the power to stay proceedings while the parties attempt an ADR.

[149] *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837, [23] (Hart J).

[150] Law of Property Act 1925, s 53(1)(b).

[151] *Goodman v Gallant* [1986] Fam 106.

[152] See, in particular, *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

[153] Arbitration Act 1996.

[154] CPR 1.4(e).

Furthermore, according to their professional codes of conduct all legal advisers are obliged to inform the parties of ADR possibilities (Scherpe and Marten 2013, 375 f). While the parties cannot be compelled to attempt a form of ADR, they must at least approach the issue of ADR in good faith (Practice Direction: Pre-action Conduct, para 8.1; cf Andrews 2013, 38 ff); failure appropriately to consider ADR can result in significant costs implications.[155]

ADR in Family Law

The ADR techniques used in England and Wales in family law are similar to those used in general (see, eg, Barton and Jay 2013). But as the Final Report of the Family Justice Review (2011b, [101]) asserted, '[m]ost separating couples make their own arrangements for the care of their children and division of their assets, without resort to court proceedings'.[156] Similar to the CPR, the Family Procedure Rules state that '[t]he court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate'.[157] However, despite many pilot projects and court-annexed schemes, it remains true that 'most family mediation takes place prior to application to the court and outside the court's domain' (Parkinson 2013, 201), and the same applies to other forms of ADR. As stated above, there is now a general statutory requirement for parties to attend a 'family mediation information and assessment meeting' before relying on court-based family proceedings, but mediation as such is not compulsory.

Arbitration is of course well-established in commercial and other civil law disputes and regulated by the Arbitration Act 1996. But, as Barton and Jay (2013, 840) rightly assert, '[t]he recognition of arbitration as a means of settling disputes within family proceedings is in its infancy' and indeed arbitration made its appearance in family law only quite recently (Singer 2012a, 2012b). As the parties cannot oust the jurisdiction of the court in most family matters (see above), arbitral awards in family matters will not be binding and therefore their substance will be subject to judicial scrutiny, with very few exceptions (see Singer 2012b, 1500 for potential examples, all of which concern issues where the court has no discretion). The parties will therefore generally be advised to seek to have the arbitral award incorporated into a consent order (on which see below) in order to bring about certainty and enforceability.

[155] See e.g. *Dunnett v Railtrack Plc (Costs)* [2002] EWCA Civ 303, [2002] 1 WLR 2434; on costs see Scherpe and Marten 2013, 386 ff and Andrews 2013, 43 ff.

[156] See also, eg, Hunt 2011.

[157] Family Procedure Rules 2010/2955, r 3.2.

Court Scrutiny

Agreements between parties reached through ADR will be considered to be contracts (provided the necessary requirements for this are fulfilled) and are then enforceable as such. Arbitral awards are final and binding on both parties in general, unless agreed otherwise in the arbitration agreement.[158] However, with regard to family law things are quite different.

As explained above, the parties in family law generally cannot oust the jurisdiction of the court, which means that even where an agreement is in place (irrespective of whether this agreement was reached by ADR or not) either party can still take the matter to court. The court will then decide 'normally', but taking into account the existence of the agreement when exercising its discretion. Agreements have increasingly been given weight with regard to the financial relations of the parties, but less so when the welfare of children is concerned.

Making Consent Orders

The fact that any agreement is still subject to the court's scrutiny creates considerable uncertainty and has been described as 'the worst of both worlds',[159] as each party might feel bound by the agreement but cannot be sure that the other party will abide by it. Therefore it is common practice to ask the court to make a so-called 'consent order'. As Barton and Jay (2013, 840) have put it, 'all routes [of ADR], including those which start earlier with pre-marital and cohabitation contracts, must converge at the finishing line of a court order'.

To obtain a consent order, the parties will jointly present to the court the agreement they have reached (whether by ADR or not), and the court will then scrutinise the agreement, taking into account not only its existence but also that both parties have asked the court to order accordingly. If the court finds that the content of the agreement does not violate public policy and is within what the court could order using its discretionary power, it will almost inevitably make a consent order in cases and agreements concerning financial matters.[160]

However, if the agreement concerns the upbringing of children, their welfare is paramount and, as explained above, this means that the court will more readily (and indeed is bound by law to do so) disregard agreements that, in the view of the court, are not consistent with the child's best interests. With regard to arbitration of matters relating to children and consent orders, Barton and Jay (2013, 844) note that '[t]he position of agreements relating to children is entirely different' to those

[158] Arbitration Act 1996, s 58(1).

[159] *Pounds v Pounds* [1994] 4 All ER 777 (Hoffmann LJ).

[160] See e.g. *Xydhias v Xydhias* [1998] EWCA Civ 1966, [1999] 2 All ER 386. See also Barton and Jay 2013, 844, and *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299.

relating to finances, because '[t]here is no tried and tested mechanism for obtaining the imprimatur of a court order as there is with the financial arrangements and the facts on which a child's welfare is to be judged are not as easily established and expressed'. Hence any arbitral awards concerning children are certainly not binding on the parties (Pearce 2013; Tolley 2013) and a consent order might be more difficult to obtain (Burrows 2013, 1189 f).

Departing from Consent Orders (in Ancillary Relief Proceedings)

Once made, a consent order then has the same legal effect as any other court order and can only be overturned/appealed out of time in extraordinary circumstances. As was held by the House of Lords in *Barder v Calouri*,[161] the lead decision on appeals out of time against consent orders regarding a financial settlement, this requires that:

1. the basis or a fundamental assumption underlying the order had been falsified by a change of circumstances;
2. such change occurred within a relatively short time of the making of the original order;
3. the application for leave to appeal was made reasonably promptly;
4. the granting for leave would not prejudice unfairly third parties who had acquired interests for value in the property affected
   (usually referred to as '*Barder* criteria'; see also Lowe and Douglas 2007, 1065).

The courts take a very strict view on these criteria, and the circumstances/new events must be indeed extraordinary. But if leave to appeal out of time is granted, the case is then reconsidered in the light of all the circumstances present at the time of the appeal.[162] Lowe and Douglas (2007) *inter alia* list the following groups that potentially qualify as '*Barder* criteria':

Death of One of the Spouses In *Barder* itself and *Smith v Smith (Smith Intervening)*[163] the order had been made on a 'clean break' basis and to ensure that the wife was financially safe for years to come, but in both cases the wife committed suicide shortly afterwards and the appeal was allowed. The same was held in *Passmore v Gill and Gill*[164] and *Barber v Barber*[165] where the wife died unexpectedly shortly after the order. By contrast, the death of the wife in *Benson v Benson*[166] 15 months after the order was not deemed to be sufficient to fulfill the '*Barder* criteria'.

[161] [1988] AC 20.

[162] S*mith v Smith (Smith Intervening)* [1992] Family Law 69. See also *Garner v Garner* [1992] 1 FLR 573.

[163] [1992] Family Law 69.

[164] [1987] 1 FLR 441.

[165] [1993] 1 FLR 476.

[166] [1996] 1 FLR 692.

Similarly in *Amey v Amey*[167] the wife had died just 2 months after the consent order, but since the agreement (and hence the order) had been made without any assumption as to the wife's health, the unexpected death was insufficient cause for the court to intervene.

Remarriage of One of the Spouses In England and Wales financial settlements often include capitalised maintenance rather than periodical payments. As the latter would stop in case of a remarriage, it is hardly surprising that the payor of such capitalised payments would feel aggrieved (if not deceived) if the payee remarried shortly after receiving a capitalised sum. Hence in *Wells v Wells*[168] (where the wife remarried 6 months after the order) and *Williams v Lindley*[169] (where the wife became engaged 2 months after the order) the orders were set aside because of the new event. By contrast, in *Chaudhuri v Chaudhuri*[170] the remarriage of the wife was not held to be sufficient as the change of circumstances had been less drastic than that of *Wells* and the original agreement had expressly contemplated the possibility of a remarriage, so in that sense it was not unexpected. Similarly, if the new partner was unknown to the spouse at the time of the consent order, a remarriage ought not to lead to the order being set aside as the possibility that one of the spouses might remarry cannot, as such, be deemed to be unexpected and extraordinary.

Change in Valuation of Property Many cases have been brought on the basis of changes in the valuation of certain property, but normal market fluctuations are certainly not sufficient to constitute a *Barder* event.[171] The changes must have been unforeseen and unforeseeable.[172] Indeed, the courts have taken a rather robust approach to these cases, and have certainly given short shrift in situations where one of the spouses agreed to accept assets with higher risks and then these risks either materialised (resulting in a loss) or paid off (resulting in a gain) and not allowed appeals out of time.[173]

Non-disclosure of Assets, Fraud etc. Needless to say, if the order is based on the wrong facts, and one of the parties is to responsible for this, then an appeal out of time will be allowed.[174]

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[167] [1992] 2 FLR 89.

[168] [1992] 2 FLR 66.

[169] [2005] EWCA Civ 103.

[170] [1992] 2 FLR 73.

[171] See, eg, *Rundle v Rundle* [1992] 2 FLR 80; *Cornick v Cornick* [1994] 2 FLR 530.

[172] *Rundle v Rundle* [1992] 2 FLR 80.

[173] *Myerson v Myerson* [2009] EWCA Civ 282, [2010] 1 WLR 114; *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174.

[174] Cf, eg, *Livesy v Jenkins* [1985] 1 AC 424.

Loss of Income/Redundancy The courts have also been firm in cases where one of the spouses lost his or her job after the order was made, essentially coming to the conclusion that losing one's job in this day and age is never unforeseeable.[175]

That said, certain parts of a consent order are open to judicial review just like any other court orders, namely periodical payments. These by their very nature are meant to be varied should circumstances change, and thus it is open to either party, irrespective of whether the order was a consent order or a 'normal' order, to apply for a variation of these periodical payments.[176]

All of the decided cases concern financial matters, and there appear to be no authorities on appeal out of time regarding consent orders concerning children. However, this is hardly surprising since it is open to the parties at any time to ask the court for a new order regarding residence, contact etc., so that there simply is no need for leave to appeal out of time. When the issues agreed upon by the parties (whether embodied in a consent order or not) are revisited by the court, the yardstick for the decision remains that the welfare of the child is paramount, and no court in England and Wales would jeopardise the welfare of any child simply because of an agreement the parties had entered into previously.

Conclusions

This chapter has demonstrated that there is considerable evidence of contractualisation in the family law of England and Wales. Indeed, in many ways such contractualisation, or at least 'private ordering' in a looser sense, is actively encouraged by the state.

That said, given that the ultimate control is reserved by and for the courts, autonomy has very clear limits in English family law, particularly in the case of parents purporting to make decisions with regard to children as distinct from that of adults making decisions about their own lives. This distinction is acceptable since the state has a particular normative duty to ensure the welfare and flourishing of children, who have interests that are independent of the wishes of their parents.

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Chapter 9
Towards a Negotiatory Ideal? Contractualization of Family Law in Finland

Sanna Koulu

Abstract This chapter offers an overview of contractual arrangements and agreements in family matters in Finland. Finnish law does not offer much scope for personal autonomy regarding status relations, and contractual options in substantive family law are mostly focused on financial issues like matrimonial property and maintenance. However, there are some noteworthy exceptions regarding paternity, adoption and filiation. The legislation on assisted reproduction, for instance, recognizes consent to treatment as a possible foundation for filiation.

While contractual options in substantive family law are rather scarce, procedurally speaking there is more room for agreement. The number of options for mediation and negotiation has increased greatly in the last few decades, beginning with legislative reforms in the 1980s. Thus the contrast between substantive and procedural family law suggests a shift away from status-based and financial provisions, towards a negotiation-based model of regulating families. Such a model also emphasizes the best interests of the child, and presumes that divorcing spouses will reach an agreement and share parental responsibilities after divorce.

General Overview

This chapter offers an overview of contractual arrangements and agreements in family matters in Finland. One of the themes highlighted is the relative scarcity of contractual options in substantive family law, which contrasts clearly with a multitude of options for mediation and negotiations in procedural terms. The bulk of the text analyzes the scope of personal autonomy and legal provisions on agreements, and the end of the chapter includes notes on the shift to a negotiation-based model of regulating families.

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Finnish Legal System in Brief

Finland's legal system belongs to the Scandinavian tradition, and the oldest legislation still in force derives from 1734, when Finland was a part of Sweden. These close ties were strengthened in early twentieth century after Finland achieved its independence from Russia, as legislative reforms were carried out in close co-operation with other Nordic countries. Today, Finland can be characterized as a late modern welfare state with a large public sector and with a strong tradition of the rule of law. The current Finnish constitution dates from 1999 (*Suomen perustuslaki*, 731/1999).[1]

The legislative power is vested in the Parliament, which enacts laws. The content of legislation is, however, strongly influenced by the preparatory process and *travaux preparatoires* have a large effect on how legislation is interpreted and applied. In the parliamentary process, the constitutional law committee (*perustuslakivaliokunta*) evaluates legislative proposals in light of their constitutionality. The committee also notes whether the proposal is in line with international human rights obligations. As there is no constitutional court in Finland, this examination by the constitutional committee is important.[2] Courts do have the power to examine the constitutionality of ordinary statutes, but this power is limited in scope (see eg. supreme court decision in KKO 2012:11; Lavapuro et al. 2011).

The judiciary in Finland consists of two main branches: the general courts and the administrative courts. In addition, there are a number of specialist courts with jurisdiction on collective labour disputes and marketing, for example. Family law belongs mostly to the jurisdiction of the general courts, covering issues of paternity, divorce, custody and contact, and maintenance. However, some cases relating to families belong to the jurisdiction of the administrative courts as they involve a public law dimension. Thus administrative courts handle child protection cases as well as cases of taxation law, legal issues related to registering gender or name changes, and other administrative law matters. Roughly speaking, both branches consist of three tiers of courts or authorities. The lowest general courts are the district courts (*käräjäoikeus*), whose decisions can be appealed to the court of appeal (*hovioikeus*) and (provisionally) to the supreme court (*korkein oikeus*). The first instance in the administrative branch is the relevant administrative authority, whose decisions can be appealed to the administrative courts (*hallinto-oikeus*) and then to the supreme administrative court (*korkein hallinto-oikeus*). The published decisions of the highest court in each branch are considered to constitute sources of law, roughly on par with *travaux preparatoires*.

[1] All legislation and case law referred in this chapter is available on the internet at http://www.finlex.fi/ [10.10.2014]. Some of the databases can be browsed in English and translations of key acts and decrees are available in several languages.

[2] The ombudsman institution also provides important oversight of legality and constitutionality; see eg. the jubilee book Parliamentary Ombudsman 90, and Kurki-Suonio 2010 in it.

The executive powers belong to the government, which mainly acts through the ministries. The implementation of legislation is dependent on budgetary concerns especially with regard to social security and issues governed by the European Social Charter.

A Note on Social Security

One of the central features of the Nordic welfare regimes is the heavy involvement of the state in providing for individuals and families. This means that e.g. social security law as well as many fields of administrative law have to account for family relations. While not considered to be part of family law as such, these legal contexts affect families in many ways. For example, cohabiting un-married spouses are not legally obligated to provide for each other or for each other's children, as a matter of private family law. However, social security regulation effectively places such an obligation, as the income of one spouse can prevent the other from receiving social security payments.

The Finnish constitution also highlights the importance of social security for family relations. The second chapter on constitutional rights[3] includes families under 19 § (the right to social security), in paragraph 3:

> The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children.

This section is noteworthy also in that it does not directly provide for protection of family life. Instead, family life is protected under another section, 10 § (the right to privacy). While family life is not mentioned in the text itself, the first sentence "Everyone's private life, honour and the sanctity of the home are guaranteed." is also considered to cover family life (see Finnish supreme court decision KKO 2011:11).

Human Rights

All in all, Finland is considered to have a dualist regime in regard to international treaty obligations. This means that human rights obligations are implemented primarily via legislation. Finland has ratified e.g. the European Convention on Human Rights relatively late, in 1990, and the past few decades have seen a tremendous change in how human rights obligations are approached. The current understanding

[3]The chapter is based on a large reform in the 1990s, and can be considered part of a larger shift in legal thinking and argumentation. See for instance Nieminen 2013.

can still be described as placing the main responsibility for implementing treaties on the legislature, and the judiciary then applies domestic legislation (along with EU regulations, of course) in a human rights -conscious way.

The supreme court (*korkein oikeus*) as well as the supreme administrative court (*korkein hallinto-oikeus*) have recently taken an especially active role with regard to the impact of human rights provisions. Within the field of family law, the question of applying human rights provisions more directly has arisen with regard to e.g. overturning a decision on adoption (KKO 2011:106), establishing paternity after the case had been time-barred by legislatory provision (KKO 2012:11) and the right of a 16-year-old to apply for a change in their own custody arrangements (KKO 2012:95). One common thread in these decisions is the need to balance the requirements of national legislation and legal certainty together with human rights concerns.

Substantive Family Law

Legal issues relating to families can turn up in a number of contexts. "Family law" in Finland concerns questions about forming and dissolving family relationships, and the term also covers questions of family property law such as matrimonial property law. It is considered a part of private law along with e.g. the law of contract and the law of obligations.

Finnish contract law has strong ties to the Scandinavian and continental traditions. As regards property and obligations, legal interpretation usually takes the parties' freedom of contract as the starting point. Traditionally, this freedom is limited mainly by *bona mores* along with the limitations of the legal system. Examples of invalid or unenforceable contracts include gambling debts and agreements about engaging in criminal activity, while the limitations of the legal system rule out such non-legal understandings such as dinner invitations.

The traditional focus on freedom of contract has, however, shifted in the past decades. The 1970s saw the beginning of consumer protection regulation, and from the 1980s onwards the personal circumstances of contractual parties has received increasing attention. This new understanding of contract law might be characterized as welfarist contract law or more broadly, social civil law (Wilhelmsson 1992). While the debate is ongoing, the welfare of the weaker party in a contract is a relevant concern in Finnish contract law, especially with regard to consumer contracts and arguably also in family matters.

In contrast to the assumption of contractual freedom in private law in general, party autonomy is rather limited in family law. Family relations are considered based on status rather than on contract, and thus their legal effects follow from statutory provisions instead of private ordering (see Helin 2004). There is no specific prohibition on contracts on family relations; instead, contracts or agreements regarding the personal dimension of family relations are usually only recognized as legal when there is a specific provision in the law to this effect. This means that Finnish family law makes clear distinctions between contracts on personal aspects

of family relations on the one hand, and contracts regarding property such as pre-nuptial agreements or sale of property between spouses on the other hand. While (limited) contractual freedom exists for contracts regarding property the opposite is true for the personal aspects of family relations.

Parents and Children

Overview

When a child is born, it always has at least one legal parent, namely the mother. Finnish law does not have legislation on maternity at the moment, so the current state of law is that the woman who gave birth is the legal mother.[4] Paternity is more complex: if the mother is married, then the husband becomes legal father *ex lege*, based on the freshly reformed Paternity Act (*isyyslaki*, 11/2015).[5] If she was unmarried, paternity can be established either by administrative decision (after a man acknowledges the child as his and the case can be considered clear enough) or by court decision. Basically, parenthood is still based on a model of biological "truth", even though biologically inaccurate paternity can come about in a number of ways. Paternity can also be overturned, and there is court praxis about the right to bring charges either to establish paternity or to overturn it.

Parental responsibility, or custody as it is called in Finland (*huolto*), is based on similar principles. The mother always has custody *ex lege* when the child is born, as does the father if the mother is married or if she marries him after the child is born and paternity is established. Otherwise, the parents can arrange custody by agreement, subject to an evaluation of the child's best interests. One of the typical cases is that a child is born to cohabiting spouses, legal paternity is established by administrative decision after the man acknowledges the child, and then the parents agree that custody shall be shared. In such a situation, the evaluation of best interests is almost a formality, as shared custody is often presumed to be in the child's best interests.[6]

[4] A reform is being prepared in the Ministry of Justice as of autumn 2014; in all likelihood it will be limited in scope and will mainly help clarify the legal parenthood of children born to two women in a registered partnership (see also below in section "Partners").

[5] The new Act will enter into force on 1 January 2016. While the main content of the provisions will remain practically identical to those of the 1975 Act, there are controversial issues involved. One of them is the legal position of persons born before or during the transition period of 1976 to 1981, which was at hand in the ECtHR cases *Grönmark v. Finland* and *Backlund v. Finland* 6.7.2010.

[6] The new Paternity Act will improve the parties' personal autonomy [etc]. For instance, acknowledgement of a child will become possible also before birth, when the parents visit a maternity clinic during pregnancy. This advance acknowledgement will be subject to a special revocation period of 30 days from birth.

After divorce or separation, custody cases can become more complex and contested. The default is that divorce or separation does not affect custody unless a new decision is made either by agreement or by court decision. Thus in most cases legal custody remains shared between the parents, while the child will live with one of them and have contact with the other. Most separating couples agree on custody and contact, but the small fraction of cases that goes to court can become bitterly disputed. While the majority of custody disputes in court happen between divorcing parents, the court also has other options in determining custody. The court can appoint another person as a custody-holder in addition to or instead of the parents, as well as distribute different aspects of custody to different people.

The power of the court to divide aspects of custody between two or more custody-holders can be important since custody is in Finnish law a broad concept that covers all issues related to the person of the child. For instance, custody-holders can decide on health-care, education, the child's name and religious affiliation, and so on. Custody also covers responsibility for day-to-day care and the right to represent the child in legal proceedings. In some cases the disputes between parents can be ameliorated by eg. awarding one of them sole authority on health-care, say, or by retaining shared custody only with regard to name and religion.

It is important to note that while custody and parenthood often go hand in hand in practice, they are legally separate institutions (see eg. Koulu 2014 for a lengthier discussion). Likewise, maintenance is separate from custody. The legal parents have an obligation to support their children financially, either informally as the family lives together or by monetary payments if the child and the parent do not live together. Maintenance obligations follow from legal parenthood; custody-holders and step-parents have no maintenance obligations in private law though their contribution is often taken as a given in determining social security entitlements.

Establishing Parenthood

In considering contractual arrangements in legal parenthood it is useful to distinguish between informal or factual agreements and legal options. Finnish law has very few legal options for the contractual establishment or revoking of parenthood. However, informal agreements on parenthood and plans for day-to-day parenting do exist, for instance within the LGBT communities. The legal significance of these agreements has not been tested in the higher courts, so it is currently unclear what kind of impact they would have.

Turning to the few options for contractual significance in establishing parenthood, the 2015 Paternity Act does offer some options. First, a degree of private autonomy is granted by 42 §, which concerns the father's right to bring charges for revoking his paternity. The section provides that if the father has decreed in writing that a child is his, knowing that this is not true, he loses his right to bring charges. (Paternity can still be revoked if the mother or the child brings the case to court.) Secondly, the Paternity Act was changed in 2007 to the effect that consent to artificial insemination effectively replaces biological truth. That is, if a man gives

his consent to medical treatment together with the prospective mother and is then established as the father, paternity cannot be revoked on the basis of the lack of biological descent.

The changes to Paternity Act in 2007 were part of a larger reform, where a statute on assisted reproduction was enacted after more than 20 years of debate and compromise. The Assisted Reproduction Act (*laki hedelmöityshoidoista*, 1237/2006) also offers some options for contractual arrangements. First, there is the related change in Paternity Act, which highlights the importance of the consent to treatment. Secondly, the Act includes a complicated balancing act for treatments for single women (as opposed to heterosexual couples). Sperm donors can forbid use of their donated gametes for such treatments. If they allow such use, they can also give their consent for paternity to be established, which is not possible in treatments for heterosexual couples. This option for sperm donors has not been applied very often; its main use case is a situation where the donor is known to the prospective mother and the parties have agreed in advance that paternity would be established. – In the context of assisted reproduction we must note that Finland currently has a prohibition on surrogate motherhood. An advance agreement to give the child up for adoption is void, and medical treatments will not be given if such an agreement exists (Assisted Reproduction Act 8 §).

While establishment of parenthood has very limited room for contractual effects, the dissolution of the parent–child relationship has even less. Finnish law does not recognize contracts or agreements regarding the dissolution of parenthood. The parent–child relation can only be dissolved by (1) revoking of paternity or (2) adoption. Both are matters for the court to decide. That said, there are some contractual aspects or dimensions to these two options if we look at them closely.

Firstly, there is an interesting option in the 1975 Paternity Act, 16 a §, for revoking paternity. If a child is born to a married woman but her husband is not the father, his paternity can be revoked if (a) the biological father acknowledges the child and (b) both mother and her husband give their consent to it. – It is unclear how useful this option has been in the nearly four decades since the Act came in force. Anecdotal evidence suggests it is quite rare. In any case, the provision is be retained in the new Paternity Act of 2015.

Secondly, adoption legislation has been recently reformed in Finland, and the new Adoption Act (*adoptiolaki*, 22/2012) also includes a new option for so-called open adoption. In the Finnish law, this means that the legal parents can, as a condition for their consent to the child being adopted, require that the child is allowed to be in contact with them after the adoption. Previously, such an agreement was legally void, as enforceable visiting rights cannot be confirmed with regard to other people than the child's actual legal parents. As of yet, there is very little case law or studies on how such agreements will work in the future.

Any other legal contracts on adoption would most likely be frowned upon, as the only consideration is to be the child's best interests. More specifically, agreements about payment are strictly forbidden by Adoption Act 5 §, and will prevent the adoption from taking place. Of course, adoption itself can be said to involve a contractual element (though this is rarely expressed in such terms) as it usually

requires consent from the parents.[7] According to section 11 of the current Act, a lack of parental consent for the adoption can only be overridden on very exceptional grounds when the child's best interests indicate it.

Agreements on Custody and Contact

The current Custody Act (*laki lapsen huollosta ja tapaamisoikeudesta*, 361/1983) emphasizes the use of agreements in arranging custody of minor children. However, such agreements are carefully regulated in the law with regard to the parties and to the content of the agreements. According to Custody Act, sections 7 and 8, the legal parents of the child can conclude an agreement on (1) his or her custody, (2) contact or visiting rights between the child and the other parent and (3) with which parent the child shall live if the parents don't live together. The agreement is evaluated by the social welfare board, and if at least one parent has custody and there is no reason to consider the agreement contrary to the child's best interests, it is registered by the board and acquires legal enforceability. Other kinds of agreements or contracts on custody and contact are not considered legally valid. This means that parents cannot make a binding agreement about distributing the different areas of custody between themselves, or about contact between the child and his or her grandparents.

Questions that often come up in cases of divorce or separation include the future care, upbringing and education of the child. In practice it is best if custody-holders (usually the parents) reach an agreement on how the child's daily life is to be arranged, but in Finnish law these agreements are not considered legally binding. That is, parents can conclude a contract to the effect that the child shall attend a specific school in the future – but such a contract does not have much legal effect if one parent later changes his or her mind. Of course, agreements on these questions, as well as deviating from a specific agreement, can affect the interpretation of the child's best interests, should the custody case later come up in court.

An interesting (but currently in Finland little explored) question relates to the exercise of parental responsibility (see Boele-Woelki et al. 2007, pp. 91–94). There are no provisions in Custody Act on transferring the exercise of parental responsibility ("factual custody") to someone else. It is probably quite common for parents to leave the child for some time with a carer or with a relative; or even for them to let the children spend some vacation periods with relatives. Such a situation was at hand also in the ECtHR case *Hokkanen v. Finland* 23.9.1994, where the child had lost her mother when she was 2 years old. The father had arranged for the mother's parents to care for the child temporarily, but after some months had passed, they had refused to give the child back.

[7]The law also recognizes adoption within the family (step-parent adoption), in which a parent's new spouse adopts the child as his or her own. In this case, only the relationship with the "outside" parent is dissolved.

Housing

When a couple with children ends up in divorce proceedings, one of the most acute questions is about the child's housing. Where shall the child live when the parents no longer live together?

In most cases in Finland, the question is settled by parental agreement. The parents can conclude an agreement about where the child lives, and if this agreement is registered and thus enforceable, the residential parent can rely on the state's executive machinery to have it enforced – to have the child returned to him or her from the other parent or from outsiders. Of course, such enforcement is subject to conditions, especially the importance of the best interests of the child and the child's opinion if he or she is old enough. Also, while the law does not say so explicitly, an agreement or court decision on housing also affects the custody-holders' respective competences. In practice, though not in law, the residential parent has broader powers with regard to the child's daily life.

It is noteworthy especially in an international comparison that an agreement regarding housing does not specify the address or even the region where the child shall live in the future. If both parents retain custody after divorce or separation, the question of the child's residential area is supposed to be decided by them jointly. This means that if the residential parent wishes to move elsewhere within the country, the only option the other parent has for resisting the move is to apply to court for a new custody decision (for discussion, see Gottberg 2006).

Partners

Three Forms of Partnership

Currently, Finnish law recognizes three forms of partnership: marriage, registered partnership and cohabitation.

Marriage is the most clearly defined form of partnership, based on the 1929 Marriage Act (*avioliittolaki*, 234/1929). While Finland can be considered a secular country, marriage has a lot of symbolic significance in addition to its legal effects, and in 2013 there was a strong political push for allowing gender-neutral marriage. The Marriage Act has recently been amended to allow two persons of any gender to marry. The amendment will enter into force on 1 March 2017. Until then, only opposite-sex couples may be married, though same-sex couples (and only same-sex couples) have been able to enter into a registered partnership since 2002.

The conditions for entering marriage are rather streamlined since a significant reform in 1987. Very close relatives may not marry each other (Marriage Act 7 §), and polygamy is prohibited (6 §). As a rule, a person under 18 years of age shall not marry, though the Ministry of Justice may grant dispensation (4 §). Two persons who wish to marry or enter a registered partnership must request that the impediments to marriage are examined on the basis of registry data.

Legally speaking, the legal effects of marriage and registered partnership are very similar. Thus, married spouses and registered spouses both have an obligation to support the other spouse financially during the partnership, and an obligation to pay maintenance can be established after divorce though it is rare. The other legal effects of marriage and registered partnership are mostly related to property issues, such as matrimonial property and inheritance law.

The main differences between marriage and registered partnership consist of three specific issues. First, if a child is born during the partnership, legal parenthood and custody *ex lege* are currently only available for married couples (see above in section "Parents and Children"). Second, there are differences as regards adoption, as registered couples may not adopt jointly like married couples but only as step-parent adoption. The third issue is of mostly symbolic value: married couples can take on a common last name by simply registering it, but this option is not available for same-sex spouses.

Both marriage and registered partnership can be dissolved by no-fault divorce. In a typical case, either spouse or both spouses together can apply for divorce; there is a mandatory "consideration period" of 6 months, after which either spouse or both spouses together can apply for the final divorce. The divorce process is very simple, and no reasons for divorce are required or examined.

In contrast to the clear legal character of marriage and legal partnership, the third type of legally recognized relationship is much more vague in nature. Cohabitation (commonly called *avoliitto*) has been common in Finland since the 1970s, though for a long time it was regulated only in the contexts of taxation and social security. Current legislation is still limited in scope, as the Act on dissolving the household of a cohabiting couple (*laki avopuolisoiden yhteistalouden purkamisesta*, 26/2011) mainly consists of a codification of existing legal practice and only covers compensation for contributions to the other partner's property.

The Act applies to both opposite-sex and same-sex couples. Cohabitation is covered by the Act when the parties have lived in the same household for 5 or more years, or when they have a child together or have joint custody for a child. In social security and tax law, the criteria for cohabitation can vary from those set out in the Act. For example, the legislation on income taxation is applied to cohabiting spouses if they have previously been married to each other or have a child together. Social security practice also sometimes presumes that any two people who live in the same apartment are in fact a couple, which may lead to difficulties for non-partnered room-mates.

Relationship Formation and Dissolution

Internationally speaking, it is not unknown for individuals to have some limited autonomy with regard to the conditions of marriage (Swennen 2013), though the formation of relationships as such belongs to the state's purview. However, the Finnish stance on private ordering with regard to relationships is rather inflexible. The current legislation on conditions for marriage or registered partnership is

rather sparse, and there is no directly applicable case law on the role of personal autonomy in this regard. It is doubtful whether contracts or privately determined criteria for entering a relationship would be considered legally relevant at all. If such agreements took place, their effects would be informal, as people can of course arrange their lives according to the agreement regardless of its lack of legal validity.

There is one situation in which promises about *entering marriage* have been considered in Finnish law; namely, with regard to testatory provisions. For example, a person may wish to make a will to the effect that her nephew will inherit, but only on the condition that he must be married – or conversely, that he must not be married. While such clauses are not completely ruled out *a priori* (Aarnio and Kangas 2008), it is likely that in most cases they would be considered legally invalid.

Dissolving a relationship remains also largely outside the bounds of private autonomy. Agreements that deviate in some way from the legislative defaults are not considered to have legal effect. For example, a promise not to apply for divorce is not legally binding, and agreements on e.g. compensation in case of adultery would likely be considered contrary to *bona mores* and thus legally null and void. It is worth noting here that the current state of law is relatively recent, as no-fault divorce was instituted by the 1987 reform. Before the reform came into force, there was relatively more leeway for agreements: according to the law back then, one spouse could e.g. forgive adultery, and thus could no longer base a claim for divorce on it (Rautiala 1968, p. 107).

Today, no-fault divorce does give married persons a lot of personal autonomy, but does not allow for contracts or agreements. In other words, divorce itself can be agreed upon in the sense that the parties can (and often do) make a joint application for divorce, and fault is not considered; but the criteria for divorce are nonnegotiable. Thus the parties can agree on eg. parental responsibility, contact, and the distribution of property, but they cannot make legal agreements on the criteria for divorce or the length of the consideration period.

The Effects of Marriage

The effects of marriage and registered partnership under Finnish law are primarily financial. Specifically, there is no obligation to live together or to have sexual relations, and no legal prohibition of adultery. Agreements or "contracts" on such topics would not be granted legal validity or impact (see e.g. Telaranta 1957). The only way in which such agreements *might* be considered in legal terms is if they affect the financial relations of the parties in some legally relevant way. For instance: if the couple had agreed to live in separate households, and one spouse had contributed funds towards the other's apartment, the agreement *might* mean that the contribution would be compensated accordingly instead of being considered maintenance.

Agreements on Patrimonial Content in Marriage

In the Finnish system, the spouses in a marriage or a registered partnership have an obligation to support each other financially.[8] This obligation can cover joint expenses, such as housing or utility bills, or either spouse's personal expenses such as health-care or education. The legal regulation of these expenses gives rise to a number of sections in the Marriage Act. Specifically, spouses are jointly liable for such debts towards the creditor (Marriage Act 52.2 §), though this liability does not extend to monetary debts or credit card debts. According to 56 §, a court can declare upon application by one spouse that the other will no longer have the ability to incur jointly payable debts – basically, if the other spouse has abused his or her right to incur such debts, that right can be removed. Such a declaration will be in effect until cancelled by the court or until the spouses agree that it should be removed. This is one of the few possibilities for agreements on patrimonial content in the Marriage Act itself. According to literature, the possibility for declaration is little used even though it is important in principle (Aarnio and Helin 1992, p. 283).

Another context in which the Marriage Act provides for agreements or contracts on patrimonial content is related to the use of property and any profits accruing from it. According to the relevant section (63 §), if a spouse permits the other spouse to administer his or her property, the latter spouse shall have the right to use the proceeds of the property for the maintenance of the family without a need to account for it, unless otherwise agreed or unless it is otherwise to be presumed. This provision can be considered a logical extension of the obligation for financial support, and it has received little interest in literature and case law.

The third and most interesting question on patrimonial content in the Marriage Act concerns the value of work one spouse has contributed to the household or to the other's business. Work contributed to the household or the family is considered as fulfilling in part or in whole the spouse's obligation to support the family, if the spouses have chosen to live in a traditional "breadwinner" and "homemaker" model. However, since the 1987 reform there is no specific provision about such work. Gottberg notes (1995, p. 88) that nowadays spouses can make a legal agreement that the homemaker shall be compensated monetarily for work within the home. In any case, contracts or agreements that would significantly diminish either spouse's obligation for supporting the other would most likely be considered unreasonable and thus subject to legal modification, and claims for compensation would most likely fail if no agreement existed.

In contrast to contributing to the household, work contributing to the other spouse's business is specifically regulated by 64 § of the Marriage Act. According to section 64 §,

[8] During the marriage, this obligation is considered primary with regard to social security, though after divorce the assumption is effectively reversed.

> If a spouse assists the other spouse in the latter's business and wants to receive compensation therefor, he or she shall prove that compensation was agreed upon or meant to be paid, or that its payment, with a view to the nature of the work and the other circumstances, is to be deemed reasonable.

The issue of contribution to the other spouse's business can be significant especially during divorce, and a crucial question is whether compensation was agreed upon. The right to compensation can be difficult to prove, and will also become time-barred in a short time, if there was no agreement. The provision has been criticized by e.g. Aarnio and Kangas (2010, pp. 139–146) and Gottberg (1995, pp. 86–89).

Agreements on Maintenance After Divorce

After divorce, the issue of maintenance often comes up as the family's housing and standard of living has to be considered anew. *Maintenance for a former spouse* is rare in Finland, partly due to the high rate of employment among women and partly due to the strong social security system. That said, in some exceptional cases there may be a need for post-divorce support for the financially dependent spouse, but even then courts rarely order maintenance payments for longer than a year or two. Agreements on maintenance are similarly rare. Maintenance may be paid as recurring payments or as a lump sum; it is possible that the latter is more common in agreements, though there is little current research on this. It is noteworthy, in comparison to Swennen (2013), that in practice obligations for maintenance between ex-spouses are secondary to social security.

Unlike maintenance for the ex-spouse, which is very rare, *maintenance for underage children* is common. Both forms of financial support can be combined with the distribution of property, when the parties agree. A relatively common arrangement in these cases is that the ownership of the family home is transferred to the spouse who will live with the children, and in return, that spouse is solely responsible for their maintenance. (For legal issues related to such arrangements see e.g. Gottberg 1995, pp. 113–121; Kaisto and Oulasmaa 1994, pp. 337–347).

If there is no agreement, the distribution of property and maintenance obligations are wholly separate. They are determined in separate legal proceedings and based on different provisions. Of course, this legal separation belies the fact that in concrete situations the distribution of property directly affects how much financial support the more dependent spouse will need after the fact. Practically speaking, this means that maintenance is rarely determined before there is at least a rough idea of the results of the distribution of property.

Procedural Family Law

Family law in Finland can be described as reasonably secularized, and there is relatively little regulation eg. on the conduct of spouses in marriage. Within the field of substantive family law, though, this relative scarcity of non-financial norms

is balanced by a focus on child law: on the best interests of the child and on the protection of family life with regard to the parent–child relationship especially.

In procedural terms, a similar divide can be seen in matrimonial proceedings, which involve mostly financial issues, and proceedings related to parents and children. In the latter context, there are a multitude of options for different kinds of mediation and negotiation.[9] They will be outlined below with the help of a rough division into *out-of-court* alternative dispute resolution (ADR) techniques and *in-court* techniques. As a general rule, most of these techniques in family matters aim at reaching an understanding between the parties, which can then be set down in an official decision. There are few mechanisms that would result in legal agreements or documents without any involvement from a court or a social welfare board.

Jurisdiction

ADR in Finland

Different ADR techniques can be characterized according to how much they emphasize the role of the facilitator versus the agency of the parties themselves. In general, facilitative out-of-court ADR techniques are well suited for realizing the autonomy and agency of the parties, but at the same time they can fall short of their goal especially if the matter is highly conflicted.

Forms of *out-of-court facilitation* in civil matters in Finland range from informal negotiations to rather juridified proceedings. Informal options include things like having a lawyer help the parties to negotiate a settlement. This kind of negotiation is not legislated at the moment, but especially with regard to property issues and monetary claims they can be quite common. This option is also well-suited to settling matrimonial property and inheritance issues, for example, as both can be determined by agreement without applying for a court-appointed executor.

Then there are a large number of semi-formal or formal procedures for out-of-court ADR between the parties. These procedures often have a large role for the facilitator or mediator, such as in settling minor criminal cases (according to *laki rikosasioiden ja eräiden riita-asioiden sovittelusta*, 1015/2005) and in consumer claims, and in a number of mediation procedures within family law which will be discussed under the next subheading.

In-court ADR consists of two main options, one relatively informal and one formal.

[9] In the following, the word "mediation" will be used as a generic term for any mechanisms and techniques that focus on achieving a sustainable arrangement or a solution to a conflict between two or more parties.

First, in civil matters the judge hearing the case shall inquire whether it would be possible for the parties to settle the case, and in quite a few cases this will result in a settlement. This is not considered an ADR technique as such, as it is part of the normal proceedings. However, it can create an important space for negotiations between parties, possibly with the help of their lawyers.

Second and more important, there is an option for in-court mediation in civil cases, provided by the Act on mediation in civil matters and confirmation of settlements in general courts (*laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa*, 394/2011). As the title indicates, the act also covers the *a posteriori* review of settlements reached via out-of-court mediation between parties, with certain exceptions such as arbitration awards. It is worth noting that this kind of in-court mediation relies on the skills and the approach of the mediating judge to a large extent, and thus it can be argued that it is not truly a case of the parties settling the conflict between themselves. However, the judge may not decide the conflict, and may only suggest a solution by request or agreement.

ADR and Mediation in Family Matters

Let us now move on to the kinds of ADR techniques used in family matters.

As mentioned above, there are several options in this context, which have not been coordinated very closely. Of the three or four main forms of out-of-court mediation in family law cases, all have a legislative basis. The first form is called simply "mediation in family matters" (*perheasioiden sovittelu*), and it is intended to function as a sort of safety net for couples considering divorce (see Marriage Act 20–23 a §, and Aarnio and Helin 1992, pp. 51–53). Both the local administration and the court in divorce cases are obliged to inform families about the availability of mediation, according to Social Welfare Act (*sosiaalihuoltolaki*, 710/1982) 13 § and Marriage Decree (*avioliittoasetus*, 820/1987) 13 §. Mediation in family matters is supposed to be available to all families with issues, but in practice the availability of services can vary geographically within the country.

The second and third forms of out-of-court mediation are both based on the Custody Act, so they are typically used during divorce to determine children's custody and contact. First, if the couple is in agreement, they can make an agreement on custody and contact and have it confirmed by the social welfare board (see above in section "Parents and Children"). In practice the agreement is most often drafted and confirmed during one session with a social worker; the Custody Act does not include provisions on the nature or content of the session, and it is not usually considered a form of ADR. The second option is somewhat more informal as there may be no specific negotiation sessions involved: if the case comes to court, the court will most often invite the social welfare board to prepare a statement on the circumstances of the family. During the preparation of this statement, the social workers working on it may discover that there is room for agreement after all; if an agreement is reached during this time, the court case will lapse.

The fourth form of out-of-court mediation in family matters is the most rare, as it concerns only cases where a previously confirmed agreement or court decision on children's custody and contact is not followed and one parent has to apply for enforcement. The enforcement case is considered by the district court, and it will most often be referred to so-called "enforcement mediation" (*täytäntöönpanosovittelu*) according to 6 § of the Act on the enforcement of decisions on child custody and contact (*laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta*, 619/1996). Out of all the ADR options, this is perhaps the most comprehensively regulated e.g. with regard to the choice of mediator from a list prepared by the social welfare board and the scheduling and content of the mediation process. In most cases, the mediator will have 4 weeks in which to interview the parties, arrange a joint session if possible, and interview the child as appropriate with regard to his or her age and maturity. Earlier, it was estimated that enforcement cases on custody and contact numbered in some hundreds per year in the whole country (see Jaakkola 2002) – a small fraction, especially in comparison to the tens of thousands of agreements per year. However, it is virtually certain that these cases have become more frequent in the past decade, though statistics are not easily available.

Moving on to an overview of in-court ADR mechanisms, the most visible and promising form in family matters consists of expert-assisted court mediation in custody disputes (*asiantuntija-avusteinen huoltoriitojen tuomioistuinsovittelu*). It is very loosely based on a Norwegian model. This mediation model has a legislative basis in the Act on mediation in civil matters and confirmation of settlements in general courts (394/2011), mentioned above. However, its current success is due to a pilot project carried out in 2011–2013, where the mediation sessions involved an expert in child and family matters. The experts are appointed by the social welfare authorities and the service is provided free of charge for the parties. The expert brings in much-needed perspectives on the best interests of the child, and the combination of legal and psychological or family expertise has proved to be beneficial in many cases. The pilot project proved successful, and in May 2014, the procedure was established at all district courts in Finland.[10]

Lastly, it is worth noting that most of the ADR techniques in family matters are more or less facilitative and techniques where conflicts are settled by a third party are rare. The most important one would be arbitration, which is primarily used in commercial disputes where the increased costs are balanced by privacy concerns and the need for a speedy resolution to the conflict. Arbitration is governed by Arbitration Act (*laki välimiesmenettelystä*, 967/1992), and it is usually based on arbitration clauses in commercial contracts. Arbitration is generally not available in family law matters in Finland.

[10]See government proposal HE 186/2013 vp. More information on the mediation process is available in a brochure by the Ministry of Justice, at http://www.oikeus.fi/en/index/esitteet/expert-assistedmediationofcustodydisputes_2.html [10.10.2014].

The reason for the unavailability of arbitration is due to the understanding of family relations as legally "indispositive". That is, procedurally speaking they cannot be settled by agreement between the parties, which would be a requirement for arbitration. This means that cases concerning paternity, adoption, custody and contact of minor children, the formation and dissolution of relationships, and personal relations between spouses are not covered by the Arbitration Act. In some cases arbitration might be permissible; ie. arbitration might be allowed in matters concerning maintenance between spouses. However, there is no case-law on this question and it is by no means certain that the arbitration clauses or other ADR clauses would be considered binding.

Court Scrutiny

As noted in the beginning of section "Jurisdiction", dispute resolution mechanisms in Finland often involve the district court or the social welfare board in some way. There are relatively few mechanisms that would result in the parties drafting an agreement by themselves, so court scrutiny of prior agreements and contracts is rather limited in scope. After a brief overview this section will focus first on the assessment of the best interests of the child in confirming agreements on custody and contact, and secondly on maintenance agreements.

Judicial Review of Agreements in General

In the field of family law, there are two main issues where agreement is relevant: child custody and contact, and financial support for minor children or dependent spouses and ex-spouses. Agreements on custody and contact as well as on maintenance for children are usually confirmed by an official of the state, thus granting them enforceability.

Agreements on custody and contact are not legally binding before they are confirmed either by a social welfare board or by court. This means that even if the parties agreed beforehand on custody and contact of their children, the agreement will not be confirmed if either party changes their mind before the confirmation itself. In view of 10 § of Custody Act the agreement will always be evaluated with regard to the best interests of the child, though in practice it is not certain how stringent such evaluation is.

Regarding maintenance there is slightly more leeway for agreements. Most agreements on child maintenance are drafted in a negotiation between the parents and a social worker, and consequently confirmed by the social welfare board according to Child Support Act 8 §. Thus they are directly enforceable without further review. The social worker will ascertain that the agreement will provide the child with sufficient financial support. Currently the monetary amount of maintenance is not outlined in legislation, but there are ministry-approved guidelines for

determining the amount (Ministry of Justice Publications 2007:2), and in practice agreements within a reasonable range will most likely be confirmed.

The difference between child custody and contact on the one hand, and maintenance on the other hand, is that the latter agreements have some legal validity even before review. Thus it is possible, though rare, for the parties to make an agreement between themselves without involving the social welfare board. Such an agreement can constitute a basis for later court proceedings and may result in a decision being given according to the agreement. However, no *a priori* review is required; the function of court proceedings would be to get legal grounds for enforcement of the contract if this proved necessary. As agreements without involvement of the social welfare board are often connected to matrimonial property distribution, they can be realized via property transfers and thus do not require specific enforcement.

In contrast to maintenance for minor children, maintenance obligations between ex-spouses are rare. There is little research or case law on this topic, but it is likely that often agreements about maintenance are mostly drafted between spouses themselves or with the help of their lawyers without involving social welfare authorities. However, a social welfare board can confirm an agreement regarding maintenance for a spouse, e.g. while the spouses are married but live apart, or for an ex-spouse, and the confirmed agreement is directly enforceable. (Otherwise an agreement must be brought to court if enforcement is desired.) The Marriage Act does include provisions on these agreements, most importantly in 50 §. The second paragraph of the section states that

> Before confirming the agreement, the social welfare board shall consider whether the agreement is to be deemed reasonable with a view to the spouse's need for maintenance, the ability of the other spouse to pay maintenance and other relevant circumstances.

In literature it has been emphasized that this paragraph does not allow or require a thorough examination, as agreements about maintenance are legally valid even without the confirmation (Aarnio and Helin 1992, p. 43).

Custody, Contact, and the Best Interests of the Child

Agreements are the most common way of arranging custody and contact in Finland, as some forty thousand agreements are confirmed each year. The confirmation of agreements is primarily a task for the social welfare board, as discussed above in section "Parents and Children", and the board has the duty to assess whether the agreement is in the best interests of the child. In addition to the social welfare board, which is restricted to either awarding or refusing confirmation of the agreement, a district court can also give a decision on the basis of agreement. In fact, while the court does have the power to deviate from parental agreement if necessary, 10 § of the Custody Act provides that

> (1) A matter concerning child custody and right of access must be decided in accordance with the best interests of the child. For this purpose, special attention must be paid to how the realisation of custody and right of access may be guaranteed in the best possible way in future.

> (2) A matter concerning the right of access or the award of custody to one or both parents must be decided in the manner agreed upon by the parents, if the parents or one of them have custody of the child and there is no reason to believe that this would be contrary to the best interests of the child.

Thus the best interests of the child are of crucial importance in considering the significance of parental agreement. Courts are required to consider the best interests and the future welfare of children in the concrete case at hand – a requirement that would seem to be in line with the case law of the ECtHr under article 8 (see e.g. *Schneider v. Germany* 15.9.2011).

In many other contexts, though, the best interests of the child have been considered in the legislative process and thus integrated in the provisions of the relevant national legislation. Accordingly, the courts do not usually consider the concrete best interests of the children involved in paternity cases or child maintenance cases, for instance. As a result the case law on the best interests principle can be ambiguous. The best interests principle has been referred to already in 1984, in a case concerning the revocation of paternity after the man had signed an agreement relinquishing his right to apply for revocation (KKO 1984 II 71), but in this and many other cases the principle has been rather superficially considered. In more recent case law, the principle has been specifically upheld e.g. with regard to the issue of granting joint custody of a child to the mother's female partner (KKO 2010:16). (For discussion, see e.g. Koulu 2013.)

The significance of a prior agreement and decision may also be subject to a sort of *a posteriori* review, as a change in circumstances may require that an agreement or a court decision on children's custody and contact be re-considered. The relevant section in the Custody Act, 12 §, provides that an agreement confirmed by the social welfare board as well as a court decision on child custody and contact may be amended, if the circumstances have changed since the confirmation of the agreement or the issue of the decision or if there is some other reason for this. As the provision shows, an agreement or decision may easily be reconsidered. Indeed this was the exact intention of the legislator, as it was considered important that any case concerning child custody or contact could always be considered anew without procedural obstacles. However, in practice it may not be in a child's best interests to have the case re-tried too often, so courts may not always carry out full-scale evaluation of the situation.

Judicial Review of Agreements on Maintenance

In addition to child custody and contact, judicial review of agreements may become relevant in connection with agreements on maintenance. In fact, maintenance constitutes the main issue that may be determined between the parties without requiring *a priori* review. Maintenance obligations for minor children are still not completely governed by party autonomy. Even though the specific amount of maintenance payments is up to the agreement of the parties, party autonomy is limited by a prohibition on waiving the right to maintenance on behalf of the child.

In other words, the parents cannot legally agree that one of them will not pay any more maintenance in the future. Such an agreement is null and void *ex lege*, if the child is in need of maintenance in the future (see decision in KKO 1984, II 141).

A confirmed agreement or court decision on maintenance is also always subject to change, either on the basis of original unfairness or on the basis of changed circumstances. Changing or modifying a previous agreement or decision is governed by 11 § in the Child Support Act (*laki lapsen elatuksesta*, 704/1975), which lays out a two-stage model of review. First, the court is to consider whether the circumstances have changed to sufficient extent that modifying the agreement or decision would be fair, or whether the original agreement was unfair in the first place. Then the court will theoretically calculate the correct amount of support on the basis of same legal criteria as in support cases in general: ie. the capability of the parents to provide support, and the needs of the child. In practice these two stages of legal consideration will overlap each other, as the consideration of the correct amount of support will influence the consideration of unfairness or the change in circumstances.

The parties have more space for private ordering with regard to maintenance between ex-spouses, as courts do not usually examine whether the amounts agreed are reasonable. If the bargaining positions of the parties were sufficiently inbalanced, to the extent of involving duress, coercion or fraud, this would of course be grounds for considering the agreement null and void. However, in most cases unequal bargaining positions would probably only be considered grounds for revoking or modifying the agreement if the content of the agreement was also unfair. That is, the bargaining positions of the parties are often considered in connection with the substantive unfairness of the agreement in question. It is of course possible that the agreement is unfair for other reasons, such as a change in circumstances.

Maintenance and support obligations may be modified on the grounds of unforeseen changes. Modification is possible regardless of whether the agreement had been subjected to *a priori* review and confirmation, though there are minor procedural considerations regarding whether the agreement had been confirmed in the first place. There is also important case law regarding maintenance agreements in cases where the child had moved back in with the parent that had already paid support as a lump sum. In these cases the Finnish supreme court has often ruled that this kind of change in circumstances meant that the parent who had received the payment had benefited from unjust enrichment and had to return the excess amount (see KKO 1995:195, 1996:29, 2005:60). On the other hand, in a similar case where the change in circumstances was that the parent had died after making the lump sum support payment, the other parent was not considered as having benefited from unjust enrichment and no return payment was ordered (KKO 2009:11).

A Posteriori Review and State Responsibility?

In Finnish law, the exact relationship between private obligations and social security legislation is hard to pin down. The relevant provisions are spread out through

legislation, and formulating an up-to-date overview can often be difficult. As a rule it can be said, however, that parties are not allowed to shift financial responsibility over to the social security system. Social security legislation includes provisions specifically intended to prevent circumventing private law obligations as a matter of course. In other words, there is no blanket ban on private agreements, but a plethora of detailed rules exist on who may receive which payments and when.

Another case in which agreements might be subjected to *a posteriori* review is if one of the parties is deeply in debt and is trying to evade creditors' attempts to have assets distrained. For example, if the debtor tries to evade payment by transferring property to family members or by paying excessively large child support payments, such arrangements might be set aside according to chapter 4, 14 § of the Enforcement Code (*ulosottokaari*, 705/2007) or they might be grounds for criminal charges (see KKO 2002:46). While the legal issues involved here are outside the scope of this report, it is noteworthy that the problems are in a way related to the solidarity between family members and the importance of maintenance obligations. In effect, legislation needs to balance the mutuality and reciprocal nature of family relations together with the protection of creditors against the possible misuse of that reciprocality.

Conclusions

The study of contractualization offers an interesting perspective into the developments of family law in the past century. There have been significant shifts in regulating families during that time, but there is also much that remains similar to the thinking of late nineteenth century. For instance the old division of status vs. contract is still visible in many institutions within the sphere of the family in Finland, though the dichotomy has become more flexible and nuanced. There might be fewer non-financial provisions regarding families, and fewer normative demands on behaviour within the family sphere, but that does not necessarily mean that regulation has decreased. Instead, the rise of contractual and negotiatory models can be seen as a new form of regulating and directing families.

Along with the rise of a more individualistic model of family law, allowing more leeway for party autonomy with regard eg. to property issues, we can pinpoint a new focus on negotiation and harmony within the family sphere. In child law especially it makes sense to speak of a negotiatory ideal: the proper sort of family is based on affectionate, negotiated bonds and even after divorce, the expectation is that the parties will participate in mediative practices and reach an appropriate consensus (Koulu 2014). While agreements are still important, a focus on the agreeable settlement of any potential disputes has superseded the traditional understanding of party autonomy as the basis of dispositive statements.

Currently, the most interesting developments in family law are taking place with regard to parenthood and the formation of partnerships, which traditionally did not offer much room for personal autonomy. The role of agreement and consent can

come to the fore in adoption matters and assisted reproduction, for instance, and in the future many thorny issues will have to be resolved concerning surrogacy arrangements and filiation. This ties also in to the wider discussion of the importance of human rights norms in national policy and decision-making, and makes family and child law a significant site for applying constitutional and human rights.

Case Law

European Court of Human Rights

Hokkanen v. Finland 23.9.1994
Backlund v. Finland 6.7.2010
Grönmark v. Finland 6.7.2010
Schneider v. Germany 15.9.2011

Finnish Supreme Court

KKO 1984 II 71 (available digitally at http://www.finlex.fi/fi/oikeus/kko/kko/1984/19840071t, in Finnish)
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KKO 1995:195 (available digitally at http://www.finlex.fi/fi/oikeus/kko/kko/1995/19950195, in Finnish)
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Chapter 10
Contractualisation of Family Law in Ireland

Louise Crowley and Maebh Harding

Abstract The very limited capacity to make private inter parte contractual arrangements under Irish family law is unsurprising given the protected status of the family under Article 41 of the Constitution and its express positioning of the marital family as the fundamental unit group of society. Individuals typically cannot obtain or exclude familial status by private agreement and the related rights and obligations remain determinable and reviewable by the operation of law. In particular, the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit. Thus Irish family law is strongly state centric with little room for formal contractualisation. Private autonomy is secondary to the state's obligation and entitlement to ensure where possible, the protection of the family, especially the marital family. Such intervention is mandated to protect the rights of the parties, both in the course of the union, as well as upon the breakdown of the relationship, but at all times to make determinations that are in the best interests of the children.

General Overview

Ireland is a democratic republic. The 1937 constitution[1] is the bedrock of the Irish legal system. It provides the framework for the current legal system, outlining the powers and functions of the legislative, judicial and executive powers. It also outlines key principles of legal and social policy and guarantees fundamental rights for all citizens.

[1] Bunreacht na hÉireann.

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The head of state is a democratically elected president but the role is mainly ceremonial.[2] The president signs Bills into law[3] and has the power to refer a Bill to the Irish Supreme Court to check its constitutionality before it is signed into law.[4] Once the Bill is found to be constitutionally valid, its constitutionality cannot again be challenged.[5] The executive function is carried out by the Irish government[6] led by the Taoiseach.[7] The legislative function is fulfilled by the Oireachtas[8] which is made up of two houses: Dáil Éireann and the Seanad.[9] The Oireachtas has sole authority to make laws in Ireland.[10] The Government is answerable to Dáil Éireann.[11]

The judiciary are appointed by the president acting on the binding advice of the Government.[12] The Government acts on the advice of the Judicial Appointments Advisory Board. The independence of the judiciary is a constitutional principle.[13]

The court of final appeal in Ireland is the Supreme Court.[14] This court has both *a priori* and *a posteriori* powers to determine whether legislation is compliant with the Constitution.[15] The High Court also has powers to review the compliance of existing legislation with the Constitution. Appeals on the question of constitutionality can be heard by the newly created Court of Appeal[16] as soon as it is established and further appealed to the Supreme Court if necessary in the interests of justice.[17] Most of the legislation in force in Ireland has been passed by the Oireachtas since 1921. However, statutes passed by the British Parliament before 1921 which had force in Ireland at that time, continue to have the force of law unless repealed or deemed incompatible with the Irish Constitution.

The Irish legal system is common law based. Case law plays an important role in determining how legislation and the Constitution itself should be interpreted. The doctrine of precedent means that the court system is hierarchical and the decision of a higher court will bind lower courts.

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[2] Articles 12–14 Bunreacht na hÉireann.

[3] Article 25 Bunreacht na hÉireann.

[4] Article 25 Bunreacht na hÉireann.

[5] Article 34.3.3°.

[6] Article 28.

[7] Prime Minister. Article 28 Bunreacht na hÉireann.

[8] The National Parliament. Article 15–24 Bunreacht na hÉireann.

[9] Dáil (House of representatives) Seanad (Senate).

[10] Article 15.2.1° Bunreacht na hÉireann.

[11] Article 28.4.1° Bunreacht na hÉireann.

[12] Article 35 Bunreacht na hÉireann.

[13] Article 35.2 Bunreacht na hÉireann.

[14] Article 34 Bunreacht na hÉireann.

[15] Article 26 and Article 34.3.2.

[16] Article 34. A Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013.

[17] Ibid.

In Irish law all persons over 18 or married persons have legal capacity.[18] This capacity is limited where the individual is a prisoner, of unsound mind or intoxicated. Minors have limited capacity to enter into legally binding agreements.[19] Contracts entered into with persons of apparently sound mind are valid provided the contract is fair and bona fide.[20]

Under Irish law, a binding contract requires evidence of offer and acceptance, consideration and intention to create legal relations. A contract may be declared void ab initio where one of these three components is not present.

Once a promise is made in return for another promise, the common law regards it as generally unnecessary for the bargain to be evidenced in writing.[21] Additionally a contract may be declared invalid because its effect is illegal or contrary to public policy, rendering the contract void or unenforceable. However it is permissible for the courts to remove the impugned clause whilst enforcing the remainder of the contract.[22]

Contractual freedom to regulate family relations in Ireland is impinged in two ways. Family statuses stemming from parent/child relationships, marriage, and civil partnership are state regulated. Individuals cannot obtain or exclude these statuses by private agreement. For example, the ability to end a marriage or civil partnership is limited by the statutory requirements. The Constitution itself also places limits on contractual freedom when it comes to divorce or adoption.

The personal and property rights and obligations stemming from family statuses can sometimes be moderated by private agreement, for example by a separation agreement or a cohabitation agreement, but these agreements are binding but reviewable by a court. When reviewing the agreement the court has a wide discretion to make adjustments based on principles of fairness.

Substantive Family Law

Articles 41 and 42 of the Constitution are vitally important to understanding Irish family law. The marital family is expressly protected under Article 41 of the constitution and the grounds for divorce are outlined at a constitutional level. This has led to an historic moral and social preference for marital families within the Irish legal system.[23] The state cannot introduce legislation that discriminates against

[18] S2(1) Age of Majority Act 1985.

[19] Limited by the Infants Relief Act 1874 see Law Reform Commission Report on Minors (LRC 15–1983) 3.

[20] *Hassard v Smith* (1872) IR Eq 429.

[21] See further R Clark "Contract Law in Ireland" 7th ed (Dublin Roundhall 2013) Part 1.

[22] Bennett v Bennett [1952] 1 KB 249.

[23] See W Duncan, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist.*

the marital family.[24] Whilst the Constitution does not expressly define the family, Article 41.3 outlines the State's pledge "to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." Given the manner in which Article 41 of the Constitution has been drafted and the express reference to the institution of marriage in Article 41.3, the courts have regarded the scope of the Constitutional protection of the family as limited to the family based on marriage.

Consequently, a family unit that is not founded upon a marital union has not as yet been recognised as a family unit for the purposes of constitutional protection and rights.[25] Notwithstanding this preferential treatment of the marital family, the non-marital family unit is now recognised under Irish statute. State regulation of same sex civil partnership and cohabitation was introduced in 2011 by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The Act created the institution of civil partnership and provides statutory protection for cohabitants. However, only the marital family has constitutional status.[26]

Article 42 guarantees the rights and duties of marital parents to provide for the religious and moral, intellectual, physical and social education of their children. The effect of this article is to give a large amount of autonomy to the marital family. The state cannot interfere with the integrity of the marital family unless parents fail in their duties towards the child.[27] In 2012 the Irish people approved an amendment to the Irish constitution to protect the rights of children.[28] This amendment allows marital children to be voluntarily placed for adoption and allows the state to intervene in the marital family to protect children on the same basis as intervention in the non-martial family. Although the amendment has been approved the Thirty-First Amendment of the Constitution (Children) Bill 2012 has not yet come into force due to an ongoing Supreme Court challenge regarding the conduct of the referendum. The case is scheduled to be heard by the Irish Supreme Court in December 2014.

Family Law in Ireland is not codified but is regulated by a number of important statutes including English statutes passed prior to 1921 which have not been expressly repealed and Irish legislation. After a traditional approach of minimal intervention, the legislature has displayed a visible willingness since the early 1990s to intervene in the autonomy of the family with all aspects of familial relationships now statutorily regulated; including dedicated legislation regarding

[24] *Murphy v Attorney General* [1982] IR 241; *Muckley v Ireland* [1985] IR 472; *Hyland v Minister for Social Welfare* [1989] IR 624; *Greene v Minister for Social Welfare.*

[25] *State (Nicholaou) v An Bord Uchtála* [1966] IR 567, 622. See further M Harding "A Softening of the Marital Paradigm?" [2012] The International Survey of Family Law 151–168.

[26] *G v An Bord Uchtála [1980] IR 32.*

[27] Article 42.5. In practice this has been proved very difficult and adversely affected the welfare of marital children. See M Harding, 'M Harding 'Constitutional Recognition of Children's rights and paramountcy of welfare' [2013] International Survey of Family Law 175–194.

[28] Thirty-First Amendment of the Constitution (Children) Bill 2012.

children's rights,[29] legislation regulating the marital family[30] and non-marital family[31]; both generally and upon the breakdown of the relationship. There is also legislation governing adoption,[32] child abduction,[33] state intervention and provision of care for children,[34] and protection from domestic violence.[35] Irish family law is characterised by a great deal of judicial discretion which has been preserved by this modern legislation with the legislature preferring to leave it to the judiciary to determine the best outcome in the circumstances of each individual case.

Legal aid for family law cases was introduced in the 1970s which increased the number of family law cases. At present there is no separate Family Court system in Ireland. A constitutional referendum to create a specialist two tiered family court system with dedicated family law judges was proposed for 2014[36] but despite this intention, the Irish department of Justice stated in September 2014 that such an amendment to the constitution was unnecessary and it is now expected that a Family Court will be established by legislation. It is now envisaged that a general scheme for the Family Law Courts Bill will be published in later 2014, with the enactment of a governing statute in 2015. Up until recently family law cases took place *in camera* but the Courts and Civil Law (Miscellaneous Provisions) Act 2013 now allows press representatives to attend family court proceedings in an effort to bring greater transparency to the family law system.

As Ireland operates a dualist system of law, ratification of an international instrument is insufficient to make it effective under Irish law; rather the legislature must enact a domestic provision to give it effect. The Supreme Court has highlighted[37] that in respect of international treaties to which Ireland is a party, this means that "international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself specifies."[38]

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[29]Children Act 1997 and Children Act 2001.

[30]Domicile and Recognition of Foreign Divorces Act 1986, Judicial Separation and Family Law Reform Act 1989, Family Law Act 1995, Family Law (Divorce) Act 1996, Family Law (Miscellaneous Provisions) Act 1997.

[31]Family Law Act 1981, Status of Children Act 1987, Civil Partnership and Certain Rights and Obligations of Cohabitees Act 2010.

[32]Adoption Acts 1952–2010.

[33]Child Abduction and Enforcement of Custody Orders Act 1991.

[34]Child Care Act 1991, Children Act 2001 and the Child Care Amendment Acts 2007–2013.

[35]Domestic Violence Act 1996, Domestic Violence (Amendment) Act 2002.

[36]Fiona Gartland, 'Referendum on separate family court system will be held in 2014, says Minister for Justice' *Irish Times* 8 July 2013 available http://www.irishtimes.com/news/crime-and-law/referendum-on-separate-family-court-system-will-be-held-in-2014-says-minister-for-justice-1.1455985. Access date 18/12/2013.

[37]*JMcD v PL and BM and the Attorney General (Notice Party)* [2010] 2 IR 199.

[38]At 245.

The European Convention on Human Rights Act 2003 incorporates the European Convention on Human Rights into Irish domestic law. Section 2 of the Act requires the judiciary to interpret Irish domestic law so as to be compatible with the Convention. Section 5 allows the courts to make a declaration that Irish law is incompatible with the Convention. This obliges the Taoiseach to bring the declaration to the attention of the Oireachtas but does not require Irish law to be changed. The first declaration of incompatibility was made by the High Court in 2007[39] where it was found that the failure of Irish law to recognise the acquired sex of transgender people was incompatible with the Convention. The declaration did not become final until 2010 when the government withdrew its appeal to the Supreme Court. The government proposed draft legislation to amend the incompatibility in July 2013.[40]

The Charter of Fundamental Rights of the European Union is directly applicable in Ireland.[41]

Ireland has ratified six of the major United Nations Human rights treaties including: the United Nations Convention on the Rights of the Child and its two optional protocols, the Convention on the Elimination of all forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, and, the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ireland is also a signatory to the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of all Persons from Enforced Disappearance.

Parents and Children

The rules of legal parenthood in Ireland centre on the 'natural' mother's relationship with the father. The definition of legal motherhood has been uncertain for a number of years as Ireland has no legislation in place to deal with artificial reproduction.[42] Irish constitutional case law makes reference to the constitutional rights of the 'natural mother' but does not define whether this refers to the birth mother or the genetic mother. In case law, some obiter comments have suggested the gestational mother is the 'natural mother'[43] and this is still the advice given by

[39] *Foy v. An t-Ard Chláraitheoir & Others* [2007] IEHC 470.

[40] Gender Recognition Bill 2013 available http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx.

[41] Article 29(4)(3) of the Constitution authorizes Irelands membership of the European Union.

[42] M Harding, 'Ireland' in K Trimmings and P Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart, 2013) *224.*

[43] *O'B v S* [1984] IR 316, 338.

the Department of Justice in relation to overseas surrogacy.[44] However, other cases have acknowledged that the identity of the 'natural mother' is uncertain.[45] Section 38 of the Status of Children Act 1987 allows the court to rely on scientific tests of inherited characteristics when making a declaration of parenthood. This suggests that maternity, when challenged should be established using a genetic test. The Law Reform Commission report predating the 1987 Act envisaged this mechanism being used to establish maternity and made no recommendations of enacting a statutory presumption of gestational motherhood.[46] Genetic testing has used for establishing motherhood in a number of cases relating to immigration.[47]

In 2013, the High Court ruled that the genetic mother is the legal mother in Irish law.[48] Abbott J concluded that if a *mater semper certa est* principle had ever existed in Irish law it had not survived the enactment of the Constitution in as far as it related to maternity following IVF.[49] The Government appealed the decision to the Irish Supreme Court[50] and the case was heard in February 2014. The ruling of the seven-judge Supreme Court is expected to be delivered on 19 October 2014. The Government also published the heads of a new Bill to regulate parenthood in the case of surrogacy. The draft Children and Family Relationships Bill 2013, as originally enacted sought to provide that the gestational mother should be viewed as the legal mother in Irish law. However when the General Scheme of the Bill was published in October 2014 all attempts to regulate surrogacy were deleted, with the law makers preferring to await the delivery of the Supreme Court ruling in *MR v An t-Ard Chláraitheoir*.

Legal fatherhood is based on a series of rebuttable presumptions found the Status of Children Act 1987. They are dependent on the man's relationship with the natural mother and so are also subject to uncertainty at this time. Where the natural mother is married, her husband will be presumed to be the father of the child unless this can be rebutted on the balance of probabilities.[51] A married father has automatic guardianship rights which give him parental authority.[52] The Civil Registration (Amendment) Bill 2014, when enacted, will make it compulsory for a father's name to be provided by the child's mother and to be registered on the birth certificate. Exceptions can be made to this where the father's identity or whereabouts are

[44] See http://www.justice.ie/en/JELR/Pages/Surrogacy.

[45] *G v An Bord Uchtála [1980] 1 IR 32–101, 97–98.*

[46] Law Reform Commission, Report on Illegitimacy (LRC 4-1982) [254].

[47] Eg *RX QMA and CXM v Minister for Equality and Law reform* [2010] IEHC 446, p6.

[48] *MR v An t-Ard Chláraitheoir* [2013] IEHC 91; C Murray, 'Recent Developments in Irish Law on Guardianship in the Context of Surrogacy Arrangements'[2013] IFL 261–266.

[49] *MR v An t-Ard Chláraitheoir* [2013] IEHC 91 [104].

[50] F Gartland, 'Landmark surrogacy case to be appealed', Irish Times 6 June 2013.

[51] Section 45 Status of Children Act.

[52] S6(1) Guardianship of Infants Act 1964.

unknown by the mother or where she can furnish proof that it would not be in the best interests of the safety of the child to contact the father and register his name.

Where a man is named on an Irish birth certificate, he is presumed to be the father and must be treated as such for all notification purposes unless a statutory declaration of parentage is made stating that he is not the father.[53] If no father is named on the certificate and the mother is unmarried, the child will have no legally recognised father unless there is a court declaration of parenthood. The issue of parentage may be raised before the Irish courts under section 35 or 38 of the Status of Children Act 1987.[54] Section 38 allows the court to order blood tests to assist it in determining whether or not a named person is the parent and all orders are subject to the welfare principle in section 3 of the Guardianship of Infants Act 1964.[55]

Even where an unmarried father is named on an Irish birth certificate or has a declaration of parenthood in his favour, he does not have automatic guardianship rights. The unmarried father can acquire guardianship rights by application to the court under s6A of the Guardianship of Infants Act 1964,[56] or by making a joint statutory declaration with the mother of the child.[57]

The status of parent cannot be legally transferred from one adult to another under Irish law except by adoption. It is not possible for mothers and married fathers to opt out of being parents unless an adoption order is made. Unmarried mothers may voluntarily put their children up for adoption but married mothers and fathers cannot. Unmarried fathers can, in practice opt out of the status of parent if they are not registered on the birth certificate and no declaration of paternity is made.

The Irish legal presumptions of fatherhood and the absence of legislation governing artificial reproduction can allow informal agreements about parental status to be realised. For example, if a married woman has a child by another man the legal presumption under Irish law is that the woman's husband is that child's legal father and has parental status. If the husband wishes to take on the status of legal father he may simply do nothing. As long as the presumption remains unchallenged he will have the status of legal father. If the child's biological father wishes to avoid the status of parent, he may simply refrain from taking any action.

Hiding behind the presumption that a woman's husband is the child's legal father has been used to facilitate parenthood by artificial reproductive services. Ireland does not currently have legislation regulating artificial reproduction although the Government has recently published the General Scheme of the Children and Family

[53] *FP v SP and the Attorney General* unreported judgment of Smith J IEHC 31 July 1999; *BM v MG* unreported judgment of McGuinness J, IECC 30 November 1999.

[54] *JPD v MG* [1991] ILRM 217 IESC.

[55] The Civil Registration (Amendment) Bill 2013, when enacted, will make it mandatory for both parents' names to appear on the birth certificate.

[56] *K v W* [1990] 2 IR 437; *W O'R v EH* [1996] 2 IR 248; *McD v L* [2009] IESC 8.

[57] S2(4) of the Guardianship of Infants Act 1964. Such a declaration must comply with the Guardianship of Children (Statutory Declarations) Regulations 1998.

Relationships Bill 2014[58] Part 3 governs the issue of parentage in cases of assisted reproduction and provides as follows:

- If a child is born as a result of assisted reproduction with the use of sperm provided by a man and eggs provided by a donor, the parents of the child are the birth mother and, if he consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception, the man.
- If a child is born as a result of assisted reproduction with the use of eggs provided by a woman and sperm provided by a donor, the parents of the child are the birth mother and the person who:

  (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
  (b) consented to be a parent of a child born as a result of assisted reproduction.

- If a child is born as a result of assisted reproduction with the use of eggs, sperm or an *in vitro* embryo provided by donors only, the parents of the child are the birth mother and a person who:

  (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
  (b) consented to be a parent of a child born as a result of assisted reproduction.

However, private agreements as to parenthood following artificial reproductive treatments are facilitated in Ireland by the absence of regulation and the use of anonymous gamete donation. A husband is recognised as the legal parent, even after sperm donation, if the legal presumption that he is the legal father remains unchallenged. No such presumption of parenthood applies to civil partnerships. Sperm donation is generally anonymous in Ireland and Irish couples also use anonymously donated sperm from Denmark. Part 4 of the Bill now imposes a prohibition on anonymity in relation to donor eggs, sperm or embryos and certain time-limited exceptions where the identity of a sperm donor is known, he is considered in Irish law to be the legal father.[59]

Fertility treatment using anonymous egg donation also occurs in Ireland.[60] The gestational mother is routinely registered as the legal mother. The existing High Court ruling in *MR v Ireland*[61] suggests that is merely legal fiction and if challenged, the egg donor, if identifiable, would be recognised in Irish law as the legal mother.

[58] Published on the 25 September 2014.

[59] *McD v L* [2010] 2 IR 199.

[60] http://www.eggdonation.ie/For_Recipients/For_Recipients.488.html.

[61] [2013] IEHC 91.

Surrogacy services are not widely available in Ireland but there are isolated incidents of clinics providing such services.[62] The whole approach to surrogacy and artificial reproduction in Ireland has been one of redefining parenthood rather than transferring the status by private agreement. It is universally agreed that adults cannot privately agree to give up parental duties or transfer parental status.[63] There has been some debate by academics about whether surrogacy agreements are against public policy.[64] While parental status cannot be transferred from a surrogate mother to commissioning parents under Irish law any dispute between a surrogate and the commissioning parents as to custody of the resulting child would undoubtedly be resolved on a best interests of the child basis, rather than by enforcing parental agreement over who should care for the child.[65]

Adoption is the only means of transferring the status of legal parent from one person to another but it is not a contractual remedy. An adoption order makes the adoptive parents the legal parents with full parental rights and duties and extinguished the rights and duties and status of the birth parents.[66] This severs the birth parent's liability for the child, maintenance obligations or inheritance rights on intestacy. Voluntary adoption is limited in Ireland. All organisations and societies engaged in placing children for adoption must be registered with the Adoption Authority[67] and private placement of any child is not allowed unless the child is being adopted by relatives.[68] Birth parents cannot generally make placement conditional on the adopters fulfilling certain requirements but section 32 of the Adoption Act 2010 requires express permission of the birth parents if the child is to be placed with adoptive parents who are a different religion. Foreign adoptions must, in general, comply with requirements for domestic adoption.

The adoption of marital children has only been permitted since the introduction of the Adoption Act 1988. It is not possible for the Adoption Authority alone to authorise the adoption of a marital child.[69] The Authority must apply to High Court for an order authorising the adoption.[70] In order for marital children to be adopted their parents must have failed in their duties within the meaning of Article 42.5 of

[62]See M Harding, 'Chapter 13-Ireland' in K Trimmings and P Beaumont *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013).

[63]See for example Department of Justice, Citizenship Parentage, Guardianship and Travel Documents issued in relation to the children born as a result of Surrogacy Arrangements entered into outside the State. And *Report of the Commission on Assisted Human Reproduction (2005)* available at www.dohc.ie/publications/cahr.html.

[64]D Madden, 'The Challenge of Surrogacy in Ireland' (1996) 14 Irish Law Times 34; GW Hogan and GF Whyte *JM Kelly: The Irish Constitution 4th ed Tottel 2003.*

[65]S3 Guardianship of Infants Act 1964.

[66]S58 Adoption Act 2010.

[67]S125(3) Adoption Act 2010.

[68]S125 Adoption Act 2010.

[69]S23 Adoption Act 2010.

[70]S54 Adoption Act 2010.

the Irish Constitution. In *Re Article 26 and the Adoption (No2) Bill 1987*[71] the court interpreted the Adoption Act 1998 as requiring both a failure by the parents in their duties and an abandonment of their constitutional rights.[72] It must also be proved that the state should supply the place of the parent and that adoption would be in the best interest of the child.

In November 2012, the Irish voters approved an amendment to the Irish constitution which would allow marital children to be adopted in the same circumstances as non-marital children.[73] The new Article 42A would allow marital children to be voluntarily placed for adoption for the first time.[74] The constitutionality of this referendum is currently being challenged,[75] Supreme Court ruling is anticipated in December 2014, and so no changes have as yet been made to the Adoption legislation.

Parental authority stems from Article 41 of the Irish Constitution. Parents have a duty to financially support their children[76] until they cease to be dependent. This duty not only attaches both to legal parents and also to persons acting in *loco parentis,* such as a step parent. Children do not have a direct right to a share of the state of their deceased parent. Where they are disinherited they may apply under section 117 of the Succession Act 1965 and they will inherit where the court concludes that the parent has failed in his moral duty to make proper provision for the child in accordance with his means. Any order made cannot affect the statutory share of the deceased's spouse.

Guardianship is the term used to signify parental authority in Irish law.[77] Guardianship is not statutorily defined but entitles parents to custody of their children[78] and a right to determine how the child should be brought up in terms of education. Article 41 of the Constitution confers constitutional rights on married parents in relation to their children including the right to guardianship, custody and the right to bring up and educate their children. These rights are reflected in the Guardianship of Infants Act 1964.

The unmarried 'natural mother' is deemed automatically to be the sole guardian of the child and given exclusive control and decision-making authority.[79] Irish law

[71] [1989] 1 IR 66.

[72] These requirements are now found in s54(2) of the Adoption Act 2010.

[73] Thirty First amendment of the Constitution (Children) Bill 2012.

[74] Article 42A.2.3.

[75] *Jordan v Minister for Children and Youth Affairs.* M Harding 'Constitutional Recognition of Children's rights and paramountcy of welfare' [2013] International Survey of Family Law 175–194.

[76] Guardianship of Infants Act 1964: Family Law (Maintenance of Spouses and Children) Act 1976.

[77] Guardianship is regulated by the Guardianship of Infants Act 1964. However the recently published General Scheme of the Children and Family Relationships Bill 2014 will, if enacted repeal the 1964 Act in its entirety.

[78] Ss6, 10 Guardianship of Infants Act 1964; *G v An Bord Uchtála* IR 32, 86.

[79] Section 6(4) Guardianship of Infants Act 1964.

grants the natural mother of a child a further constitutional right to the custody of her child under Article 40.3 of the Constitution[80] although she and her child are not recognised as a family for the purposes of protection under Article 41.[81] It is not possible to strip a natural mother or married parents of their guardianship rights unless their status as parent is removed by making an adoption order.[82] A key element of the Children and Family Relationships Bill 2014 is the introduction for the first time in Irish law, of an automatic right to guardianship for the unmarried, natural father of a child. Head 34(3) of the Bill provides that the father of a child, to whom guardianship status will automatically apply, refers to a father who although not married to the mother of the child, has cohabited with the mother of the child for at least 12 consecutive months including at least three months after the birth of the child.

It is generally not possible for a person to contractually vest another person with full parental authority. A parent will remain a guardian, liable for child support and entitled to be consulted on major decisions relating to the child. Mothers may vest a father with parental authority by statutory declaration.[83] Guardians may also appoint another person to act as guardian after his or her death.[84] Guardians who have been appointed by deed may be stripped of guardianship status by order of court in exceptional circumstances.[85]

Where a child has no guardian, any person may apply to court to be appointed as guardian.[86] The court may also appoint a guardian where a parent has failed to nominate a testamentary guardian.[87] Where such a guardian is appointed they will generally act as joint guardian with the surviving parent. The Court may permit the appointed guardian to act to the exclusion of the surviving parent but cannot divest the surviving parent of their constitutional rights.[88]

Guardians have the right to confer exclusive 'custody' of the child to another guardian or parent[89] but not to third parties. Custody is the day to day care and control of a child.[90] Such an arrangement is always subject to review by the courts.

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[80] In *Re M* [1946] IR 334 and *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 locate the rights in 41 and 42. A distinction is made in *G v An Bord Uchtála* [1980] IR 32, 55. *See further* O'B v S [1984] IR 316, *GD v St Louise's Adoption society* Unreported HC Budd J and *M'OC v Sacred Heart* [1996] ILRM 297.

[81] Walsh J *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

[82] Section 8(4) Guardianship of Infants Act 1964.

[83] S2(4) Guardianship of Infants Act 1964.

[84] S7 Guardianship of Infants Act 1964.

[85] S8(4) Guardianship of Infants Act 1964; *FN and EB v CO, HO and EK* unreported High Court, Finlay-Geoghegan J, March 26, 2004.

[86] S8(1) Guardianship of Infants Act 1964.

[87] S8(2) Guardianship of Infants Act 1964.

[88] S8(4) Guardianship of Infants Act 1964.

[89] S18 Guardianship of Infants Act 1964.

[90] *WO'R v EH* [1996] 2 IR 248, 249.

Separating parents often draw up a parenting plan which includes provisions as to education choices and religious education. This is not a contract with binding legal effect. In case of later disagreement between the parents, an application can be made to the court under section 11 of the Guardianship of Infants Act 1964. The court will make any order relating to welfare as it thinks proper with regard to the welfare of the child.[91] The courts do tend to respect initial decisions of the parents relating to the religious upbringing of the child.[92]

Partners

Irish law recognises the formal institutions of marriage and civil partnership as well as providing statutory protection for cohabitants.[93] State regulation of same sex civil partnership and cohabitation was conferred in 2011 by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The Act created the institution of civil partnership and provides statutory protection for cohabitants, with more significant protection arising for "qualified cohabitants", where two persons have co-habited for a period of five years, or for a period of 2 years, where there are children of the union.[94]

Marriage

The current legal concept of marriage remains the definition provided over 150 years ago by Lord Penzance in *Hyde v Hyde*[95]; "Marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others" expanded upon by the Irish courts in *Murray v Ireland* per Costello J –

> . . . the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship.[96]

The provisions relating to the formalities of the marriage ceremony are contained in the Civil Registration Act 2004, commenced in November 2007. The formal

[91] Section 3 Guardianship of Infants Act 1964.

[92] This is supported by s17 of the Guardianship of Infants Act 1964.

[93] See generally L Crowley *Family Law* (Roundhall 2013) chapter 1, *The Family, Marriage and the Law,* 1–87.

[94] See generally L Crowley (Roundhall 2013) chapter 2, *Non-Marital Family* 88–136.

[95] (1866) LR 1 PD 130.

[96] [1985] ILRM 532.

requirements are very strictly governed and failure to comply will result in such a ceremony being declared invalid. Parties must notify the Registrar of their intention to marry 3 months prior to the marriage.[97] They then attend the office of the Registrar 5 days before their marriage and sign a declaration in his presence that there is no impediment to the marriage. The Registrar completes a Marriage Registration Form which is filled out after the marriage and signed by the solemnizer, the parties and the two witnesses to the marriage.[98] The form is then returned to the Registrar's office.

However the Act includes stated exceptions to the formalities requirements, whereby one or both of the parties concerned can make an application to either the High Court or the Circuit Court for an exemption from the otherwise mandatory 3-month notice and/or minimum age requirement of 18, such exemption only being granted if "it is justified by serious reasons and is in the interests of the parties to the intended marriage."[99] Although the Act does not address the right of parties to opt into a private arrangement with more onerous formalities, it is clear that to opt out of any of the legislative requirements will require the consent of the courts.

The Civil Registration Act 2004 lists five impediments to marriage; parties being within the prohibited degrees of relationship,[100] one of the parties being in an existing marriage or civil partnership, the marriage being void due to mental incapacity,[101] where the parties are of the same sex, and where the parties are under age.[102] All five of these impediments will individually render the marriage *void ab initio*. Marriage will also be void where it is polygamous.[103]

Various non-financial inter-spousal obligations have historically been identified by the common law. Such obligations, including the duty to cohabit, and the duty to refrain from adulterous behaviour have rarely been actioned in their own right.

Both spouses have a right to consortium, a right which arises from the constitutional understanding of marriage.[104] Both parties also have a duty to financially maintain each other which cannot be derogated from by agreement.[105] The Family Law (Maintenance of Spouses and Children) Act 1976 provides a statutory right to apply for maintenance for spouses and children. The amount of maintenance payable depends on the needs of the spouses and the resources available.

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[97] S46 Civil Registration Act 2004.

[98] S49 Civil Registration Act 2004.

[99] Section 33(2) Family Law Act 1995; unaffected by the 2004 Act.

[100] The Marriage Act 1835; See also M Harding, 'The Curious Incident of the Marriage Act No.2 1537 and the Irish Statute Book'(2012) 32 Legal Studies 78–108.

[101] The Marriage of Lunatics Act 1811; *Turner v Meyers* (1908) 1 Hag Con 414, *ME v AE* [1987] IR 147.

[102] Sections 31–33 Family Law Act 1995.

[103] *Conlan v Mohammed* [1987] ILRM 523.

[104] *McKinley v Minister for Defence* [1992] 2 IR 333.

[105] Maintenance of Spouses of Children Act 1976, Judicial separation and Family Law Reform 1989. The Family Law Act 1995 and the Family Law (Divorce) Act 1996.

Marriage confers a right to remain in the family home regardless of legal ownership under the Family Home Protection Act 1976. Both spouses also have notional obligation to cohabit but this is now unenforceable following the introduction of the Family Law Act 1981. Since the introduction of the Succession Act 1965 there is no freedom of disposition for spouses the surviving spouse is entitled to one half of the deceased spouse's estate where there are no children of the marriage and to one third where there are children of the marriage. This takes priority over other bequests in the will. Where a spouse dies intestate the surviving spouse inherits the whole estate or where there are children two thirds with the remaining third distributed equally amongst the children.

Legal separation removes the obligation of the spouses to cohabit. This can be done by separation agreement or by a court order for judicial separation. An application to court for judicial separation will allow the applicant to claim ancillary relief which is granted on much the same basis as ancillary relief upon divorce. A separation agreement must be in the form of a deed signed by both spouses to be legally enforceable. Entering into a separation agreement prohibits either spouse from later applying for judicial separation[106] and so parties to a separation agreement are bound to the terms of the separation agreement and cannot apply to the court for financial relief unless they later apply for divorce. At the divorce stage the separation agreement may be reviewed by a court and varied. Until that point the agreement is enforceable as a contract and either spouse may apply to the court for specific performance of the agreement. A separation agreement can also be made a rule of court under section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976. This makes it more easily enforceable as breach of a term amounts to contempt of court.

The grounds for a decree of judicial separation are both fault and non fault based.[107] There are also specific procedural requirements.

Divorce was introduced in 1996 by the Family Law (Divorce) Act 1996. Similar to judicial separation, unlike separation by agreement, parties who wish to divorce must apply to the court. Divorce is granted on a no fault basis, but there are four requirements for a divorce as set out by Article 41.3.3 of the Constitution which cannot be derogated from by agreement. Spouses must have lived apart from one another for four years out of the previous five,[108] there must be no reasonable prospect of reconciliation, such provision must be made for the spouses and children as the court considers 'proper'[109] and the divorce must comply with certain procedural requirements.[110]

[106] *A O'D v P O' D* [1998] 1 ILRM 543.

[107] Set out in section 2(1)(a)-(f) of the Judicial Separation and Family Law Reform Act 1989.

[108] *McA v McA [2000] 1 IR 457.*

[109] Section 20 of the Family Law (Divorce) Act 1996 requires the court to consider a number of factors when considering what is proper.

[110] As set out in the Family Law (Divorce) Act 1996 including – 1 years residency in the jurisdiction, each spouse must provide an affidavit of means, solicitors must have discussed with

There has been judicial acknowledgement that in light of Article 41.2 which acknowledges the vital contribution of the homemaker, maintenance should be set at a level to avoid the mother working outside the home if possible.[111] The non-financial contributions of a homemaker must also be taken into account by the court when determining what provision is proper in the circumstances.[112]

A spouse cannot contract out of maintenance obligations/entitlements and retains the right to return to court at any future time to seek further maintenance and other financial relief, despite any covenants to the contrary or orders made by the court. This applies equally in respect of judicial separation and divorce proceedings or following on from the making of any decrees in such proceedings.[113] Similarly, either spouse can apply to the court for the variation of an existing maintenance order under s.18 of the Family Law Act 1995 and s.22 of the Family Law (Divorce) Act 1996. Thus it is not possible to exclude by way of agreement or otherwise, the capacity of a spouse to apply for maintenance at some time in the future.

Any attempt to draw a distinction between support obligations and the division of property on divorce is not appropriate given the absence of any definition as to matrimonial property, the infinite right of either spouse to apply to the court for ancillary financial relief and the over-riding obligation on the court to ensure that proper provision is made for both parties. Whether this will necessitate ongoing support payments and/or property division can only be determined in light of the circumstances of each case.

Civil Partnership

To a large extent, the institution of civil partnership mirrors that of marriage. It can be entered into by civil ceremony only.[114] A declaration must be made in the presence of a registrar and witnesses and the partners must sign a civil partnership form.[115]

Civil partnership is available to a couple of the same sex, the civil partnership can be registered under section 59D of the Civil Registration Act 2004, as inserted by section 16 of the 2010 Act. An existing purported civil partnership equivalent

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their clients the prospects of reconciliation, mediation and executing a separation agreement. Rules of court require the spouses to swear affidavits of welfare relating to any children of the marriage.

[111] *BL v ML* [1992] 2 IR 77.

[112] Section 20(2)(f) Family Law (Divorce) Act 1996.

[113] The long-standing position in relation to maintenance as enunciated by Walsh J in *HD v PD* was that "... it is not possible to contract out of the Act by an agreement ..." In *JH v RH* Barr J ordered an increase in the maintenance payable by the husband in favour of the wife and children, despite the existence of a separation agreement, which constituted "a full and final settlement of all matters outstanding between them ..."

[114] Part 3 2010 Act.

[115] S59D Civil Registration Act 2004.

can be recognized under Irish law. A section 5 order registering the relationship of two persons of the same sex as a civil partnership will be made where the following criteria are fulfilled:

(a) The relationship is exclusive in nature,
(b) The relationship is permanent unless the parties dissolve it through the courts,
(c) The relationship has been registered under the law of that jurisdictions, and
(d) The rights and obligations attendant on the relationship are, in the opinion of the minster, sufficient to indicate that the relationship would be treated comparably to a civil partnership.[116]

In enacting the 2010 Act, the legislature has provided remedies very similar to divorce for parties to a civil partnership upon the breakdown and dissolution of that relationship. The civil partnership will be void if the parties lack capacity, where formalities are not respected or where consent is considered invalid by reason of mental incapacity, duress or undue influence. Civil partnerships within the prohibited degrees of relationship are also void but the class of relationships, regarded as so classified is smaller than that for marriage.

The consequences of civil partnership include the right to remain in the shared home regardless of legal ownership.[117] Civil partners are given the same right to maintenance, succession rights on intestacy as spouses and the right to challenge their partner's will.[118] The Finance (No3) Act 2011 allows civil partners to receive the same tax treatment as married couples in respect of income tax, stamp duty capital acquisitions tax, capital gains tax and VAT.

A civil partnership can be dissolved by court order only. Parties must live apart for 2 years out of the previous 3 rather than the 4 year period imposed for marriage.[119] Before dissolution the court must ensure that proper provision is made for each civil partner.[120]

Cohabitation

Part 15 of the 2010 Act provides protection for certain cohabitants. Cohabitants are not under a duty to maintain each other; instead the legislation creates a very basic

[116] An order of recognition made under s.5(1) entitles and obliges the parties to the legal relationship to be treated as civil partners under Irish law from the later of –

(a) 21 days after the order is made, and
(b) the day on which the relationship was registered under the law of the jurisdiction in which it was entered into.

[117] Part 4 2010 Act.

[118] S11A Succession Act 1965.

[119] S110 2010 Act.

[120] S110b. 2010 Act.

level of protection for cohabitants who have become financially dependent on their partner. A cohabitant is defined as one of two adults who live together as a couple in an intimate and committed relationship.[121] There are no formation requirements as such. Whether or not a couple are in an intimate and committed relationship will be assessed by the court. The court is given discretion in making this determination but must consider a number of factors including the basis on which the couple live together, their degree of financial dependence, whether or not the couple care for children together and the extent to which the couple present themselves as a couple to the world.[122]

Cohabitants who have been in a relationship of 5 years duration or who have been together for 2 years and have a child together are treated as 'qualified cohabitants.'[123] Qualified cohabitants can apply for a number of different orders[124] to redress financial unfairness caused by the relationship. Qualified cohabitants can also apply for provision from the estate of their deceased cohabitant.[125]

In order to be eligible for an order to redress financial unfairness the applicant must satisfy the court that he is financially dependent on the other cohabitant and this dependence has been caused by the relationship or the ending of the relationship. The court will make an order only if it is fair and equitable to do so in the circumstances.[126] The court will consider the financial needs and obligations of each cohabitant, the rights and entitlements of the spouses and civil partners or former spouses and former civil partners of each cohabitant. The court must consider the needs of any dependent child. The court must also consider the duration of the relationship, the degree of commitment shown, the contributions of each cohabitant the effect the relationship has had on future earning capacity and the conduct of each cohabitant.[127]

Married couples and those in civil partnerships cannot be treated as cohabiting with each other under this legislation. Where a married person is also in a cohabitating relationship their cohabitant's ability to apply for relief under the Act is limited by the constitutional protection of marriage. The relationship will not be considered as one of 'qualified cohabitants' unless the ground for divorce from the cohabitant's spouse are satisfied.[128] This ensures that financial redress towards a cohabitant does not undermine the financial obligations of the married cohabitant to

[121] S172(1) 2010 Act.

[122] S172 (2).

[123] S172(5) 2010 Act.

[124] Redress, property adjustment, pension adjustment, compulsory maintenance.ss 173–175 187.

[125] S194.

[126] S173(2).

[127] S173 2010.

[128] I.e. living apart for 4 years out of the previous 5 Article 41.3.2 of the Irish Constitution.

his or her spouse. No such limitation is placed on a relationship where a civil partner is cohabiting with a person who is not their civil partner.[129]

Unlike married couples or civil partners, cohabitants can opt out of the statutory protections by agreement. Such agreements must comply with the general law of contact, they must be in writing and both cohabitants must have received legal advice. These agreements do not have the force of a normal contract as they can be set aside by the courts in exceptional circumstances where enforcement would cause serious injustice.[130]

Procedural Family Law

Jurisdiction

In Ireland the European Communities (Mediation) Regulations 2011[131] gave effect to the EU Directive 2008/52/EC; "the Mediation Directive".[132] The purpose of the Directive is to regulate the recourse to mediation,[133] to protect the confidentiality of the mediation process[134] and to detail the extent of the enforceability of agreements resulting from mediation.[135] Regulation 3(1) provides that a court may order that proceedings be adjourned for such time as the Court considers just and convenient and to

(a) invite the parties to use mediation to settle or determine the relevant dispute or issue, or
(b) where the parties so consent, refer the proceedings or issue to such mediation.

Where the parties enter into an agreement, regulation 5 provides that they may apply for an order making the agreement a rule of court and such an order shall be enforceable against the parties or any of them.[136]

Irish family law statutes demonstrate a shift away from reliance upon court hearings and a greater emphasis upon creating legal structures that encourage agreement-based resolution. Both the Family Law Act 1995 and the Family Law

[129]See J Mee 'Cohabitation Law Reform in Ireland' (2011) 23 *Child and Family Law Quarterly 323–343, 332.*

[130]S202(4) 2010 Act.

[131]S.I. No. 209/2011.

[132]Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (2008) OJ L 136/3.

[133]Regulation 3.

[134]Regulation 4.

[135]Regulation 5.

[136]Regulation 5(1).

(Divorce) Act 1996 require the applicant's solicitor to discuss the possibility of counselling and/or mediation and/or the conclusion of a separation agreement with the applicant prior to issuing judicial separation and divorce proceedings.[137] Similarly the solicitor for the respondent must discuss the possibility of counselling and/or mediation and/or the conclusion of a separation agreement with the respondent. Thus prior to issuing proceedings and involving the court in the process the proposed applicant must be fully informed of all non-adversarial options available to facilitate the more amicable resolution of the difficulties where possible.[138] Court Rules have recently been amended[139] to establish a practice of case management meetings which seek to narrow the issues in dispute thereby facilitating the negotiation of a settlement and/or the isolation of contentious issues, if any, requiring the attendance of the parties and/or their representatives to facilitate *inter parte* talks with a view to resolution.

Additionally there has been an increase in reliance upon *inter parte* mediated agreements to resolve the issues arising on relationship breakdown. The Irish Family Mediation Service is a state run and state financed service that operates to encourage and facilitate separating couples to agree mutually acceptable arrangements on all relevant issues. Mediation does not provide a counselling service nor does it actively seek to re-unite the parties, rather it represents a non- adversarial approach to the relationship breakdown.[140] A successful series of mediation sessions will result in a written document that details the parties' agreement. To give this agreement the force of law, its terms are typically drawn up in a legal deed of separation or other legal agreement, or can form the basis of the terms of a judicial ruling of separation or divorce.[141]

Third party arbitration is carried out within a legislative framework and is governed by the Arbitration Act 2010 which has replaced the Arbitration Acts 1954–1998. The ADR process is a resolution procedure whereby two parties in a dispute agree to be bound by a decision of an independent third party. The role of the arbitrator is similar to that of a judge but the procedure is typically less formal.

The resolution of family law disputes is either achieved *inter partes* or by order of the court, making the presiding judge the only third party likely to settle any outstanding issues. Thus where parties to proceedings for a decree of judicial separation or divorce fail to agree the terms of the resolution of the dispute, the matter is determined by the court, based upon the evidence presented, in light of the statutory and constitutional obligation on the court to secure proper provision for the spouses and any dependent children in the circumstances. Whilst the inclusion of ADR clauses is permissible, the court is unlikely to enforce an agreement to engage with ADR options. The jurisdiction of the Irish courts cannot be removed

[137] Section 5 Family Law Act 1995.

[138] The obligation on the solicitor representing the respondent is governed by s.6 of the 1995 Act.

[139] S.I. No 358 of 2008: Circuit Court Rules (Case Progression in Family Law Proceedings) 2008.

[140] Mediation is a service for both married and non married couples. It can also provide a mediation service to families in crisis.

[141] See further L Crowley *Family Law (*Roundhall 2013) chapter 10 *Private Ordering*, 557–586.

by private arrangement and the courts obligation to ensure that proper provision is made prior to granting a decree of judicial separation or divorce means that an Irish court is unlikely to give up its authority and jurisdiction to an alternative forum, simply by virtue of the inclusion of an obligatory ADR clause.

Court Scrutiny

The arbitrator's decision, which is called the 'award', is final and binding. Section 23(1) of the Arbitration Act 2010 provides that "An award made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award." There are limited grounds for a challenge to an arbitrator's award, as established under Article 34 of the UNCITRAL Model Law, adopted in the Arbitration Act 2010.

Irish lawmakers have long asserted the importance of the state's capacity to retain ultimate control over the resolution of family disputes. Although this conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract, such state involvement is permitted and even encouraged in family law given the underlying and inescapable issues of public policy that arise.[142] The relevant public policy issues of concern to the courts in the context of marital disputes range from the enforcement of spousal and parental obligations, to the state's capacity to enforce maintenance obligations to avoid a spouse transferring his/her dependency from the other spouse to the state, thereby becoming a charge on the state. In particular the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit.

Notwithstanding this over-riding supervisory role of the state, the Irish courts have acknowledged the capacity of parties to resolve financial and custodial disputes amongst themselves and embraced the practice of allowing disputing spouses, with the aid of counsel and/or mediators, to reach such an agreement.[143] Separation agreements and *inter parte* consents drawn up in lieu of a full court hearing are typically made orders of the court in the form they are presented.

[142]For example in the context of a marital breakdown dispute in *The State (Bouzagou) v Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 426 Barrington J noted that in the absence of an agreement between the husband and wife, the task of reconciling the rights of the individual members of the family was a matter for the courts to determine.

[143]As supported by the research work of Carol Coulter "Family Law Matters". In Volume 1 No 3 Coulter traced the operations of the Dublin Circuit Family Court for the month of October 2006, noting that of the 161 cases concluded in that month only 16 went to a full hearing of the court. Even more significantly, in a similar study of the practices of the Cork Circuit Family Court, an analysis of the 48 divorce and judicial separation applications listed for resolution in the 2 week family law session in October 2005 noted that all 48 cases were settled and none necessitated a court hearing.

However contractual freedom in this context remains subject to the statutory and common law rights and obligations of both spouses. Whilst the Irish courts have shown a growing preference not to revisit the content of more recently drafted separation agreements,[144] they retain the right to do so where justice and the constitutional requirement of proper provision so require. Finally, as regards the courts' view of anticipatory private ordering, the issue of the enforceability of pre-nuptial agreements under Irish law has recently been considered[145] and it has been suggested that they do not offend against the protection afforded to the institution of marriage and are enforceable and capable of variation under existing Irish law.

Given the very right of an Irish court, irrespective of the fact and content of a family agreement, to make whatever orders are required in the interest of justice, it is likely that a court would declare such an agreement null and void, or refuse to enforce a particular clause, where it is shown that the parties had significantly unequal bargaining positions. For example, the Supreme Court recently awarded the respondent husband an additional €2,148,000 on the basis of the appellant's lack of full disclosure at the time the parties entered into a separation agreement.[146]

Although in recent years the Irish courts have demonstrated an increased willingness to enforce the terms of family agreements, they continue to retain and exercise an over-riding supervisory role in respect of the well-being of all parties affected by such an arrangement. Where no especially unforeseen circumstances have arisen, the courts have increasingly required the parties to honour the terms agreed. However, this is not a definitive stance; in *SMcM v MMcM*,[147] the court ordered the payment of additional financial relief in favour of the applicant wife notwithstanding the existence of a 15-year old separation agreement which included a full and final settlement clause. Although he regarded the separation agreement as reasonable in the circumstances, Abbott J was of the view that it would be unfair to rely upon the agreement in order to prevent the wife from enjoying a better standard of living and lifestyle, akin to that experienced throughout the country generally, and more specifically by the husband.[148] Similarly in *RG v CG*[149] Finlay Geoghegan J

[144] See the very trenchant views expressed in *WA v MA* [2005] 1 IR 1 where Hardiman J regarded it as appropriate to give "very significant weight" to the terms of the separation agreement between the parties and ultimately refused to order any further financial relief in favour of the applicant wife.

[145] The then Minster for Justice Equality and Law Reform, Michael McDowell appointed a Study Group to study and report on the operation of the law since the introduction of divorce in 1996, taking into account constitutional requirements. The Study Group published its report in April 2007.

[146] *SJN v PCO'D* Unreported High Court 29 November 2006.

[147] *SMcM v MMcM* [2006] IEHC 451.

[148] *Ibid* at pages 3, 4 of the transcript.

[149] *RG v CG* [2005] 2 IR 418.

rejected the suggestion that parties could effectively enter into an agreement to relieve the court of its future obligation to be satisfied as to the making of proper provision on divorce.

The relevant public policy issues of concern to the courts in the context of marital disputes range from the enforcement of spousal and parental obligations, to the state's capacity to enforce maintenance obligations to avoid a spouse transferring his/her dependency from the other spouse to the state, thereby becoming a charge on the state. In particular, the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit.

State intervention and regulation of the family and the protection of the rights of the vulnerable is most crucial where there is evidence of parental failure in respect of the needs of children. Thus where the terms of a family agreement are regarded by the court as not in the best interests of a child affected by it, the courts will be in a position to modify the impugned term(s). Whilst this right/obligation to regard the welfare of the child as the paramount consideration of the court has a statutory basis in the context of an application under the Guardianship of Infants Act 1964, as amended, and the Child Care Act 1991, as amended, this obligation has been greatly enhanced and will have widespread application given the recent elevation of the rights of children by virtue of the Constitutional referendum in November 2012, resulting in the new Article 42A which, inter alia will require the State to recognise and affirm the natural and imprescriptible rights of all children and, as far as practicable, by its laws protect and vindicate those rights.

Conclusions

Irish family law is strongly state centric with little room for formal contractualisation. In general, parties cannot enter into binding legal agreements about family status. The status of parenthood is fixed by law and cannot be transferred from one individual to another except by adoption. Parental decisions about the upbringing of a child are made informally without legal interference. While separating parents may enter into parenting agreements, which are legally enforceable, they are not absolute and are always subject to variation, where necessary in the best interest of the child or children. Where holders of parental authority disagree at a later date the court will make a determination based on the best interests of the child.

Formation of formal relationships and dissolution of formal relationship are matters subject to clear state regulation. The wishes of the parties are given greater effect in determining the consequences of their relationship breakdown but are always subject to the governing statutory requirements and judicial interpretations. Private autonomy is secondary to the state's obligation and entitlement to ensure where possible, the protection of the martial family and the rights of the parties to the marriage, both in the course of the union, as well as upon the breakdown of the relationship, and at all times to make determinations that are in the best interests of the children.

Chapter 11
The Contractualisation of Family Law in Italy

Maria Rosaria Marella

Abstract Family law evolves shifting from one polarity, grounded on solidarity – status – tradition, to another molded around individualism – contract – modernity. Such a representation, however, does not fit the reality of any legal system we might consider, for legal change does not proceed along linear paths and towards one unambiguous direction, rather it takes place through ruptures and deviations within an incessant tension between continuity and discontinuity, and, as far as family law is concerned, between private ordering and state intervention.

In Italian law the implementation of the modern family, allegedly coincident with the egalitarian family, has been insofar committed to legal reforms (concerning spousal maintenance after divorce as well as child custody) rather than to freedom of contract.

More generally private autonomy plays no role at all in reference to certain issues as procreation, and a limited role under the Judge's control in reference to others, like child custody. The role of freedom of contract in family matters is, generally speaking, very narrow although the wind is slowly changing. On the contrary, as far as the fundamental rights of family members are concerned, individualism prevails on solidarity. In the name of fundamental rights protection Italian case law does not enforce the interspousal immunity in tort rule any longer: here the law of obligations prevails on the traditional paradigm.

Understanding the Contractualization of Family Law: The Conceptual Framework

Freedom of contract is traditionally understood as the major mechanism of self-determination in private law. For this reason, when applied to domestic relations, it should enhance personal autonomy within family as well as contribute to the modernization of family law and to its proximity to the market model.

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In fact, contract represents the epitome of modern private law. As such, it is portrayed as the opposite of status, the legal *dispositif* upon which the traditional family is founded. Consequently the contract/status opposition mirrors the modernity/tradition dichotomy. If this scheme quite simply applied to family law the modern family would be entirely ruled by contract. However, the legal regime governing family relations is traditionally seen as separate from the core of private law, the market, and freedom of contract, because it pursues a different goal– solidarity among individuals as opposed to exchange between them. This is true for the legal regime governing "informal" domestic arrangements (cohabitation agreements) as well as for the regulation of married couples. In both cases, the position of spouses or partners is constructed as external to the market, and oriented towards the realization of the interests of the family, which, in turn, prevail over the interests of the individual parties. So we have a third opposition governing family law in its relation with the law of the market: solidarity v. individualism (and exchange). We can summarize the two polarities between which family law evolves in the following way: from solidarity – status – tradition to individualism – contract – modernity.

Such a representation does not fit the reality of any legal system we might consider, for legal change does not proceed along linear paths and towards one unambiguous direction, rather it takes place through ruptures and deviations within an incessant tension between continuity and discontinuity. In particular the scheme above can be challenged on two bases.

Firstly, the solidarity paradigm survives, both in legal rules and social stereotypes, in spite of the progressive reorientation of family law regimes toward the paradigm of private ordering. This is strikingly clear in Italian law, where the tension between status and contract is dramatically intense. The solidarity model continues to play a role within the legal regime governing unmarried couples and "legitimate" families, beginning with the construction of a rigid opposition between unpaid work within the household and paid work in the market. In fact what lies beneath the status/contract dialectics is also the legal status of housework, i.e. the legal regulation of familial care work as non-work, which fosters the exceptionalism that characterizes family law from the outset. As far as family caregivers are mostly women, namely wives and female cohabitants, this means that an egalitarian conception of the (heterosexual) family is constantly being superseded by an opposing tendency to construe, although indirectly, gender roles as rigid and natural to the spouses and partners. To my knowledge the gendered division of caring labor and housework is still an important feature in Italian households, notwithstanding the so called feminization of labor that interests the labor market in Italy just like elsewhere in the world. S. G. Standing, Global Feminization Through Flexible Labor: A Theme Revisited, World Development, Vol. 27, no. 3, 583, 1999. This phenomenon however is twofold: on the one hand it describes the rise in female labor force participation and the simultaneous growing labor market flexibility. On the other it highlights a tendency characteristic of this stage of capitalism to overcome the production/reproduction divide as far as flexible and precarious jobs in the labor market mimic the features of carework, such as

affection, emotional investment and indeterminacy in working time. S. M. Hardt & A. Negri, Commonwealth, Harvard University Press, Cambridge, MA, 2009, 133 ff.; C. Morini, Per amore o per forza. Femminilizzazione del lavoro e biopolitiche del corpo, ombre corte, Verona, 2010.

On the other hand, the modern family understood as the contractualized family does not necessarily equals the modern family understood as the egalitarian family. A private ordering within the family should equal self-determination and social enhancement for men and women, both in terms of personal liberty and wealth redistribution. However freedom of contract is *not* the vehicle towards the equality of the spouses (or partners), as long as it implies a gender-neutral approach. Too often–in legislation, case law, as well as in scholarly analysis–the shift in family law from a patriarchal, communitarian paradigm to a market paradigm represents husbands and wives, and men and women, as neutral bargaining parties. It does not take into account how deeply social and legal norms, ranging from gender roles to the opposition between (unpaid) housework and the (paid) work in the market as a consequence of the family/market dichotomy, affect the bargaining power of men and women within the family, the market and society. This is especially true now that the financial crisis has substantially worsened the economic situation of family (female) caregivers.

In Italian law, for that matter, the implementation of the modern family, i.e. of the egalitarian family, has been insofar committed to legal reforms (concerning spousal maintenance after divorce as well as child custody) rather than to freedom of contract. More generally private autonomy plays no role at all in reference to certain issues as procreation, and a limited role under the Judge's control in reference to others, like child custody. The role of freedom of contract in family matters is in general very narrow although the wind is slowly changing. On the contrary, as far as the fundamental rights of family members are concerned, individualism prevails on solidarity. In the name of fundamental rights protection Italian case law does not enforce the interspousal immunity in tort rule any longer: here the law of obligations prevails on the traditional paradigm.

Basic Framework for Italian Family Law

Marriage and Legitimate Family

The Italian constitution of 1948 devotes art. 29 to marriage and the equality of spouses, and art. 30 to the equality of marriage children and children born out of wedlock. In the light of the constitutional principles the regulation of the legitimate family – marriage, marital property and filiation–provided by the Civil Code of 1942 was reformed in 1975 (legge 19 maggio 1975, n. 151, "Riforma del diritto di famiglia"). Divorce was introduced in the Italian system in 1970 (Legge 1 dicembre 1970, n. 898, "Disciplina dei casi di scioglimento del matrimonio") and is not incorporated in the Civil Code, which regulates only the first stage of marriage

dissolution, separation. The law of divorce has been reformed in 1987 (Legge 6 marzo 1987, n. 74, "Nuove norme sulla disciplina dei casi di scioglimento del matrimonio") according to a substantive equality rationale that requires an objective valuation of the economic conditions of the weaker spouse in the perspective of an equitable assessment of the financial support due. A new law very recently approved by the Italian Parliament (April 22, 2015) has dramatically shortened the separation period that compulsorily precedes divorce (so called divorzio breve).

Unmarried Couples

Italian law does not regulate/recognize unmarried couples. So cohabitation arrangements are or should be the realm of the private ordering of domestic relationships in our legal system. However, although the law of obligations extensively applies to issues related to earnings, property and expenses concerning the cohabitation ménage, this is not the case for a significant enforcement of freedom of contract, as I will illustrate in part III.

Since November 2013 the National Notary Counsel promotes cohabitation contracts encouraging notaries to inform unmarried couples about modes and effects of the contractualization of their ménages.[1] So far the impact of cohabitation contracts in case law has been almost null.

Filiation

Differences in the legal treatment of marriage children, adoptive children and children born out of wedlock have been abolished most recently (Legge 10 dicembre 2012, n. 219 "Disposizioni in materia di riconoscimento dei figli naturali", and Decreto Legislativo 28 dicembre 2013, n. 154, "Modifica della normativa vigente al fine di eliminare ogni residua discriminazione rimasta nel nostro ordinamento fra i figli nati nel e fuori dal matrimonio, così garantendo la completa eguaglianza giuridica degli stessi").

Also the regulation of child custody at family dissolution has been recently reformed. The new regime of joint custody established in 2006 (Legge 8 febbraio 2006, n. 54, "Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli") has severely reduced the role that the Civil Code formerly reserved to parents negotiation. In the name of the best interest of the child, interpreted as the right of the child to biparental care, the matter is currently ruled by a strict regime of joint custody that can be derogated only in few, exceptional cases. Courts emphasize that child custody is subtracted to parents negotiation, so

[1] http://www.notariato.it/it/notariato/chi-siamo/contratti-di-convivenza.html

that one parent cannot renounce to joint custody: this is in fact a right of the child and not a right of the parents.

Competing conceptions of gender equality within the family underpin the adoption of such a legal solution: on the one hand joint custody is widely interpreted as the epitome of women's liberation, for it seems to set aside the stereotype of the mother as the unique caregiver; on the other hand, its opponents reject it as a tool given to divorced husbands to control a former wife's way of life – a control that can eventually result in reducing the financial support the husband is obliged to give.

Adult adoption is regulated by the Civil Code (Art. 291–314). It transfers the adopter's family name and inheritance rights on the adoptee and requires the valid consent of both the adoptee and the adopter. However no agreement comes into consideration for legal purposes: The consent of both adoptee and adopter has to be expressed to the President of the Tribunal and the child-parent relationship is created by the state.

The adoption of minors is regulated by statutory law (Legge 4 maggio 1983, n. 184 "Diritto del minore ad una famiglia", as reformed by the following statutes: Legge 31 dicembre 1998, n. 476 "Ratifica ed esecuzione della Convenzione per la tutela dei minori e la cooperazione in materia di adozione internazionale, fatta a L'Aja il 29 maggio 1993. Modifiche alla legge 4 maggio 1983, n. 184, in tema di adozione di minori stranieri"; Legge 28 marzo 2001, n. 149, "Modifiche alla legge 4 maggio 1983, n. 184, recante «Disciplina dell'adozione e dell'affidamento dei minori», nonché al titolo VIII del libro primo del codice civile"; Decreto Legislativo 28 dicembre 2013, n. 154, "Modifica della normativa vigente al fine di eliminare ogni residua discriminazione rimasta nel nostro ordinamento fra i figli nati nel e fuori dal matrimonio, così garantendo la completa eguaglianza giuridica degli stessi"). The child-parent relationship is created by the state and private autonomy is banned from this field. Most recent case law applies the regulation of the so called "adoption in special cases", a sort of step-parent adoption (art. 44 D, Legge 4 maggio 1983, n. 184) to same sex parents, in this way giving legal recognition to same sex families, whereas Italian law does not regulate same sex couples at any rate (S. for instance Trib.min. Roma, 30 luglio 2014, in www.articolo29.it).

Agreements upon Procreation

The Italian law on assisted reproduction prohibits surrogacy and insemination with donor sperm (Legge 19 febbraio 2004, n. 40, "Norme in materia di procreazione medicalmente assistita").[2] Thus there is no room for procreation agreements. Before the prohibitionist regime was enacted, case law was relatively opened to private autonomy in assisted reproduction. The first decision on surrogacy declared the

[2]With the decision n. 162/2014 (hold on April, 8th 2014) the Constitutional Court struck down the prohibition of third parties' gamete donation because in violation of family privacy, reproductive selfdetermination and right to health.

contract void as against public policy in commodifying motherhood and imposing on the surrogate mother the renounce to her legal status as mother (parental status under Italian law are not at one party's disposal).[3] A second and last decision, however, found the contract valid and enforceable, as it was considered the expression of a solidarity bond between the two women (this time the contract was gratuitous).[4] In a case in which the husband had firstly consented to the artificial insemination of his wife by donor and then, after the child birth, as a consequence of the marriage crisis, had settled a lawsuit to deny paternity on the basis of his infertility, the Supreme Court rejected the claim asserting that the man's conduct was against good faith, in so doing enforcing a general clause that concerns the law of obligations and is in principle extraneous to family law.[5]

International Family Law

According to the national law that regulates the choice/conflict of laws (Legge n. 31 maggio 1995, n. 218, "Riforma del Sistema italiano di diritto internazionale private"), the personal aspects of marriage are regulated by the law of nationality if the spouses are citizens of the same country, otherwise by the law of domicile (Art. 29). Disputes on marital property are resolved according to the same criteria (Art. 30). However the law allows the spouses to choose the law of nationality or domicile of one of them on the basis of a formal (written) agreement (Art. 30). The case of property agreements between spouses is not contemplated at any rate. Recently Italian courts deal with the issue of foreign same sex marriage registration. This case law mostly regards Italian citizens who go abroad to celebrate a same sex marriage, which is banned in Italy, and then ask the Italian authority to register their marriage record. According to the majoritarian opinion such marriages are not compatible with Italian law and contrary to the public policy, However the Tribunal of Grosseto has broken this path by ordering the registration of a marriage record concerning an Italian gay couple who had married in New York City (Decreto 3 aprile 2014 and Decreto 17 febbraio 2015).

Solidarity v. Exchange in the Regulation of Unmarried Couples

With respect to unmarried couples, the separation of the family from the market was first constructed as an opposition between particular domestic arrangements and good mores. As well as in many other western legal systems, in Italy cohabitation

[3]Trib. Monza, 27 ottobre 1989, in *Foro it*., 1990, I, 298 ss.

[4]Trib. Roma, ordinanza, 17 febbraio 2000, in *Guida al diritto*, 9, 80.

[5]Cass. civ., Sez. I, 16 marzo 1999, n. 2315, in *Giur. it*., 2000, 275.

agreements were considered void on grounds of public policy; a man's promise financially to support his partner during and after the end of the relationship was conceived of as consideration for the sexual performance of the woman. Such promises were held to be unenforceable because they were rooted in a meretricious relationship. This mode of interpretation has been superseded to an extent as freedom of contract has entered into the analysis. However, in the courts' perception, there is still a fundamental difference between cohabitation agreements and market transactions. The ambivalence of the feminine – housewife on one side, prostitute on the other – still informs judicial discourse and adjudication.[6]

The Doctrine of the Natural Obligation

In the Italian legal system the lack of a legal recognition of unmarried couples implies the search for other solutions within the law of obligations. Italian scholarship maintains the enforceability of cohabitation arrangements since the 1980s.[7] Cohabitation agreements are enforceable as long as they are grounded on a *causa (cause suffisante).* There is no doubt that valid *causa* can be identified, for instance, in the performance of everyday housework, while detriment can be located in the loss of professional opportunities in the labour market. Nevertheless, in case law, concerns about the protection of the weaker partners are usually addressed outside the market and beyond the boundaries of freedom of contract. Where domestic arrangements are concerned, Italian courts mostly enforce the doctrine of moral obligation (*obbligazione naturale*, Art. 2034 c.c.), where solidarity, *not* bargaining, between the partners is the operative principle. Any transfer of money or conveyance of property within the couple, whether or not for the purpose of maintenance, is interpreted as the spontaneous performance of a moral or social duty inspired by a reciprocal sense of solidarity between the partners. Consequently, there is no enforceable agreement, whatever the original intention of the parties. The only legal effect of this moral obligation is that the payment or the object of the performance can be retained. For example, the Italian Supreme Court rejected the claim of a woman who had lent a large amount of money to her partner when he was experiencing financial troubles and who subsequently sought to retrieve the money

[6] As recently as 1986, the Italian Supreme Court (Cass., 1 agosto 1986, n. 4927, in *Foro it*., 1987, I, 493) stated that the economic loss suffered by a prostitute as a consequence of physical injury could not be assessed according to her actual income, which was the result of illegitimate transactions established in violation of public policy, but had to be estimated on the basis of the average monthly income of a housewife. More precisely, the amount was assessed on the basis of the social subsidy provided by the state and conferred in some circumstances on non-working people or those performing unpaid work like housewives. The sex-money exchange issue in reference to a cohabitation ménage still takes the center stage in the decision by Tribunal Palermo, 3 settembre 1999, in "Famiglia e diritto", 2000, 284.

[7] F. Gazzoni, *Dal concubinato alla famiglia di fatto*, Milano, 1983.

from his heirs upon his death. The court denied that there had ever been a loan, and held that the true ground for the transfer of money was the woman's sense of solidarity with her companion in the framework of their relationship; a moral rather than contractual obligation was in the background (Cass., 3 febbraio 1975, n. 389, in Foro it., 1975, I, 2301).

In most recent case law, the doctrine of the natural obligation and the doctrine of the cause suffisante tend to overlap in the light of the will of the parties' enforcement. Moral duties originating from the solidarity bonds that supposedly underpin cohabitations *more uxorio* are now taken into consideration not to overcome or subvert the contractual arrangement but instead as the legal foundation upon which the court grounds the legitimacy of the contractual enforcement. The moral obligation strengthens now the contractual arrangement. The sale of a land to the partner is therefore valid although she did not paid the price and legal requirements for a valid gift do not occur.[8] In a most recent case the Supreme Court endorses this interpretation while reaffirming the constitutional implications of the "de facto" family in Italian law and the importance of solidarity as the main feature of its legal regulation.[9]

Legal Treatment of Working Activities Performed in the Household

The dominant mode of interpretation in decisions regarding the legal qualification of working activities within the family gave rise in the recent past to quite perverse results. In this respect Italian case law is strict in defining a sharp boundary between paid and unpaid work. Acts performed in the framework of a *more uxorio* relationship are held to be grounded in *affectionis vel benevolentiae causa* (that is, made "in consideration of love and affection") and should not be remunerated. In fact, unless the performer proves that a proper labour contract was established between the parties, the court will presume that because of their intimate relationship, the work was intended to be gratuitous. For example, a woman who had been working for years as a nurse in the consulting room of a doctor was held to be no longer entitled to her salary from the moment she became engaged in a *more uxorio* relationship with the doctor.[10] In the *ratio decidendi* of the Supreme Court, notions of "solidarity" and "gratitude" were crucial in setting aside the presumption of paid work. In fact, the normal legal presumption was flipped in this context: in order to establish her case, the plaintiff had to prove she *was* a regular employee. We should conclude that not only housework equals solidarity in Italian case law.

[8]T. Bologna, 16 febbraio 2011.

[9]Cass., 22 gennaio 2014, n. 1277.

[10]Cass., 7 luglio 1979, n. 4221, in *Foro it*, 1979, I, 2315.

Even in more recent cases, women's work in their partners' enterprises is normally characterized as unpaid. We find the same *ratio* in the case of a woman who had been working for a long time in her partner's fish-breeding factory[11] and in the case of a woman who not only had been working on her partner's farm, but had also lent him money.[12] In both cases, there was no remuneration and no money back; everything melts into the blob of solidarity.

Cohabitation Contracts

The proper enforcement of a cohabitation contract scarcely emerges in case law. The number of couples living in Italy that are willing to govern their relationship by contract is presumably small. Moreover the general approach of Italian courts does not encourage people to do so. In the decision of a tribunal, the court did uphold the validity of a cohabitation agreement according to which the partners had promised to contribute each to the 50 % of the total expenses the household maintenance had required.[13] At the same time this decision is expressive of the inherent ambiguity connoting Italian case law as to the "struggle" between solidarity – status – tradition on the one hand and individualism – contract – modernity, on the other. The court seems ready to welcome freedom of contract in family matters. However the enforceability of the cohabitation contract is maintained on the basis of the doctrine of *causa familiare*, according to which the legal justification of money transfers between partners relies on family bonds, that is on solidarity, rather than on a bargain/market exchange rationale. Second, in upholding the claim of the woman who had for the most part provided to the household maintenance, the court does not enforce the will of the parties but the legal regime governing *married* couples, and in particular art. 143 c.c. which provides that each spouse has the duty to contribute to the household according to her means (and not to the fifty-fifty regime the partners had elected in the cohabitation agreement). Few years later, in an *obiter dictum*, the same court has stated that cohabitation contracts are valid and enforceable as long as they regulate and fulfil interests worth of legal protection according to art. 1322 c.c.[14] In fact the lawsuit concerns once again the professional labor performed by the woman for years on behalf of his partner's business. The court upholds the plaintiff's right to wage payment, eventually qualifying the work

[11]Cass., 17 febbraio 1988, n 1701, in *Foro it.*, 1988, I, 2306. See also Cass., sez. Lav., 15 giugno 1990, n. 5803.

[12]Trib. Torino, 24 novembre 1990, in *Giur.it.*, 1992, I, 2, 428, n. Oberto.

[13]T. Savona, 29 giugno 2002, in *Famiglia e diritto*, 2003, 596, rev. G. Ferrando, *Le contribuzioni tra conviventi fra obbligazione naturale e contratto*.

[14]T. Savona, 24 giugno 2008, n. 549, in *Famiglia e diritto*, 2009, 385.

she had performed as market labor (although the case ends up with the compensation "as justice requires" between plaintiff's wages and defendant's–two working days–contribution to the partner's home improving).

Agreements in Contemplation of Divorce and the Family/Market Distinction

This section analyses the effect of a market or private ordering paradigm in contrast to the solidarity paradigm in the framework of marriage, with specific reference to the enforceability of prenuptial agreements in contemplation of divorce. Family law, which in Italian law concerns only married – and not unmarried – couples, is widely believed to be situated at the periphery of private law and external to the legal structures governing the market – contract, property, and tort law. As far as they impinge on family law rather than market transactions, each of these private law institutions follows different rules. This is the case because, in the family law framework, relations between individuals are supposed to be shaped by the solidarity paradigm. And the solidarity paradigm is, indeed, expected to be fulfilled by the law – whether in a legislative or judicial context – through the mechanism of familial *status* as opposed to freedom of contract.

In the Italian legal system, patrimonial transactions between spouses are largely external to the general notion of contract. The structure of marital property is defined by mandatory rules. According to the Civil Code, spouses can choose between different regimes: shared property, the default regime, and other forms of marital property, the most important of which is separate property. Both regimes concern assets acquired during the marriage. However, their choice as to regime does not amount to a contract. On the contrary, it is consistent with the notion of *Rechtsgeschaeft:* a broad legal category in which all other agreements, whether involving patrimonial issues or not, as well as declarations of will other than contracts can be accommodated. Through this technical strategy, familial agreements on marital property are not governed according to a market paradigm. On the contrary they are typical and strictly regulated by the Civil Code. In other words, the position of the spouses, unlike in the market, is defined by mandatory rules based upon personal and inalienable status whose entitlements and obligations can barely be modified at will. Moreover, although the spouses can establish agreements on personal or patrimonial issues, these agreements are much less stable than regular contracts, in so far as they can only be enforced as long as the circumstances upon which they were entered into do not change. In fact, they are presumed to be grounded in solidarity rather than in the individual allocation of risk. It is rather interesting, however, that the choice between shared property and separate property is not submitted to any kind of requirement, assessment or control by courts, unlike alimony and maintenance after separation and divorce, although it may affect the economic situation of the spouses during marriage and especially by marriage dissolution.

Within this framework, prenuptial and marital agreements in contemplation of divorce have been insofar considered void by Italian courts because they treat marital status as a commodity. The legal regime governing divorce cannot be derogated from, as long as it promotes, and establishes, a bond of "post-marital" solidarity that can last indefinitely, even after the obliged (former) spouse has passed away.

According to the law, post-divorce financial support has to be assessed on the basis of a comparison between the actual economic conditions of the weaker spouse and the standard of living during marriage. It is debatable, however, whether Italian divorce law, as opposed to freedom of contract, truly promotes solidarity between the former spouses. A divorce regime may be more likely to promote solidarity if it considers not only the wife's domestic contribution but also her investments in the human capital of her husband as assets to be shared upon the dissolution of marriage. However, this is not the view taken by Italian courts, where the alimony obligation is usually not assessed on the basis of the husband's earnings and career prospects, even though they can also be regarded as a product of the wife's labor. This is the reason why contracts may be useful instruments to remedy defects in the existing scheme of family entitlements. In fact concerns about the protection of the weaker spouse go beyond the consideration of gender equality gaps in Italian society as well as the anxiety for risks of inequitable division of assets at divorce. Freedom of contract between spouses has been so far strongly restricted in order to ensure that no undue influence or oppression can be exerted by one spouse against the other. This, together with worries about a prospective commodification of marriage, have turned the substantive equality paradigm adopted by the courts into an ideological stance oriented towards the protection of the sanctity of marriage.

As a matter of fact, gender equality concerns influence divorce and alimony law in all European countries. However, strategies are disparate. According to German law, for instance, gender equality is realized (also) through freedom of contract; subsequently, prospective spouses can conclude valid premarital support waivers in contemplation of divorce: in the name of formal equality between the spouses, no concern for wives or spouses in need of support is worth of consideration. In contrast, Italian law has so far held agreements of this tenor void because they are deemed disruptive of spouses' equality, as they would threaten the weaker party's chances to negotiate, so undermining her right to defense in the perspective of divorce. Both models are enacted in different European legislations, both motivated by egalitarian reasons. It is hard to say which of them is more effective from the perspective of self-determination and equality of opportunity between genders. At the operational level, both models present unpredicted implications. Thus, the German Constitutional Court has recently stated that a prenuptial agreement that would severely affect the future financial position of the one spouse does not enhance self-determination, rather it is to be interpreted as an act of hetero-determination, that is: of subjection to the other party. As a result, German courts cannot understand freedom of contract as a medium for gender equality, as far as its enforcement is detached from justice concerns. On the other hand, an attentive analysis of Italian case law shows that plaintiffs are often husbands, made worse off by agreements that more than the legal régime itself favor the non-wealthy spouse.

Contracts in contemplation of divorce therefore turn out to be more likely to have fairer distributive effects for the weaker party than the egalitarian policy pursued by Italian legislation through mandatory rules on support obligations. What the better law is in reference to the question of financial support after divorce should be cautiously scrutinized under varying circumstances and in connection with the complexity of the originating legal system. This would entail a thoughtful enquiry not only of case law and legislation, but also of judges' mentality, of the welfare system where that legal solution impinges on and of what social strata that solution does affect/worsen/enhance.

From this perspective, any strategy that conceives family law as a closed system, as a body of rules separated from patrimonial law and social security, as an *island* floating in the market realm (untouched by market rules and dynamics), appears inherently misleading.

In any case, the fortune of marital agreements in Italian law has recently changed, starting from the decision of the Supreme Court in 2000, that established the principle of "relative voidness" of contracts in contemplation of divorce, according to which the validity of such an agreement cannot be contested by the spouse made worse-off by the agreement itself at the expenses of the less wealthy spouse. In the same decision the Court stated also that marital agreements are enforceable when they represent the settlement of previous disputes occurred between spouses, this way starting breaking up the taboo of the "commodification" of marriage.[15]

Eventually, the Supreme Court addressed for the first time a prenuptial agreement[16]. The prospective wife had promised to transfer to husband a real estate at divorce in exchange for the expenses he had afforded to restore another real property of wife. At the time of divorce the wife did not fulfil her promise and alleged the contract was unenforceable for lack of *cause suffisante*. The Supreme Court upheld the contract stating that a cause suffisante was to be identified in the exchange of real estate v. house restoration costs, even if the property transfer was actually subject to the occurrence of divorce. According to the Court the context of marriage solidarity provided a justification for the *suspension* of the exchange agreement. In so doing the Court opens up to prenuptial agreements while compromising between freedom of contract and family law exceptionalism. Interestingly enough the weaker spouse seems to be the husband in this case.

Separation as a Legal Stage in the Regulation of Marriage Dissolution

In Italian law the dissolution of marriage results in a complex legal process that necessarily implies an intermediate step before divorce: legal separation. The separation of the spouses can be agreed upon by the spouses or settled by the court.

[15]Cass., 14 giugno 2000, n. 8109, in *Foro it*., I, 2001, 1318.

[16]Cass., 21 dicembre 2012, n. 23713.

Even when separation is based on the spouses' consent, the related agreement has to be filed with a court. Thus private autonomy is restricted also in this case, as the spouses arrangement has to be submitted and appraised in its terms by the court. However at this stage of marriage dissolution Italian case law is relatively open to private ordering of domestic relations especially in reference to the economic side of marriage. Therefore marital agreements which have not been directly assessed by the court are deemed enforceable when they are not in contrast with the general agreement of separation filed with the court. Recently, case law seems to lean forward a full recognition of freedom of contract in separation agreements[17] although the many ways in which private autonomy is interwoven with judge's control makes this subject very hard to map and taxonomize. A most recent law reform has introduced a special ADR procedure for setting marriage dissolution disputes (d. l. n. 132/2014, "Misure urgenti di degiurisdizionalizzazione e altri interventi per la definizione dell'arretrato in materia di processo civile" and legge n. 162/2014, so called "assisted negotiation"). Accordingly the spouses can negotiate the terms of marriage dissolution with the assistance of a lawyer, so reducing time and emotional costs of litigation. However the new ADR procedure is not available if minors or adult children with disabilities or not financially independent are involved.

Transfers of Immovables Between Spouses

I will pass quickly to my final point. The Supreme Court decision on prenuptial agreement we have discussed above epitomizes the encounter of freedom of contract with family law exceptionalism at marriage dissolution. Promises of financial support for the period after marriage or cohabitation are often unenforceable for lack of causa suffisante. In Italian case law, one often reads about promises in favor of wives concerning further money or, more frequently, estates, as integral parts of the financial support due according to the legal regime of divorce. However, these promises, although not necessarily violating the mandatory regime, are void on the basis that there is no *cause suffisante* in support of them. By disregarding the importance of housework, childcare and other unpaid contributions typically made by women to the family economy and treating them instead simply as instances of love and affection, the family/market conception plays a significant and detrimental role for women's position both in the family and the market. By contrast, these promises should be held as made in consideration of fundamental contributions to the family unit made by the wife across a range of contexts, in accordance with a recent ltalian Supreme Court decision.[18] The case involved a complex transaction between spouses. When the marriage was close to the point

[17]Cass., 20 ottobre 2005, n. 20290, in *Famiglia e diritto*, 2006, 147.

[18]Cass., 12 maggio 1999, n. 4716, in *Vita not*., 2001, 1.

of breakdown, the husband and wife entered into a marriage covenant excluding community of property; at the same time, under a separate agreement, the husband turned the family house that was under his exclusive ownership into a communal asset. The contract provided that the house had been built by both spouses together. After the divorce, the husband alleged that the agreement concerning the house was void for lack of *cause suffisante*. The Supreme Court upheld the contract on a technical basis by considering the contribution of the wife to the construction of the house. No inquiry was requested by the court in order to assess the nature and extent of the wife's contribution.

As this and other cases indicate, the substance of the cause suffisante, benefit on the one hand, detriment on the other, are to be found in the reciprocal gains and losses produced in the household and valued within the complex web of constant exchanges, mutual giving, and support that characterizes the family economy and the patrimonial relations between spouses within it. As far as the wife's contribution is at stake, house- and care work plays a role as (valuable) part of an unexpressed bargain.

Conclusion

The analysis carried out in this paper suggests that the contractual regulation of family matters does not necessarily alter the meaning of familial relations nor thwart exchanges of love, counselling and emotional support among family members. On the contrary contracts may extend the opportunity to establish meaning in the social sphere of the family as long as they contribute to the pursuit of valuable plans of life. To this regard the new constraints private autonomy undergoes in the Italian law of reproduction and filiation represent a backlash on the way towards the enhancement of people's self-determination.

On the other hand, limits to the private ordering in the family are justified as long as freedom of contract is used as an instrument of unfairness and exploitation.

Therefore not only standards like fairness, reasonableness and good faith but also mere technical rules, the positive requirements of contract enforcement, the finding of the cause suffisante, and the intention of the parties to create a legal relation can be successfully deployed by courts to realize distributive goals and promotes progressive values in contract and family law. In practice, all these elements often involve the valuation of unpaid work as a critical contribution to the household. The reappraisal of (unpaid) house- and care work emerges as a central factor in realizing contractual fairness in family matters. It also prove to be a crucial issue in distributive conflicts between women and men. In Italy and beyond Italian borders.

Chapter 12
Autonomy and Private Ordering in Portuguese Family Law

Rita Lobo Xavier

Abstract This chapter describes substantive and procedural Portuguese Family Law focusing on autonomy and private ordering and emphasizes that state intervention in family relations is increasing, mainly regarding children protection, criminalization of domestic violence and social security protection of cohabitants. According to Portuguese Law domestic contracts and family agreements have no binding effect; nevertheless family mediation is encouraged as well as settlements on divorce or separation.

General Overview

Main Features of Portuguese Family Law System

The Portuguese legal system's fundamental law is the Portuguese Constitution of 1976 (CRP), which underwent successive revisions in 1982, 1989, 1997, 2001 and 2004.

Portugal has a Democratic Rule of Law based on the separation and interdependence of powers and is in respect of and ensures the enforcement of fundamental freedoms and rights (art. 2.° CRP). The Bodies of Sovereignty must observe the separation and interdependence established in the Constitution (art. 111.° CRP). State powers are divided between Parliament ("Assembleia da República"), which exercises legislative power (art. 16.°–164.° CRP), the Courts, which exercise judicial power (art. 202.° CRP), and the Government, which exercises executive power (art.182.° CRP). The separation of powers is manifested in the primacy of the legislative competence of Parliament, reserved in the Courts jurisdiction, in the exclusion of Parliament's administrative competence. The Republic's President,

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elected by universal, direct and secret polls and who represents the Portuguese Republic, ensures national independence, the unity of the State and the functioning of democratic institutions (art. 120.° CRP).

International fundamental rights instruments, including those arising from the Universal Declaration of Human Rights and the European Convention on Human Rights, are an integral part of Portuguese law (art. 8.° CRP). Applicators of law, including Courts and public authorities have a duty to know and apply these precepts.

In accordance with article 16.° CRP, the fundamental rights consecrated in the Constitution do not exclude any other set of international laws and rules (paragraph 1), and the constitutional and legal provisions relating to fundamental rights must be interpreted and integrated in accordance with the Universal Declaration of Human rights.

Constitucionalisation of Family Law

Constitutional Review

The Constitutional Court reviews the constitutionality of laws, either by preventive means, or through a successive path (abstract and concrete) (art. 221.°, 223.°, 278 .°, 280.°, 281.° CRP). It consists of 13 judges, ten appointed by Parliament and three co-opted among them. Mandatorily its members comprise of six judges from other courts, and the others may be jurists of recognized merit (art. 222.° CRP).

Constitutional Court may assess the compatibility of norms of family law with constitutional rights and this had led to various reforms in family law.

Constitutional Protection of Family and Marriage

The Portuguese Constitution recognizes the family as "fundamental element of society" (art. 67.° (Family)), protecting it as an institution and imposing the duty of positively protecting it on the State and on society (MIRANDA and MEDEIROS 2010; COELHO and OLIVEIRA 2008). CRP consecrates the principle of subsidiary State intervention and imposes an obligation of State cooperation with the Family, in particular with the parents.

The Constitution does not present a definition of Family and it would be undesirable to do so: it refers to the Family as a reality which precedes any legal regulation. It contains, however, an idea about Family, in regards to its role and its importance, and therefore, it is not disinterested in the way it is presented in a social aspect and in the legal order of things. So, it is possible to find the contours of a "constitutional concept of Family", mainly from the combination of art. 36.°, 67.°, 68.° and 69.° CRP. Art. 36.° (Family, Marriage and Filiation), inserted in the Chapter of rights, freedom and personal guarantees, emphasizes the dimension of

Family freedom in relation to the State and of Family members' rights. The other provisions that were mentioned arise in economic, social and cultural rights content and face the Family in its social dimension as a recipient of affirmative protective action from the State (ANDRADE 2008).

It is commonly accepted that, from the set of constitutional provisions, Family, Marriage and Adoption constitute "institutional guarantees" as a result, so that an ordinary legislator is prevented from deleting or altering its essential features (MIRANDA and MEDEIROS 2010; XAVIER 2008, 2012). The constitutional protection of Family and Marriage does not end within the protection of liberty and individual autonomy of its members, which also involves the protection of its institutional dimension. It is also important to emphasize the non-discriminative principle towards children born out of wedlock, and the protection of maternity and paternity rights as eminent social values (art. 36.°, n.° 4, and 68.° CRP).

The Constitution does not expressly refer to non-marital partnerships, being understood that its constitutional protection results from the combination between the right to marry or not to marry (art. 36.°, n.° 1 CRP) and the right of personal development (art. 26 .°, n.° 1 CRP) (COELHO and OLIVEIRA 2008; CID 2005).

Public Family Law

Penal Code

The Penal Code contains a section regarding "crimes against the family", where crimes of bigamy, civil status falsification, kidnap of a minor and the refusal of alimony obligations are provided. Some punishments are aggravated when there is a family relation, kinship, affinity or adoption between aggressor and victim. Domestic violence is also a crime under Portuguese Penal Code and its punishment has increased. Adultery or incest have long ceased to be crimes of disruptive action within family relationships, they have now come to be exclusively associated with private morals.

Social Security

Family relations have great relevance in the context of the Social Security system, where benefits are expected to be awarded in certain situations that involve household expenses or loss of income, for example, in cases where there is a death of a spouse or unmarried partner.

Labor Law

Within Labor Law, there are some ways to protect maternity and paternity rights which include access to work protection; employment development (work expe-

rience, licenses, exemptions, absences to care for children and special working conditions for pregnant women); and in termination of employment contracts (CARVALHO 2004)

Tax Law

Under Tax Law, the Personal Income Tax (PIT) Code established a family taxation system, where the tax unit was the family and where some adjustments were made destined to avoid penalizing the family, however many consider these adjustments still occur in relation to couples with over three children. Despite the fact that article 67.°, paragraph 2, point *f*) of the Constitution, (which should be read in conjunction with article 104.°, paragraph 1), consecrates "the protection of the family as one of the important purposes of the tax system", families are still penalized on PIT. On the whole, it can be said that the system was unjust when looking at it from a household's expenses perspective. Strictly speaking, all families were unfavorably discriminated against when compared to single people without children. In regards to large families, this situation worsens, being that these families were unfavorably discriminated against even in comparison to single people with children or divorced people with depending children. In fact, on PIT, the situation and composition of families were not seen to, as they should be – even through constitutional requirement (NABAIS 1998). More specifically, it is due to the Constitution that there is a prohibition of unfavorable discrimination against married taxpayers or with children, compared to single or childless taxpayers. The 2015 Personal Income Tax Reform introduces a new family quotient (substituting the current marital quotient) that foresees the inclusion of children and, in some cases, ascendants with low income, to calculate the marginal tax rate that shall be applicable to the family. However, the benefits arising from the application of the family quotient, translated into a tax reduction, are limited.

Children Rights

The increasing number of known cases of abandonment, neglect and maltreatment of children and youth, together with the ethical and legal awareness concerning such situations, determined the emergence of legislation such as the "Law for the Protection of Children and Young People in Danger", under which Children and Youth Protection Commissions were created to intervene in this area. Such intervention, guided by the principle of the best interest of the child and, where possible, in respect of the family prevalence principle, should also favor measures to support the family. The United Nations Convention on the Rights of the Child and its direct applicability help to focus on children rights protection.

Substantive Family Law

Private Autonomy and Contractual Freedom

The principle of *Private autonomy* governs private law, however, its domain, par excellence, is the Contracts Law. In the field of contracts, the freedom to stipulate and conclude a contract is clearly manifested (choice of effects) (art.405.° CC). In relation to personal rights, private autonomy has its limits in respect of public order (art. 81.°, n.° 1 CC) and the free revocability of voluntary limitations to these rights (art. 81.°, n.° 2 CC) (COSTA 2013; LEITÃO 2013).

There have been increasing restrictions on the free rule of conformation in regards to contracts, due to a contract design dominated by ethical and social imperatives. Such restrictions are aimed at safeguarding the interests of the parties – namely, substantial justice in its relations – and collective values, such as the protection of public order principles and the facility and security of legal commerce (VARELA 2000; COSTA, M. 2009). Article 280.° CC formulates the validity requirements of the negotiation object that include no opposition to the law, public policy and *bona mores*. The reference to public policy and *bona mores* refers to a set of underlying principles subjacent to the legal system and to a set of ethical rules accepted by honest, upright persons, who act in good faith, in a given environment and at a certain moment (HÖRSTER 1992; CORDEIRO 2005; FERNANDES 2010; PINTO 2005). Article 281.° CC reaffirms the invalidity of a contract whose common goal for both parties is contrary to law, public policy or *bona mores*.

Article 282.° CC provides the invalidity of a legal transaction, where one party obtains excessive or unjustified benefits by exploiting a situation where the other party is suffering from a light state of mental dependency or a weakness of character.

To be referred to also the limits of enforceability of typical additional clauses, such as the term, condition or mode. It is forbidden to include term, condition or mode in certain contracts and acts such as marriage, filiation, inheritance acceptance. Illicit conditions are those contrary to law, public policy or *bona mores* (art. 271.° CC). Restrictive conditions of freedom are unlawful, such as the condition of residing or not residing in a certain place, cohabitating or not with certain people, making or not making a will, marrying or not marrying, etc . . . This illegality is also affirmed under the rules applying to will (articles 2230.°–2234.° CC) (VARELA and LIMA 1987; VASCONCELOS 2012).

Should also be mentioned the specific constraints that arise from restrictions stipulating the penal clause (art. 809.°–812.° CC), concerning the general prohibited contractual clauses and those relating to limited clauses and liability exclusions (Decree-Law n.° 446/85 of 25 October) (MONTEIRO (1985)).

A covenant of good faith and fair dealing applies throughout all (pre- and post) contractual phases. Good faith refers to rules of conduct which may consist within personal autonomy limits, or rather, limitations on the exercising of subjective rights, more specifically within the abuse of rights institute (art. 334.° CC), and the promotion of a set of protective obligations, loyalty and information in the field

of contract compliance, in accordance with the understanding of the complexity of the obligations (art. 762.°, n.°2 CC, the mandatory standard that embodies the prohibition of abuse of rights in terms of complying with obligations) (CORDEIRO 1984; MONTEIRO 1989; MARTINEZ 2001).

Private Autonomy and Family Law

Under Family Law, there is only the freedom to conclude a contract when regarding personal family acts that, when committed, trigger the imperative effects required by law. There is a marked predominance of mandatory standards, which reveals the inherent public interest in family relation discipline. Contents of each family relation are legally affirmed and cannot be changed by the respective subjects.

Portuguese law recognizes marriage – civil, catholic and under other religious order (art. 1587.°, 1615.°, b) CC). Civil marriage is a contract, verbal and solemn, concluded before three witnesses, one of which must be invested in public or religious authority (art. 1615.° and 1616.°CC).

In the case of marriage, any changes to the obligations and reciprocal conjugal rights under article 1762.° CC is considered non-valid (art.1618.°, n.° 2 CC). The law specifically prohibits the change of marital or parental rights in prenuptial agreements, any clause violating this prohibition is null and void (art. 1699.° CC). Standards concerning requirements for the form and substance of marriage, the proceedings and causes of divorce and separation of spouses and assets are also imperative.

The Portuguese Constitution consecrates the fundamental right to marry or not to marry. Thus, any legal restrictions on such rights must be necessary, appropriate and proportionate. Private Law however considers the condition to marry or not to marry illicit and also any restrictions on the right to marry or not to marry. A contract by which a person is self-limited in some aspect of that right would be considered invalid (art. 280.° CC). The law expressly shows that if the condition of marrying or not marrying is put forward in the will of an heir or successor it is considered invalid (art. 2233.° CC) (VARELA and LIMA 1992, 1995).

In cases where parties are obliged to live together, to have sexual relations, to mutually support each other financially and to be faithful, the contract is invalid. The inclusion of such obligations of a personal nature in contractual terms must be considered as a breach of *bona mores* (art. 280.° CC). To the extent where the assumption of these obligations are voluntary limitations of personal rights, it only implies an authorizing agreement, it is in fact non-binding, and even if any such provisions could be regarded as valid, it would never be enforced legally, nor would its failure to comply result in an obligation to pay compensation (CORDEIRO 2005).

The question is whether the obligations of a personal nature assumed by spouses or non-marital partnerships have consequences of a patrimonial nature, such as the recognition of the value of the work done at home and the caring of children. Since 1977, the CC recognizes this value in the context of marriage and the

contribution to the family economy. Each spouse should contribute in equal measure but to the extent of each spouse's possibilities, and can do so through the care of children and the home. This obligation has not been regulated through a judicially enforced contract. The contribution to family responsibilities assumes that an agreement between the spouses has been made, and depends on the circumstances of each spouse (art. 1671.° n.°2, and 1676.° CC). Authors that have studied these agreements – agreements on the orientation of family life – admit its legally binding nature, but do not consider judicial enforced compliance (ALBUQUERQUE 1986; COELHO and OLIVEIRA 2008; XAVIER 2000).

Whether spouses are obligated to pay a compensation to repay certain behaviors that match spousal obligations is still being questioned (XAVIER (2009)). The law expects the rights of a spouse to be compensated by the other on the grounds of excessive contribution. This compensational credit will only be payable in the event of divorce, and the quantity being determined by the Court (art. 1676.°, n.° 2 and 3).

Within a marriage, each spouse must provide for himself /herself financially after a divorce, although the possibility of one of the spouse's paying alimony is to be expected, in cases where one has possibilities and the other has needs (articles 2016. ° and 2004.° CC). The law determines alimony between former spouses through an agreement. The agreed alimony determined in the court order may at any time be changed or withdrawn in terms of circumstantial alteration. In regards to divorce, the law does not obligate a division of common property, if such exists, or even the presentation of a Ward. If there is division of common property between ex-spouses, then it obviously affects the necessity of alimony or not. However, the determination of alimony is independent of the division of marital assets.

The right to divorce is also a constitutionally protected fundamental right and is personal and indispensable. In 2008 a *no-fault grounds for divorce* system was consecrated. The exclusion of any legal cause for divorce is not permitted through contract. Some doctrine, however, considers the contractual clause inserted valid, for example, in the prenuptial agreement, which establishes a patrimonial penalty in the event of a spouse requiring a divorce or violating any reciprocal conjugal obligation (XAVIER (2000)). Nor is a contractual provision consent demand permissible from a family council for a divorce. The family council's authorization for divorce is only expected in the event that one of the spouse's is disabled. In this case, divorce proceedings can be presented through a legal representative with the family council's authorization; when the legal representative is the other spouse the claim may be presented by any relative related in the first degree until the 3rd degree in the collateral line, again only if authorized by the family council (article 1785.°, n.° 2, CC).

Legal parenthood, contents of parental responsibilities and proceedings are all imperatively established (art. 1878.°, 1901.°, 1910.°–1912.° 1906.° CC). Contractual *waivers* or *transfers* of parental responsibilities (as a whole or partially) are explicitly forbidden by law. Parental responsibilities are indispensable, non-transferable and imprescriptible (art. 1882.° CC). The same happens with the formation and effects of adoption (art. 1973.°, 1986.°–1988.°, 1994.°–2000.° CC). Portuguese law considers adoption as a child protection measure, under strict Court

control in the best interest of the child. As a rule, although the consent of the adopting parents is required, adoption is the result of a court decision. It is thus institutional rather than contractual.

Parents and Children

Legal Parenthood

The system for establishing filiation is reached from a factual reality – that is, the biological facts of paternity and maternity – within a legal reality. Birth, maternity and paternity are facts obligatorily subject to registration, under penalty of unatendability (articles 1.° and 2.° of the Civil Registration Code). Within the civil registry, the declaration of birth is an important moment in this system as it identifies who the father and mother are (art. 96.° and 97.° CRC).

The system for establishing filiation in the Civil Code is now oriented so that there are no missing birth records regarding paternity and maternity. The system follows the principle of biological truth that points to legal bonds reflecting biological bonds, in the assumption that this corresponds to private and public interest and, more specifically, is in the "best interest of the child " (a principle governing all of today's standards and criteria for all decisions concerning children).

Law does not allow "anonymous" childbirths: raising matters of maternity is to be expected in the case of a child's missing birth certificate, and maternity can be affirmed by a court sentence, regardless of the woman's will (art. 1808.° and 1814.° CC).

Regarding legal parenthood, raising matters of maternity and paternity are to be expected in the case of a child missing a birth certificate regarding one of those aspects (art. 1808. ° and 1874.° CC).

The default position in Portuguese legal system is that the *mother* is the (legally) female person who gave birth to a child: *mater semper certa est.* A legal presumption of paternity applies to the (legally) male husband of the mother at the time of the birth or of the conception of the child: *pater is est quem iustae nuptiae demonstrant*. He probably is the genitor of the child – in the light of the duty of fidelity, but the presumption of paternity is rebuttable (COELHO and OLIVEIRA 2006).

Law n.° 32/2006, of 26th July, regulates the so-called "artificial insemination" process (AI), and when these techniques do not involve the use of a third donor, paternity is legal established in general terms (with the presumption of paternity in favor of the husband of the mother, voluntary recognition or court recognition), however, valid consent is required for AI (under article 14. °). As for maternity, the mother is always the woman who gives birth. For situations of AI where there is donor assistance, there is a special scheme that dispenses biological derivation.

The legal bond of filiation can only be terminated by court order, with future adoption in sight. With this in mind, the law requires the consent of

the parental authority, except in cases expressly waivered by law. For example, in cases of abandonment, as appears in paragraph *c*) of n.° 2 of art.1978.° CC.

Parental Responsibilities

When legally established, parenthood has effects in relation to a minor that are designated as "parental responsibilities". In accordance to the Constitution and the Civil Code, parents have rights and obligations in regards to their children to which they cannot be separated from, unless for failure to comply motives of said responsibilities, and always according to a judicial decision (art. 36 .° , n.° 6 CRP, 1978.° and 1787.° CC). The rights and obligations that integrate parental responsibilities should be exercised in the best interest of the child. The law does not present a contract on the ownership of parental responsibilities. Parental responsibilities are considered unavailable by law and doctrine, or rather, they cannot be foregone and are non-transferable (article 1882.° CC). Delegation of said parental responsibilities is possible through a unilateral act that assumes what is close in nature to that of a mandate (SOTTOMAYOR 2003).

The default position is the attribution of parental responsibilities to the legal parents (both father and mother). This attribution is guaranteed by the Constitution. and stripping from parental responsibilities is under strict scrutiny by the courts.

If they do not live together or in the case of separation, divorce or annulment of marriage there is a court procedure for the regulation of parental responsibilities. In the case of divorce or separation by mutual consent (by means of an administrative process), it is possible to reach an agreement between the parents regarding parental responsibilities, the residence of the child and the alimony due (art. 1775. ° CC), but this agreement is subject to a favorable judgment from the Public Ministry's prosecutor and the administrative authority's approval in having jurisdiction to decree the divorce, and who also desire the same objective which would be in light of the best interests of the child (art. 1776 °–A and 1778.° CC). It is not possible to transfer the ownership of parental responsibilities, nor terminate said responsibilities with a contract.

The law does not expect a concluded contract with the insight of establishing commitments relative to specific aspects of a child's education, effective in the event of divorce or separation of the parents, for example. The commitment of such contracts, if concluded, may not be required in Court. It may only be a relevant factor for a Court decision for parental responsibilities or for an amendment, or for example, for demonstrating the previously established routines. If there is a written agreement, for example, a prenuptial agreement before there were even children, this agreement can be freely revocable and compliance is not legally enforced. The same applies if such agreement is made at the time of divorce or separation. Matters affecting the education of a minor should be subject to decisions made in accordance with the parents, when both are exercising parental responsibilities, in the interests of the children and in presence of concrete circumstances (art. 1901.°, 1885.° and

1886.° CC). For situations where there is a lack of agreement, Court intervention is expected, if requested, and a child hearing is held (art. 1901.°, 2.° CC).

Parents can always petition the court to review their arrangements in the light of changed circumstances or, even without changed circumstances, in the best interest of the child.

If such contracts prevail in the future, with the possibility of non-marital partnership ruptures, separation or divorce, the fulfillment of this commitment is not enforceable in court and may only be a relevant factor to demonstrate the routines established previously (SOTTOMAYOR 2014).

Partners

Formation

Portuguese law recognizes non-marital partnerships, subject to certain conditions (Law n.° 7 /2001 of 11th May). A non-marital partnership is essentially two people cohabiting in similar conditions to that of marriage for more than 2 years (this being as long as there is no kinship between them in the first degree, in a direct or collateral affinity, or one or both are married and not separated of spouses and assets). It is necessary that at least one of them invoke the non-marital partnership title to qualify for legal protection under the law.

Content

This type of union does not generate a marital status nor is it foreseen to be registered in the future. Members of this union do not have reciprocal legal rights or obligations, the rights and obligations assumed are only of a moral nature. However, members of this union are eligible for almost all social and labor rights awarded to married couples, as well as protection of the house they both cohabit, this being in the case of a rupture or in the event of a death of one of them. There are no differences in the legal system with regards to children born to a married couple or people living in a non-marital partnership in what concerns parenthood or in what concerns the exercising of parental responsibilities.

Members who live in an unmarried union are not legally obliged to fulfill reciprocal obligations; doctrine states, however, that they can enter into a "cohabitation agreement" within a patrimonial content, so as to affirm a fixed value of contribution from each spouse and a division of property or income (COELHO & OLIVEIRA 2008; CID 2005).

Dissolution

Within the framework of non-marital partnership, the unilateral rupture is free, and does not even have to be decreed by a court, each partner's personal decision is sufficient, unless he/she wishes to enforce rights against a third party or the other partner (art. 8.°of Law n.° 7/2001 of 11th May).

In the context of non-marital partnership there are no alimony rights in the event of a rupture. There are no rules provided for division of assets.

Procedural Family Law

Legal Framework of ADR

Within Portuguese law, the principle is the monopoly of justice administration by state courts. However, nowadays the Justice Administration System integrates "alternative" means of dispute resolution (ADR). The system allows a *pre-court mediation* and *endo-trial mediation*. Law n. ° 29/2013 of 19th April sets out the general principles applicable to mediation conducted in Portugal, as well as private and commercial legal mediation systems, mediators and public mediation. Article 9.° establishes the principle of enforceability of the mediation agreement and the lack of necessity for court approval, provided that certain conditions are fulfilled, namely: that the agreement concerns a dispute that may be subject to mediation and for which the law does not require court approval; that the parties have capacity to conclude the agreement, that the agreement has been obtained from mediation conducted in accordance with the law; that its content does not violate public policy.

With regard to private and commercial mediation, articles 13.° and 14 .° refer to *pre – court mediation*, or rather, the possibility for parties to use mediation even before introducing a cause in court and requiring judicial approval in accordance that eventually it will be obtained in this way. The court approval aims to verify whether the agreement complies with the dispute which may be subject to mediation, whether the parties are able to conclude such agreements, whether compliance with general principles of law, good faith and public order are being kept, and being that the judge has the power to refuse approval and remit the agreement to the parties and submit a new agreement approval within a 10-day time limit (article 14.°, n.° 3 and n.° 4).

Within the Code of Civil Procedure (CPC), the possibility of parties resorting to mediation services at any stage of the proceedings, as determined by the judge or joint option, with a suspension in the proceedings for a period not exceeding 6 months (endo – procedural mediation) is planned expressly and in general character. Article 273.° states that the court may determine the remittance of a case to mediation at any stage of the proceedings, as long as there is no opposition from either party (paragraph 1). The parties may also jointly elect to resolve the dispute

by mediation, according to the suspension of proceedings (n.° 2). The suspension in proceedings can be verified without a court order, and through the communication from any party's use of mediation system (n.° 3). Checking up on the impossibility of a mediation agreement, the mediator informs the court thereof, preferably electronically, ceasing the proceedings automatically and without any act necessary from the judge or the secretary, (n.° 4). If agreement is reached, it is referred to the Court, preferably electronically, following the terms established by law for the approval of mediated agreements (n.° 4). Article 45.° of Law n.° 29/2013 states that the concluded mediation agreement will only become enforceable if homologated by court.

The system allows voluntary arbitration, which is now regulated by Law n .° 63/2011, of 14th December (the Voluntary Arbitration Law). In article 1.° thereof, this law refers to the arbitration agreement which must always be stated in writing (article 2.°, n.° 1). Through the arbitration agreement, parties in dispute concerning the interests of a patrimonial nature – or a dispute which although not involving interests of a patrimonial nature is however possible to conclude regarding the rights involved – conclude a written agreement through arbitral decisions (art. 1.° , n.°1 and 2, and art. 289.° CPC). A current dispute can be in process, having already been processed in a Judicial Court and, if so, is referred to as an arbitral compromise (articles 1.° n.° 3, and 290.° CPC), or eventual litigations arise from a certain legal contractual or extra-contractual relationship (arbitration clause) (article 1.°, n.°3). When the arbitration agreement is valid, the decision on the issue is subtracted from the courts, even if initially submitted to the courts, even when the sentence is not subject to appeal through the state court, this always being the case when parties have not expressly foreseen such a possibility and when an agreement has been determined by the arbitrators according to equity. With regard to the constitution of the Arbitral Tribunal, the arbitration agreement may designate an Institutionalized Arbitration Centre or refer to an Arbitration Tribunal constituting *ad hoc* (SILVA 2009; GOUVEIA 2014).

Family Mediation

The law assumes that ADR techniques are applicable in the context of disputes arising under Family Law (Family Mediation). The general principles of mediation are embodied in Law n.° 29/2013 of 19th April (articles 3.°–9.°) and apply to family mediation, although it is expressly excluded from the scope of law laid down therein (art. 10.°).

Subjective personal family rights cannot be the object of a legal transaction, although the procedural law allows and promotes the conclusion of agreements in the context of divorce and legal separation of spouses and assets. Before starting divorce proceedings, the civil registry office or the court must inform the spouses about the existence and objectives of family mediation services (art. 1774.° CC). In the context of the regulation of parental responsibilities, the law also allows the

court to determine the intervention of public or private mediation at any stage in the proceedings (art. 147.° – D, Decree – Law n.° 314/78 of 27th October). If contractualised the spousal obligation agreement obtained through ADR techniques is not enforceable by law, unless it is homologated by court (XAVIER 2010).

Arbitration has no place in matters of family law (non-patrimonial)

Court Scrutiny

A former spouse may lose the right to an agreed alimony if he/she is no longer in need of such alimony; if he/she remarry; if he/she lives in consensual union; or if he/she becomes unworthy of said alimony due to his/her moral conduct (art. 2019.° CC). An agreement is not valid whereby a person waives their right to alimony for the future, nor can it be ceded; if an agreement is concluded with this content it will be considered invalid; the only thing that can be waivered are the payments already due but not yet paid (art. 2008.° CC).

The best interest of the child is the criterion that should guide all parental decisions regarding minors. The parental responsibilities agreement is not only previously assessed in light of this interest, as it may be amended at the request of either parent if it fails to match this interest. The court may modify agreements, obviously at request of a parent. Agreements can also be modified if initiated by a Public Ministry prosecutor, this in the understanding that the child is in danger.

So that compliance may be requested, agreements achieved between spouses in the process of divorce or separation of spouses and assets obtained through family mediation need to be subjected to administrative or judicial control (court approval or homologation) in order to check that the interests of both parties are duly protected. The agreement relative to parental responsibilities obtained in the context of a process of regulation of parental responsibilities through family mediation will be presented to a judge who will approve the agreement after reviewing it in the light of the best interest of the child.

The decisions of arbitral tribunals need not be ratified or approved by the State Court.

The resolution of family disputes by means of an agreement is not to be expected outside the context of allowed ADR techniques.

Agreements between family members relating to personal rights are void, without there even being a need for a proposal to put a procedure into action. Only contracts with a patrimonial content will be valid. The agreements that are valid are approved by court decision, being that the possible situation of inequality within positions being allegedly controlled. The possibility of a contract annulment based on unequal bargaining positions may only arise in relation to contracts with purely patrimonial content, which is of no interest to our study.

Agreements between family members that have been approved by a court decision may at any time be amended, by the Court, at the request of a party, on the grounds of changes of circumstances that result in unfair results.

Conclusions

There is a *numerus clausus* of family relations and formation and dissolution of family relations are regulated by imperative norms.

We cannot identify a trend towards contratualisation of family law in Portugal. In fact, state intervention in family relations is increasing mainly regarding children protection, criminalisation of domestic violence and social security protection of cohabitants. The best interest of the child is the criterion that should guide all parental decisions regarding minors so agreements on parental responsibilities are under strict scrutiny. Domestic contracts and family pacts have no binding effect. Nevertheless family mediation is encouraged as well as divorce or separation settlements.

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Chapter 13
Perspective roumaine sur la contractualisation du droit de la famille

Marieta Avram and Cristina Mihaela Nicolescu

Abstract In the Romanian legal system, the Constitution contains several general principles that can be considered directive for family relationships. The latter are further regulated in Book II. Family, of the Civil Code, which Book entered into force in 2011. The current legislative trend in Romanian family law is one in the direction of more flexibility. Without denying the social dimension of the family, as evidenced by several imperative norms, private autonomy plays a more important role, which is highlighted in this chapter.

Chapitre 1: Aperçu Général

La position du Droit de la Famille dans le Système Juridique Roumain

Dans le système juridique roumain, la Constitution consacre quelques principes généraux – de vraies lignes directrices qui dirigent les relations familiales.

L'article 26 alinéa 1 prévoit, pour les autorités publiques, l'obligation de respecter et de protéger la vie familiale, l'article 48 institue les principes généraux qui sont le fondement du droit de la famille,[1] l'article 49 fixe les principes qui établissent le cadre du régime spécial de protection et d'assistance des enfants et des jeunes, tandis que le droit de succession est garanti par l'article 46.

[1] Le principe du mariage librement consenti entre les conjoints, ainsi que celui d'égalité des époux, le droit et le devoir des parents d'assurer la croissance, l'éducation et l'instruction des enfants, le principe selon lequel les enfants sont égaux devant la loi, qu'ils soient nés d'un mariage ou hors mariage.

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La loi-cadre qui régit les relations de famille est le Code civil, adopté par la Loi n° 287/2009, entrée en vigueur le 1er octobre 2011 – Livre II « De la famille » (art. 258 – art. 534).[2] La loi n° 71/2011, de mise en application du nouveau Code civil roumain, a abrogé l'ancien Code de la famille, adopté le 1er février 1954 après l'instauration du régime communiste en Roumanie.

Tendances d'Evolution

En Roumanie, les tendances actuelles de l'évolution législative en matière familiale vont dans le sens de l'établissement d'un *droit plus souple*, de telle sorte que, sans nier la dimension sociale de la famille, mise en évidence par l'existence des normes impératives, la volonté individuelle joue un rôle plus important en ce qui concerne les rapports de famille (Avram 2013, 17).

Chapitre 2: Contractualisation sur le Plan du Droit Matériel des Familles

Résumé Les droits et les devoirs parentaux, ayant caractère personnel – non patrimonial et étant régis par normes impératives, sont inaliénables, ne pouvant pas être transférés par voie contractuelle. Les accords entre les parents sur l'exercice de l'autorité parentale ou sur la prise d'une mesure de protection de l'enfant sont permis, mais ils doivent être autorisés par le tribunal de tutelle lequel doit certifier qu'ils respectent l'intérêt supérieur de l'enfant – art. 506 C.civ.

Hors mariage entre un homme et une femme, le Code civil roumain ne permet aucune autre forme de mariage ou de partenariat enregistré, soit entre personnes de sexe opposé soit entre personnes de même sexe. Dans le contexte de l'examen de la liberté matrimoniale, dans la doctrine juridique roumaine on a parlé des soi-disant limites conventionnelles de la liberté matrimoniale sous la forme des clauses de célibat, dont la validité dans un acte juridique est controversée. Le Code civil a constitué l'opportunité d'une réforme profonde de l'institution du divorce en droit roumain. L'accent se met sur le divorce par accord des époux, encouragés à faire appel à une solution à l'amiable, autant que possible, pour tous les problèmes accessoires à la dissolution du mariage.

[2] Après l'adoption, en 2009, du Code civil roumain, l'Institut Juriscope de Poitiers et la Faculté de droit de l'Université de Bucarest ont pris l'initiative de le traduire en français. Le Code ainsi traduit a été publié aux prestigieuses éditions Dalloz au printemps 2013.

Considérations générales

Selon l'article 1169 C.civ. "Les parties sont libres de conclure tout contrat et de déterminer son contenu, dans les limites imposées par la loi, par l'ordre public et les bonnes mœurs".

Dans la doctrine, on distingue entre *l'ordre public politique ou classique* et *l'ordre public moderne ou économique*. La première inclut les normes qui protègent l'Etat, la famille et l'individu. L'ordre public moderne comprend le groupe de normes qui se propose d'encourager les nouvelles réalités juridiques, tant que celles-ci résultent des changements économiques et sociaux intervenus (Popa 2012, 65 *et seq.*). En ce qui concerne les bonnes mœurs, celles-ci désignent la totalité des règles de conduite qui se sont dessinées dans la conscience de la société et dont le respect a été nécessaire, par une expérience et pratique de longue durée (Popa 2012, 69).

Les normes qui protègent la famille (en principe, les réglementations consacrées aux relations personnelles des époux, aux rapports entre les parents et les enfants, ainsi que les normes en matière successorale, dont le but et celui de préserver le patrimoine de la famille, par le biais de la réserve successorale) font partie de la sphère de l'ordre public politique (classique).

En application de l'ordre public en matière des conventions matrimoniales, l'article 332 alinéa 2 C.civ. prévoit qu'on ne peut porter atteinte à l'égalité entre les époux, ni à l'autorité parentale, ni à la dévolution successorale légale. En général, par la convention matrimoniale on ne peut pas modifier les effets légaux extrapatrimoniaux du mariage, car la compétence exclusive appartient au législateur.

Sur le plan de l'autorité parentale, selon l'article 36 alinéa 6 de la Loi n° 272/2004,[3] *aucun des parents ne peut renoncer à l'autorité parentale*, mais il peut s'entendre avec l'autre en ce qui concerne la modalité d'exercice de l'autorité parentale, dans les conditions de l'art. 506 C.civ. Dans les cas où la loi permet différents accords entre les parents concernant l'exercice des droits et/ou l'exécution des obligations parentales, ceux-ci doivent être conformes à l'intérêt supérieur de l'enfant ; dans le cas contraire, ils seraient "censurés" par le tribunal des tutelles.

Le principe de l'intérêt supérieur de l'enfant constitue le principe dominant qui assure le respect et la garantie des droits de l'enfant dans chacune de ces hypothèses. Toute mesure relative à l'enfant doit être prise dans le respect de ce principe fondamental, quel que soit son auteur (instances judiciaires, autorités publiques ou organismes privés)–art. 263 C.civ. ; art. 2 de la Loi n° 272/2004.

Comme la notion d'ordre public, celle de bonnes mœurs a des contours variables, étant soumise à une évolution permanente, en rapport avec les évolutions des standards de moralité. Ainsi, en ce qui concerne la validité des contrats conclus entre les concubins, la jurisprudence traditionnelle stipulait que ce type de contrats était frappé de nullité absolue, pour cause immorale et illicite (Cour Suprême de

[3]Relative à la protection et à la promotion des droits de l'enfant (republiée au Journal Officiel n°159 du 5 mars 2014).

Justice, arrêt n° 39, 13 juin 1994). Il était considéré que la plupart des contrats cachent une intention illicite–le début, l'entretien ou la reprise des relations de concubinage (Popa 2001). Mais la pratique judiciaire récente semble se retirer de la ligne classique (Cour d'appel Piteşti, Chambre civile, conflits de travail et assurance sociale, mineurs et famille, jugement n° 26, 22 janvier 2007).

Parents et Enfants

Aspects généraux concernant l'autorité parentale dans le système juridique roumain

Selon l'art. 483 C.civ., "L'autorité parentale est l'ensemble des droits et des devoirs qui concernent tant la personne que les biens de l'enfant et qui appartiennent également aux deux parents." Les droits et les devoirs parentaux ne sont pas différents en fonction de la modalité de leur exercice, à savoir l'accomplissement par les parents du mariage, les parents hors mariage (envers lesquels la filiation a été établie selon une des modalités prévues par la loi) ou les parents adoptifs.

Du point de vue du contenu, la notion d'autorité parentale désigne la totalité des droits et des devoirs reconnus aux parents dans le but d'assurer les conditions nécessaires à l'entretien, à l'éducation et à la formation pour la vie de l'enfant, avec la précision importante que les droits parentaux ne sont conçus qu'aux fins de l'accomplissement des devoirs, en représentant des véritables moyens de réalisation de l'autorité parentale (Filipescu and Filipescu 2006, 617). Le contenu de l'autorité parentale est configuré par les articles 487–502 C.civ., qui détaillent le "portefeuille" des droits et des devoirs parentaux, dont la physionomie est complétée par les articles 9–53 du Chapitre IIème "Les droits de l'enfant" de la Loi n°. 272/2004.

L'autorité parentale s'exerce jusqu'à la date à laquelle l'enfant acquiert la pleine capacité d'exercice, à savoir : quand il a atteint l'âge de 18 ans, par mariage ou par émancipation.[4]

La responsabilité pour l'éducation et l'assurance du développement de l'enfant incombe, d'abord, aux parents, la responsabilité de la collectivité locale étant subsidiaire et l'intervention de l'État complémentaire. Pour les situations dans lesquelles la protection du mineur à travers les parents n'est pas possible ou désirable, la législation offre des solutions alternatives, à savoir l'institution de la tutelle, les mesures de protection spéciale prévues par la Loi no. 272/2004 (le placement, le placement en régime d'urgence, la surveillance spécialisée) et l'adoption.[5]

[4] Selon l'art. 40 C.civ., "Pour motifs bien-fondés le tribunal de tutelle peut reconnaître au mineur qui a atteint l'âge de 16 ans la pleine capacité d'exercice. Dans ce but, les parents ou le tuteur du mineur seront écoutés et, le cas échéant, l'avis du conseil de famille sera obtenu."

[5] Art. 44 de la Loi no. 272/2004.

Le choix du type d'enseignement ou de la formation professionnelle est qualifiée par le législateur comme une décision importante pour la vie de l'enfant qui requiert l'accord des deux parents dans la situation dans laquelle l'autorité parentale s'exerce en commun, indifféremment du fait que les parents vivent ensemble ou séparés–art. 36 par. 3 de la Loi no. 272/2004.

Indubitablement, les accords des parents ayant pour objet le choix du type d'éducation que l'enfant recevra, de l'école à laquelle il sera inscrit (par exemple, dans le système public ou privé), des activités extrascolaires (artistiques ou sportives), en fonction des capacités de l'enfant etc. sont permis. Ces décisions des parents produisent des effets dans la sphère juridique de l'enfant, mais celui-ci n'est pas un tiers absolu, parce que la législation consacre le droit de l'enfant d'être associé aux décisions qui le regardent, en fonction de l'âge et de son degré de maturité – art. 483 par. 2 C.civ. En plus, selon l'art. 498 C.civ., l'enfant qui a accompli l'âge de 14 ans peut demander aux parents de changer le type d'enseignement ou de formation professionnelle qu'il reçoit et, en cas d'opposition des parents, l'enfant peut saisir le tribunal de tutelle.

Selon les dispositions générales de l'art. 496 par. 2 C.civ., si les parents ne vivent pas ensemble, ils déterminent, conjointement, *la résidence de l'enfant*, sans que l'accord soit soumis au filtre du tribunal. Les parents peuvent tomber d'accord sur le fait que le mineur vive avec l'un d'entre eux ou même avec un tiers. Le droit des parents à établir la résidente de l'enfant est opposable à celui-ci et aux tiers, avec la précision que, dans les conditions de l'art. 498 par. 1 C.civ., le mineur qui a accompli l'âge de 14 ans peut demander aux parents de changer de résidence si cela est nécessaire pour parachever ses études ou sa formation professionnelle.

En cas de divorce judiciaire, le tribunal peut prendre acte de l'accord des parents sur la résidence de l'enfant, si à son avis est en consonance avec l'intérêt supérieur de l'enfant – art. 400 par. 1 C.civ.

En cas de divorce consensuel par procédure notariale, l'accord des époux sur la détermination de la résidence des enfants après le divorce est une condition d'admissibilité de la demande, le rapport d'enquête sociale devant certifier que l'accord des parents respecte l'intérêt de l'enfant. Autrement, le notaire public émet une disposition de rejet de la demande de divorce et conseille les époux à s'adresser au tribunal – art. 375 par. 2 corroboré par l'art. 376 par. 5 C.civ.

Selon l'art. 497 par. 1 C.civ., "S'il a des effets sur l'exercice de l'autorité ou de certains droits parentaux, le changement de la résidence de l'enfant, avec le parent auprès duquel il vit, ne peut avoir lieu qu'avec l'accord préalable de l'autre parent." La disposition a vocation générale d'application, sans distinction entre le fait que les parents sont mariés ou non, ou soient séparés ou divorcés.

Détermination de la filiation

Dans le système juridique roumain les modalités pour la détermination de la filiation sont régies par normes impératives, toute détermination contractuelle étant exclue.

Selon l'art. 408 C.civ., la filiation envers la mère résulte du fait de la naissance, elle peut être établie aussi par reconnaissance ou par décision judiciaire; la filiation envers le père du mariage s'établit par effet de la présomption de paternité,[6] et l'enfant hors mariage peut établir sa paternité par reconnaissance ou par décision judiciaire, selon le cas.

L'accouchement dans l'anonymat n'est pas régi, mais en pratique il existe des cas d'abandon de l'enfant aux centres médicaux ou des situations dans lesquelles l'accouchement n'a pas eu lieu dans ces centres médicaux. Si suite aux vérifications effectuées par les autorités compétentes l'identité de la mère ne peut être établie, l'enfant est enregistré dans le registre de l'état civil comme né de parents inconnus. Théoriquement, dans cette hypothèse, toute femme peut reconnaître l'enfant [art. 415 par. 1 C.civ.] par un acte juridique unilatéral, mais, selon l'art. 420 par. 1, la reconnaissance qui ne correspond pas à la vérité peut être contestée n'importe quand et par toute personne intéressée.

Pour la première fois dans la législation roumaine le Code civil a introduit une série de textes relatifs à la *reproduction humaine médicalement assistée avec tiers donneur* (art. 441–447).

Selon l'art. 441 par. 1, aucun rapport de filiation ne peut être établi entre le donneur et l'enfant conçu de cette manière, un corrélatif indispensable du principe de la confidentialité des informations en matière.

La condition essentielle pour le recours à toute technique de reproduction médicalement assistée avec tiers donneur est l'existence du consentement de chacun des parents, à savoir de la future mère et du futur père qui constituent un couple marié ou non marié ou, selon le cas, de la femme seule qui désire devenir mère (Florian 2012, 485). Le consentement doit être préalablement exprimé, dans des conditions assurant sa pleine confidentialité, devant un notaire public qui leur explique, expressément, les conséquences de leur action relative à la filiation. Selon l'art. 442 par. 2, "Le consentement reste sans effets en cas de décès, de formulation d'une demande de divorce ou de séparation de fait, survenue avant le moment de la conception réalisée dans le cadre de la reproduction humaine médicalement assistée. Il peut être révoqué à tout moment, par écrit, y compris devant le médecin appelé pour la reproduction avec tiers donneur."

Sans être expressément prévu par la loi, l'obligation du titulaire du consentement de devenir le parent légal de l'enfant conçu par cette technique médicale en découle. Mais le consentement de soi à soi-même ne provoque aucun rapport de filiation, et ne représente qu'une prémisse.

Dans le cas de l'enfant né dans le cadre du mariage, la filiation envers le mari de la mère est établie par l'activation de la présomption de paternité, ayant comme fondement "la volonté à procréer" exprimée par le consentement donné. La négation d'un lien de paternité de la part du mari de la mère est possible seulement s'il n'a

[6] Selon l'art. 414 par. 1 C.civ., "L'enfant né ou conçu pendant le mariage a comme père le mari de la mère."

pas consenti à la reproduction médicalement assistée avec tiers donneur ou lorsque l'enfant n'a pas été conçu de cette manière.

Quant à l'enfant hors mariage, le consentement préalable de l'homme n'est pas suffisant pour établir le rapport de filiation, en étant nécessaire la reconnaissance de l'enfant. Sinon, on peut engendre la responsabilité de l'homme qui refuse de reconnaître l'enfant (art. 444). La paternité sera établie par voie judiciaire, le tribunal en prenant seulement acte de l'existence et de la validité du consentement, ainsi que de l'identité de l'enfant.

Dans le Code civil il n'y a aucune disposition légale relative au soi-disant "contrat de maternité",[7] en pratique le principe selon lequel la maternité se fonde sur le fait de la naissance s'applique ; dès lors, du point de vue juridique, seule la femme qui a accouché de l'enfant, peut être considérée mère. Une convention ayant pour objet la grossesse ou la procréation pour autrui est frappée de nullité absolue, parce que, quoiqu'elle ne soit pas interdite *in terminis* par la loi, elle rentre dans le périmètre des limites de la liberté à contracter, avec la violation de deux principes fondamentaux d'ordre public: le principe de l'indisponibilité du corps humain (du point de vue de la mère porteuse et de l'enfant qui deviendrait "un bien dans le circuit civil") et le principe de l'indisponibilité de l'état civil (la filiation d'une personne est établie selon la loi, et ne peut faire l'objet des stipulations contractuelles).[8]

En tant qu'opération juridique complexe, *l'adoption* suppose cumulativement la manifestation de volonté des personnes prévues par la loi et un acte d'autorité (décision judiciaire). Au-delà des controverses exprimées dans la doctrine roumaine sur la nature juridique de l'adoption (Avram 2013, 439),[9] sans doute, la simple manifestation de volonté des personnes appelées à consentir à l'adoption n'est pas suffisante pour créer des rapports de filiation et de parenté civile.

Ainsi, l'adoption doit être consentie par le tribunal de tutelle, lequel effectue un véritable contrôle de légalité et d'opportunité, en admettant la demande "seulement si, sur le fondement des preuves administrées, il est convaincu que l'adoption est dans l'intérêt supérieur de l'enfant" – art. 51 par. 1 de la Loi no. 273/2004 relative à la procédure de l'adoption, republiée.

[7]Selon le modèle du Code civil français, le projet du Code civil a prévu au début que toute convention sur la procréation ou la grossesse pour un autre est nulle, mais, dans le cadre des débats parlementaires, parce qu'on n'a pas abouti à un consensus, le texte a été éliminé.

[8]Des solutions jurisprudentielles isolées peuvent aussi être identifiées, dans lesquelles les tribunaux, sans mettre en discussion le caractère licite ou illicite de ces conventions, ont établi le rapport de filiation envers le couple bénéficiaire (duquel le matériel génétique provenait). On a apprécié que l'omission volontaire de la réalité biologique dévoilée par les preuves (l'enfant avait été soigné par les parents bénéficiaires immédiatement après la naissance), en donnant priorité à l'application formaliste des normes juridiques, contrevient à l'intérêt supérieur du mineur protégé par l'art. 8 C.E.D.H.

[9]Le Code civil roumain de 1864 régissait l'adoption sous la forme d'un contrat solennel, conclu entre l'adoptant et l'adopté.

Un des principes fondamentaux qui doit être respecté obligatoirement pendant la procédure d'adoption est celui de garantir la confidentialité en ce qui concerne l'identité de l'adoptant et des parents naturels. Un reflet de ce principe est transposé dans l'art. 68 par. 2 de la Loi no. 273/2004, republiée: "Les adoptants et l'adopté ont le droit d'obtenir de la part des autorités compétentes des extraits des registres publiques dont le contenu atteste le fait, la date et le lieu de naissance, mais qui ne dévoilent expressément ni l'adoption ni l'identité des parents naturels."

Une autorité parentale peut-elle être attribuée par voie contractuelle?

Les droits et les devoirs parentaux, ayant caractère personnel – non patrimonial et étant régis par normes impératives, sont inaliénables, ne pouvant pas être transférés par voie contractuelle.

Les accords entre les parents sur l'exercice de l'autorité parentale ou sur la prise d'une mesure de protection de l'enfant sont permis, mais ils doivent être autorisés par le tribunal de tutelle lequel doit certifier qu'ils respectent l'intérêt supérieur de l'enfant – art. 506 C.civ. La doctrine a pu considérer (Avram 2013, 156) que, bien que la règle générale soit qu'après le divorce l'autorité parentale revienne en commun aux deux parents, le tribunal peut prendre acte de l'accord des parents selon lequel l'autorité parentale sera exercée par l'un d'entre eux. Évidemment, un tel accord sera autorisé seulement s'il est dans l'intérêt supérieur de l'enfant, aspect qui doit être analysé dans un cas comme dans l'autre.

Dans les situations spéciales la délégation partielle et temporaire des droits et des devoirs parentaux à un tiers est consentie (d'habitude, dans le cadre de la famille élargie), mais l'accord de volonté qui intervient (parents – personne déléguée) constitue seulement les prémisses de la délégation de l'exercice de l'autorité parentale, laquelle est disposée par le tribunal de tutelle, suite au contrôle de légalité et d'opportunité.

Par exemple, les parents qui doivent partir travailler à l'étranger sont tenus à communiquer cette intention au service public d'entraide sociale compétent pour leur domicile, 40 jours au minimum avant de quitter le pays, la communication devant contenir la désignation de la personne qui s'occupe de l'entretien de l'enfant pendant l'absence des parents – art. 104 de la Loi no. 272/2004. Le tribunal dispose de la délégation temporaire de l'autorité parentale sur la personne de l'enfant, pendant l'absence des parents, mais pas plus d'un an, à la personne désignée,[10] cette dernière donnant son accord personnellement, devant la juridiction.

Une autre situation qui peut être évoquée est la désignation du tuteur par le parent. Selon l'art. 114 C.civ., le parent peut désigner, par acte unilatéral ou par contrat de mandat, conclus sous forme authentique, ou, selon le cas, par testament, la personne qui sera nommée tuteur de ses enfants. La désignation faite dans ces conditions peut

[10]Selon l'art. 105 par. 1, la personne désignée doit faire partie de la famille élargie, avoir 18 ans au minimum et satisfaire les conditions matérielles et les garanties morales nécessaires à l'éducation et à la garde d'un enfant.

être révoquée n'importe quand par le parent, même par un acte sous seing privé. Il faut noter que l'acte juridique de désignation du tuteur ne produit pas des effets immédiats, il est touché par une condition suspensive, consistant dans l'apparition d'une des situations visées à l'art. 110 C.civ. qui impose l'institution de la tutelle du mineur (décès des parents, déchéance de l'autorité parentale, mise sous interdiction etc.).

La cessation des rapports de filiation par voie contractuelle est-elle possible?

Les aspects relatifs à la cesse des rapports de filiation sont régis par normes impératives, qui se trouvent au-delà du périmètre de la liberté de contracter. Les droits parentaux sont en même temps des obligations – droits fonctions, dont l'exercice est obligatoire.

L'art. 36 par. 6 de la Loi no. 272/2004 statue expressément qu'un parent ne peut pas renoncer à l'autorité parentale, une abdication irrévocable *de iure* des droits et des devoirs parentaux n'étant donc pas permise.[11]

Dans le cas de la tutelle, l'art. 120 par. 2 C.civ. énonce de manière limitative les situations qui permettent au tuteur de refuser de continuer la tutelle,[12] mais ces circonstances doivent être constatées par le tribunal de tutelle qui décidera d'urgence le remplacement du tuteur. On peut observer que le renoncement à la tutelle ne suppose pas un transfert des droits parentaux par voie contractuelle.

Dans le cas de l'adoption nous ne sommes pas non plus en présence d'un transfert de ce genre, malgré l'effet extinctif qu'elle provoque sur les rapports de parenté biologique et l'effet constitutif sur l'adoptant et sa famille.[13] Par conséquent, les effets de l'adoption se produisent en vertu de la décision judiciaire qui l'autorise et seulement après la date à laquelle la décision est devenue définitive.

Une situation spéciale est l'adoption de la personne majeure, cas dans lequel le consentement des parents naturels n'est plus nécessaire. Dans une telle hypothèse, par la simple manifestation de volonté de l'adoptant et de l'enfant majeur (censurée, il est vrai, par la juridiction) on peut déterminer la cessation de tous les droits et devoirs auxquels les rapports de filiation sont susceptibles à donner naissance (droits des successions, obligation alimentaire etc.).

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[11] Certainement, dans les cas isolés et infortunés un parent peut abandonner son enfant, ce qui peut avoir la signification d'un renoncement *de facto* aux droits et aux devoirs parentaux.

[12] Selon ce texte, "Peut refuser la continuation de la tutelle: (a) celui qui a accompli 60 ans; (b) la femme enceinte ou la mère d'un enfant qui a moins de 8 ans; (c) celui qui entretien et éduque 2 ou plusieurs enfants; (d) celui qui, à cause de la maladie, de l'infirmité, du type d'activités déroulées, de la distance du domicile du lieu où les biens du mineur se trouvent ou à cause d'autres motifs fondés, ne pourrait plus accomplir cette tâche."

[13] Conformément à l'art. 470 par. 1 et 2 C.civ., "(1) L'adoption établit la filiation entre l'adopté et l'adoptant, ainsi que les rapports de parenté entre l'adopté et les parents de l'adoptant. (2). Les rapports de parenté entre l'adopté et ses descendants, d'une part, et les parents naturels et leur parents, d'autre part, cessent."

Partenaires

Les types de partenariats régis par la loi roumaine

Traditionnellement, dans le droit roumain la famille se fonde sur le *mariage*. Le paragraphe 1 de l'art. 259 C.civ. définit le mariage comme l'union librement consentie d'un homme et d'une femme, conclu dans les conditions de la loi et le par. 2 consacre le droit de l'homme et de la femme de se marier dans le but de fonder une famille.

De plus, l'art. 277 C.civ. prévoit expressément "*l'interdiction ou l'équivalence de certaines formes de cohabitation avec le mariage"*. Le texte interdit le mariage entre les personnes du même sexe. Dans le même temps, en Roumanie, ne peuvent pas être reconnus, même s'ils ont été valablement contractés à l'étranger : (a) *les mariages entre personnes de même sexe* conclus ou contractés à l'étranger soit par des ressortissants roumains, soit par des ressortissants étrangers; (b) *les partenariats civils* entre personnes de sexe opposé ou de même sexe conclus ou contractés à l'étranger soit par des ressortissants roumains, soit par des ressortissants étrangers. Les dispositions légales régissant la libre circulation sur le territoire de la Roumanie des ressortissants des États membres de l'Union européenne et de l'Espace économique européen restent applicables.

Cela signifie que hors mariage entre un homme et une femme, le Code civil ne permet aucune autre forme de mariage ou de partenariat enregistré, soit entre personnes de sexe opposé soit entre personnes de même sexe. L'évolution de la législation roumaine en la matière, en fonction d'une possible réorganisation des valeurs et d'une ouverture vers une vision plus tolérante sur les relations humaines et familiales, constitue, sans doute, un élément qui peut susciter l'intérêt et la curiosité des spécialistes.

Un autre élément "pittoresque", propre à mettre en exergue la vision spécifique du législateur roumain sur les relations familiales est le règlement des *fiançailles* dans le Code civil (art. 266–270). L'art. 270 C.civ. définit les *fiançailles* comme la "promesse réciproque de se marier". La célébration du mariage n'est pas conditionnée par la célébration des fiançailles (par. 4 de l'art. 266), pendant que le fiancé qui rompt les fiançailles ne peut pas être contraint à célébrer le mariage (par. 1 de l'art. 267). En pratique l'institution n'a pas soulevé de problèmes particuliers, même en l'absence d'un règlement (antérieurement au Nouveau Code civil, ni le Code de la famille de 1953 ni le Code civil de 1864 n'ont régi les fiançailles).

Mais le Code civil ne prête aucune attention au *concubinage ou à l'union libre*, lesquels restent de simples situations de fait, prémisses de la loi, dont la loi se désintéresse du point de vue du plan horizontal des relations entre les partenaires d'un couple.

Liberté matrimoniale et liberté contractuelle

En fonction du règlement strict des conditions relatives à la contraction du mariage, il a été qualifié par la doctrine juridique comme *un acte juridique condition*, en

considérant que les parties ne peuvent pas décider quelles sont les conditions dans lesquelles le mariage se contracte ou non, parce que ces conditions sont expressément prévues par la loi.

La nature juridique même du mariage dans la doctrine juridique roumaine a été et reste controversée. Longtemps, sous l'empire du Code de la famille, la thèse contractualiste du mariage a été répudiée, en considérant que l'acte du mariage ne peut pas être qualifié comme un contrat et on a fait un inventaire des principales différences entre le mariage et le contrat. Récemment, sous l'impulsion du nouveau règlement du Code civil, après une nouvelle analyse des soi-disant différences entre le mariage et le contrat, devenues *tabou* sous l'empire du Code de la famille, on a constaté que, pourtant, ces différences ne peuvent pas soustraire entièrement l'institution du mariage à la coupole du contrat, l'accord de volonté des futurs époux en représentant le noyau qui assure l'élément commun et de continuité entre le mariage et le contrat (Florian 2008, 17–21).

Malgré cela, le fait que le mariage est en soi un acte personnel non patrimonial et statutaire, lui confère certains traits spécifiques représentés inclusivement par le règlement strict des conditions de validité.

Partant, l'ouverture que la doctrine juridique roumaine manifeste envers la qualification du mariage comme *un contrat* est contrebalancée par le rappel permanent du fait que, quand même, *le mariage n'est pas un contrat ordinaire.* Dans ce contexte on dégage l'ensemble des problèmes lié à la liberté matrimoniale envers la liberté contractuelle.

Dans le contexte de l'examen de la liberté matrimoniale, dans la doctrine juridique roumaine on a parlé des soi-disant limites conventionnelles de la liberté matrimoniale sous la forme des clauses de célibat, dont la validité dans un acte juridique est controversée. Au-delà de leur effet par rapport à l'acte juridique dont elles font partie, par rapport à l'acte du mariage l'opinion est unanime au sens que les interdictions ou les obstacles au mariage, lesquels sont de vraies limites du droit de la personne de se marier, ne peuvent être introduits que par la loi.

Dès lors, si la partie contre laquelle une telle clause a été énoncée se (re)marie, le mariage reste valable et il ne peut être annulé à cause de la violation de la clause de célibat, l'intéressé perdant les droits ou les avantages conditionnés par le respect de la clause de célibat.

La pratique judiciaire roumaine ne s'est pas confrontée récemment avec le problème de la validité des clauses de célibat, mais l'orientation de la doctrine sur cet aspect ponctuel peut constituer un repère pour dégager une vision plus générale relative à la validité des conventions par lesquelles on pourrait modifier ou instituer des conditions de fond ou de procédure nouvelles concernant la contraction valable du mariage, comme par exemple : l'institution par voie conventionnelle d'une condition d'âge plus élevé que l'âge matrimonial légal (25 ans à la place de 18 ans) ou l'institution des conditions complémentaires "d'acquiescement" ou "d'autorisation" de la part des certaines personnes (grands-parents ou d'autres parents ou autorités publiques).

Sans qu'il y ait de différence entre les clauses retrouvées dans le cadre d'un contrat conclu entre les futurs époux ou entre un des futurs époux et un tiers ou entre les tiers, à notre avis, il faut faire la distinction entre les deux plans:

(i) *les effets intrinsèques du mariage*. Dans les conditions où une telle clause limite la liberté matrimoniale que la loi prévoit en faveur de l'institution du mariage, on considère que la clause en en question n'est pas valable. Dès lors, le mariage conclu avec la violation de la clause est valable, parce que les conditions de contraction et les causes de nullité du mariage sont établies par la loi (art. 259 par. 4 C.civ.) ;
(ii) *les effets extrinsèques du mariage*. De ce point de vue, l'analyse de la validité et des possibles effets de la clause se fait selon le droit commun, en examinant l'intention des parties (la cause licite ou illicite de l'établissement d'une telle condition) et si la violation de cette clause a provoqué ou moins un dommage lequel doit être réparé. Même de ce point de vue l'analyse suppose, à notre avis, une attention particulière pour prévenir que les effets extrinsèques du mariage au niveau de la responsabilité ne constituent un facteur indirect de restriction injustifiée de la liberté matrimoniale.

Les fiançailles

Comme l'institution du mariage, les fiançailles peuvent se conclure seulement entre l'homme et la femme (par. 5 de l'art. 266). En revanche, la contraction des fiançailles n'est soumise à aucune formalité et elle peut être démontrée par tout moyen de preuve.

La nature juridique des fiançailles est controversée, mais la doctrine juridique roumaine est plutôt favorable à la thèse contractualiste (Florian 2009, 628 *et seq.*; Hageanu 2011, 529–531).

En même temps, au-delà de l'impact pratiquement limité de cette institution, le règlement des effets patrimoniaux de la rupture des fiançailles met au clair la vision dualiste du législateur qui délimite le plan du mariage du plan des effets de droit commun de la responsabilité. Le règlement de l'institution des fiançailles est, ainsi, révélatrice au niveau de la liberté contractuelle, comme situation juridique antérieure au mariage et au mécanisme dans lequel il peut fonctionner.

Pour le respect de la liberté matrimoniale, selon l'art. 267 par. 1, le fiancé qui rompt les fiançailles ne peut pas être contraint à célébrer le mariage. De même, la clause pénale stipulée pour rompre les fiançailles est réputée non écrite. Dès lors, *les fiançailles ne produisent pas des effets intrinsèques au plan du mariage.* En échange, selon l'art. 268 C.civ., la rupture des fiançailles donne droit à la restitution des dons faits dans l'éventualité du mariage, hormis les dons ordinaires. En même temps, l'art. 269 institue le principe selon lequel la partie qui rompt les fiançailles abusivement peut être tenue aux dédommagements des frais supportés ou contractés aux fins du mariage, dans la mesure où ils ont été appropriés aux circonstances, ainsi que pour tout autre dommage provoqué (y compris les dommages moraux). Il en

résulte que, quoique les fiançailles ne puissent pas provoquer des conséquences au niveau de la contraction du mariage, la rupture unilatérale des fiançailles produit des *effets juridiques extrinsèques au mariage, au niveau de la réparation du dommage provoqué à l'autre partie.*

La dissolution du mariage

Le Code civil a constitué l'opportunité d'une réforme profonde de l'institution du divorce en droit roumain. En dernière analyse, on constate une permissivité particulière du législateur envers le divorce, par une nouvelle approche des conditions de divorce, tant au niveau substantiel qu'au niveau procédural, en assurant ainsi plusieurs options aux époux. En voulant dédramatiser le divorce et dégrever les tribunaux de ces affaires, l'accent se met sur le divorce par accord des époux, encouragés à faire appel à une solution à l'amiable, autant que possible, pour tous les problèmes accessoires à la dissolution du mariage.

Selon l'art. 373 C.civ. le divorce peut avoir lieu :

(a) par consentement mutuel des époux, sur demande des deux conjoints ou sur demande d'un des conjoints acceptée par l'autre ;
(b) lorsqu'à cause de motifs fondés, les rapports entre les époux sont gravement lésés et la continuation du mariage n'est plus possible ;
(c) sur demande d'un des conjoints, après une séparation de fait qui a duré au moins 2 années ;
(d) sur demande du conjoint dont l'état de santé rend impossible la continuation du mariage.

Dans le cadre du *divorce par consentement mutuel des époux*, l'accent est évidemment mis sur le consentement libre et non vicié des conjoints aux fins de la dissolution du mariage.

Le Code civil régit ainsi trois modalités de réalisation du divorce par consentement des époux: le divorce par voie administrative ; le divorce par procédure notariale; le divorce par voie judiciaire.

Essentiellement, du mode de règlement du divorce par consentement mutuel des époux il résulte que, pratiquement, le centre de gravité s'est déplacé de la conception traditionnelle du divorce-sanction, fondé sur la faute, vers le divorce remède, fondé sur le consentement des époux, qui élimine toute discussion relative aux motifs de divorce et à la faute à l'origine de la dissolution du mariage. Dans la pratique des tribunaux le divorce par consentement mutuel des époux a un champ d'application très étendu, au sens qu'au moins le chef principal de demande concernant le divorce et le nom après le divorce est traité suite à l'accord entre les époux, par le changement du divorce introduit par un des conjoints en divorce par consentement. Pratiquement, les aspects qui, d'ordinaire constituent l'objet de différends sont liés à la résidence des enfants et aux modalités d'exercice du droit aux rapports personnels avec les enfants.

Auto-réglementation du divorce?

De l'exposé de la réglementation du divorce par consentement des parties il résulte que le législateur a laissé aux époux un champ large d'action en matière. Puisque l'autorité compétente à prendre acte du consentement des époux n'étudie plus les motifs de divorce, le contenu concret du consentement reste inconnu dans la zone de confidentialité de la vie intime, privée et familiale des époux.

La conclusion des conventions préalables au divorce par lesquelles les époux excluraient ou restreindraient la possibilité du divorce par rapport à certains motifs de divorce ou par lesquelles ils imposeraient des conditions additionnelles d'admissibilité du divorce ne s'inscrit pas dans une pratique naturelle des couples en Roumanie. Sur le plan théorique le problème est controversé.

En principe dans la législation roumaine il n'y a pas de texte exprès qui interdise ces conventions, mais, d'autre part, selon l'art. 259 par. 6 C.civ. "Le mariage peut être dissout par divorce, dans les conditions de la loi". Le texte peut être compris aussi au sens que le divorce est régi par la loi, pas par les époux ; dès lors il pourra être prononcé toutes les fois que les conditions légales sont remplies, indépendamment de ce que les parties ont convenu. D'autre part, le problème peut être placé aussi dans le cadre de l'art. 308 C.civ., selon lequel "Les époux décident d'un commun accord tout ce qui concerne le mariage". Dans ces conditions, il est à concevoir que les époux décident de maintenir le mariage, donc d'exclure le divorce, même dans les conditions où l'un d'entre eux a violé son obligation de fidélité, de cohabiter ou une autre obligation légale, avec la conséquence de l'impossibilité de demander la dissolution du mariage pour cette raison par le conjoint innocent. La solution ne peut pas être exclue *de plano*, vu le fait qu'à la différence de la matière du mariage régie par le principe de la liberté matrimoniale (le droit de se marier étant un droit fondamental de la personne), en matière de divorce il n'est pas consacré un droit fondamental au divorce.

D'autre part, on n'exclut pas, toujours en vertu de l'art. 308 C.civ., que les époux conviennent entre eux d'un certain comportement, au-delà des obligations prévues par la loi ou même pour leur exécution, qui puisse attirer le divorce dans le cas où l'un des conjoints ignore ce comportement.

La pratique judiciaire roumaine ne s'est pas confrontée à des situations de ce genre et la doctrine en général a limité l'examen des conditions de divorce aux conditions légales, sans prendre en considération ces conditions ou limitations conventionnelles. En ce qui nous concerne, à notre avis ces clauses pourraient être examinées du point de vue de l'art. 259 par. 6 et de l'art. 308 C.civ., ainsi que des conditions générales des contrats, le motif qui a animé les époux pour arriver à un tel accord étant essentiel, du point de vue de la cause licite et morale. En tout cas, vu le règlement généreux des cas de divorce en Roumanie et vu que les motifs de divorce ne sont pas limités par la loi, la contribution pratique de ces accords semble réduite.

De même, dans la mesure où on peut parler de ces accords en pratique, il faut signaler le fait qu'en général, ils ne sont pas formalisés par documents. Dans ce contexte, on tient aussi compte du fait qu'en Roumanie les époux n'ont

pas l'habitude de conclure des conventions pour régler les rapports entre eux, en tenant compte du fait que sous l'empire du Code de la famille le règlement des relations de famille est strict. Jusqu'à l'entrée en vigueur du Code civil, les conventions matrimoniales étaient interdites, le Code de la famille a établi le régime de la communauté légale en tant que régime matrimonial unique et impératif. L'interdiction de la conclusion des conventions matrimoniales a imprimé dans la mémoire collective l'idée que les rapports entre les époux sont soustraits au domaine contractuel. Même après l'entrée en vigueur du nouveau Code civil le 1 octobre 2011, le taux des conventions matrimoniales reste faible. Dans la mesure où le principe de l'autonomie de volonté se reflète dans les dispositions de l'art. 308 C.civ., au sens que les époux ont le pouvoir de décider sur tout ce qui concerne leur mariage, l'accord de volonté n'est pas, d'habitude, écrit. Si et en quelle mesure la convention matrimoniale peut constituer le véhicule par lequel, outre les clauses spécifiques au régime matrimonial, les futurs époux ou les époux englobent aussi les clauses relatives au divorce ou à ses effets reste un problème ouvert, le rôle du notaire public, qui authentifie une telle convention, étant essentiel en ce qui concerne la vérification de la légalité de ces clauses.

Accords après le divorce

Après la dissolution du mariage par divorce, il existe entre les époux une obligation alimentaire, mais dans des conditions extrêmement restrictives. Selon l'art. 389 C.civ. le conjoint divorcé a droit aux aliments, s'il en a besoin à cause d'une incapacité de travail apparue avant le mariage ou pendant le mariage. Le droit aux aliments existe aussi si l'incapacité de travail apparaît dans un délai d'un an après le divorce, mais seulement si elle est provoquée par une circonstance liée au mariage. Lorsque le divorce est prononcé pour faute de l'un des époux, celui-ci a le droit aux aliments seulement à compter d'un an après le divorce. Vu les conditions si restrictives de l'obligation alimentaire, son application en pratique est réduite. Mais rien n'empêche, théoriquement, les époux, dans le cadre de la procédure de divorce, ou les anciens époux, après le divorce, de conclure un contrat d'entretien, au-delà des conditions visées à l'art. 389 C.civ.

Mais l'obligation alimentaire ne se confond pas avec la prestation compensatoire (art. 390 C.civ.), comme institution nouvelle, introduite dans le Code civil, et qui est destinée à compenser, autant que possible, un déséquilibre significatif que le divorce pourrait déterminer dans les conditions de vie de celui qui la demande. La prestation compensatoire a, à son tour, un champ d'application restreint, parce qu'elle suppose une durée du mariage d'au moins 20 ans et un divorce prononcé pour faute exclusive de celui qui est tenu au payement. Le conjoint qui demande la prestation compensatoire ne peut pas demander aussi la pension alimentaire à l'ancien époux. La prestation compensatoire ne peut être demandée qu'au moment du divorce. Les époux peuvent conclure un accord par lequel ils établissent tant les conditions que le montant et les modalités de payement de la prestation compensatoire.

Évidemment, l'établissement de l'obligation alimentaire ou l'octroi de la prestation compensatoire est distinct de la liquidation du régime matrimonial et de la division des biens communs. Pour autant, la partie qui revient au conjoint créancier des aliments peut constituer un critère en fonction duquel évaluer l'état de besoin ainsi que les conditions pour l'octroi de la pension alimentaire. En même temps, selon l'art. 391 C.civ., lors de l'établissement de la prestation compensatoire il est tenu compte, parmi d'autres critères, des effets que la liquidation du régime matrimonial a ou aura.

Chapitre 3: Aspects de la Contractualisation du point de vue de la Procédure

Résumé La Loi no. 192/2006 relative à la médiation et à l'organisation de la profession de médiateur établit le cadre légal général pour la résolution amiable des conflits, les litiges familiaux représentant une des catégories de litiges qui jouissent d'un règlement exprès dans le contenu de cette loi. La procédure de médiation en Roumanie et la profession de médiateur se trouvent dans une étape de commencement, la tendance principale étant celle de recourir aux tribunaux pour la résolution des différends. L'accord de médiation des époux sur la dissolution du mariage et la résolution des aspects accessoires du divorce est déposé par les parties à la juridiction compétente pour prononcer le divorce. Par ailleurs, les accords de médiation conclus entre les parties dans les affaires/conflits ayant pour objet l'exercice des droits parentaux, la contribution des parents à l'entretien des enfants et la détermination de la résidence des enfants, revêt la forme d'un jugement d'expédient. Les relations familiales sont expressément exclues par le Code de procédure civile de la sphère de l'arbitrage.

Modes alternatifs de résolution des conflits

La médiation

La Loi no. 192/2006 relative à la médiation et à l'organisation de la profession de médiateur établit le cadre légal général pour la résolution amiable des conflits, les litiges familiaux représentant une des catégories de litiges qui jouissent d'un règlement exprès dans le contenu de cette loi. La Loi no. 192/2006 régit en même temps les principes de la médiation, la profession de médiateur, ainsi que les règles générales applicables à la procédure de médiation et les dispositions spéciales relatives à la médiation de certains conflits comme ceux de famille et ceux en matière pénale.

La loi régit la *médiation facultative* qui suppose la présence d'un médiateur qui dirige le processus de médiation en facilitant les pourparlers, dans des conditions

de neutralité, d'impartialité, de confidentialité et d'autodétermination des parties, pour obtenir une solution réciproquement convenable, efficace et durable (art. 1). Les parties peuvent recourir à la médiation soit avant de s'adresser au tribunal, soit au cours d'une procédure judiciaire. Selon l'art. 61 de la loi, lorsque le conflit a été porté devant le tribunal, sa résolution par la voie de la médiation peut avoir lieu à l'initiative des parties ou sur proposition de n'importe laquelle de ces parties ou encore sur recommandation du tribunal, concernant les droits sur lesquels les parties peuvent disposer selon la loi. La médiation peut avoir pour objet la résolution en tout ou en partie du litige.

En conformité avec l'art. 62 de la loi, pour le déroulement de la procédure de médiation, le jugement des affaires civile par les juridictions ou les tribunaux arbitraux sera suspendu sur demande des parties.

Ce nouveau règlement a donné une impulsion à l'institution de la médiation en Roumanie, les conflits familiaux en acquérant un poids important dans le cadre des différends pouvant être résolus par cette procédure. Malgré cela, il faut remarquer le fait que la procédure de médiation en Roumanie et la profession de médiateur se trouvent dans une étape de commencement, la tendance principale étant celle de recourir aux tribunaux pour la résolution des différends.

Règlement de la médiation dans les conflits familiaux

Les articles 64–66 de la loi sont expressément consacrés à la résolution par le truchement de la médiation des conflits familiaux. Ainsi, selon l'article 64, par le biais de la médiation peuvent être résolus les malentendus entre les époux relatifs à:

(a) la continuation du mariage ;
(b) le partage des biens communs ;
(c) l'exercice de l'autorité parentale ;
(d) la détermination de la résidence des enfants ;
(e) la contribution des parents à l'entretien des enfants ;
(f) tout autre malentendu apparu dans les rapports entre les époux concernant les droits dont ils peuvent disposer selon la loi.

Selon l'art. 65, le médiateur veillera à ce que le résultat de la médiation ne contrevienne pas à l'intérêt supérieur de l'enfant, encouragera les parents à se concentrer d'abord sur les exigences de l'enfant et à ce que l'engagement de la responsabilité parentale, la séparation de fait ou le divorce n'empiète pas sur son éducation et son développement.

En même temps, en tenant compte du caractère spécifique des relations familiales, selon l'art. 66, avant de conclure le contrat de médiation ou, selon le cas, pendant la procédure, le médiateur fait toutes les diligences pour vérifier si entre les parties il y a une relation abusive ou violente, et les effets de cette situation peuvent influencer la médiation et il décide si, dans ces circonstances, la résolution par médiation est appropriée. De même, si pendant la médiation le médiateur prend connaissance de l'existence de certains faits qui mettent en danger l'éducation ou

le développement normal de l'enfant ou porte des préjudices graves à l'intérêt supérieur de celui-ci, il est tenu à saisir l'autorité compétente.

Selon l'art. 2 par. 5 de la loi, dans toute convention concernant les droits dont les parties peuvent disposer, elles peuvent introduire une clause de médiation, dont la validité est indépendante de la validité du contrat dont elle fait partie. Dès lors, y compris dans les conflits familiaux, avec le respect des conditions prévues par ce texte, une telle clause est valable, mais sa force contraignante est discutable, vu le principe de l'auto-détermination des parties, expressément introduit par l'art. 1 de la Loi no. 192/2006, selon lequel la médiation est une procédure ayant toujours pour base le libre consentement des parties. La médiation se fonde sur la coopération des parties et elle suppose l'utilisation des techniques ayant comme fondement la communication et les pourparlers. [Le contrat de médiation peut être dénoncé à tout moment par l'une o l'autre des parties qui peut se retirer de la procédure, en conformité avec l'art. 56 par. 1 c) de la loi.] De plus, une clause convenue *a priori* prévoyant le recours à la procédure de la médiation ne peut acquérir force obligatoire et entraîner des sanctions pour la partie qui refuse la médiation.

L'arbitrage

Le Code de procédure civile republié régit l'arbitrage en tant que juridiction alternative ayant un caractère privé, dans le cadre de laquelle les parties litigantes et le tribunal arbitral compétent peuvent établir des règles de procédure dérogatoires au droit commun, à condition que les règles en discussion ne soient contraires à l'ordre public et aux dispositions impératives de la loi (art. 541–621). Selon l'art. 542 du Code de procédure civile republié, les personnes ayant pleine capacité d'exercice peuvent convenir de résoudre par la voie de l'arbitrage les conflits qui les opposent, hormis ceux qui concernent l'état civil, la capacité des personnes, le débat successoral, les relations de famille, ainsi que les droits sur lesquels les parties ne peuvent pas disposer. Dès lors, les relations familiales sont expressément exclues par le Code de procédure civile de la sphère de l'arbitrage. Traditionnellement, l'arbitrage n'a pas constitué en Roumanie un mode alternatif à la juridiction publique de résolution des conflits familiaux.

Reconnaissance des Accords de Médiation

Vérification a priori de l'accord de médiation

Selon l'art. 58 de la Loi no. 192/2006, lorsque les parties en conflit ont abouti à un accord, il est possible de rédiger un accord écrit, contenant toutes les clauses consenties par elles, ayant valeur d'un acte sous seing privé. D'habitude, l'accord est rédigé par le médiateur, sauf les situations dans lesquelles les parties et le médiateur conviennent autrement.

L'accord ne suppose pas la vérification *a priori* par une autre autorité publique. Exceptionnellement, lorsque le conflit faisant l'objet d'une médiation concerne le transfert du droit de propriété sur les biens immeubles, ainsi que d'autres droits réels, les partages et les affaires successorales, sous peine de nullité absolue, l'accord de médiation rédigé par le médiateur sera présenté au notaire public ou à la juridiction, pour que ceux-ci, ayant à la base l'accord de médiation, puissent vérifier les conditions de fond et de forme par les procédures prévues par la loi et émettre un acte authentique ou une décision judiciaire, selon le cas, dans le respect des procédures légales. Les accords de médiation seront vérifiés en ce qui concerne l'accomplissement des conditions de fond et de forme, le notaire public ou la juridiction, selon le cas, pouvant apporter les modifications et les compléments adéquats avec l'accord des parties.

Dans ces cas, la raison de la vérification des accords de médiation consiste dans le fait qu'en matière de propriété et de publicité immobilière la loi établit la condition de la forme authentique de l'acte en vertu duquel l'inscription des droits ainsi transférés se fait dans le livre foncier.

En outre, lorsque la procédure judiciaire a été suspendue parce que les parties, de leur propre initiative ou sur la proposition de la juridiction ont fait appel à la procédure de la médiation, selon l'art. 61 de la loi, à la clôture de la procédure de médiation, le médiateur est tenu, dans tous les cas, à transmettre à la juridiction compétente l'accord de médiation et le procès-verbal de clôture de la médiation, en original et sous format électronique, si les parties ont abouti un accord ou seulement le procès-verbal de conclusion de la médiation dans les situations dans lesquelles la procédure ne s'est pas conclue par un accord.

Conformément à l'art. 63 de la loi, lorsque le conflit a été résolu par la voie de la médiation, la juridiction prononce, sur demande des parties, avec le respect des conditions légales, un jugement d'expédient, dans le cadre d'une procédure simplifiée prévue par les dispositions des articles 438–441 du Code de procédure civile republié. Il est significatif que, pour encourager les parties à faire appel à la procédure de médiation et rendre effectif l'avantage du point de vue de la réduction coûts, il ait été prévu que, au moment du prononcé de la décision, la juridiction dispose, sur demande de la partie intéressée, la restitution du droit de timbre judiciaire, payé pour la revêtir du pouvoir, hormis les cas dans lesquels le conflit résolu par voie de médiation est lié au transfert du droit de propriété, de la constitution d'un autre droit réel sur un bien immeuble, les partages et les causes successorales.

En même temps, l'avantage de la présentation de l'accord de médiation à la juridiction consiste dans le fait que le jugement d'expédient par laquelle la juridiction prend note de l'accord des parties vaut titre exécutoire.

Selon l'art. 64 de la Loi no. 192/2006, l'accord des époux sur la dissolution du mariage et la résolution des aspects accessoires du divorce est déposé par les parties à la juridiction compétente pour prononcer le divorce. Par ailleurs, les accords de médiation conclus entre les parties dans les affaires/conflits ayant pour objet l'exercice des droits parentaux, la contribution des parents à l'entretien des enfants et la détermination de la résidence des enfants, revêt la forme d'un jugement d'expédient.

Vérification a posteriori de l'accord de médiation

La Loi no. 192/2006 ne prévoit pas expressément la possibilité de dénonciation ultérieure de l'accord de médiation. Malgré ça, il est indubitable qu'il est possible d'introduire ultérieurement une action en nullité de l'accord de médiation, dans les conditions du droit commun. La solution est possible même dans l'hypothèse dans laquelle l'accord de médiation a été inclus dans un jugement d'expédient. Selon l'art. 2279 C.civ. la transaction constatée par un jugement d'expédient peut être dissoute par une action en nullité ou une action en résolution ou résiliation, comme tout autre contrat. Elle peut aussi être attaquée par action révocatoire ou action en déclaration de simulation.

Selon l'art. 58 par. 2 de la Loi no. 192/2006, l'accord de médiation ne doit pas porter atteinte à la loi, à l'ordre public et aux bonnes moeurs.

Les causes de nullité peuvent concerner l'objet de la médiation. Par exemple, selon l'art. 2 par. 4 de la loi, les droits strictement personnels ne peuvent pas faire l'objet de médiation, comme ceux relatifs au statut de la personne, ainsi que tout autre droit dont les parties, selon la loi, ne peuvent pas disposer par convention ou par tout autre moyen admis par la loi. En même temps, les principes de la médiation, surtout le principe de la neutralité et de l'impartialité du médiateur sont d'ordre public, de façon qu'un accord de médiation conclu en violation de ces principes est susceptible d'être dissout par la juridiction. Le déroulement du processus de médiation dans des conditions d'inégalité manifeste entre les parties, avec la violation de la part du médiateur de l'obligation légale et déontologique d'assurer l'équilibre entre les parties et de diriger le processus de négociation de manière que chaque partie puisse affirmer et soutenir ses intérêts, peut constituer une telle cause de nullité.

Il n'y a une disposition expresse dans la loi de la médiation en ce sens, mais les dispositions du droit commun en matière d'imprévision peuvent être appliquées (art. 1271 C.civ.). Si l'exécution du contrat est devenue excessivement onéreuse à cause d'un changement exceptionnel des circonstances qui puissent rendre manifestement injuste l'obligation du débiteur à exécuter l'obligation, la juridiction peut disposer soit l'adaptation du contrat, pour répartir en équité entre les parties les pertes et les bénéfices résultant du changement des circonstances ou, selon le cas, la cessation du contrat au moment et dans les conditions qu'il établit.

Au-delà de ce texte général, applicable seulement dans le cadre des rapports patrimoniaux, concernant strictement la matière des relations familiales, il faut également, prendre en considération les dispositions spéciales qui permettent la modification de certaines mesures, dans les conditions où les circonstances prises en considération par les parties au moment de la décision ont changé. Ainsi, selon l'art. 403 C.civ., la modification des mesures prises envers l'enfant, en cas de changement des circonstances est possible, sur demande de l'un ou l'autre des parents ou d'un autre membre de la famille, de l'enfant, de l'institution de protection, de l'institution publique spécialisée dans la protection de l'enfant ou du procureur.

De même, en matière d'obligation alimentaire, conformément à l'art. 531 C.civ., si un changement apparaît en ce qui concerne les moyens de celui qui offre les

aliments et le besoin de celui qui le reçoit, le tribunal, en fonction des circonstances, peut augmenter ou diminuer les aliments ou peut décider la cessation de son payement.

En matière de prestation compensatoire, l'art. 394 C.civ. prévoit que la juridiction peut augmenter ou diminuer son montant, si les moyens du débiteur et les ressources du créancier se modifient d'une manière significative.

Dans tous ces cas la révision de la décision judiciaire par laquelle ces mesures ont été établies est donc possible, ainsi que, le cas échéant, celle de l'accord de médiation.

Chapitre 4: Conclusions

La loi-cadre qui régit les relations de famille est le Code civil, adopté par la Loi n° 287/2009, entrée en vigueur le 1er octobre 2011 – Livre II "De la famille" (art. 258 – art. 534). En Roumanie, les tendances actuelles de l'évolution législative en matière familiale vont dans le sens de l'établissement d'un droit plus souple, de telle sorte que, sans nier la dimension sociale de la famille, mise en évidence par l'existence des normes impératives, la volonté individuelle joue un rôle plus important en ce qui concerne les rapports de famille.

Les droits et les devoirs parentaux, ayant caractère personnel – non patrimonial et étant régis par normes impératives, sont inaliénables, ne pouvant pas être transférés par voie contractuelle. Les accords entre les parents sur l'exercice de l'autorité parentale ou sur la prise d'une mesure de protection de l'enfant sont permis, mais ils doivent être autorisés par le tribunal de tutelle lequel doit certifier qu'ils respectent l'intérêt supérieur de l'enfant – art. 506 C.civ.

Hors mariage entre un homme et une femme, le Code civil roumain ne permet aucune autre forme de mariage ou de partenariat enregistré, soit entre personnes de sexe opposé soit entre personnes de même sexe. Le Code civil a constitué l'opportunité d'une réforme profonde de l'institution du divorce en droit roumain. L'accent se met sur le divorce par accord des époux, encouragés à faire appel à une solution à l'amiable, autant que possible, pour tous les problèmes accessoires à la dissolution du mariage.

La Loi no. 192/2006 relative à la médiation et à l'organisation de la profession de médiateur établit le cadre légal général pour la résolution amiable des conflits, les litiges familiaux représentant une des catégories de litiges qui jouissent d'un règlement exprès dans le contenu de cette loi. La procédure de médiation en Roumanie et la profession de médiateur se trouvent dans une étape de commencement, la tendance principale étant celle de recourir aux tribunaux pour la résolution des différends. L'accord de médiation des époux sur la dissolution du mariage et la résolution des aspects accessoires du divorce est déposé par les parties à la juridiction compétente pour prononcer le divorce. Par ailleurs, les accords de médiation conclus entre les parties dans les affaires/conflits ayant pour objet l'exercice des droits parentaux, la contribution des parents à l'entretien des enfants et la détermination de la

résidence des enfants, revêt la forme d'un jugement d'expédient. Les relations familiales sont expressément exclues par le Code de procédure civile de la sphère de l'arbitrage.

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Chapter 14
Family Law in Spain: Contractualisation or Individualisation?

Carlos Martínez de Aguirre Aldaz

Abstract Contractualisation is widely considered one of the major trends in current Western Family Law. Regarding Spanish Law, this statement is correct in many Family Law aspects regarding substantial Law. But there is also a complementary, sometimes contradictory trend, towards the individualisation of Family Law, as an outcome of the legal changes introduced in Spanish Family Law in 2005: same-sex marriage (13/2005 Act) and divorce on demand (15/2005 Act). After these reforms, the will of the individuals plays an important, even decisive role, both in vertical and horizontal Family relationships: for instance, in the establishment of legal filiation links, not only in the well known cases of recognition of paternity or maternity, but also in filiation coming from the use of reproductive technologies; or in the dissolution of marriage through the divorce on demand, in which the sole will of only one of the spouses is enough to end the marriage, transforming marriage itself, from the legal point of view, from more than a contract to less than any contract.

General Overview

The Spanish Legal System: A Quick Overview

The Spanish legal system follows the continental European model in its basic guidelines: the supremacy of written law over other legal sources, the very limited role of custom, and the existence of a flexible and open decision-making system (the so-called general legal principles) -art. 1 of the Spanish Civil Code: hereinafter SCC-. The rulings of the Supreme Court play an important role in the interpretation of written laws, but in themselves do not constitute a source of law – art. 1.6 SCC–.

The Constitution – hereinafter, SC – is the supreme rule of the Spanish legal system, which means that the acts and statutes having the force of an act (written or not, and whatever their source), that are contraries to the Constitution are not valid.

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It is a written Constitution that can only be modified under the provisions established by the Constitution itself (arts. 166–169 SC). There is a Constitutional Court that is entitled to hear appeals against the alleged unconstitutionality of acts and statutes having the force of an act, but neither the Constitutional Court nor the Supreme Court have the authority to change the Constitution. The duty of the Constitutional Court as far as it refers to the Constitution, is limited on the one hand to interpret it (wherein the Constitutional Court can act creatively, but must strictly respect the limits regarding the interpretation of constitutional law: therefore, it cannot either repeal or modify it) and on the other hand to guaranteeing that it is not infringed by the acts passed by the "*Cortes Generales*" (Spanish Parliament) or the regional parliaments.

Who Can Legislate on Family Law?

For the purposes of this paper, it should be stated that the Spanish legal system is a complex one, since different regional sub-systems are included in it, and the criteria are not clear[1] regarding the distribution of competences between the state or central legislature and the autonomous legislators. This is relevant in relation to the legal regulation of family and marriage, as it has led to a really complex legal situation:

1. On the one hand, the central legislator is the only body constitutionally competent to legislate on the personal aspects of marriage (for instance, this means that it is the only body that can decide whether two people of the same sex can marry,[2] or the grounds for divorce); economic aspects can be legislated by several but not all *"Comunidades Autónomas"* (Self-governing Communities).
2. On the other hand, since partnership is not marriage (hence, its personal regulation seems not to be of the exclusive competence of the central legislator), a large number of regional statutes regarding civil partnership have been passed.[3] These statutes have very different extent and content, but all of them include both heterosexual and homosexual couples within their field of application. The

[1] De Pablo P (2011) Las normas jurídicas de Derecho Privado. Fuentes del Derecho y fuentes del Derecho Privado". In De Pablo (coord.) Curso de Derecho civil I. Derecho Privado. Derecho de la Persona, 4th. edn. Colex Madrid, p. 75–127.

[2] The Spanish legislator has so ruled through the 13/2005 Act, of 1 July.

[3] Catalonia (the 10/1998 Act on Civil Unions), Aragón (the 6/1999 Act on Unmarried Couples), Navarra (the 6/2000 Act for the Legal Equality of Unmarried Couples), the Autonomous Community of Valencia (the 1/2001 Act on Civil Unions), the Baleares (the 18/2001 Act on Unmarried Couples), the Autonomous Community of Madrid (the 11/2001 Act on Civil Unions), Asturias (the 4/2002 Act on Unmarried Couples), Andalusia (the 5/2002 Act on Unmarried Couples), the Canary Islands (the 5/2003 Act on Unmarried Couples), Extremadura (the 5/2003 Act on Unmarried Couples), the Basque Country (the 2/2003 Act on Unmarried Couples), Cantabria (the 1/2005 Act on Unmarried Couples) and Galicia (in the problematic Third Additional Provision of the 2/2006 Act).

Constitutional Court ruled in 2013 that the statutes of Madrid and Navarra are partially unconstitutional (rulings of the Constitutional Court – hereinafter, STC – numbers 81/2013 and 93/2013) on account of causes that also concur in most of the regional statutes above mentioned.

There are also a few regional Acts regarding filiation and parental authority, as well as a wide number of regional laws (statutes) relating the institutions of protection of children: those statutes involve legal institutions that usually involve a kind of delegation of parental authority.

This paper will only address central state legislation.

Marriage and Family in the Spanish Constitution

The Spanish Constitution deals with marriage in its art. 32 and family in its art. 39. According to art. 32, *"men and women have the right to marry with full legal equality"*.[4] On the other hand, art. 39 provides that family and children are under the protection of public authorities, and states the principle of equal legal treatment of children, irrespective of the marital status of their mothers.

Regarding the applicability of international human rights, the art. 10 SC. states that the principles relating to the fundamental rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain (and Spain has ratified the most relevant international treaties relating human rights). On the other hand, it is relevant to say that in accordance with the above mentioned art. 39 SC, *"children shall enjoy the protection provided for in the international agreements safeguarding their rights"*. Legal rules contained in international treaties have direct application in Spain since they are full published in the *Boletín Oficial del Estado* (Spanish Official State Gazette), after their ratification: art. 1.5 SCC.

The Extent and Boundaries of Private Autonomy in Spanish Family Law

The general boundaries of private autonomy in Spanish Law are laws (statute), morals and public order (art. 1.225 SCC)[5]: (i) "laws" meaning the statutory rules

[4]The English translation of the Spanish Constitution is available at the web site of the *Congreso de los Diputados* (http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf: last accessed 10.12.2013). Hereinafter, all English translations of the SC are quotations from this source.

[5]There is a translation of the Spanish Civil Code into English in *Spanish Civil Code* (De Ramón-Laca Clausen S trans., Ministry of Justice [Madrid] ed., 2009), available at http://www.

that cannot be derogated by the contracting parties; (ii) "morals" is the ethical limit of private autonomy, whose content depends on social ethical standards (even though this concept has a minimum objective content, linked to human dignity); (iii) "public order" means the basic principles of the Spanish legal system: the specific content of this limit can be drawn upon the Constitution and the constitutional principles and values.[6] These boundaries apply to Family Law too, but some remarks need to be made.

Regarding Family Law, spouses can celebrate all kinds of contracts with each other (art. 1.323 SCC), and can also stipulate, amend or replace the property regime of their marriage or any other provisions as a result thereof: so there is a wide room for private autonomy in this field.

The general limits of contractual freedom in Family Law are the same as previously mentioned (laws, morals, public order), but Spanish Law also emphasizes the principle of equality (which is an order public principle), according to which contracts (or contractual clauses) stipulated by the spouses that are contrary to the equal rights of the spouses are void (see arts. 66 SCC as for personal aspects, and 1.328 SCC as for property regime of the marriage). This "equality-of-the-spouses limit" is not easy to assess and apply; the Spanish Supreme Court has confined the effectiveness of this principle to a "programmatic statement", so that art. 66 cannot be used as the only ground for appeal to the Supreme Court itself (ruling 4.12.1998). The principle of equality of the spouses is compatible with the allocation of functions and responsibilities between them, provided that this allocation does not introduce a significant imbalance to the detriment of one of them. So, stipulations that introduce irreversible radical inequality between spouses are strictly prohibited, as well as pacts granting irrevocable powers of property administration or legal representation in favor of one of them.

Finally, I would like to mention another limit, this time to a significant family agreement: according to art. 90 SCC, agreements between the spouses that are adopted to regulate the consequences of the annulment, separation or divorce shall be approved by the judge, unless they are detrimental to the children or seriously prejudicial to one of the spouses; those (detriment of the children, serious prejudice to one of the spouses) are the legal limits to the private autonomy regarding the consequences of divorce.

These and other specific legal limits and prohibitions will be briefly developed later on.

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mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html. Accessed 10 Dec 2013). Hereinafter, all English translations of the SCC are quotations from this source.

[6] *Ad rem* see Martínez de Aguirre C (2011a), 419–420.

Contractualisation of Parenting?

Basic Spanish Rules Relating to Parenting

For Spanish law, the main legal parental relationship is based on biological filiation: filiation is, first of all, the biological link between one person and his or her offspring. So the primary basis of the parent-child relationship is biological.[7]

A legal filiation relationship can also be created between those people who are known not to be joined by biological links, as occurs under Spanish Law in adoption (arts. 175 *et seq.* SCC) and in some cases of assisted reproductive technology, using donor's gamete (sperm or, less often, ovum): in both cases (adoption and reproductive technology) the will of the adoptants (art. 177 SCC) or the users of that technology (arts. 6 and 8 of the *Ley 14/2006, de Técnicas de Reproducción Humana Asistida* [Human Assisted Reproductive Technologies Act] *of May 26, 2006* -hereinafter LTRHA-)[8] is needed (but adoption also needs judicial resolution: art. 176.1 SCC). According to art. 108 SCC, biological and adoptive filiation have the same legal effects, and so has filiation derived from reproductive technology.

The duty of the parents is specified in a set of obligations, rights, and powers: in Spanish law basically through the *patria potestad* (parental authority). According to art. 154 SCC, *"parental authority shall be exercised always for the benefit of the children, according to their personality, and respecting their physical and psychological integrity. This authority comprises the following duties and powers: 1. To look after them, to have them in their company, feed them, educate them and provide them with a comprehensive upbringing. 2. To represent them and to manage*

[7]The Spanish Constitution stipulates that the law shall provide for investigation into paternity. This is what is usually known as *libre investigación de la paternidad*—free investigation into paternity or maternity—.This provision provides the constitutional foundation for the principle that the legal father of a child is the man who is his or her biological father, or and the legal mother of a child is his or her biological mother. The investigation envisaged by the Constitution is not an inquiry into legal parentage (for whose knowing there is no need to investigate anything: a consult the Civil Registry would be enough) but into biological facts. This conclusion is supported by the widespread use of biological tests for this purpose, as contemplated by the Civil Procedure Act (art. 767.2: *"the examination of paternity and maternity through all kinds of tests, including biological tests, shall be admissible in kinship trials"*).

There is a translation of the Spanish Civil Procedure Act into English in *Civil Procedure Act* (Linguaserve trans., Ministry of Justice [Madrid] ed., 2012), available at http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html (accessed 10 Dec 2013).

[8]LTRHA allows the use of a gamete donated by either a man or a woman. In such case, the offspring is considered, from the legal point of view, the son or daughter of the man (or woman) that accepted the use of the gamete (arts. 7, 8), the donor being the biological parent but not the legal parent. In order to better understand the Spanish legal system concerning reproductive technologies, see Martínez de Aguirre C (2013b), pp. 344 *et seq.*

their property".[9] On the other hand, children must obey their parents while they remain under their parental authority, respect them, and contribute, according to their possibilities, to the discharge of family expenses while they live with their parents (art. 155 SCC).

The duty of parents to provide assistance to children born within or outside marriage is established by Article 39.3 SC.[10] As this provision follows directly from Article 39.2 SC, relating to investigation of paternity, the implication is clear that at the constitutional level it is the biological parents who have this duty of assistance. The free investigation of paternity is used to determine who the biological father (or mother) is; he (or she) is in turn obliged to provide the child with assistance. So, at the constitutional level too, parenthood is a biological concept, and not only a (purely) legal one. In accordance with this, whoever is the biological father or mother must be considered the legal father or mother with all the duties and obligations of paternity or maternity; in order to establish who the biological father or mother is, free investigation into paternity has been established at a constitutional level (art. 39.2 SC).

The Role of the Will in the Establishment of Legal Filiation Links

Even when Law gives to the will of the prospective parents a significant role (even necessary) in the creation of the (artificial[11]) legal link between them and their children, Spanish Law does not know legal parenthood by contract. A more detailed view of this topic is convenient:

Recognition of Paternity or Maternity

Non-matrimonial filiation can be legally determined by recognition before the officer in charge of the Civil Registry, in a testament or in another public document (art. 120 SCC). Recognition requires the consent of the child if he or she is of legal age (art. 122 SCC), or of the representative of the child who is minor or incapable (art. 123 SCC). In any case, recognition is a declaration of knowledge

[9] *Patria potestad* (parental authority) is regulated in articles 154 *et seq*. SCC. Concerning parental authority in Spanish law, see Lacruz Berdejo JL (2005), pp. 399 *et seq.*; Pérez Álvarez MA (2013), pp. 351 *et seq.*

[10] "*Parents must provide for their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law so establishes*".

[11] Filiation legal links that does not arise from biology can be considered "artificial" ones, i.e., created by Law: *ad rem* see Martínez de Aguirre C (2011b), pp. 317 *et seq.*

(the person who recognizes states that he knows that the child is of his or her biological offspring) more than a declaration of will (although the will to declare that knowledge is usually involved).[12] So, a recognition could be made through a contract between the father who recognizes and the mother (as legal representative of the child), because the declarations legally required are present: in this case, the important thing is not the contract, but the recognition itself, which would have had the same legal effects if made in a will, or in a public document.

Adoption

Adoption is not a contract in Spanish Law. To adopt a children the consent of the prospective adoptive parents is needed (art. 177.1 SCC), but is not enough: (i) they have to be declared suitable to exercise parental authority by the public entity entrusted with the protection of minors (art. 176.2 SCC)[13]; (ii) this public entity must do a proposal in favor of the prospective adopters; (iii) a judicial resolution is required: in fact, adoption is constituted by this judicial resolution, not by the will of the adopters. On the other hand, there is no contract between adopters and biological parents (if known), whose consent it not always necessary (art. 177.2 and 3 SCC).

Reproductive Technologies

In the Spanish regulation of medically assisted procreation, a decisive role that is given to free will, to the extent that in three situations legal filiation links that lack a biological basis, are established[14]:

1. When a woman married to a man uses donor semen, with the consent of her husband: according to art. 8 LTRHA, the newborn is considered legally the husband's child. This occurs through the combination of the legal presumption of paternity (art. 116 SCC) and the prohibition on challenging paternity (art. 8.1 LTRHA). In this case legal paternity is not based on biology but exclusively on the consent given by the husband.
2. When a woman married to another woman uses donor semen. In accordance with art. 7.3 LTRHA, both of the married women could legally be "mothers" of the child born as a result of these techniques: one as a resultof giving birth, the other

[12] *Ad rem* see Martínez de Aguirre C (2013a), pp. 322 *et seq.*

[13] The proposal of the public entity is not necessary in some cases (see art. 176.2 SCC), but even in these cases the declaration of suitability and the judicial resolution mentioned in text are needed.

[14] *Ad rem, in extenso,* see Martínez de Aguirre C (2011b), pp. 328 *et seq.*

if she has made a statement, before the birth (not after), declaring her will to assume maternity. In such a case, this "second" maternity (the first one arises from the birth) derives only from will.

3. When an unmarried woman uses donor semen, with the consent of a man who is going to assume paternity. Under art. 8.2 LTHRA, the newborn may be registered in the Civil Registry as a (non-marital) son or daughter of that man, even though there may be no emotional or cohabiting relationship between him and the woman who gave birth. In this case, the only basis for the legal determination of his paternity is the will of the consenting man: neither the nonexistent biological relationship nor the equally nonexistent presumption of paternity can be used to justify it. On the other hand, can it be said that he has acknowledged paternity in the true sense, since he has not acknowledged any biological affinity but merely consented to fertilization by another man's sperm.

Surrogate motherhood is strictly prohibited by art. 10 LTRHA, which states that this contract is null and void: the legal mother will be the woman who gives birth to the child. However, this clear legal statement must be nuanced and complemented by the *Resolución de la Dirección General de los Registros y del Notariado* (Resolution of the General Directorate of Registries and Notaries: hereinafter, DGRN) of 18 February 2009. The problem solved by this Resolution is as follows: two Spanish men entered into marriage in October 2005. After entering into a surrogate motherhood contract in California, they requested the registration of the two children born as a consequence of aforementioned contract in the Civil Register of the Spanish Consulate of Los Angeles, as children of them both. The Consul denied the registration, based on the aforementioned art. 10 LTRHA. That decision was appealed, and the *Dirección General de los Registros y del Notariado* upheld the appeal and agreed on the registration of the two children as the children of the requesting parties. This decision was appealed by the public prosecutor, and both the *Juez de Primera Instancia* (First Circuit Judge) and the *Audiencia Provincial* (Provincial Court) upheld the appeal. Finally, the *Instrucción* (Directive) *de la Dirección General de los Registros y del Notariado* of 5 October 2010, established the cases and conditions to allow the registration of children born abroad as a consequence of surrogate motherhood. That *Instrucción* gives legal validity to what actually is an evasion of the law that prohibits surrogate motherhood. From then on, 12 out of 15 cases of filiation derived from surrogate motherhood that took place abroad have been registered in the Civil Registry, while the remaining three have been rejected.[15]

Anonymous birth has been erased from Spanish Law since the ruling of the Spanish Supreme Court of 21 September 1999.

[15] See Barber Cárcamo R (2013), p. 2907.

Agreements Relating Exercise and Content of Parental Authority

Delegation of Parental Authority

There is no legal way for a person to be contractually vested with parental authority as a whole. When the parents (and the guardians too), as a result of serious circumstances, cannot take care of the minor, they may request the public entity entrusted with the protection of minors to assume his or her custody for the necessary period of time (art. 172.2 SCC): this "custody" means sort of a delegation of the exercise of parental authority in favor of the public entity. The custody can be performed by means of family foster care or residential care (art. 172.3 SCC); family foster care produces the full participation of the minor in family life and imposes on the foster parent the obligations of taking care of him, having him in his company, feeding him, educating him and providing him with a comprehensive upbringing (art. 173.1 SCC): these duties basically match with those of parents, related to personal aspects, as established by art. 154.III.1 SCC. According to art. 173.2 SCC, "*foster care shall be executed in writing, with the consent of the public entity, whether or not it holds the guardianship or custody, of the persons who take the minor in, and of the minor if he should be older than twelve years old. When the parents who have not been deprived of parental authority or the guardian should be known, they shall also be required to give or to have given their consent, save in the event of provisional family foster care referred to in section 3 of this article*": so there is an agreement, that could include items related to the way of performing foster care, including instructions about educational choices, religious issues, and so on.[16]

A similar delegation of the exercise of parental authority, but now in favor of private persons, is also admitted by authors.[17] When this private delegation implies the existence of a family foster care, its constitution seems to need the consent of the public entity (see above, art. 173.2 SCC).

Agreements Related to Some Contents of Parental Authority, Especially upon Divorce

Contracts about educational choices, religious education or orientation of the children, career, etc., are not usual in Spain, even upon divorce of separation. They can be agreed under the general boundaries of private autonomy (law, morals, public order), and the specific ones for family agreements (principle of equality, detriment of the children, best interest of the children).

Spouses can conclude "settlement agreements" (*convenio regulador*) to regulate the effects of the separation or divorce; relating to the children, these agreements

[16] See Mayor del Hoyo MV (1999) p. 392 *et seq.*

[17] Tamayo Haya S (2008) p. 179, and there further authorities.

must address at least the following items (art. 90 SCC): (a) care and custody of the children subject to the parental authority of both spouses; (b) attribution of the use of the family home; (c) alimony and economic children support. In any event, these agreements must be approved by the Judge, who can reject them if they are detrimental to the children: so it is a contract controlled by the Judge. If the spouses do not reach any agreement, or the Judge rejects it, it is up to the same Judge to regulate the consequences of divorce or separation, relating both children and spouses, in their personal and economic aspects (art. 90 SCC).

Agreements Relating the Dissolution of the Parent-Child Relation

Under Spanish Law there is no way to dissolve the parent-child legal relation through a contract, with mere negative effects (i.e., the relation disappears, but no other parent-child relation appears in its – legal – place).

On the other hand, there are two ways for the parents' will to affect the parent-child relation: (i) through the consent to the adoption of the child by a third party (art. 177.2 SCC): but, as stated above, adoption needs a judicial decision, hence here there is not a contract; furthermore, in this case the relation dissolved (between the biological parents and the child) is legally replaced by a new parent-child relation: the one between adoptive parents and the child; (ii) parents can emancipate their children from the age of 16 years, with the consent of the child (art. 317 SSC): there are two consents (the one of the parents and the one of the child), but they are not contractually related to each other; on the other hand, the emancipation does not dissolve the parent-child relation as a whole, but only makes disappear its content regarding the legal situation of the child as a minor.

The Role of the Will in Horizontal Family Relations: Towards the De-contractualisation

In Spanish Family Law regulated by the SCC, marriage is the only type of "partnership" (horizontal family relations) recognized as a whole by the Law, despite the wide number of statutes establishing rules relating non-married partnership.[18] That is why this paper is going to focus on marriage and its legal regulation. Furthermore, a complete regulation of civil unions in Spain seems not to be needed, given that legal marriage has assumed the main legal features of civil unions – free dissolubility and gender neutrality – since the marriage law reforms of 2005.[19]

[18] As stated above (see footnote 3), there are 13 regional statutes relating civil unions too.

[19] Martínez de Aguirre C (2007), p. 47; 2012, p. 57; De Pablo P (2013), p. 77. As for the 2005 marriage legal reforms, the 13/2005 Act (July 1st.) allows same-sex marriage, and trough 15/2005 Act (July 8th), unilateral unjustified divorce is enacted.

According to art. 44.2 SCC, *"marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders"*. Hence, legal marriage has turned on a gender-neutral institution, from the legal point of view.

The Formation of Marriage

Prenuptial Agreements

The promise of marriage does not give rise to the obligation to marry or to comply with the provisions thereof in the event of failure to perform the marriage (art. 42 SCC), but the breach of a promise of marriage can give rise to the obligation to compensate the other party for expenses made and obligations contracted in consideration of the promised marriage (art. 43 SCC).

As for prenuptial agreements regarding the effects of divorce, see below (section "Prenuptial agreements relating the consequences of divorce").

Formal Requirements and Impediments

According to art. 45 SCC, there is no marriage without matrimonial consent; any condition, term or mode limiting consent shall be deemed not to have been written.

Marriage is a formal contract in Spanish Law: matrimonial consent may be given in the terms provided by State legislation – civil marriage – (art. 59 SCC), or in the form provided by Canon Law or by any else registered religious confession (at this point in time, Evangelical, Jew and Muslim ones). Civil marriage must be performed before the Judge, Mayor or public officer provided in the Civil Code (art. 49 SCC: see also arts. 51 and 52 SCC). Marriage performed without the intervention of the officers before whom it is to be performed, or without the presence of witnesses, is null and void (art. 73 SCC).

The SCC establishes the following rules regarding impediments:

1. Non-emancipated minors cannot marry (art. 46.1 SCC), but The First Instance Judge may waive, with just cause and at the request of one of the parties, the age impediment for persons older than 14 (art. 48.II SCC). On the other hand, parents with the consent of the child, can emancipate their children older than 16 (art. 317 SCC): once the child is emancipated, he is able to marry as said above.
2. Persons who are already joined in marriage can also not marry (art. 46.2 SCC), but since divorce is available after three months from the wedding, without the divorce petitioner needing any ground (art. 85 SCC), this impediment is easy to avoid: in this case, the will of the spouse that applies for divorce has a determinant role, because even though divorce must be decreed by the Judge (art. 86 SCC), the Court cannot reject the petition of divorce.

3. According to art. 47 SCC, the following persons may also not marry each other: (i) direct line relatives by consanguinity or adoption; (ii) collateral relatives by consanguinity up to the third degree, but the First Instance Judge may waive the impediment relating to third degree collateral consanguinity (art. 48.II SCC).

Non-patrimonial Content of Marriage: The Marital Duties

Obligations that Do Not Oblige: The Marital Duties

According to arts. 67 and 68 SCC, the spouses are obliged to live together, to be faithful to one another, to come to one another's aid, to respect and assist each other and act in the family interest; they also must share domestic responsibilities and the care and attendance of parents and descendants and other dependents in their charge: all those are the legal duties of marriage. After the reform of Spanish marriage Law, they have become non-binding obligations, that is to say, obligations that do not oblige, at least from the legal point of view.

In the current regulation of marriage, marital duties, with the only exception of the duty of assist each other in its economic content, have virtually no legal significance, and its non-performance does not have any legal consequence: no legal remedies are granted to the aggrieved spouse, no relevant legal sanction is provided for the breaching spouse. Let us see it with a little more detail.

1. No one of the spouses is entitled to compel the other one to the specific performance of these obligations, because they are directly tied to personal freedom: they can be voluntarily fulfilled, but cannot be legally enforced (I must insist: with the only exception of the duty of assistance in its economic aspect).
2. The breach of some of his or her duties by a spouse is not sanctioned, in the current regulation of marriage (since the 2005 reform), by means of granting to the other spouse the power to ask for separation on the ground of that breach. That power was granted to the non-breaching spouse under the legislation in vigor until 2005; the reform of this year eliminated from Spanish Law the grounds for separation and divorce: from then on either spouse is entitled to divorce after three months from wedding, without he or she needing to allege any specific ground. So, divorce can be requested for either spouse, regardless the existence of any ground, and regardless the fulfillment (or not) of marital duties: his or her will is enough to divorce. That means that the power to ask for divorce is not linked to the performance of marital duties.
3. What about damages? Could the non-breaching spouse be entitled to sue for non-pecuniary damages? From a theoretical point of view, the answer could be, yes, either on the ground of art. 1.101 SCC, i.e., for breach of contract, or on the more general ground of art. 1.902 SCC ("*the person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused*"). But Spanish Supreme Court has so far denied

damages for breach of the obligation of fidelity (S. 30.7.1999): this is the only sentence of the Supreme Court relating to this issue, which is prior to the 2005 reform: this is significant, because the Supreme Court ruled according to the rules previous to the above mentioned reform, the only legal consequence of the breach of the obligation of fidelity was the right to request the separation. Since grounds for separation have disappeared from Spanish Law, the only legal consequence of the breach of marital duties has also disappeared. There is some debate about this issue,[20] but so far neither Supreme Court nor any Court of Appeal has changed that ruling. So, according to the decision of our Supreme Court still in vigor, the aggrieved spouse is not entitled to non-pecuniary damages.

In conclusion, on the one hand the breach of marital duties does not have any significant legal consequence; on the other hand, either spouse can terminate those "duties" by means of divorce, and getting divorced depends only on his or her will: so, an obligation whose breach does not have any legal consequence, whose termination depends on the mere will of the person obligated, is no longer an obligation. Therefore, articles 67 and 68 SCC contain non-binding obligations, i.e., obligations that do not oblige, with the above-mentioned exception of the duty of assistance in its economic aspect.

So, Spanish Law grants a quite significant role to the will of each one of the spouses, but this power of the will does not need a contract to be implemented.

Agreements Relating Marital Duties

Marital duties cannot be eliminated by the spouses, although they may specify or modulate its content by mutual agreement, provided that this modulation does not affect the substance of this duty (i.e., the modulated duty has to remain recognizable as a specific marital duty). Any agreements prior to the wedding, aimed at eliminating any of these duties, cause the nullity of marriage; if these agreements are reached after the wedding, in some cases shall be deemed not to have been written (for example, when affecting the duties of mutual aid, or fidelity), while in others they may be legally relevant (for example, the ones excluding the duty of cohabitation, because they cause a situation of *de facto* separation by mutual agreement, with legal effects: e.g., see arts. 116, 156, 834 etc. SCC).

Patrimonial Content of Marriage: Marriage Articles

Contracts relating the patrimonial content of marriage are widely admitted and used in Spanish Family Law. According to art. 1.315 SCC, the property regime of the marriage shall be as stipulated by the spouses in *capitulaciones matrimoniales*

[20] See, for instance, Novales Alquézar A (2006); Martin Casals M, Ribot Igualada J (2011).

(marriage articles). In marriage articles the spouses may stipulate, amend or replace the property regime of their marriage or any other provisions as a result thereof (art. 1.325 SCC). Those agreements can be reached at any time (i.e., before or after the wedding). The general principle is, therefore, the freedom of spouses to determine the economic regime to which they are going to submit their marriage; according to this, the spouses may agree any legal regimes, introduce them more or less significant changes, or design their own economic system. The boundaries of these agreements are, as said above, statutes, morals, public order and the principle of equality between spouses. In any event, the amendments of the marriage property regime performed during the marriage shall in no event prejudice rights already acquired by third parties (art. 1.317 SCC).

Dissolution of Marriage: From More Than a Contract to Less Than Any Contract

Divorce on Demand

The marriage shall be dissolved by the death or the declaration of death of one of the spouses, and by divorce (art. 85 SCC). Divorce shall be decreed at the request of both spouses or of one of them, after the lapse of three months from the performance of the marriage (art. 86 SCC, in connection with art. 81 SCC): neither a specific ground for divorce nor an agreement between the spouses is needed to obtain the divorce: the mere will of one of the spouses is enough. The Judge is not allowed to reject the request of divorce, provided this request fulfils the merely formal legal requirements.

A proposal of "settlement agreement" (when both spouses agree with the divorce), or a proposal of the measures which are to regulate the effects of the divorce, must be attached to the divorce request made by one of the spouses. Concerning this "settlement agreement", see below.

Would be valid an agreement between the spouses, including grounds for divorce, or even rejecting the very possibility of asking for divorce (for instance, an "indissolubility agreement")? There are not judicial decisions about this issue, this seems to be a theoretical question. The constitutional principle of "free development of personality" (art. 10 SC) could be used to support every answer to this question: on the one hand, the agreement itself could be easily considered as a way for the spouses to develop their personality (i.e., freedom would be in the base of that agreement); on the other hand, Roca Trías has stated that marriage without divorce would not be possible under Spanish Law, on account of the "right to liberty" and of the same principle of free development of personality.[21]

[21] See, Roca Trías E (2010), p. 73.

The divorce on demand, as it is regulated nowadays in Spanish Law, has changed the meaning and legal nature of marriage. We used to say that marriage was a contract (because the will of both spouses, husband and wife, was necessary), but more than a contract (due to the strong limitations to the will of the spouses, mainly regarding the basic structure and the dissolution of marriage); today, we have to conclude that, from the legal point of view, marriage has become less than any contract, because from it does not arise any legal obligation, and because every spouse can freely finish marriage at any time, being enough his or her only will. With this legal regulation, marriage has been, so to speak, de-contractualised: in this case, not the rules, but the game itself has changed.

This conclusion clearly reveals that there is a strong trend towards the individualization of Family Law, rather than towards its contractualisation.

The "Settlement Agreement" Relating the Effects of the Divorce

The Spanish Civil Code gives special relevance to the agreement of the spouses, to the point of being such an agreement, mainly through the so-called settlement agreement, the main source of legal regulation of the effects of divorce (art. 90 SCC). Only if the spouses have not reached an agreement, or if the agreement has not been approved by the Court, the judge shall determine the consequences of the divorce relating to spouses, children and property.

According to art. 90 SCC, this agreement must contain, at least the following items: (a) care of the children, the schedule of communications and stays of the children with the parent who does not usually live with them; (b) if deemed necessary, the schedule of visits and communications between grandchildren and grandparents, always taking into account the interests of the minors; (c) attribution of the use of the family home and appurtenances; (d) contribution to the expenses of the marriage and support; (e) liquidation, where applicable, of the marriage property regime; (f) allowance to be paid, as the case may be, by one of the spouses.

These agreements must be approved by the Judge, who can reject them if they are detrimental to the children or seriously prejudicial to one of the spouses. If the spouses do not reach any agreement, or the Judge rejects it on the grounds above-mentioned, it is up to the same Judge to regulate the consequences of divorce relating children and spouses, in its personal and economic aspects (art. 90 SCC).

Prenuptial Agreements Relating the Consequences of Divorce

Although this was not common in Spain, prenuptial agreements regarding the consequences of divorce seem to be valid and enforceable in Spanish Law,[22] since they are "*agreements between the spouses adopted to regulate the consequences of*

[22]García Rubio MP (2003); Gaspar Lera S (2011), p. 1045.

the annulment, separation or divorce" (art. 90.II Cc). For the same reason, such agreements require the approval of the Court, and have the same limits noted above: detriment to the children or serious prejudice to one of the spouses.

A particularly relevant case is that of the prenuptial agreements concerning economic imbalance. In accordance with art. 97 SCC, "*the spouse for whom the separation or divorce should give rise to an economic imbalance in relation with the other's position, involving a deterioration of his situation prior to the marriage, shall be entitled to compensation, which may consist of a temporary or indefinite allowance or a lump sum settlement, as determined in the settlement agreement or in the judgment* ".

Can this "imbalance compensation" be waived prior to marriage? Agreements aimed either waive such compensation, either preset its amount, are becoming more and more frequent in Spain.[23] However, the legal admission of this kind of agreement may have undesirable effects[24]: for example, this could discourage the fulfillment of his or her marital duties by the spouse with greater economic resources, who is aware that he or she will not be economically harmed by the decision to divorce that the other spouse can take because of the breach of marital duties; on the other hand, those agreements give a stronger position to the spouse with greater resources, compared to the one who made a greater personal investment in marriage.

The solution is not easy because the cases can be very different, and generalize a single criterion can adequately solve some problems, but at the same time, leave other unresolved and even aggravated. In any case, the opinion that such agreements are valid and effective seems more consistent with the scarce binding effects of marriage in Spanish Law,[25] with the increasingly important role of the individual will of the spouses, with the doubts about the ultimate basis of compensation for imbalance, and with the non-mandatory character that both the Supreme Court (ruling of 2 December 1987) and the DGRN (resolution 10 November 1995) attribute to the legal rules on imbalance compensation. However, as noted by García Rubio (2003), such agreements have certain limits: the existence of a possible abuse of dominant position in the negotiation process, the violation of constitutional rights of one of the spouses, or in the end the supervening change of circumstances. That is why the art. 90.II Cc (under which *"agreements between the spouses adopted to regulate the consequences of the annulment, separation or divorce shall be approved by the judge, unless they are detrimental to the children or seriously prejudicial to one of the spouses"*) may be useful.

[23]Cabezuelo Arenas AL (2010).

[24]Cabezuelo Arenas AL (2010).

[25]Martínez de Aguirre C (2007).

Final Remarks

The reforms of Spanish Family Law carried out in the recent decades have significantly increased the power of the individual will in legal family issues. Contracts play an important role, as seen, regarding property regime and the effects of divorce (but in the latter case, the "settlement agreements" are subjected to the scrutiny of the Courts). But in many other cases, as we have also seen, the Law allows the will of individuals to take relevant decisions (for instance, to get divorced, to consent an adoption – as adopter, or as biological father or mother–, and so on) that are not channeled through a contract. Hence it has been rather a "privatization" or "individualization" than a real "contractualisation" of Family Law.

There has been a significant change in the, so to speak, "internal balance" of Spanish Family Law, and this change has as a consequence, a parallel change in the role of will, and in the demarcation of the borders the will can act into: for instance, forty years ago, divorce was not allowed under Spanish Law, and no one was able to introduce the divorce in his or her marriage through a contract; nowadays, divorce on demand (groundless divorce) is allowed, and no one can renounce to the divorce, or even to introduce limited grounds for divorce in his or her marriage, through a contract. A real contractualisation on this field would have mean that the spouses are free to use a contract to choose between dissolubility or indissolubility of their marriage, or to establish the grounds for divorce for their marriage. The very notion of marriage, relating to its legal stability, has changed from indissolubility to free dissolubility, but this particular legal feature of marriage is considered to form part from the essence of the institution, so people are not allowed to make agreements relating it.

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Chapter 15
Family Law Contractualisation in the Netherlands – Changes and Trends

Katharina Boele-Woelki and Merel Jonker

Abstract This chapter aims to highlight the significant changes Dutch family law has undergone with regard to private ordering of family relationships. Whereas most family law rules are still mandatory, choices increasingly are available: partners, irrespective of their gender, may enter into a marriage or into a registered partnership or may conclude a cohabitation agreement; out-court (administrative) divorce will soon be available for spouses without minor children and divorce agreements anyhow are encouraged and even compulsory with regard to the consequences of divorce with regard to minor children ('parenting plan'). Alternative dispute resolution, including arbitration in areas where parties have the freedom to conclude binding contracts, is increasingly used. Future legislative evolutions might include forms of multi-parenthood; this remains to be seen in 2016.

Regulating Family Relations

The rights and obligations of family members are, to a large extent, regulated by law. However, this does not apply to all parts of life, and the question of whether the legal framework is still adequate in light of a number of important developments in European society, such as the increase in divorce and non-marital cohabitation (with children), has been the subject of recent research. Within the legal framework, family members can define their relationship by making agreements with one another. How broad should this freedom be with regard to international, European and national values, particularly the principle of equality? Who has, and takes, responsibility for people who have a need for protection and care? Where is the line between the public and the private domain? In the discussion on legislating family relations more questions arise: When and how should the state take regulatory action? Which areas (e.g. the entering and leaving of relationships, descent) must be (mandatorily) regulated? Which conceptions regarding 'the family' and the

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protection of the 'vulnerable' lie at the heart of this, and are these in accordance with the views of society? National family law has been influenced by international (CRC, CEDAW) and European (EU, ECHR, ESH) norms and values, but the question arises as to what extent. These are governmental concerns. The other side of the coin is self-regulation. Which agreements can family members make between themselves. It concerns agreements between children and parents about care, between partners over their property relationship and the distribution of care, between couples and third parties over the lineage and care of children, between separated parents over their children, between parents and third parties with regard to the medical care of their children, or between family members concerning organ or tissue donation, or acting as a donor. In making an agreement, it is not only the content which is important, but also, in particular, the fulfilment of obligations and the impact of changes in circumstances. How far does party autonomy extend in family relations? Do the principles of contract law apply unlimitedly, in particular the rule of *pacta sunt servanda*, and how should the courts decide where fundamental values are involved? Under what circumstances can an appeal to reasonableness and fairness be made?

In the following sections an attempt will be made to provide an analysis of how the contractualisation of Dutch family law has evolved. Two main parts are to be distinguished: the freedom of family members to contract on substantive family law issues (1) and their freedom to make legal arrangements as regards the procedure, more precisely the resolution of family disputes (2).

Substantive Contractualisation

Boundaries of Contractual Freedom

Private Law

The general boundaries of private autonomy are provided by Article 3:40 DCC. A juridical act is revocable (*vernietigbaar*) or void (*nietig*) if it violates the law, public order and good morals. In principle, a juridical act that violates a mandatory statutory provision is void. However, if the provision is "intended solely for the protection of one of the parties of a multilateral juridical act, the act may only be annulled".[1] A contract that violates public order or good morals is generally void. For instance, a commercial surrogacy agreement in which the parties agree that the commissioning parents will pay the surrogate mother much more than merely compensation is void because it violates good morals.

[1] Art. 3:40 section 2 DCC; Hartkamp AS (2006) Law of Obligations. In: Chorus MJ, Gerver PHM and Hondius E Introduction to Dutch Law. Kluwer Law International, Alphen aan den Rijn, pp 157–158.

Family Law

Generally, Dutch family law rules have a mandatory character. As a result party autonomy in family matters is limited. For instance, the rights and duties of spouses and registered partners are laid down in mandatory statutory provisions.[2] Parties are not allowed to deviate from these rules by agreement, unless otherwise stated. Article 1:84 section 3 DCC, for example, provides for the possibility to deviate from the mutual duty to bear the costs of the household.[3] Furthermore, parents are not able to enter into agreements concerning the establishment of affiliation or the relinquishment of parental responsibility. However, it is possible to agree on other family-related issues, for example (matrimonial) property relationships, maintenance and contact agreements. Although agreements on child maintenance are allowed, parents have to operate within the confines of the law. For instance, a child maintenance agreement cannot waive the obligation to pay child maintenance.[4]

Horizontal Family Law

Marriage and Registered Partnership

The law recognizes two types of partnerships: a civil marriage and a registered partnership. Both partnerships are open to heterosexual as well as homosexual couples. In 2006, the Act opening civil marriage to same-sex couples (Wet openstelling huwelijk) and the Act introducing registered partnership (Wet geregistreerd partnerschap) were evaluated.[5] The researchers concluded, among other things, that although the legal consequences are almost identical for married couples and registered partners, there was a "societal demand" for a marital alternative.[6] The statistics support this conclusion. In 2012, the total number of marriages was 70,315 (69,030 between a man and a woman, 544 between men and 741 between women). In 2013, the total number of marriages decreased significantly to 64,549 (63,327 between a man and a woman, 522 between men and 700 between women). In 2012, the total number of registered partnerships was 9,225 (8,789 between a man and a woman, 217 between men and 218 between women) whereas in 2013 the total number slightly increased to 9,445 (9,038 between a man and a woman, 208

[2] Title 6 of Book 1 DCC.

[3] Art.1:84 section 1 en 2 DCC.

[4] Art. 1:400 section 2 DCC.

[5] Boele-Woelki KRSD et al (2007) Huwelijk of geregistreerd partnerschap. Kluwer: WODC Ministerie van Justitie, Deventer.

[6] Boele-Woelki KRSD et al (2007) Huwelijk of geregistreerd partnerschap. Kluwer: WODC Ministerie van Justitie, Deventer, p 254.

between men and 199 between women).[7] These figures show that the institution of registered partnership has acquired a solid standing among heterosexual couples.

Formation Requirements

Several legal conditions have to be fulfilled to enter into a marriage or registered partnership (the same conditions apply). Since polygamy is not allowed in the Netherlands, a person may only marry or register a relationship if he or she is not married to or registered with another person (Art. 1:33 DCC). Persons are not allowed to enter into a formal relationship with persons who are within the prohibited degrees of consanguinity. Both partners should have a minimum age of eighteen, unless the partners have reached the age of sixteen and can prove that the woman is pregnant or has already given birth to a child. In addition, the Minister of Justice may provide for a dispensation in case of other important circumstances (Art. 1:31 DCC). However, in practice this is hardly granted. A minor can only marry with the consent of his or her parents. In the event that parents do not consent, the minor can request substitute consent from the courts. At this moment in time, a Bill is pending in the Second Chamber concerning forced marriages.[8] In order to reduce this kind of marriage it is proposed that the exceptions made for minors will be abolished. This means that a person has to be eighteen years of age in order to be able to marry. In addition, neither a marriage between an uncle or an aunt with a niece or nephew will be allowed, nor a marriage between first cousins. An exception applies if both parties declare under oath that their wish to marry is based on their free consent. If the Bill will be approved, the Public Prosecutor will be obliged to prevent a marriage if it concerns a forced marriage. Furthermore, the Public Prosecutor will have the competence to declare a forced marriage void. A marriage or registered partnership is not possible if one of the partners is mentally disabled and is not able to determine his or her own will. Although the legal conditions for entering into a marriage or a registered partnership are the same, differences exist with regard to the legal conditions for a dissolution.

Dissolution

A marriage is dissolved by death, divorce or a decree of legal separation (*scheiding van tafel en bed*). Spouses can jointly or unilaterally request the court for a divorce. Since 2003 the number of divorces is approximately 33,000–35,000 per year. The percentages of divorces granted upon a joint request increased from 48.4 % in 1999

[7] Statistics Netherlands. http://statline.cbs.nl

[8] *Kamerstukken II* 2012/13, 33 488, nr. 3. The Second Chamber approved the amended Bill of 25 March 2014. It has been submitted to the First Chamber.

to 64.8 % in 2009, while in 2011 it decreased to 58.7 %.[9] The only ground for divorce is irretrievable breakdown, even if the partners file a unilateral request; divorce by consent does not form an autonomous ground for divorce. While spouses are obliged to request the court for a divorce, registered partners without children can dissolve their relationship without the intervention of the court. This requires that partners have entered into an agreement, including a statement that they want to end their relationship because it has irretrievably broken down. In December 2013, a Bill was proposed which introduces a so-called administrative divorce. Once this Bill will enter into force the courts will lose their monopoly to dissolve marriages. The courts will share this competence with civil registrars. Three conditions are to be fulfilled: (1) the spouses do not have minor children at the moment of their request; (2) the divorce is based upon a joint request; and (3) the spouses declare that their marriage has irretrievably broken down. The Bill has been modelled on the administrative dissolution of registered partnerships which was introduced in 1998. Currently, if registered partners choose to dissolve their partnership at the office of the civil registrar they are obliged to submit a dissolution agreement on maintenance, the continued use of the house/apartment, the division of property and pension rights. In contrast, when they request the court to dissolve their partnership such an agreement is not necessary. In order to make the administrative divorce 'attractive' the Bill proposes not to require a divorce agreement. In turn it will be abandoned for the dissolution of registered partnerships as well in order to have similar rules for both institutions. In about 14,000 divorce cases per year the spouses have no minor children at the moment of filing the divorce request. A huge decrease in the courts' workload is expected to take place.[10]

Cohabitation

Book 1 of the DCC which contains family law does not regulate cohabitation. However, in tax law, for example, cohabitants can have tax advantages if they fulfill certain requirements, and in social security law cohabitants are considered to be equal to married couples. The only provision in Book 1 of the DCC that refers to cohabitants concerns spousal maintenance. The right of a partner to receive spousal maintenance will end if he or she starts living together with someone "as if they are married".[11] In legal literature, it has been argued that certain marital property rights should be applicable to cohabitants. In 2010, research was conducted, commissioned by the Ministry of Security and Justice, on the "necessity

[9]Chin-A-Fat BES (2013) (Echt)scheiding. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, pp. 404–405; Statistics Netherlands http://statline.cbs.nl/

[10]http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/12/08/wet-scheiden-zonder-rechter-memorie-van-toelichting.html

[11]Living together with someone who is still married does not fall under this definition, Hoge Raad 20 December 2013, ECLI:NL:HR:2013:2058.

to provide an additional legal regulation of the total separation of property" to partners in a formalized relationship as well as to partners living in an informal relationship.[12] The researchers concluded that "there are sufficient grounds to consider a regulation providing for the mitigation of financial problems and unfair effects of the termination of informal relationships". They, amongst others, suggest that a number of provisions for married couples in Book 1 of the Civil Code could be equally applied to partners in an informal relationship.[13] The Ministry of Security and Justice, however, did not see any need to legislate at this moment in time.[14] As a result, partners can only obtain legal recognition of their relationship to a certain extent by entering into a cohabitation agreement. The legal consequences are limited to the issues laid down by the partners. If the agreement is drawn up by a notary, it can be executed.

Contracting on Horizontal Relationships

Contracting on Formal or Substantive Conditions

Under Dutch family law it is not possible to bind oneself through an agreement in respect of the formation requirements. The rules on entering into a marriage or a registered partnership are mandatory. This also applies as regards the substantive and formal conditions to dissolve a marriage or registered partnership. They are not at the disposal of spouses/partners. This will not change once the Bill on divorce without the involvement of a judge will enter into force.

Contracting on Divorce

The consequences of a divorce can be arranged in a divorce agreement (*echtscheidingsconvenant*) in which the division of property, spousal maintenance, pension rights and child arrangements are laid down. There are no formal requirements for such agreements,[15] except for the child arrangements; they have to be in writing. This also means that persons without any legal education can be consulted by the spouses in drawing up their divorce agreement or that spouses can download a

[12] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague.

[13] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 296.

[14] Letter to the Second Chamber 28 February 2012, *Kamerstukken II* 2011/12, 28 867 nr. 29.

[15] Hoge Raad 26 January 1979, *NJ* 1980, 19.

standard agreement from the internet. Over the past few years, an increase in the number of (online) "divorce agents" has been observed.[16]

Contracting on Spousal Maintenance

Spouses can enter into an agreement concerning spousal maintenance before or after the divorce decree (Art. 1:158 DCC). Spouses have the freedom to agree that no maintenance has to be paid; however, they can only agree on this during the marriage with the prospect of a divorce.[17] Furthermore, spouses can deviate from the duration of the maintenance. It is important to note that spouses may agree that the contract cannot be amended by the courts due to 'a change of circumstances'. If spouses have laid down such a provision, the courts may only interfere in case a change of circumstances results in an extremely unreasonable and unfair situation. Contracts between spouses who have not laid down that their contracts cannot be changed, can be altered by the courts if a 'change of circumstances' has taken place. Another reason for the courts to change the agreement is if the spouses have clearly disregarded the legal standard. However, the court will interpret these provisions strictly, in order to respect the autonomy of the spouses. It has also been argued that changing a maintenance agreement may have consequences for the agreement regarding the division of property.[18]

Vertical Family Law

The Parent-Child Family Relation(s)

Legal Parenthood

While legal parenthood is still primarily based on biology, a trend is developing towards social parenthood as a basis for legal parenthood. In 2009 the requirements for adoption by lesbian couples were eased. In the same year approximately 25,000 lesbian couples lived together of whom 20 % had children under 18 years of age in their household.[19] Based on sociological research, it is expected that these numbers

[16]Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18.

[17]Hoge Raad 7 March 1980, *NJ* 1980, 363. For a dissenting opinion see Schonewille F (2012) Partijautonomie in het relatievermogensrecht. Maklu-Uitgevers, Apeldoorn/Antwerp, pp 127–130.

[18]Wortmann SFM and Van Duijvendijk-Brand J (2012) Personen- en familierecht. Kluwer, Deventer, p 170.

[19]Vonk MJ and Bos H (2012) Duo-moederschap in Nederland vanuit juridisch en ontwikkelingspsychologisch perspectief. Familie & Recht 2012, juli-September. doi: 10.5553/FenR/.000005

will increase in the coming years.[20] On 1st April 2014, the Act concerning the establishment of legal parenthood of the female partner of the mother other than through adoption entered into force.[21] The fundamental changes in affiliation law encompass the following. The mother of a child is not only the woman who has given birth to the child (*mater semper certa est*)[22] or who has adopted the child, but also the woman who is married to the birthmother, who has recognized the child or whose parenthood is established in court. In order to become a co-mother by law, the partners have to be married or registered and must have used medically assisted procreation with the sperm of an unknown donor. If they are not married or they used a known donor, the co-mother can recognize the child or her motherhood can be established in court proceedings.

The father is the man who is married to the mother, who has recognized the child, whose paternity has been established in court proceedings or who has adopted the child. The recognition of maternity or paternity is null and void if the birthmother has not given her consent to the recognition. However, co-mothers, begetters and donors with family life may request the court to substitute its authorization for the mother's consent. Male couples can only become legal parents by adoption. Until recently, married fathers received legal parenthood by law, while registered partners had to recognize their child. On the 1st April 2014, the situation of married and registered couples with regard to affiliation finally were equalized.[23]

Parental Responsibility

A person who has parental responsibility over a child is obliged to care for the child. This means that such persons are responsible for the mental and physical well-being of the child, its safety and the development of its personality.[24] Furthermore, parents with parental responsibility are obliged to encourage contact with the other parent. Legal parents who are married or who are registered partners have joint parental responsibility over their children by law. If the legal parents are not married or registered, only the mother has parental responsibility. In order to exercise joint parental responsibility, the father and the mother have to be recorded in the parental responsibility register as exercising joint parental responsibility (Art. 1:252 DCC). This joint request will generally be granted. If the mother does not cooperate the father can request the court to assign joint parental responsibility to both parents or sole parental responsibility to him. The court can replace the mother's consent to

[20] Vonk MJ and Bos H (2012) Duo-moederschap in Nederland vanuit juridisch en ontwikkelingspsychologisch perspectief. Familie & Recht 2012, juli-September. doi: 10.5553/FenR/.000005

[21] *Staatsblad* 2013, 480; 2014, 132.

[22] While the birthmother is not necessarily the genetic parent, the legislator has decided to maintain this principle also in case of egg donation or surrogacy.

[23] *Staatsblad* 2013, 486; 2014, 134.

[24] Art. 1:247 DCC.

exercise joint parental responsibility with the father if this is in the best interest of the child. One of the legal parents may also have joint parental responsibility with a non-legal parent, if the child is born 'within' a marriage or registered partnership and only has one legal parent. In addition, the court may assign parental responsibility to a non-legal parent who, together with the legal parent, takes care for the child. As long as same-sex couples do not both become legal parents by law, the latter rules in particular will be of importance for them. In principle, parents maintain joint parental responsibility after a divorce or separation. Only upon the request of one of the parents and if the child would become "torn or lost between the parents" in the case of joint parental responsibility, or sole parental responsibility is otherwise necessary in the best interests of the child, the court may determine that one of the parents has parental responsibility. However, this is the exception rather than the rule.[25]

Child Maintenance

Parents are obliged to maintain their children. Not only legal parents have this obligation, but also others might have to financially support a child. The biological father has to pay child maintenance if the child does not have two legal parents. The same is true for the partner of the mother who has agreed to the procreation of the child. This might be a male partner as well as a female partner. Besides the biological parent and the parent who intended to care for the child, a social parent may be financially responsible; both a step-parent and a non-legal parent with parental responsibility have an obligation to support their (step)child (Art. 1:395 DCC and 1:253w DCC). While a step-parent only has this responsibility as long as he is in a formalized relationship with the mother and lives together with the child, these requirements are not applicable to the parent with parental responsibility.

Contracting on Legal Parenthood

Dutch law concerning affiliation and parental responsibility is mandatory and cannot be set aside by contract.[26] These kinds of contracts are considered void, since they violate the law (Art. 3:40 DCC). However, this does not mean that parents do not make agreements concerning the role that a third person should play in the child's life. Lesbian couples may, for example, enter into a contract with

[25]Schrama WM (2009) Family Function over Family Form in the Law of Parentage, The legal position of children born in informal relationships. In: Boele-Woelki KRSD (ed.) Debates in Family Law at the Dawn of the 21st Century. European Family Law series no. 23. Intersentia, Antwerp, pp 117–138.

[26]De Boer J (2010) 1* Personen- en familierecht, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Kluwer, Deventer, p 695.

a known donor agreeing on the roles of all parties, or commissioning parents may enter into an agreement with a surrogate mother. However, these agreements are not recognized as valid agreements and cannot be enforced.[27] It is generally acknowledged that a surrogate mother cannot be obliged to give away the child. Less clarity exists with regard to the obligation of commissioning parents to accept a child. While some authors state that commissioning parents cannot be obliged to do this, others argue that they can.[28] Although surrogacy agreements on the establishment or exclusion of parenthood are invalid, these kinds of agreements may be of importance in court proceedings concerning the assignment of parenthood. If all parties agree that the commissioning parents will take care of the child and adhere to this decision after the birth of the child, the court might more easily transfer legal parenthood and parental responsibilities from the surrogate mother to the commissioning parents.[29] Also agreements between lesbian couples with known donors in which they agree that the known donor will have parental responsibility or will play a specific role in the child's life are not enforceable. They are however used in court proceedings in order to prove the initial parties' intentions.

Contracting on Parental Responsibilities

Parenting Plan

As mentioned in section "The parent-child family relation(s)" parents maintain joint parental responsibility after a divorce or separation and they cannot obtain or lose parental responsibility by contract. Only the courts can decide on this matter. Since 2009, parents with parental responsibility, who want to divorce or separate, are obliged to enter into a 'parenting plan' (*ouderschapsplan*). They have to make agreements concerning (1) the division of care and upbringing duties (main residence and contact); (2) the way they will inform each other about child-related issues; and (3) child maintenance. The parenting plan is to be submitted to the courts which marginally scrutinize whether the agreement is in the best interests of the child.[30] Upon approval it will be attached to or incorporated into the divorce decision. The question arises as to what other issues parents can agree upon and what legal status is given to the parenting plan. Although it is argued

[27]Boele-Woelki KRSD (2013) (Cross-border) Surrogate Motherhood: We Need to Take Action Now! In: The Permanent Bureau of the Hague Conference on Private International Law (ed) A Commitment to Private International Law, Essays in honour of Hans van Loon. Intersentia, Cambrigde/Antwerp/Portland, pp 47–58.

[28]Boele-Woelki KRSD et al. (2012) Draagmoederschap en illegale opneming van kinderen. Boom Juridische Uitgevers, The Hague, p 47.

[29]See for example Rechtbank Noord Nederland 11 September 2013, ECLI:NL:RBNNE:2013:5503, *NJF* 2013/143.

[30]Ackermans-Wijn JCE (2012) De nieuwe aanbevelingen van het LOVF met betrekking tot het ouderschapsplan. EB Tijdschrift voor Scheidingsrecht 74: 7–8.

in literature that parents are free in exercising their parental responsibilities and that they cannot be bound by contract,[31] the minister has stated that a parenting plan does not limit parents in exercising parental responsibilities but that it enables parents to consider how they want to exercise their responsibilities after a divorce or separation. Furthermore, it is unclear whether a parenting plan is a substantive or procedural requirement for obtaining a divorce. If a parenting plan is not submitted, the divorce will not be pronounced. As a result the requirements for obtaining a divorce in the Netherlands have become more severe. The spouses are bound to come to an agreement as regards the divorce consequences for children. This obligatory character of the parenting plan is irreconcilable with the notion of party autonomy. Freedom of contract does not exist as regards the above-mentioned issues which are prescribed by law and must be contained in the agreement. Only as regards the precise content of the arrangements are the spouses free to decide, although they may not violate the best interests of the child. Only in exceptional cases, where it has been proven that the parents cannot communicate, will the court decide on issues which are to be included in a parenting plan and will subsequently dissolve the marriage. However, this path is not easily taken. First, the parents have to do their 'homework'. Mediation might help in this regard, but not in all cases does mediation turn out to be successful. In cases of so-called divorces involving a bitter conflict between the separating spouses (*vechtscheidingen*) the obligation to draw up a parenting plan might be more of an obstacle than a relief. In the evaluation study of parenting plans which was published in December 2013, it has been concluded that:

1. agreements concerning the children after divorce are being increasingly entered into;
2. the parenting plan is imbedded in the daily work of family lawyers, mediators and judges;
3. the parenting plan obliges the parents to think about the consequences of their separation for their children which is considered to be an advantage since otherwise the divorce procedure cannot start;
4. less judicial procedures concerning child matters are taking place, which can be explained by the fact that parents must agree on several child issues at the time of their divorce.

Finally, it has been concluded that there is no evidence that parenting plans have led to more contact between the child and both parents, that fewer conflicts between the parents have arisen and that children have less problems.[32] These aims, however, constituted the initial objectives of the legislator. With regard to the enforcement of parenting plans see section "Execution".

[31]De Boer J (2010) 1* Personen- en familierecht, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Kluwer, Deventer, p 818.

[32]Ter Voet MJ and Geurts T (2013) Evaluatie ouderschapsplan: een eerste verkenning. WODC, The Hague, pp 7–11.

Contracting on (Religious) Education

With reference to a decision of the *Hoge Raad* in 1938 it has been argued that the person with parental responsibility is free to decide on the choice of education and cannot be bound by contract.[33] However, it is not unusual that parents add a provision in their parenting plan that they will jointly decide on educational matters and that they will try mediation if they are not able to agree. If parents do not reach an agreement, they can request the court to decide on the matter.[34] It can be reported that disputes have been decided about all sorts of issues linked to the exercise of parental responsibilities, such as religious education and medical treatment. Choosing or changing schools and other problems connected with the child's education have also been a source of disputes.[35] However, since the introduction of the parenting plan in 2009, agreements on specific educational choices laid down in a parenting plan have not been contested before the courts (or at least not been published).

Contracting on the Child's Residence

In principle, the parents are free to decide with whom the child should live. The determination of the (main) residence of the child is one of the mandatory requirements of the parenting plan that the parents are obliged to draw up upon their separation. The parents can agree on residence with one of them or on shared residence. If they cannot reach an agreement as to with whom the child should live or whether it should live with both parents on an alternating basis, they can ask the court to decide.[36]

The *Hof 's-Gravenhage* held in 2011 that, in principle, a settlement agreement (see section "Arbitration") concerning the residence of a child is generally binding.[37] However, in this particular case the court decided that due to a change of circumstance the agreement was no longer in the best interests of the child. Therefore, the agreement was no longer binding.

[33] Hoge Raad 20 May 1938, *NJ* 1939, 94.

[34] See for example Gerechtshof 's-Gravenhage 9 June 2010, ECLI:NL:GHSGR:2010:BM8379; Gerechtshof 's-Hertogenbosch 20 December 2012, ECLI:NL:GHSHE:2012:BY6982; Gerechtshof Arnhem-Leeuwarden 10 January 2013, ECLI:NL:GHARL:2013:BZ1919.

[35] See for example Gerechtshof 's Gravenhage, 23 June 2010, LJN BN3877, Rechtbank Zwolle, 19 August 2004, LJN AQ7125 and Rechtbank 's Hertogenbosch 9 June 2005, LJN AT7299.

[36] Art. 1:253a DCC.

[37] Gerechtshof 's Gravenhage 2 March 2011, *RFR* 2011/73.

Contracting on the Dissolution of the Parent-Child Relationship

According to Dutch law parents with parental responsibilities cannot dissolve their legal relationship with the child by agreement. The rule 'once a parent, always a parent' applies. Only the court can dissolve the parent-child relationship in the case of adoption or when it discharges the holder(s) from their parental responsibilities when his/her/their behaviour results in a serious risk to the person or the property of the child.

Procedural Contractualisation

ADR Techniques

There are three main ADR techniques available in the Netherlands: arbitration, binding advice and mediation. Arbitration and binding advice can be characterised as mechanisms in which a third independent person stands above the parties while in mediation a third person stands "between" the parties.[38] Until recently, in particular arbitration has not been used in family disputes (see section "Arbitration"). The Netherlands is not familiar with in-court ADR, yet courts have the possibility to refer parties to mediation and all courts have a so- called mediation office.[39] In 8 out of 1,000 cases the courts refer to mediation,[40] most of them being family cases.[41]

Arbitration and Binding Advice

Arbitration and binding advice have a statutory basis in both national and transnational law.[42] Parties can enter into an arbitration agreement in which they agree to submit a dispute to arbitration. The dispute is settled by one of more arbitrators, mostly one or three (at least an uneven number). On the 1st January 2015 the new Dutch arbitration law entered into force.[43] It contains new rules on the exchange

[38] Brenninkmeijer AFM (2013) Mediation. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, p 35.

[39] Chin-A-Fat BES (2011) Scheiden anno 2011, Over depolarisering, mediation en overlegscheiding. In: Justitiële verkenningen, Scheiding en ouderschap 37 (6). Boom Juridische Uitgevers-WODC, The Hague, p 37.

[40] De Rechtspraak. Kengetallen 2011. http://www.rechtspraak.nl

[41] Chin-A-Fat BES (2011) Scheiden anno 2011, Over depolarisering, mediation en overlegscheiding. In: Justitiële verkenningen, Scheiding en ouderschap 37 (6). Boom Juridische Uitgevers-WODC, The Hague, p 38.

[42] Art. 1020–1073 of the Code of Civil Procedure (CCP) and Art. 900–906 of Book 7 DCC.

[43] *Staatsblad* 2014, 200; 2014, 254.

of procedural documents by e-mail, and the procedure has become cheaper for the parties involved. Binding advice concerns "the performance of a contract which calls for a third party to decide as to how a conflict should be solved".[44] The Netherlands has many specific dispute committees (*geschillencommissies*), e.g. committees for consumer cases, disputes between employers and employees and disputes between landlords and tenants.

Since these ADR techniques are private arrangements without any state interference, no formal registration exists. This means that the exact number of arbitration and binding advice cases cannot be obtained. Approximately 1,500 arbitration cases are registered at the courts each year whereas the number of cases of binding advice is estimated at nearly 5,000 per year.[45]

Mediation

Mediation is only regulated for transnational situations, due to the implementation of the EU directive on certain aspects of mediation in civil and commercial matters.[46] While the Second Chamber approved the initial proposal to apply the directive also in national situations,[47] it was withdrawn, because it would not have received the necessary majority in the First Chamber.[48] This means that mediation is not regulated as such, but the legal basis is found in settlement agreements (*vaststellingsovereenkomsten*).[49] The provisions regarding this kind of agreement cover the result of a successful mediation, but not other issues such as access to the courts, limitation periods, liability, confidentiality and the costs of mediators. These rules have been developed in the case law.[50] Only in the Code of Civil Procedure is any explicit reference made to mediation. Courts have the possibility to refer to mediation if divorcing parents were not able to agree upon a 'parenting plan'.[51] However, mediation is not obligatory. In September 2013, a new proposal to regulate mediation in national situations was introduced in the Second Chamber.[52]

[44]Hondius E (2006) Specific contracts. In: Chorus MJ et al Introduction to Dutch Law. Kluwer Law International, Alphen aan den Rijn, p 240.

[45]Brenninkmeijer AFM (2013) Mediation. In: Brenninkmeijer AFM et al (ed.) Handboek mediation. Sdu Uitgevers, The Hague, pp 43–44.

[46]Implementation of EU Directive 2008/52/EG: *Staatsblad* 2012, 570.

[47]*Kamerstukken II* 2011/2012, 33 122, nr. 2.

[48]*Kamerstukken I* 2012/2013, 32 555 H.

[49]Articles 900–906 Book 7 DCC. This is the same basis as for binding advice.

[50]Van Hoek AAH and Kocken CLB (2013) The Netherlands. In: Esplugues C et al Civil and Commercial Mediation in Europe. Intersentia, Cambridge/Antwerp/Portland, p 497.

[51]Articles 815 and 818 CCP.

[52]*Kamerstukken II* 2012/2013, 33 722.

According to official documents the Netherlands considers itself as a leading country with regard to mediation.[53] Nevertheless, in 2010, the number of mediations was approximately only 51,960, which is relatively small in comparison with the 1,187,560 civil court cases in the same year.[54] Research indicates that in 70 % of all mediation cases the parties do reach an agreement and in 16 % of cases a partial agreement is reached.[55]

Application in Family Matters

Arbitration

Since March 2012, a new ADR technique has been promoted in family disputes: arbitration.[56] Although arbitration was theoretically possible in family matters, in practice it was rarely used. It has been argued that arbitration does not suit family-related issues since family matters are matters of public order.[57] Article 1020 section 3 of the Code of Civil Procedure determines as regards the arbitrability of a case that "the arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose." In the *travaux préparatoires* of this Code it is stated that most family matters have a mandatory character in Dutch law, which means that this kind of dispute would not be suitable for arbitration. Exceptions are made for the division of matrimonial property and for maintenance agreements.[58] It has been argued that even though many areas of family law are mandatory and do not provide any possibility for the parties to deviate, modify or change certain rules such as the establishment and exclusion of affiliation and parental responsibility, other family-related matters are at the discretion of the parties, such as property relations between the spouses, the division of property after divorce, spousal and child maintenance *and* the residence of the child andcontact agreements.[59] In 2010, the

[53] *Kamerstukken II* 2012/2013, 33 722, nr. 2, p 1.

[54] Including debt collection cases. Van Hoek AAH and Kocken CLB (2013) The Netherlands. In: Esplugues C et al Civil and Commercial Mediation in Europe. Intersentia, Cambridge/Antwerp/Portland, p 494 who refer to *Kamerstukken I* 2012/2013, 32 555 nr. C, pp 3–4.

[55] Vogels RJM (2011) De stand van Mediation in Nederland. Stratus, Zoetermeer, p 14.

[56] Since March 2012 the Netherlands Arbitration Institute has 20 specialized family law arbitrators.

[57] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12, who refers to Snijders HJ (2011) Nederlands Arbitragerecht. Kluwer, Deventer, p 84.

[58] Meijer GJ (2012) Commentaar op artikel 1020 Rv. In: Van Mierlo AIM, Van Nispen CJJC, Polak MV (eds.) Tekst & commentaar Burgerlijke Rechtsvordering. Kluwer, Deventer. The new Dutch arbitration law does not change Article 1020 section 3 of the Code of Civil Procedure.

[59] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12; Gerechtshof 's- Gravenhage 2 March 2011, ECLI:NL:GHSGR:2011:BP9424 (binding agreement regarding the residence of a child).

Rechtbank Arnhem held that a request by a mother to change the child maintenance agreement was not admissible since she had entered into an arbitration contract with the other parent.[60]

Since court procedures concerning divorce-related issues are time-consuming and costly, arbitration is considered as a possible alternative. No specific exceptions exist for the arbitration procedure in family law matters. This means that partners can agree upon arbitration *ad hoc* or in advance and that the court has to grant leave for enforcement, thereby marginally scrutinizing the settlement, before it can be executed (section "Execution"). It is not known how often arbitration in family law disputes has been used.

Mediation

Mediation has a long history in family law matters. Mediation started in the late 1980s when some family lawyers were trained to become divorce mediators. In 1990 they established an association for divorce mediation lawyers (*Vereniging van Advocaat-Scheidingsbemiddelaars, currently vFAS*). Since then, mediation has gained major importance. Approximately 45 % of the total number of mediation cases concern family issues.[61] Mediation is on a voluntary basis, but courts can refer parents to mediation in order to enter into a 'parenting plan'. The main reasons for partners to make use of mediation is because they want to maintain a good relationship with the other partner or because of the lower costs.[62]

Collaborative Divorce

While, for long time, mediation was the dominant ADR technique used in family law matters, since recently collaborative divorce and family law arbitration have been introduced in the Netherlands. Inspired by American practice, collaborative law was introduced at the beginning of this century. Especially in family law, this has become a popular form of dispute resolution; the so-called collaborative divorce.[63] According to this method, both parties are represented by their lawyer, but aim to settle the dispute without court intervention. They may jointly appoint a coach and include other experts in the process, for example a financial expert or child therapist.

[60] Rechtbank Arnhem 14 June 2010, ECLI:NL:RBARN:2010:BN2002.

[61] Vogels RJM (2011) De stand van mediation in Nederland. Stratus, Zoetermeer, p 11.

[62] Vogels RJM and Van der Zeijden P.Th (2010) De stand van mediation in Nederland. Stratus, Zoetermeer, p 42.

[63] Zonnenberg LHM (2012) Arbitrage in het familierecht. EB Tijdschrift voor Scheidingsrecht 12.

Recognition of Agreements Reached Through ADR

Execution

A decision by an arbitrator can be executed in the same way as a court decision, after the court (*voorzieningenrechter*) has granted leave for enforcement. The court will scrutinize the arbitration agreement only marginally, thereby deciding whether the formal requirements have been fulfilled and whether the agreement does not violate public order or good morals. In principle, binding advice, settlement agreements, mediation agreements and parenting plans are binding, but cannot be executed like a court decision. However, parties can request the court to incorporate the agreement in the (divorce) decision, which means that the agreement can be executed. Only agreements concerning the children will be subject to legal scrutiny; agreements which are not in the best interests of the child will not be accepted. The percentage of agreements concerning the children that were incorporated in the divorce decision increased from 59 % in 2007 to 82 % in 2011.[64]

Judicial Scrutiny

In principle, contracts with regard to family matters are binding. Therefore, a strict standard of scrutiny applies. Declaring a family agreement null and void because of an unequal bargaining position is highly exceptional in Dutch practice. Unequal bargaining positions might be relevant in cases concerning matrimonial property agreements. Spouses may, for example, enter into a contract in which they agree upon the total separation of property (*koude uitsluiting*), which may result in a considerably unfair situation for one of the spouses. In 2010, a report was published concerning the question whether an additional regulation should be provided that could mitigate the unfair effects of the total separation of property. One of the conclusions was that only in exceptional cases should the courts declare a total separation of property agreement to be null or void.[65]

Spouses who would like to have their agreement declared null or void on the grounds of unequal bargaining positions may argue on the basis of an abuse of circumstances (*misbruik van omstandigheden*), mental disorder, being contrary to the standards of reasonableness and fairness (*in strijd met de maatstaven van redelijkheid en billijkheid*) or a fundamental mistake (*dwaling*). An abuse of circumstances is not easily recognized by the courts when it concerns family

[64] Ter Voet MJ and Geurts T (2013) Evaluatie ouderschapsplan: een eerste verkenning. WODC, The Hague, p 81.

[65] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 51.

agreements.[66] The law requires causality between the circumstances of the weaker spouse and the conclusion of the agreement. The other spouse must have known of the (psychological) weakness of the spouse and must have abused these circumstances.[67] The *Hof Amsterdam*, for example, recognized an abuse of circumstances in a case in which the man threatened to commit suicide if the woman would not sign the divorce agreement.[68] Based on Art. 3:34 DCC, a weaker spouse can argue that he or she had a mental disorder at the time of the conclusion of the contract. However, just as in the case of an abuse of circumstances the court does not easily acknowledge this. Probably, this argument may only succeed in cases where the weaker party has been treated in a mental hospital before or at the time of the divorce procedure.[69] A strict standard of scrutiny also applies if it concerns cases which are contrary to the standards of reasonableness and fairness.[70] Only in one case has this argument been accepted so far by the *Hoge Raad*. In this case the man knew in advance that the woman would not be able to comply with the agreement.[71] Based on Article 6:228 DCC an agreement is voidable if it has been entered into under the influence of a mistake with regard to the facts or legal rights and would not have been concluded by the mistaken party if he or she would have had a correct view of the situation. Although parties often claim that they have entered into an agreement under the influence of a mistake, because they were not fully informed by the other party, the courts rarely accept this argument.[72]

Modification of Family Agreements

Based on Art. 6:258 DCC the court has the competence to "change the legal effects of an agreement or it may dissolve an agreement in full or in part if there are unforeseen circumstances of such a nature that the opposite party, according to standards of reasonableness and fairness, may not expect an unchanged continuation of the agreement." The court may change or dissolve the agreement with retroactive

[66]Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18; Subelack TM (2012) De vaststellingsovereenkomst. EB Tijdschrift voor scheidingsrecht 6. For example, Gerechtshof 's Hertogenbosch 25 June 2007, LJN BA9017; Gerechtshof 's-Gravenhage 16 December 2009, LJN BL4259; Gerechtshof 's-Hertogenbosch 22 December 2009, ECLI:NL:GHSHE:2009:BL1040.

[67]Art. 3:44 DCC.

[68]Gerechtshof Amsterdam 22 July 1999, *EB* 2001, 27.

[69]Hoge Raad 24 May 1985, *NJ* 1986, 699 and its sequel Hoge Raad 23 December 1988, *NJ* 1989, 278.

[70]Art. 6:248 section 2 DCC.

[71]Hoge Raad 16 January 1981, *NJ* 1982, 31.

[72]Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18.

effect. In family disputes, courts rarely accept "unforeseen circumstances" as a ground to dissolve an agreement.[73]

As mentioned in section "Contracting on horizontal relationships" parties can enter into maintenance agreements. Spouses are allowed to agree that no spousal maintenance has to be paid and they may deviate from the legal duration of the maintenance. The standard of scrutiny will not be different from other cases, even if a certain agreement would result in a shift of financial responsibility from the ex-partner to the State. The court can alter maintenance agreements if a 'change of circumstances' has taken place. However, if parties agree that the contract cannot be changed by the courts due to 'a change of circumstances', the courts may only interfere in extremely unreasonable and unfair situations. In case an agreement concerns children, the court will be less strict. The contract will always be scrutinized by the court by taking the best interests of the child into account. For example, in the case mentioned in section "Contracting on parental responsibilities" concerning the residence of a child, the court decided that the settlement agreement was no longer in the best interests of the child.[74]

Changes and Trends

Dutch family law has undergone significant changes regarding the possibility of the parties to contract about their family relationship. Most family law rules are still mandatory; however, more and more choices are becoming available: partners, irrespective of their gender, may enter into a marriage or into a registered partnership; they may conclude a cohabitation agreement which however only binds the two partners but which is also recognized by the State for the purpose of specific social and tax benefits; spouses (without minor children) may choose for the dissolution of their marriage through a court decision or – de lege ferenda – through registration at the civil registrar's office. Divorce agreements are encouraged, but are not obligatory. This does not apply to the divorce consequences as regards children. Parents must agree on clearly prescribed issues, which concern the residence(s) of the child, child maintenance and the information rights of the other parent. The parenting plan is compulsory. Alternative dispute resolution is often used, which to an increasing extent includes arbitration in areas in which parties have the freedom to conclude binding contracts. In the area of affiliation and parental responsibilities it is not possible to deviate from the legal rules by contract. Recently, research into

[73] Antokolskaia MV et al (2010) Koude Uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan. WODC, The Hague, p 30; Groenleer M (2009) De aantastbaarheid van een echtscheidingsconvenant. EB Tijdschrift voor scheidingsrecht 18. One of the few examples in which the court recognized unforeseen circumstances was Hoge Raad 12 June 1987, *NJ* 1988, 150.

[74] Rechtbank 's Gravenhage 2 March 2010, ECLI:NL:GHSGR:2011:BP9424.

the possibility of introducing multiple parental responsibilities into Dutch family law based upon a contract between a lesbian couple and a known donor or a step-parent plan has been finalized. The Ministry of Security and Justice commissioned this socio-empirical and comparative research, which was published in 2014.[75] A multidisciplinary composed state commission on 'recalibration parenthood' was appointed in April 2014. Its report is expected in 2016. Whether the legislator will then legislate in this area remains to be seen.

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[75] Antokolskaia M V et al (2014) Meeroudergezag: een oplossing voor kinderen met meer dan twee ouders? Een empirisch en rechtsvergelijkend onderzoek. Boom Juridische Uitgevers, The Hague.

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Chapter 16
The Contractualization of Family Law in the United States

Adrienne Hunter Jules and Fernanda G. Nicola

Abstract This chapter highlights the evolutions in U.S. law on the contractualisation of family law. As any U.S. report on family law requires discussion of the varied laws of the 50 U.S. states, this chapter necessarily contains a vast summary component with broad generalizations in order to provide the requested context for U.S. law. The authors also explore larger themes and scholarship in order to illustrate some of the important developments and theories advanced by U.S. lawyers and scholars in the areas discussed.

Basic Framework for U.S. Family Law

Family Law as a State Prerogative

Thelegal system of the United States is a system of separation of powers, "both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive, and judicial authority)."[1] Substantive family law, as understood in its narrow sense as the laws governing the entrance and exit from marriage and all related ancillary issues, e.g. marital property division, spousal support, child custody, child support, is a state prerogative.[2] The Tenth Amendment

[1] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 7 (3d ed. 2000).

[2] United States v. Windsor, 133 S. Ct. 2675, 2691 (2013); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004); Rose v. Rose, 481 U.S. 619, 625 (1987).

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to the U.S. Constitution generally secures this authority for the states.[3] Adhering to a common law system within this framework of federalism, the states adopt statutes and procedural rules governing these areas of family law, as narrowly defined, and the highest state courts interpret and apply the resulting rules and regulations, issuing binding decisions that have precedential value upon lower state courts and in effect become the substantive family law.

Federal Family Law

The fact that the states exercise authority over family law generally does not mean that federal law has no role in governing the family.[4] As just one example, there exist over a thousand federal laws in which "federal rights and benefits are conditioned upon marital or spousal status."[5] In the area of child support, the federal government takes an instructive role, through federal legislation requiring states to identify parents and create state child support guidelines.[6] Further, efforts of the Uniform Law Commission to create uniform laws among the states have resulted in various draft legislation, some of which the states have adopted.

The U.S. Supreme Court has issued opinions on family law issues, addressing topics such as abortion, termination of parental rights, and state criminalization of sexual conduct.[7] These decisions, the authors argue, deal generally with an individual's right to privacy, an individual's right to make decisions regarding the most intimate aspects of her life, free from intrusion by the government or others, a right generally carved out of the guarantees of the U.S. Constitution and the Bill of Rights.[8]

The Supreme Court recently considered same-sex marriage. In *U.S. v. Windsor*, the Court declared key provisions of the federal Defense of Marriage Act (DOMA)

[3] Lavine v. Cincent, 401 U.S. 531 (1971).

[4] *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 539 (2008); *See also*, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383 (2007); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999).

[5] *Windsor*, 133 S. Ct. at 2683 (2013).

[6] *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (conditioning federal funding for state welfare programs on implementation of state programs to establish paternity and enforce child support payments); Family Support Act, Pub. L. No. 100–485, 102 Stat. 2345 (1988) (conditioning federal funding for child support enforcement on state establishment of presumptive child support guidelines.)

[7] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Santosky v. Kramer, 455 U.S. 745, 758–759 (1982); Lawrence v. Texas, 539 U.S. 558 (2005); *see also* Linda D. Elrod, *The Federalization of Family Law*, 36 HUM. RTS. 6 (2009).

[8] *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161–62 (2004).

unconstitutional. DOMA, enacted by the U.S. Congress in 1996, before any state had legalized same-sex marriage, prevented federal recognition of any same-sex marriage lawfully granted by any U.S. state.[9] By the time of this writing, 13 of the 50 U.S. states permit same-sex marriage.

The authors assert that *U.S. v. Windsor* presents evolving U.S. jurisprudence, extending beyond the right to privacy, that people acquire a constitutionally protected public dignity and status through marriage, as do their children,[10] that the government cannot diminish by refusing legal recognition.[11] Logically following *Loving v. Virginia*,[12] which commands legal recognition of interracial marriages, this jurisprudence should lead to the conclusion that no state can refuse legal recognition of valid out-of-state same-sex marriages, and, eventually, should invalidate state laws denying marriage licenses for same-sex marriages.[13] These latter two developments have not yet occurred, but are surely on the horizon.

[9]The U.S. Supreme Court this year also considered *Hollingsworth v. Perry*, 133S. Ct. 2652 (2013) held that proponents of a state law banning same-sex marriage (Proposition 8) lacked standing to appeal a lower federal court decision that the law was unconstitutional. Although there was no substantive discussion of same-sex marriage, *Hollingsworth* effectively means that Proposition 8 is gone. Without Proposition 8, California officials are free to resume issuing marriage licenses for same sex couples, and these marriages will have full status and recognition under the laws of the state of California.

[10]*Windsor*, 133 S. Ct. at 2693 ("And [DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). Macarena Saez, immediately following the issuance of the decision, commented on the prevalent use of the word "dignity" in the decision and the ways in which this prevalence perhaps represents both a transplant from foreign jurisprudence but also a newer "American" understanding of a dignity-conferring institution of marriage, oral comments at a forum following the decision, American University, Washington College of Law (June 27, 2013); *see also* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & LAW 387, 417 (2012) (decrying the reappearance of previously denounced illegitimacy as the new rationale for striking down same-sex marriage prohibitions which purportedly harm children of same-sex couples by making it impossible for their parents to be married).

[11]*Windsor*, 133 S. Ct. at 2693 ("DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.").

[12]Loving v. Virginia, 388 U.S. 1, 11 (1967); *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("The right to marry is of fundamental importance for all individuals.").

[13]*See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (foreshadowing this development); *See also* Jeffrey Toobin, *Adieu, DOMA!*, THE NEW YORKER (July 8, 2013) http://www.newyorker.com/talk/comment/2013/07/08/130708taco_talk_toobin

International Family Law

International law also affects U.S. family law in disputes implicating specific international conventions to which the U.S. is a signatory.[14] For example, the Hague Convention on the Civil Aspects of International Child Abduction provides procedures for the return of children unlawfully removed from or retained outside of the country of their habitual residence.[15] The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption regulates international adoption.[16] These Conventions respectively provide procedures for the return of children unlawfully removed from or retained outside the state of their habitual residence and regulate international adoption.[17] Even though these conventions are important human rights instruments, they have spurred criticism among U.S. scholars.[18] These scholars have disputed the goals and implementation of the Convention on Adoption, some arguing that it should be less burdensome and encourage international adoption,[19] others arguing that international adoption abuses such as child-buying and coercion abound, and strict regulation is necessary and desirable in order to protect vulnerable birth parents.[20]

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[14] *See* D. KELLY WEISBURG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 857 (5th ed. 2013). *See generally* Anne Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80–84 (2010); Barbara Stark, *The Internationalization of American Family Law*, 24 J. AM. ACAD. MATRIMONIAL LAW. 467, 469 (2012); Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 635–37 (2008). With respect to International Human Rights instruments affecting family law, women and children, the U.S. has failed to ratify some significant human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, and the Convention on the Rights on the Child, *opened for signature on* Nov. 20, 1989, 1577 U.N.T.S. 3.

[15] Implemented in the U.S. through the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610, and 22 C.F.R. §§ 94.1–94.8 (2013). *See* Linda D. Elrod & Robert G. Spector, *Review of the Year in Family Law 2011–2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471 (2013).

[16] Implemented in the U.S. through the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. § 14901 (2000). *See* Elrod & Spector, *supra* note 16.

[17] *See* Estin, *supra* note 15, at 80–84 (quoting Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 101–03 (1980)); *see also* WEISBURG & APPLETON, supra note 15, at 857.

[18] *See* Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1600 (2006).

[19] *See* Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 115, 165 (2007).

[20] *See* KATHRYN JOYCE, THE CHILD CATCHERS (2013); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 128 (2008).

Finally, prominent Human Rights norms advanced by regional courts such as the European Court of Human Rights interpreting Article 8 of the ECHR famously influenced the U.S. Supreme Court decision in *Lawrence v. Texas.*[21] The Inter-American Human Rights system originating out of the Organization of American States is gaining momentum among LGBT groups for interpreting the contours of sexual discrimination and gender equality.[22] The Inter-American Commission of Human Rights condemned the United States in the case Jessica Lehahan, finding that through police non- intervention in a domestic violence case, the U.S. failed to exercise its good faith duty to enforce antidiscrimination provisions for the protection of women.[23]

Contracting Horizontal Intimate Relationships

In accordance with the framework set forth in the IACL request, this article first addresses horizontal intimate relationship contracting and then vertical intimate relationship contracting. This article then discusses the contract method of alternative dispute resolution and provides some final words on contracting permanence within family law.

Marriage as Contract?

Contracting horizontal intimate relationships concerns marriage and its alternatives, a discussion about which, the authors believe, requires discussion of the changing relationship of marriage to contract, within the U.S. Not always worthy of its occasional appellation, the so-called "marriage contract" is qualitatively different from a standard contract.[24] Janet Halley traces the beginnings of U.S. treatment of marriage as a contract to the early nineteenth century; Halley then notices a profound

[21] 123 S. Ct. at 2481.

[22] *See* Atala Riffo and Daughters v. Chile, *Decisions and Judgments*, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Rosa M. Celorio, *The* Case of Karen Atala *and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 354 (2012).

[23] *See* Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

[24] While mutual asset seems always to have been a requirement in Western marriages, the reasons why people marry have changed over time, people now expecting personal fulfillment instead of or in addition to other goals such as property control or political advantage. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY; OR HOW LOVE CONQUERED MARRIAGE 24–31 (2005); *see also* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 87–115

shift in the mid-nineteenth century, when contemporary thinkers began to conceive of marriage as more of a status than a contract.[25] This transformation corresponded with the rise of free market *laissez faire* ideology and actually pitted family relationships against contractual relationships within the market: "the husband, wife, and child constituted 'the family' and lived in an affective, sentimental, altruistic, ascriptive, and morally saturated legal and social space. The market was the family's opposite: rational, individualistic, free, and morally neutral."[26] Many regard *Maynard v. Hill* (1888) as the seminal U.S. case establishing marriage as more than a mere contract, as also a status, properly regulated by the government.[27]

And so it is today, marriage based on the free assent of the parties immediately subjects the parties to legal rights and obligations, often without their full knowledge or consent. Further, states set the terms under which the parties may abandon the marriage. In this manner, we may describe U.S. marriage more appropriately as an institution of public status with accompanying rights and obligations created by the public will versus a form of private contract. Nevertheless, the view of marriage as more status than contract is an ongoing, fluid debate, many arguing that contract is more important in defining this relationship and the behavior of individuals within it. Notably, Martha Ertman emphasizes the view that marriage is and long has been a mix of status and contract, in varying proportions over time, with status not necessarily winning, in the past or present.[28]

Contracting In and Out of Marriage Default Rules

The use of civil contracts to govern horizontal relationships between intimate partners represents an effort by private individuals to circumvent the underlying default laws of marriage. We see this form of contractualization of family law in the distinct scenarios described below.

No Marriage and No Contract

As it was necessary first to reflect briefly on the relationship of marriage to contract, it is now appropriate that we take another break in the discussion to make clear

(2009); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 56–58 (2011).

[25] Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 2 (2011).

[26] *Id.* at 3.

[27] *Maynard v. Hill*, 125 U.S. 190 (1888).

[28] *See* Martha Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17, 66–68 (1998) [hereinafter Ertman, *Commercializing Marriage*]; Martha Ertman, *Marriage as a Trade*, 36 HARV. C.R.-C.L. L. REV. 79, 92–98 (2001) [hereinafter Ertman, *Marriage as a Trade*].

who we are talking about and who we are not talking about, when we discuss marriage and contractual circumvention of marriage law. Increasingly, more U.S. citizens are spending more of their adult lives outside of a marriage, whether or not they have children.[29] There are important class and racial distinctions in this overall trend. Generally speaking, the class qualities of greater education and higher income predict higher levels of marriage.[30] As a striking racial distinction, African-Americans, in particular, after correcting for education and income, spend fewer of their adult years in marriage.[31]

Generally speaking, those persons in non-marital intimate relationships have legal obligations to one another that are no different than between strangers. There are exceptions to be sure. As the most prominent, striking exception, Washington State currently allows non-married cohabitating partners participation in the state's community property regime, so that non-married, cohabitating partners may request division of assets acquired during their cohabitation upon dissolution of their relationship.[32] More generally, across more states, domestic violence statutes in many jurisdictions impose obligations and bestow rights upon persons in intimate relationships, irrespective of their marital status. Certain jurisdictions also transmute the status of cohabitating persons into the status of married persons, through common-law marriage. Some private organizations and companies also have made available benefits, such as health and retirement benefits, to the non-married domestic partners of their members and employees.

Further, certain state legislatures have created new categories of legally recognized horizontal relationships that these states statutorily deem virtually equal or very similar to the relationship of marriage, i.e. civil unions and domestic partnerships. There is reason to believe these legislative developments have been efforts of inclusion for same-sex couples who cannot marry under the laws of those states. Accordingly, as those state laws change, and same-sex couples gain the right to marry, these newer legally recognized categories for unmarried intimate partners might cease to exist.[33]

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[29] *See* Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES, Feb. 17, 2012, at A1; *see* Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES, May 26, 2011, at A22.

[30] *See* CHERLIN, *supra* note 25, at 114–15.

[31] *See* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); *see also* Ralph Richard Banks and Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage,* 11 MICH. J. RACE & L. 115, 122 (2005).

[32] *In re* Marriage of Lindsey, 678 P.2d 328, 332 (Wash. 1984); Connell v. Francisco, 898 P.2d 831, 837 (Wash. 1995).

[33] *See, e.g.*, Michael Dresser & Carrie Wells, *With Same-sex Marriage Now Available, State to End Benefits for Domestic Partners*, BALT. SUN (May 3, 2013), http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502_1_domestic-partners-health-benefits-state-employees#.Uk3RAqPdmsk.email

Further, the legal effect of the *Marvin* decision, discussed below, has been the creation of equitable theories of recovery for individuals who split after years cohabitating without marriage to recover some division of the assets acquired by each other during their time together or some ongoing monetary support after they part ways. These theories include theories of implied contracts, joint venture, constructive trust or resulting trust, and have been adopted by some but not all U.S. courts.[34] These theories, where accepted, allow parties to avoid marriage and the technical requirements of contract execution and still receive some of the dissolution rights associated with marriage.[35]

Not all states have been eager to expand dissolution rights to cohabiting intimate partners who neither marry nor contract for marriage-like benefits. A few states reject the theories described above as disingenuous attempts to create contracts where none really exist in order to avoid their state laws prohibiting the recognition of common law marriages.[36] Some states require an express contract, whether oral or written[37]; others require an actual written contract.[38]

Getting back to the subject of our inquiry regarding the contractualization of family law, do we consider those persons in intimate horizontal relationships outside of marriage who do not execute contracts to govern their relationships to be privately ordering their family lives? What if the laws of their states might grant them some equitable relief when they split?

To be sure, horizontal intimate relationships outside of marriage and contract are not necessarily completely without some form of informal private ordering. As just

[34] *See, e.g.*, Donovan v. Scuderi, 443 A.2d 121, 128 (Md. App. 1982) (oral agreement); Kinkenon v. Hue, 301 N.W.2d 77, 81 (Neb. 1981) (oral agreement); Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. 1983) (oral agreement); Carroll v. Lee, 712 P.2d 923 (Ariz. 1986) (implied agreement); Kaiser v. Strong, 735 N.E.2d 144, 149 (Ill. App. 2000) (constructive trust); Akers v. Stamper, 410 S.W.2d 710, 712 (Ky. 1966) (joint venture). *See generally* ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 707–08 (3d ed. 2012).

[35] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 (2002). Having abandoned the contract approach to resolving cohabitation disputes, the ALI recommends the presumption of a legally cognizable domestic partnership, akin to marriage in rights upon dissolution, after 3 years of cohabitation.

[36] *See e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1208–09 (Ill. 1979) ("It is said that because there are so many unmarried cohabitants today courts must confer a legal status on such relationships. This, of course, is the rationale underlying some of the decisions and commentaries . . . If this is to be the result, however, it would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts . . . ."); *see also* Devaney v. L'Esperance, 949 A.2d 743, 754 (N.J. 2008) (Rivera-Soto, J., concurring) ("The vast majority of states that do not acknowledge common law marriages also have rejected a cause of action for palimony [payments akin to alimony following the dissolution of cohabitation] . . . ").

[37] *See, e.g.*, Levar v. Elkins, 604 P.2d 602, 603 (Alaska 1980); Dominguez v. Cruz, 617 P.2d 1322, 1322 (N.M. Ct. App. 1980); Monroe v. Monroe, 413 N.E.2d 1154, 1158 (N.Y. 1980); *see generally* OLIPHANT & VER STEEGH, *supra* note 35, at 708.

[38] *See, e.g.*, MINN. STAT. § § 513.075, 513.076 (2008); TEX. BUS. & COM. CODE ANN. §26.01(b)(3) (West 2007). *See generally* OLIPHANT & VER STEEGH, *supra* note 35, at 708.

one example, in her work on low- income single mothers, Katherine Edin explores the ways in which these mothers operate within well-defined informal systems of financial obligations and entitlements created and sustained by various forms of non-marital horizontal intimate relationships.[39] Many others have documented the ways in which some adults historically have formed extended kinship communities, the members of which undertake significant monetary and in-kind exchanges in order to assist one another.[40]

As an additional consideration, some lament the focus on marriage and approximations of marriage (perhaps contractually created) as a failure in our collective imagination to envision other institutions for providing social and economic security to individuals.[41] This discussion regarding our collective values and priorities points to significant socio-political concerns, mostly located outside of family law, narrowly defined, but this discussion is beyond the focus of this work.

Cohabitation Contracts

Now that we are clear regarding who we are (and who we likely are not) talking about in the U.S. context, and now that we have acknowledged though not weighed in on an ongoing debate regarding the degree to which we should value marriage,[42] below is the discussion of unmarried cohabitants who legally contract for marriage-like contractual obligations and rights.

The actual tally of how many unmarried intimate partners endeavor (or would endeavor) to go through the trouble and bear the expense of executing contracts to create rights and obligations to govern their relationships is unknown, but is

[39]KATHERINE EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).

[40]*See* Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 18–19 (2005); Melissa Murray, *The Networked Family: Re-framing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391–92 (2008).

[41]*See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228–36 (1995); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008); Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 MICH. L. REV. 977, 995 (2013); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 209–10 (2007).

[42]For further discussion in this ongoing debate, specifically in the context of marriage promotion initiatives instituted during Bush era, see Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 288 (2009); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1675–78 (2005); Theodora Ooms et al., Ctr. for Law & Soc. Policy, *Beyond Marriage Licenses: Efforts in States to Strengthen Marriage and Two-Parent Families* 5–10 (2004).

presumably small.[43] Surely some do. Of note, some particularly diligent same-sex couples rely upon such contracts in order to provide them with the legal protections upon dissolution afforded married couples, where these same-sex couples may not marry within their state of residence.

Marvin v. Marvin is an early U.S. case regarding the enforceability of cohabitation contracts, holding, "[t]he fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses."[44] In *Marvin*, the court addressed an alleged oral contract between unmarried persons for post-relationship support and equitable division of assets. The court took pains to distinguish this alleged contract from a contract for sexual services (prostitution), which would be against public policy and illegal.

In this decision, we therefore see approximations of the market/family divide discussed earlier in this work, as the court struggles with the notion that persons involved in a romantic relationship could execute a contract between themselves. Are the parties contracting for sex? No, the court answered, the parties are contracting *despite* the sex, and the sex doesn't invalidate their contractual arrangements.

Though spurring academic debate and some court decisions, discussed above, regarding expanded equitable remedies for cohabitating couples to recover marriage-like benefits upon dissolution of their relationships, the *Marvin* case actually was quite limited in its legal holding; the holding firmly requires the existence of an express or implied contract for remedy. Indeed, upon remand, the trial court denied relief, finding that the parties never agreed to share interest in all property acquired during their relationship and never agreed that one partner would provide for all of the financial needs of the other for the rest of her life.[45] Further, the trial court on remand awarded the plaintiff money for the purposes of rehabilitation, but the appellate court struck down this award as an improper equitable remedy where there was no valid agreement.[46]

Premarital Contracts

The second way in which parties circumvent the default system of marriage laws through contract is through prenuptial (or antenuptial) agreements. Although states previously maintained that prenuptial agreements specifying how spouses would divide assets and/or support one another following a divorce were void,

[43] *See* Ira Mark Ellman, *"Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (Oct. 2011).

[44] 557 P.2d 106, 113 (Cal. 1976), *remanded to* 176 Cal. Rpt. 555 (Ct. App. 1981).

[45] *Id.* at 559; *see* OLIPHANT & VER STEEGH, *supra* note 35, at 710.

[46] *Marvin*, 176 Cal. Rpt. at 559.

as against public policy in encouraging divorce,[47] today, prenuptial agreements in contemplation of divorce are not *per se* unenforceable.[48] To the knowledge of the authors, opposition to these contracts did *not* engage in a discussion of whether the parties' sexual relationship or future sexual relationship makes these agreements illegal, as the *Marvin* decision queried.[49]

The Uniform Premarital Agreement Act (UPAA), created in 1983, adopted, in whole or in part, by half of the states, allows fiance´es wide latitude in opting completely out of a state's statutory and common law scheme for division of assets and alimony upon divorce. The one blanket restriction within the UPAA concerns child support, a child's right that "may not be adversely affected by a premarital agreement."[50] Parties generally also may not contract freely on issues child custody, though in less specified ways.

The rules applicable to the enforcement and interpretation of contracts generally apply to prenuptial agreements, both in states that have adopted the UPAA and the others. Both the UPAA and the specific laws of most states consider standard contract concepts of unconscionability and voluntary consent, with the specific concerns of coercion, fraud, duress, and undue influence. The extent to which these concepts and concerns prevent enforcement of prenuptial agreements that greatly disadvantage one party is all over the board, nationally. Of particular interest is a court's understanding of the relationship of the parties upon signing: how similar or different is the relationship of betrothed spouses signing a prenuptial agreement to the relationship between parties in an arms-length commercial negotiation? Are the parties in a confidential or fiduciary relationship thereby heightening the standards of their financial disclosure prior to execution?[51]

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[47] *See, e.g.*, McCarthy v. Santangelo, 78 A.2d 240, 241 (Conn. 1951). *See generally* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998); Premarital agreements allowing parties to set forth their wishes upon the death of a spouse generally speaking always have been enforceable.

[48] *See, e.g.*, Van Kipnis v. Van Kipnis, 900 N.E.2d 977, 980 (N.Y. 2008). This development was not universally heralded as progress. *See generally* Bix, *supra* note 48, at 148–58; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 207–11 (1982); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352–59 (2007).

[49] Although avoided by practitioners and policy advocates, parallels between marriage and prostitution, immensely taboo, have indeed been made by well-respected economists, such as Richard Posner, champion of the "law and economics" discipline. *See* Viviana A. Zelizer, *The Purchase of Intimacy*, 25 L. & SOC. INQUIRY 817, 825 (2000).

[50] UNIF. PREMARITAL AGREEMENT ACT, § 3(b) (1983).

[51] U.S. States answer this question somewhat differently. *See, e.g.*, Mallen v. Mallen, 622 S.E.2d 812, 815 (Ga. 2005) (no confidential or fiduciary relationship prior to marriage); Ansin v. Craven-Ansin, 929 N.E.2d 955, 966 (Ma. 2010) (parties to a premarital agreement are in confidential relationship with one another but not a fiduciary relationship, owing a duty of absolute fidelity to one another).

There are a few ways in which interpretation of prenuptial agreements clearly veers from standard contract interpretation. First, when determining whether or not to enforce a prenuptial agreement, some states consider not only the circumstances surrounding execution of the agreement, but also the circumstances at the time of enforcement of the agreement. Also interesting for the authors of this work, while most states understand that the *marriage itself* may be valid and sufficient consideration for a prenuptial agreement, upon an implicit understanding that the parties would not marry but for the prenuptial agreement, the UPAA explicitly states that prenuptial agreements are enforceable *without* consideration, in contradiction of a very basic tenet of standard contract interpretation. Curiously, the UPAA also states that an amendment or revocation of a prenuptial agreement also is enforceable without consideration. Unless we consider that continuation of a marriage would qualify as consideration, this provision of the UPAA is a serious abrogation of standard contract interpretation.[52]

At a much broader level, a distinction generally may be made between the prenuptial agreement as a "partnership agreement," taking from the modern view of marriage as a partnership between spouses,[53] and a typical business partnership agreement, which would not concern exclusively the terms of dissolution (the exit package) but also presumably would include some discussion regarding the expectations of the partners during the course of the partnership and the terms of breach that would void or require amendment of some or all of the terms governing dissolution (termination for cause provisions). There is no legal requirement for prenuptial agreements to contain any provisions regarding the expectations of the spouses during the marriage.[54] Indeed, although many states retain their fault grounds for divorce (i.e. adultery, cruel and inhuman treatment, abandonment) along with their no-fault option, many prenuptial agreements do not contain any mention of this potential bad behavior during marriage as cause for modification of the terms

[52] *See generally* Whitmore v. Whitmore, 778 N.Y.S.2d 73 (App. Div. 2004).

[53] This view, for example, undergirds the modern legal shift away from title to equitable division of marital property.

[54] Linda McClain, in her work, *Family Constitutions and the (New) Constitution of the Family*, 75 FORDHAM L. REV. 833 (2006), undertakes a thoughtful discussion of a new phenomenon of families drafting their own "family constitutions" to govern the operation of their families and compares these family constitutions to the U.S. Constitution and corporate mission statements. These family constitutions however have no legal enforceability. Martha Ertman has argued for an expanded view of the purpose and benefits of contractual bargaining in intimate relationships and proposes contracts that indeed include detailed discussions of expectations during marriage along with other unenforceable inclusions, i.e. professions of love, arguing that these inclusions help govern the behavior of the parties during the marriage, reduce the likelihood of dissolution, and the likelihood that the dissolution terms of the agreement will be accepted and not contested upon dissolution. *See* MARTHA M. ERTMAN, LOVE & CONTRACTS (forthcoming from Beacon Press 2014). Ertman, *Commercializing Marriage*, *supra* note 29, at 66–68; Ertman, *Marriage as a Trade*, *supra* note 29, at 92–98.

of a prenuptial agreement. This reality exists even while some states still consider one of these cause categories—adultery—a criminal offense.[55]

Of course, some good attorneys are mindful of negative potentialities and advise clients to include so-called "bad boy" clauses in prenuptial agreements for protection. But "bad boy" clauses in prenuptial agreements are neither required by law nor particularly common. On the other end of the spectrum, there is an open question as to whether positive behavior expectation terms in prenuptial agreements, terms such as the obligation to reside in the same home, provide sexual affection, or provide housekeeping labor would be enforceable, either because courts consider these terms essential obligations of marriage and therefore without consideration or because judges just do not feel comfortable enforcing these obligations, with or without a contract.[56]

Of note, somewhat ironically in light of the original rationale for prohibiting certain prenuptial agreements, a newer form of premarital contract has appeared on the scene, one expressly designed to make it *harder* to divorce—the covenant marriage contract. The authors characterize the covenant marriage contract only partially as contractual private ordering, for the reasons discussed below.

Three U.S. states maintain covenant marriage contracts, Louisiana, Arkansas and Arizona.[57] The statutorily prescribed contractual terms for a covenant marriage contract in all three states include limiting divorce to situations where there are proven allegations of serious fault, including adultery, conviction of a felony, abandonment for 1 year, or physical or sexual abuse of a spouse or a child of one of the spouses.[58] The parties alternatively may obtain a divorce if they live separate for some period of time.[59]

Different from private ordering in the context of an ordinary premarital agreement, with covenant marriage contracts, the parties do not create their own terms;

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[55] *See, e.g.*, MICH. STAT. ANN. § 750.30; N.D. STAT. ANN. § 12.1-20-09 (1991); MASS. STAT. ANN. CH. 272, § 14; GA STAT. ANN. § 16-6-19.

[56] *See* Michigan Trust Co. v. Chapin, 64 N.W. 334, 334 (Mich. 1895) ("[P]romise to pay for services which the very existence of the relation made it her duty to perform, was without consideration."); N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471, 474 (N.C. 1987) (the law can enforce a duty of support but not a corresponding duty to render services in the home); OLIPHANT & VER STEEGH, *supra* note 35, at 510–14, 651–52.

[57] LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25–111, 25-312-314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; *see also* Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 872–73 (2010); *see also* Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467, 482 (2006).

[58] LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312-314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

[59] LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25–111, 25-312-314, 25-901-906 (2000 & Supp. 2005); Ark. Code Ann. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

instead, the contract terms *already exist* as drafted by the state legislature. The parties contract by just signing up. In this manner, it is perhaps questionable whether the covenant marriage contract really qualifies as contractual private ordering.

On the other hand, the Louisiana legislation uniquely imposes upon the parties some of the terms customarily left out of standard prenuptial agreements, marriage obligations other than dissolution rights. For example, the Louisiana statute provides that parties must agree to mutual love and respect, mutual residence, decision-making in the best interest of the family, mutual duty for household management, and the teaching of children in accordance with their "capacities, natural inclinations, and aspirations."[60]

Postnuptial and Separation Contracts

The third way in which parties circumvent the default laws of marriage through contract is through postnuptial or separation agreements, agreements between married spouses. However counterintuitive the notion at first may seem, postnuptial and separation agreements are not meaningfully different as distinct legal categories. Both postnuptial and separation agreements with varying degrees set forth the terms for the continuation of the marriage (the later containing the explicit term of separate residences) as well as the agreed-upon consequences of divorce.

While courts sometimes treat these agreements similar to prenuptial agreements, postnuptial and separation agreements differ from prenuptial agreements in key ways.[61] First, unlike prenuptial agreements, these contracts cannot have the marriage as the consideration for the agreement.[62] Second, there is no doubt the parties are in a confidential or fiduciary relationship with one another, necessarily heightening the requirements of full and fair disclosure before signing. Finally, as parties enter these agreements with the intention to stay married after some period of marriage and perhaps some marital discord, these contracts occasionally contain language regarding how the parties will govern themselves *during the marriage*, not just how assets will be divided and support provided upon divorce. Inclusion of terms regarding how the parties will conduct themselves during the marriage, whether or not the parties will reside in the same home, how money will be shared and assets managed during the marriage, distinguishes these agreements from prenuptial agreements in a profound way.

[60]LA. REV. STAT. ANN. § 9:272 (2008); *see also* Spaht, *supra* note 58.

[61]For a detailed discussion regarding the differing treatment of postnuptial agreements, see Barbara Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11 (2012).

[62]This would be the case also with any amendment or revocation of a prenuptial agreement, a situation discussed previously in this work, *supra* note 46.

Divorce Settlement Contracts

The fourth and most common way in which parties contract horizontal relationships is through divorce settlement agreements, settling all matters of dispute between divorcing spouses, including matters involving the parties' children. The authors include divorce settlement agreements in our discussion of horizontal relationships, even though divorce settlement agreements also contract, in more limited fashion, vertical intimate relationships between parents and children, because these agreements originate primarily from the breakdown of the horizontal relationship and must be all-inclusive in resolving both horizontal and vertical disputes.

Somewhat different from the contracts already discussed, divorce settlement agreements do not, on the whole, represent attempts to create or veer from established family law, but instead present the results of negotiations *on the basis of* the established family law in the state with jurisdiction over the dispute. Parties executing divorce settlement agreements are not creating their own rules to govern all potential eventualities of their marriages; they are agreeing to compromise based on the situation and law existing at that time.

In their influential 1979 work, "Bargaining in the Shadow of the Law: The Case of Divorce," Robert Mnookin and Lewis Kornhauser discussed the ways in which legal rules create bargaining endowments for divorcing spouses.[63] The legal rules governing spousal and child support, child custody, and the division of marital assets give each spouse certain claims or bargaining chips in their negotiations with each other.[64] Mnookin and Kornhauser also discuss the effects that trial uncertainty, varying degrees of risk aversion, and transaction costs have on the negotiation process.[65] In what we believe is their most enduring contribution to the discussion of private ordering in family law, Mnookin and Kornhauser assert: "Discretionary standards can substantially affect the relative bargaining strength of the two parties, primarily because their attitudes toward risk and capacities to bear transaction costs may differ substantially."[66]

Family law practice and procedure are rife with judicial discretion, statutorily created and bolstered by the relative lack of appellate review and accompanying precedent. Legislatures intentionally create systems for adjudication of disputes over child custody and visitation, distribution of marital assets, spousal support and even (though to a somewhat lesser degree) child support that provide judges with vast amounts of discretion upon which to base their decisions after consideration of the facts presented and the character of the parties presenting those facts (character being something greater than credibility and more closely resembling the concept of

[63] Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[64] *Id.*

[65] *Id.*

[66] *Id.* at 980.

"moral dessert"). The standard of "best interests of the child" is just one significant example. There are equally vague and imprecise standards for spousal support (how long and for what purposes should it be awarded) and equitable division of marital assets (what is equitable).

Further, there often is a relative lack of judicial precedent. Beyond the real aversion of appellate courts generally to hearing family law cases, the costs, delays and further uncertainty involved in bringing cases up for appeal means that as a practical matter, few family law matters will reach the appellate courts for adjudication and establishment of judicial precedent. Some jurisdictions are better than others. Jurisdictions more hospitable to hearing family law appeals and having resident litigants with greater financial capacities to bring cases up for appeal have more case law, more precedent, and therefore offer a more predictive quality to negotiations. However, for the most part, one accurately may describe family law negotiations as bargaining in the shadow of the unpredictable Wild, Wild West. The virtual impossibility of predicting court outcomes causes unique challenges for adversarily-oriented spouses attempting to arrange their affairs upon divorce privately without resorting to litigation and third-party adjudication of their disputes.

When parties do resolve their divorce disputes by written settlement agreements, their agreements are subject to standard rules of contract interpretation and enforcement, without the sort of specialized contractual hurdles that may occasion premarital and post marital agreements. Absent immediate challenge by either party to the enforceability of these contracts based upon some principle of standard contract law (i.e. fraud), the parties together will present these contracts to the court for approval and incorporation into judgments of the court. Once incorporated into final judgments of the court, these contracts no longer maintain their status as mere private contract.

Default Rules of Intimate Horizontal Relationships

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate horizontal relationship, marriage, and the newer legally recognized horizontal relationships legislatively created in some states, absent an alternative contractual arrangement. Also, included is additional general discussion regarding any substantive restrictions on contracting around the default rules described.

Getting Married

There are various state restrictions on who may marry. These state restrictions include minimum age requirements and prohibitions against the marriage of persons related to one another, bigamy, polygamy, and (in most remaining states) same-sex

marriage.[67] Restrictions against marriage due to income/wealth,[68] incarceration,[69] and race[70] have been struck down by the Supreme Court and no longer exist in any state.

Simply said, there is no way for private parties to contract around valid state restrictions on who may marry, nor may private parties limit the marriage prospects of others, including their sons and daughters, by contract. These contractual limitations notwithstanding, parties generally may work around existing restrictions, where state laws vary, by getting married in another state. Such marriages generally receive federal recognition and, with the exception of same-sex marriages, other state recognition.[71]

Rights and Responsibilities During Marriage

Historically, the states imposed a "duty of necessaries" upon husbands, requiring husbands to pay the necessary expenses of their wives.[72] By Supreme Court mandate, states now must apply this principle in a gender-neutral fashion, so that wives also would bear responsibility for their husband's necessary expenses.[73] However, some states have abandoned this principle altogether. Where the principle still applies, with the exception of ordering payment to third parties to pay spousal expenses, courts have been reluctant to apply this principle and to quantify this ongoing duty during a marriage.[74]

Beyond this unspecific duty of financial support, states impose no real marital duties upon spouses toward one another, to the extent that spouses would have any cause of action in court for failure to perform. As discussed below, the advent of no-fault divorce and the potential that fault may be excluded as a factor relevant to the distribution of assets and alimony, means that obligations customarily understood to accompany marriage, such as sexual fidelity and kind treatment, lose the force of law.

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[67] *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

[68] Zablocki v. Redhail, 434 U.S. 374, 391 (1978).

[69] Turner v. Safley, 482 U.S. 78, 79 (1987).

[70] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[71] *See Windsor*, 133 S. Ct. at 2693; U.S. CONSTITUTION, art. IV, §1. Unchallenged provisions of DOMA currently prevent application of full faith and credit to out-of-state same-sex marriages.

[72] *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003); s*ee, e.g.*, N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987).

[73] Orr v. Orr, 440 U.S. 268 (1979).

[74] McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).

Getting Divorced

Some form of no-fault default divorce exists in all 50 U.S. states,[75] meaning spouses no longer must prove some element of fault in order to get a divorce. Parties generally cannot contract to limit (or expand) causes of action for divorce by contract. The one exception remains covenant marriage contracts, statutory creations of states expressly allowing parties to expand limitations on their rights to divorce.

Division of Assets upon Divorce

U.S. states generally classify assets upon divorce as either marital assets, assets acquired during the marriage, or separate assets, assets acquired before the marriage or through bequest, devise, or gift.[76] Once a court determines that certain property is separate, typically, the court will award this property to the spouse with title to the property.[77]

U.S. states then employ two alternate methods of dividing property upon divorce: community property or equitable distribution. In community property states, courts generally divide marital property equally (50/50). In equitable distribution states, courts generally divide property acquired during the marriage equitably, as determined by the court. Although not usually codified by statute, people involved in litigation in equitable distribution jurisdictions sometimes conceptually begin with consideration of 50/50 division of marital assets and then move back and forth along the percentages based on some combination of factors, including contributions to the acquisitions of the assets, marital fault, and need.[78] The laws of community property and equitable distribution embody the important notion of a marriage as a "partnership," and so property acquired through the effort or skill of ether "partner" belongs to the partnership.[79]

Significant fine distinctions and qualifications appear in the case law of equitable distribution and community property division, so that litigation regarding asset

[75] *See also* OLIPHANT & VER STEEGH, *supra* note 35, at 514.

[76] JOHN E.B. MYERS, EXPERIENCING FAMILY LAW 536 (2013).

[77] There are some exceptions. In addition to alimony, which is precisely an award of separate property to the other spouse, some states authorize awards of separate property. *See* MASS GEN. LAWS. ANN. Ch. 208, § 34 (2011); CONN. GEN. STAT. ANN. § 46B-81(a) (1978); IND. CODE ANN. § 31-15-7-4(a)(1997); Williams v. Massa, 728 N.E.2d 932 (2000); Krafick v. Krafick, 663 A.2d 365, 370 (Conn. 1995); MYERS, *supra* note 77, at 539.

[78] *See* MYERS, *supra* note 77, at 536; *see, e.g.*, *In re* Dube, 44 A.3d 556, 575 (N.H. 2012) ("[New Hampshire's equitable distribution law] creates a presumption that equal distribution of marital property is equitable.").

[79] *See generally* MYERS, *supra* note 77, at 536.

division upon divorce may become quite complex and expensive. As just a few examples, there are classification of asset issues, such the termination of the acquisition of marital assets, which could be the date of the divorce judgment or some date prior (when the parties ceased working together as a partnership), and the appreciation of separate assets, which could be due to the efforts of one or both of the partners and therefore arguably should be characterized as marital. There are valuation issues, prompting the use of an array of valuation experts, such as real estate appraisers and art appraisers. There are distribution issues, such as the method for dividing the value of a marital home (should the court order the parties to sell it?) and the method for dividing a closely held business between antagonistic spouses.

In addition, the state of New York has expanded notions of marital property to include future property not yet acquired. For example, New York State has well-established law on Enhanced Earning Capacity, a principle initially applied to the division of professional degrees, such as medical licenses, which enable one spouse an enhanced earning capacity, and if earned during the marriage, the principle holds, should be divided upon divorce.[80] The case law then expanded the principle to apply to other certifications and then merely to any professional advancement during the marriage enabling one spouse to earn a significantly higher income than he would have without such advancement. Once enhanced earning capacity becomes a marital asset, New York courts employ a complex system for valuing this asset and then awarding an equitable portion of it to the other spouse upon divorce, in a form of payments that may resemble alimony, but instead are explicitly property division.[81]

As before discussed, parties may displace these community property or equitable distribution regimes by prenuptial agreement, as long as the parties adhere to the governing contractual requirements. Often, the explicit goal of one of the parties initiating a prenuptial agreement will be to avoid the acquisition of marital assets altogether or the transmutation of separate assets into marital assets based upon appreciation during the marriage. As long as the parties respect the relevant contractual requirements, as discussed earlier in this work, this goal is acceptable; the parties may do as they please according to their own consciences.[82]

Spousal Support upon Divorce

Alimony, also termed spousal support or spousal maintenance, is an award out of the separate estate of one spouse to the other spouse. Alimony may be periodic, over

[80] The case that started it all was O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).

[81] *See also* Haugan v. Haugan, 343 N.W.2d 796 (Wis. 1984) (court also attempts to compensate a spouse for the enhanced earning capacity of the other acquired during the marriage).

[82] As before discussed, some jurisdictions impose contractual requirements that do indeed impose morality upon these agreements, employing principles of "unconscionability" and "unfairness based upon changed circumstances." These are contractual requirements not restrictions on contract terms, but the lines can become a little blurred.

time, or lump sum (awarded in one chunk). Lifetime alimony is just that, alimony awarded periodically as long as both spouses shall live. Alimony is terminable upon the death of the receiving spouse (and usually the payor spouse) or upon the remarriage of the receiving spouse. In some cases, alimony terminates when the receiving spouse begins living with another person in a relationship akin to marriage. There is also temporary alimony otherwise known as temporary support or support *pendente lite*, payments from one spouse to another during the pendency of the divorce litigation. Some states consider awards of attorney's fees, designed to level the playing field between spouses so they both can afford equally effective counsel, part of temporary alimony.[83]

Courts award alimony generally based upon the need of one spouse and the ability to pay of the other. The frequency, in addition to the length and duration of awards of spousal support, has decreased rapidly over the years. Lifetime alimony has become almost non-existent. And the rationale for awards of alimony has moved over time generally from an emphasis on an enhanced conception of duty and need characteristic of a society with few opportunities for women to earn income and a system of laws that distributed assets upon divorce according to title, to an impoverished, sex-neutral conception of need,[84] allowing either spouse (perhaps) a limited period of alimony for quick rehabilitation based upon only those perceived educational and professional sacrifices made by that spouse. Alimony awards accordingly have become "more complicated and difficult to predict."[85]

Unlike property division, there are some substantive restrictions on private ordering of spousal support by prenuptial agreement. The majority of states allow parties to waive alimony within the terms of a prenuptial agreement. However, at least four states (California, Iowa, New Mexico and South Dakota) expressly refuse to allow parties to waive their right to alimony in a premarital agreement.[86] Further, some states, even if they allow waivers of alimony, absolutely prohibit waivers of temporary alimony.

Fault?

Of particular note, although all states now have incorporated some form of no-fault divorce, states differ considerably on the issue of whether or not marital fault is relevant and admissible for purposes of determining the division of marital assets and alimony.

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[83] *See* FLA. STAT. ANN. § 61.16 (West 1996); GA. CODE ANN. § 19-6-2 (West 1985).

[84] Orr v. Orr, 440 U.S. 268 (1979) (holding that sex is not a "reliable proxy for need."); *see also* OLIPHANT & VER STEEGH, *supra* note 35, at 514.

[85] OLIPHANT & VER STEEGH, *supra* note 35, at 510.

[86] Bix, *supra* note 48, at 157.

Some states require courts to consider the conduct of the parties in dividing assets.[87] Other states prohibit the consideration of conduct in dividing assets or awarding alimony.[88] Some states have some mixed version of allowing fault for considerations of division of marital assets but not alimony or vice versa.[89] Some states statutorily bar alimony awards to payee spouses who have committed adultery but have no similar statutory provision directing courts to increase alimony where the payor has committed adultery.[90]

Practically, some cunning attorneys may attempt to introduce evidence of fault, even where prohibited, as evidence otherwise relevant to financial matters, for example, the dissipation of marital assets on an extra-marital affair.[91] Whether or not fault is relevant, and whether or not fault is likely to be introduced at trial, may give greater bargaining power to one spouse over the other, thereby dramatically affecting divorce settlement negotiations.

Domestic Partnerships and Civil Unions

Currently, seven U.S. states offer domestic partnerships and/or civil unions to citizens who wish to take on many of the rights and responsibilities of marriage, without marriage. For a same-sex couple living in a state where marriage is not yet legal for same-sex partners, a domestic partnership or civil union is the only option for establishing a legally recognized intimate horizontal relationship. In some states, the designation of domestic partnership or civil union affords the couple the same rights and obligations of marriage, without the marriage title.

For example, New Jersey's statute offering civil unions to same-sex couples provides individuals united by civil union with the same state benefits and protections afforded married persons, including dissolution rights.[92] Of note, the New Jersey civil union statute explicitly provides that parties in civil unions may use prenuptial agreements in the same manner as married spouses.[93]

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[87] *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169–170*; see, e.g.*, R.I. GEN. LAWS. ANN. § 15-5-16.1 (West 2004); Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992).

[88] *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169–170; *see, e.g.*, *In re* Marriage of Tjaden, 199 N.W.2d 475 (Iowa 1972); Hartland v. Hartland, 777 P.2d 636 (Alaska 1989); *In re* Marriage of Boseman, 107 Cal. Rptr. 232 (1973).

[89] *See* OLIPHANT & VER STEEGH, *supra* note 35, at 169–70; *see, e.g.*, Chapman v. Chapman, 498 S.W.2d 134, 137 (Ky. 1973).

[90] *See, e.g.*, GA. CODE ANN. § 19-6-1(c) (1979).

[91] *See* Fernanda G. Nicola, *Intimate Liability: Tort Law, Family Law and the Stereotyped Narratives of Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445 (2013).

[92] N.J. STAT. ANN. § 37:1–32 (West 2007).

[93] *Id.*

Contracting Vertical Intimate Relationships

As we first tracked the various types of permissible horizontal relationship contracts before discussing the underlying default legal rules governing horizontal intimate relationships absent contracts, we now do the same for vertical relationships. Possible contracting occurs with regard to the establishment of parentage and with regard to disputes between legal parents.

Contracting Parentage in Assisted Reproduction

In recent decades, assisted reproductive technology has introduced new issues of multiple contenders for parenthood.[94] The technology has advanced much faster than the law, resulting in very different legal treatment in each state.[95] In response, the Uniform Law Commission adopted the Uniform Parentage Act of 2000 (UPA).[96] Although several states have adopted and expanded upon the UPA, jurisdictional differences abound. For this reason, below is a broad, general discussion of how individuals may contract parentage through assisted reproduction under current state laws attempting to regulate the practice and its consequences.

Egg or Sperm Donation Contracts

The enforceability of contracts pertaining to egg and sperm donation is varied and uncertain among the states' laws. This uncertainty exists against a backdrop of varied states laws governing the rights and responsibilities of the parties involved, absent a contract. As a threshold matter, some states establish a default rule preventing egg and sperm donors from acquiring parental rights and obligations[97]; some states do the opposite and impose parentage upon donors. Contracts providing for alternative arrangements may or may not be enforced by the courts.

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[94] *See* JUDITH AREEN ET AL., FAMILY LAW CASES AND MATERIALS 572 (6th ed. 2012) (explaining that in the case of surrogacy using in vitro fertilization, there may be easily be six contenders for parenthood: two intended parents, one sperm donor, one egg donor, a gestational surrogate and her husband).

[95] *See In re* F.T.R., 833 N.W.2d 634, 644 (Wis. 2013) ("The ability to create a family using ART has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage"); *see also* Elrod & Spector, *supra* note 16, at 624.

[96] UNIF. PARENTAGE ACT, prefatory note, at 2 (2002).

[97] *See* UNIF. PARENTAGE ACT, § 702 cmt. (2002) (explaining that donors may not sue to establish parentage and may not be sued to obtain support for the child); *see, e.g.*, WIS. STAT. ANN. § 891.40 (West 2008).

For example, some states and not others enforce contracts supporting sperm donors who wish to contract *for* parental rights and responsibilities, despite statutory bars against paternity for sperm donors.[98] Another example occurs in the case of "ovum sharing," where lesbian partners extract the egg from one partner, fertilize it and insert it into the other for gestation and birth. In contradiction of its general statutory rule that egg donors do not enjoy parental rights, at least one state appears statutorily to accept (and require) an actual written contract stating the intentions of the parties that the egg donor will assume parental rights before affording parentage to the egg donor.[99]

Surrogacy Contracts

Following the widely publicized 1988 *Baby M* case,[100] many states legislatively declared all surrogacy contracts void and unenforceable, and some states even instituted civil and criminal penalties for these contracts.[101] Several of these states have since invalidated or repealed their laws prohibiting and/or criminalizing surrogacy contracts, now permitting surrogacy contracts, under strict regulations with contractual requirements.[102]

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[98] *See e.g. In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (refusing to apply a blanket statutory bar to donor parental rights to the sperm donor in the case because he had evidence of an oral agreement with the mother to be considered the natural father of the child); *see also* N.H. REV. STAT. ANN. § 168-B:11 (West 2013) (stating that an agreement is writing is sufficient to privately guarantee a sperm donor's parentage); McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989), *cert. denied* 495 U.S. 905 (1990) (concluding that the blanket statutory bar to donor parental rights would violate the Due Process clause of the Fourteenth Amendment if the donor had an agreement to have rights and responsibilities as a parent). *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994) (imposing paternity on biological father despite agreement that he would be sperm donor only).

[99] *See, e.g.* T.M.H. v. D.M.T., 79 So. 3d 787, 792 (Fla. Dist. Ct. App. 2011); *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009). *See generally* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

[100] 537 A.2d 1227 (N.J. 1988)(concluding that the contract violates New Jersey public policy by privately arranging custody matters when the state is the ultimate arbiter of the best interests of the child in custody matters).

[101] *See* Donald P. Myers, *7 States Prohibit Surrogacy for Pay*, L.A. TIMES (Mar. 6, 1989), http://articles.latimes.com/1989-03-06/news/vw-70_1_states-prohibit-surrogacy (explaining that in the year since *In the Matter of Baby M*, was decided, seven states had banned surrogacy and twelve additional states were considering similar legislation); *See, e.g.*, MICH. COMP. LAWS § 722.859 (1988).

[102] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25–218(a) (1989), *invalidated by* Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (declaring the law unconstitutional on equal protection grounds); Surrogacy Parenting Agreement Act of 2013, Council 32, Period Twenty (D.C. 2013) (proposing that surrogacy contracts complying with various requirements be considered

While some states still will not enforce surrogacy contracts and statutorily mandate that a gestational mother is the parent,[103] the enforceability of surrogacy agreements with contractual requirements is the position now advocated in the Uniform Parentage Act,[104] and the position many states now follow.

As just a few examples of the types of contractual requirements states may impose before enforcing surrogacy contracts, some states have eligibility requirements, such as a minimum age; commissioning parent requirements, such as the gestating incapacity of the commissioning mother and her marriage; transaction requirements, such as non-mandatory surrender until expiration of a waiting period and prohibitions on "commercial surrogacy" or surrogacy for payment[105]; and judicial pre-authorization.[106]

Private and Open Adoption Contracts

We outline the basics of adoption default rules in the U.S. later in this work but wanted to mention here an important development in parentage by adoption accomplished through private contract. While a small number of states outright prohibit independent or private adoption contracts,[107] most states permit private adoption agreements between birth and adoptive parents, negotiated outside the confines of state-run adoption agencies, though typically with state oversight and regulation.[108] As a more recent development, some states now also allow parties to

presumptively valid); S.B. 4617, 236th Leg., Reg. Session (N.Y. 2013) (proposing that surrogacy contracts complying with numerous requirements be enforced through judgment of parentage).

[103] *See, e.g.*, N.D. CENT. CODE § 14-18-05. *See* COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:9 (2012).

[104] UNIF. PARENTAGE ACT § 801 (2002).

[105] *See, e.g.*, KY. REV. STAT. ANN. § 199.590 (West 2005); LA. REV. STAT. ANN. § 9:2713 (1987); WASH. REV. CODE ANN. § 26.26.230 (West 1989). Scholars have criticized this altruistic rhetoric as reinforcing gender norms about motherhood and monetary motivation. *See* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 247 (2009); *see generally* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman and Joan C. Williams, eds., 2005).

[106] *See, e.g.*, FLA. STAT. ANN. § 742.15 (West 1993) (providing minimum age requirement of 18 years old and requiring commissioning parents to be married); N.H. REV. STAT. ANN. § 168-B:25 (West 2013) (providing mandatory terms including a term that allows a surrogate to keep the child if she signs a written intent to keep the child and delivers the writing to the intended parents within 72 h of the birth of the child); N.H. REV. STAT. ANN. § 168-B:23 (West 2013) (requiring judicial pre-authorization); VA. CODE ANN. § 20–158 (West 2000) (requiring judicial validation).

[107] *See* COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:4 (2012).

[108] *See* Does 1, 2, 3, 4, 5, 6, & 7 v. State, 993 P.2d 822, 829–30 (1999) (discussing the principle that private adoption agreements must conform to state statutory requirements in order to be enforceable, making them different from other types of contracts).

negotiate and contract various terms of an "open" adoption, permitting a birth parent to terminate her parental rights while retaining some right to post-adoption contact with the child.[109] As discussed later in this work, enforcement of open adoption contracts allows parties to avoid the default rule that an adoption severs completely the relationship with a birth parent.

Co-parenting Contracts for Non-legal Parents

Some non-legal parents preemptively execute co-parenting agreements with legal parents, demonstrating the desires of these adults to share parenting responsibilities for the child, even though one is not a legal parent. Co-parenting agreements may or may not be enforced, depending on the state.[110]

Contract Resolution of Conflict Between Legal Parents

Once established as legal parents, parents may resolve disputes over custody and support for their children by contract. Here, again we take another break to put our inquiry into context. The general framework of legal rights and responsibilities that attach to legal parenthood (rights of access and decision-making with obligations of care and financial support) operates with little if any judicial oversight, except in two discreet scenarios. The first is state intervention caused by alleged abuse or neglect, undertaken according to a highly complex child protection system, where the state becomes an investigator and potentially a party in litigation against a parent on behalf of a child.

The second scenario of judicial oversight of parenting, of importance for the instant work, is private family law litigation, where parties invite state intervention because they cannot get along with each other regarding their children. As just one illustration, although courts are unlikely to review, much less scrutinize the parenting actions of two married parents, upon divorce, a court may scrutinize quite heavily the actions of both parents (with granular detail) in the context of a custody trial.[111]

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[109] Open adoption agreements have become more popular in the U.S. *See, e.g.*, Weinschel v. Strople, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983).

[110] COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:31 (2012).

[111] *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 ch.1, topic 1, overview of the current legal context (2002).

This is important because we must realize that while parents privately order their intimate vertical relationships every day, without contracts,[112] and without judicial review, intraparental conflict brings legal parents (and sometimes others with interests in children, i.e. grandparents) before the courts and opens the possibility of private ordering by contract, in settlement, in order to avoid a final adjudication by the courts.

Child Custody Settlement Contracts

After a child custody matter is brought before a court in the nature of a custody action or as an ancillary issue in a divorce action, legal parents may resolve their disputes and agree upon a custodial arrangement, but not without presenting this agreement to the court for approval.[113] Indeed, many state statutes now *require* parents to execute and present parenting plan agreements, which in many states are pre-designed forms on which the parents select between pre-designed options for custodial arrangements and sign. Parties who prefer to execute more personalized, lengthy settlement agreements regarding custody often then will reference their lengthier agreements in such required forms. Such parenting plan agreements, whether outlined in lengthier agreements or as checked boxes on a form, often cover not only the residential location of the child, but also the specific time the child shall spend with each parent, how child transfers will take place, and which parent shall make daily decisions and those more significant decisions regarding, for example, schooling and religion.

While all states require some form of court oversight of agreements regarding children, states vary in the degree to which they allow judges to set aside, or abandon, these agreements based upon the judge's discretion regarding the best interests of the children involved.[114] In practice, unless an agreement—on its face—presents a child custody arrangement that seems clearly harmful to the children subject to the dispute, courts rarely will disturb it, as courts unlikely have the

[112] *But see* McClain, *supra* note 55, at 845 (describing the ways that family constitutions guide daily life).

[113] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.06 (2002).

[114] Johnson v. Johnson, 9 A.3d 1003 (N.J. 2010) (setting forth a system for judicial review of arbitration awards, deferring to the agreements unless a party contests the agreement as being harmful to the child, and requiring a record of all documentary evidence from the arbitration be kept for the purpose of this review.); Illinois mandates that mediated agreements regarding financial assets be upheld unless the agreements are unconscionable, but mediated agreements pertaining to children must be determined to be in the children's best interest. *See* MODEL FAMILY LAW ARBITRATION ACT (Am. Acad. Matrimonial Law. 2004); Ronald S. Granberg & Sarah A. Cavassa, *Private Ordering and Alternative Dispute Resolution*, 23 J. AM. ACAD. MATRIMONIAL LAW. 287 (2010); *see also* John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411, 443 (2012).

information necessary to question its terms.[115] Likewise, parties may not amend custody agreements privately (at least not if they wish the amendments to have legal effect), as amendments also require judicial approval.

Child Support Settlement Contracts

In the specific area of child support, court supervision over contractual terms indeed may be more taxing. The Federal government mandates that states create guidelines for child support using specific descriptive and numerical criteria,[116] and while individual state child support guidelines vary, sometimes significantly, all state child support guidelines *explicitly* limit the terms upon which parties may agree privately regarding how they will divide the financial obligations of their children upon divorce.

Courts will require a joint showing by the parties that their agreements regarding child support conform to the child support guidelines of that jurisdiction. Agreements or awards not attaching an adequate showing of conformity often will be tossed out completely by the presiding judge, sometimes to the great frustrations of parties and their attorneys who have spent significant time negotiating those terms in the context of the overall settlement.

Default Rules of Intimate Vertical Relationships

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate vertical relationship of parent and child, absent an alternative contractual arrangement, first discussing generally who qualifies as a legal parent under default rules, and then discussing generally how states divvy rights and responsibilities between legal parents and others. This discussion is by no means exhaustive, as the law of parentage is ever-evolving and far too vast for this work.

Legal Parentage by Biology or Marriage

Absent a contract, or some other factual scenario, such as adoption or assisted reproduction, legal parenthood in the U.S. generally is a function of biology with a

[115] Mnookin & Kornhauser, *supra* note 64, at 955–56.

[116] Family Support Act of 1988, 42 U.S.C.A. § 1305 (1996); *see* Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews,* 43 FAM. CT. REV. 415 (2005); *see also* Lande, *supra* note 115, at 443.

marital presumption, based on a two-parent model of one legal father and one legal mother. Maternity is traditionally easy to determine based on the woman giving birth to the child, and rarely gives rise to dispute, except where complicated by assisted reproduction.

Paternity is more typically contested, and courts have devised various sets of legal principles determining legal fatherhood. For example, courts generally presume a husband is the father of his wife's children born during the marriage, and for a short period after divorce or death.[117] A husband may challenge this presumption in court in most states, but it is a very strong presumption to overcome.[118] Outside the marriage context, courts usually determine paternity based on biology using genetic testing.[119]

Additionally, in 1996, Congress compelled each state to adopt procedures for men to acknowledge their paternity without adjudication.[120] Under the resulting state laws, men may sign standard forms voluntarily acknowledging or denying paternity, filing such forms with the state agency maintaining birth records.[121]

Legal Parentage by Adoption

Adoption is a parent-child relationship created by the states, authorized expressly by state statutes, and regulated intensely by the states.[122] The adoption process typically begins with the termination of the parental rights of the birth mother, and if known, the birth father, and relinquishment of the child to a state-regulated adoption agency.

Prospective adoptive parents typically then must seek approval directly from the adoption agency, which maintains minimum eligibility requirements, often state-mandated, and conducts extensive investigations to verify the appropriateness of the placement. Following agency approval, prospective adoptive parents typically must receive judicial approval in order for the adoption to proceed.[123]

The advent of step-parent and second parent adoption is particularly important to note, as an aberration of the standard adoption framework. While a typical adoption

[117] *See* MYERS, *supra* note 77, at 143; *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105 (West 2013).

[118] *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1053–54 (Pa. 1999) ("[T]hat a child born to a married woman is the child of the woman's husband-has been one of the strongest presumptions known to the law.").

[119] *See, e.g.*, People *ex rel.* B.W., 17 P.3d 199, 201 (Colo. Ct. App. 2000) ("There is no presumption of paternity in regard to children born to unmarried parents.").

[120] 42 U.S.C. § 666(a)(5)(C) (1996).

[121] *Id. See also* UNIF. PARENTAGE ACT, § 303 (2002).

[122] *See, e.g.*, CAL. FAM. CODE § 8600 (West 1992).

[123] *See, e.g.*, FLA. STAT. ANN. § 63.022 (West 2012); Lofton v. Sec'y of Dep't of Children & Family Serv., 358 F.3d 804, 809 (11th Cir. 2004).

terminates the existing parent-child relationship of the birth parent and substitutes it with a new parent-child relationship with the adoptive parent, states allowing step-parent and second-parent adoption by statute or judicial precedent provide an exception to this framework, allowing adoptive parentage without destroying the parentage of the birth parent. Step-parent adoption permits the adoption by a married adult of his spouse's child. Second parent adoption permits the adoption by an intimate partner, including a same-sex partner, of his partner's child.[124]

Once a legal adoption takes place, the adoptive parents assume all of the rights and obligations of legal parenthood, including the rights and obligations of custody and child support.

Child Custody

States consider two main forms of child custody for legal parents—physical and legal custody. Physical custody refers to the right to have the child physically present with the parent. Visitation or parenting time is a part of physical custody. Legal custody refers to the right to make decisions concerning the child. Physical and legal custody do not have to be exclusive; parents may share physical and legal custody, so that the child travels between the care of the parents and both parents make decisions for the child or somehow divide decision-making authority by subject matter or according to physical custody.

States generally must make additional findings of parental unfitness before removing all forms of custody from a parent, essentially terminating his parental rights.[125] There is no longer a physical or legal custodial presumption in favor of the mother or the father.[126] Some states authorize courts to consider and sometimes defer to the wishes of the child (usually above a certain age) in determining physical custodial arrangements.

The majority of U.S. states authorize courts to use the legal standard of "best interest of the child" in making determinations about custody. While the Uniform Marriage and Divorce Act (UMDA) and various state statutes provide specific factors for courts to consider in determining the best interest of the child, this standard remains amorphous, allowing courts significant discretion in determining issues of child custody.

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[124] *See, e.g.*, Sharon S. V. Superior Court, 73 P.3d 554 (Cal. 2003) (finding that a woman intending to coparent with another adult who has agreed to adopt the child is permitted to waive the statutory benefit of "giv[ing] up all rights of custody, services, and earnings" as provided on California's official independent adoption agreement form). *See generally* Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, FLA. ST. U. L. REV. 913, 914 (2007).

[125] *See* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982).

[126] *See, e.g., Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981).

State laws on custody vary, and parents often litigate both the choice of law and the appropriate jurisdiction for resolving their child custody disputes, in no small part because custody jurisdiction outcomes also may limit a parent's ability to relocate across state lines with a child. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified into the statutes of all 50 states, provides detailed, though complex, procedures for courts to determine which state's substantive law applies and which state court has jurisdiction to adjudicate a family law dispute involving child custody.[127]

Child Support

States maintain specific child support guidelines, according to federal mandate. These guidelines vary widely from state to state in substance and specificity. Most states employ an "income sharing" model that dictates an appropriate amount of support for a child based on the combined incomes of the parents and then prorates this amount between the parents based on the percentage of income attributable to each of them. In contrast, some states maintain a "percentage-of-income" model that dictates the amount of support owed by the nonresidential parent as a state-mandated percentage of his or her income. States generally consider the number of children financially supported by the nonresidential parent in determining support. Some states, with significant variations in approach, also consider parenting time offsets for child support obligations based upon extensive physical custodial time. Parenting time offsets become particularly contested in situations where the parents share almost equal physical custody.

Some states cap the level of income that courts consider in determining child support, so that a middle-class parent may have the same child support obligation as a very wealthy parent, these states reasoning that the financial needs of children should have limits.[128] Other states do not so cap the income levels, these states reasoning that children should be able to enjoy the standard of living they would enjoy if residing with the wealthy parent.[129] Even states that cap the levels of support usually allow some form of upward deviation based on high income, and all states allow for deviations based upon the extraordinary needs of a child. States also allow for downward deviations in cases where the support payments would leave the non-residential parent without sufficient income to live above a determined poverty level.

Additionally, despite specified guidelines, and in many states, statutory child support worksheets, there is always room for contest and negotiation over the appropriate child support payments one parent should pay to the other. Of greatest

[127]The federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000), also governs these issues.

[128]*See, e.g.*, GA. CODE ANN. § 19-6-15 (West 2011).

[129]*See, e.g.*, CAL. FAM. CODE § 4058 (West 1993).

importance is the method for determining parental income, as issues such as overtime pay, periodic but irregular income, and voluntary unemployment play a significant role in child support outcomes, as they can in alimony outcomes.

As state laws on child support vary significantly, parents often litigate both the choice of law and which jurisdiction is appropriate for resolving their child support disputes, as the law and jurisdiction may have enormous impacts on the amount owed. The federal Uniform Interstate Family Support Act (UIFSA) has been codified into the state statutes and is the law of all 50 states. This uniform law creates well-defined, though complex, procedures for courts to determine which state substantive law applies and which state court has jurisdiction to adjudicate a family law disputes involving child support.

Non-legal Parents

In recent years, state legislatures began creating statutory protections for third-parties, most commonly grandparents, who are not legal parents but who desire legally guaranteed rights of access to children. In 2000, the U.S. Supreme Court in *Troxel v. Granville* confirmed that only legal parents have constitutionally protected rights to children, rights that third-parties, including grandparents, generally may not infringe.[130] There is still plenty of room for legally guaranteed third-party visitation and custody following the Troxel decision, and many third-party visitation and custody statutes remain good law.[131]

In addition, of note, though not discussed at length in this work, de facto legal parentage for adults who are not legal parents but who effectively behave as parents is an important principle recognized in at least one jurisdiction in the U.S.[132]

Contracting Method—Alternative Dispute Resolution

Individuals involved in disputes pertaining to legally recognized vertical and horizontal relationships may resolve their disputes through alternative dispute resolution (ADR) methods, including mediation and arbitration, as would litigants in any other civil action. In addition to typical ADR, as similar but distinctly different from mediation, collaborative family law is another ADR method.

[130] Troxel v. Granville, 530 U.S. 57 (2000).

[131] *See* OLIPHANT & VER STEEGH, *supra* note 35, at 336; *see also* Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009).

[132] *See, e.g.*, D.C. CODE ANN. §§ 16-831.01 et seq. (providing that a "de facto parent" has standing to seek custody or visitation).

Interestingly, although the application of civil procedure to family disputes historically has not been without vigorous debate and skepticism, leading, for example, to the specialty family law courts with their unique procedural rules[133] and to the many distinctive substantive rules applicable to the family, as discussed in this work, general receptiveness to the application of civil ADR to family disputes has been comparatively unremarkable.[134] Indeed, as scholar Amy Cohen documents, many indeed have presented the resolution of family disputes through ADR as the gold standard, a model for the resolution of ordinary civil matters.[135]

Mediation

Mediation is a process by which parties in family law litigation resolve their disputes through the assistance of a neutral, third-party facilitator who does not have authority to impose binding decisions upon the parties; the parties ultimately must agree to any resolution.[136] In an effort to encourage the use of mediation in resolving family law disputes, many states offer dispute resolution services through the court system at a reduced rate to make mediation affordable for most litigants. Often, courts order parties to mediate before proceeding to trial.[137] Typically, mediators meet certain mandated requirements in terms of training and experience, but mediator requirements vary substantially from state to state.[138]

There is a plethora of debate and scholarship, among academics, policy-makers and practitioners, regarding the appropriateness of mediation, especially court-ordered mediation, in situations where intimate partner violence exists or potentially exists, as mediation presumes parties come to the negotiation table with equal

[133] *See* Halley, *supra* note 26; Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189 (2011).

[134] Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91 (2011).

[135] *Id.*

[136] *See* Lande, *supra* note 115, at 423; Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001); *see also* Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview, in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 4–6, 10–13 (Jay Folberg et al. 2004).

[137] *See* Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 669–70 (2008); *see also* Carrie-Anne Tondo, et al., *Mediation Trends,* 39 FAM. CT. REV. 445 (2001).

[138] *See* Ver Steegh, *supra* note 138, at 662; *see also* Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 995 (2000); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 16 (Kenneth Kressel et al. eds., 1989).

bargaining capabilities, free from the control of the other party, a situation thwarted by the presence of violence within the relationship.[139] This emphasis and concern are warranted.

What however is peculiar is the relative dearth of scholarship and debate on the impact of intimate partner violence in the contracting contexts discussed earlier in this work, i.e. cohabitation agreements, prenuptial agreements, surrogacy agreements, those that are pre-conflict but still adversarial in nature. Except for the specter of added involuntariness with respect to court-ordered mediation and, of course, the greater frequency of mediated divorce and child custody and support settlements in general versus these other agreements, there is no rational explanation for the discrepancy. Why does partner control in one contracting context matter but not in the other? Further, the concern specifically with "intimate partner violence" with its very well defined scholarship-driven definitional qualities may obscure the general concern over bargaining inequalities more broadly.[140]

Collaborative Law

Collaborative law differs from friendly negotiations in the mediation context or otherwise, in that parties agreeing to the collaborative process sign a pledge that prevents their attorneys from ever litigating their disputes, if the parties are unable to come to an agreement.[141] Popular[142] though controversial,[143] collaborative law is an ADR method that must be considered; although substantively, in terms of our inquiry into the ways in which parties privately resolve their disputes, there is little substantive difference between agreements reached collaboratively and those reached through mediation or other settlement negotiations.

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[139] *See, e.g.*, ABA COMM'N ON DOMESTIC VIOLENCE, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (2008), *available at* http://www.americanbar.org/content/damlabalmigrated/domviol/docs/mediation-jan-uary_2008.authcheckdam.pdf (listing of state rules); Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646 (2010); Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555 (2010).

[140] *See* Jana Singer, *The Privatization of Family Law*, WIS. L. REV. (1992) (discussing bargaining inequalities, generally, and in the context of ADR).

[141] Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319–21, 326–32 (2004).

[142] REGINA A. DEMETEO, HISTORY OF COLLABORATIVE DIVORCE (2011) (reporting that The International Academy of Collaborative Professionals has over 4,000 members in 24 countries around the world and estimates that there are over 22,000 collaboratively-trained lawyers worldwide).

[143] Despite the increasing popularity of collaborative law, there is considerable disagreement among family law attorneys as to its benefits.

Arbitration

Alternatively, arbitration is a process whereby parties in conflict agree to the substitution of a third-party in place of the judge with jurisdiction over the subject dispute and by agreement vest this third-party with the authority to hear evidence and decide the dispute, in a decision that will bind the parties.[144] Parties would agree to use arbitration in order to control the *timing* of their litigation and the *identity* of the decision-maker, not necessarily to control the substance of the resolution,[145] and in this sense arbitration is not really private ordering by the parties. However, because arbitration involves removal of the matter from state control, and placement of the matter in the hands of a non-state actor, we discuss arbitration appropriately within this work.

Family Law Contracting Permanence

Modifications of Final Judgments in Family Law

Prenuptial, postnuptial, separation and settlement agreements incorporated into final judgments are not necessarily *final*, because the judgments themselves are not necessarily final with regard to all issues—presenting somewhat of a U.S. civil procedure aberration in apparent violation of the principle of finality of judgments. Specifically, a court may modify its judgment on issues of alimony, child support, and child custody.

Generally, a party seeking to modify a final judgment regarding one or more of these issues must first prove a material change in circumstances in order to maintain the modification action, in the first instance, and then prove the underlying standards supporting her claim, i.e. best interests of the child for child custody. There usually are some restrictions on the ability of a party to seek modification, for example, a time moratorium (e.g. 2 years) on custody modification actions to promote stability for children, and preclusions against modification of alimony duration.

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[144]Lande, *supra* note 115, at 442–43 (noting the prevalence of "private judges," usually retired judges statutorily authorized to decide family law disputes. Often these private judges are called "special masters" or "referees." Unlike general arbitrators, these private judges are bound by consideration of the law, and their decisions are generally appealable); *see also* George K. Walker, Arbitrating Family Law Cases by Agreement, 18 J. AM. ACAD. MATRIMONIAL LAW. 429, 431 n.8 (2003); John W. Whittlesey, Note, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. § 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials,* 58 CASE W. RES. L. REV. 543, 543–46 (2008).

[145]*Id.*

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Appendix: Questionnaire

Major Aims

1. Contextualise the traditional status versus contract divide in private law in general, and family law exceptionalism in general.
2. Describe and analyse substantive contractualisation of family law, i.e. contractual arrangements on formation, content and dissolution of vertical and horizontal family relations that may be derogative of the legal default regime.
3. Describe and analyse procedural contractualisation of family law, i.e. contractual arrangements on private jurisdiction (party or third party resolution or settlement of family conflicts) on the one hand and recognition of family agreements by State courts on the other hand.

Questions

Do not limit your research to formal family law only, as contractualisation may also be achieved through other private or public law techniques. Think of conditions and charges to donations or testaments, of penalty clauses or liquidated damages clauses, of agreements on evidence etc.

The following topics need **not** be elaborated in the reports:

– private international law
– legal pluralism/group rights
– matrimonial property law/law of succession

Chapter I. General part

1. Spend one page on a general explanation of your legal system. Distinguish between the legislative, judiciary and executive powers and, if applicable, the

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Constitutional basis of your legal system. Please mention whether or not a (Constitutional) Court may assess the legislation.
2. Situate family law in your legal system. Use substantive rather than formal descriptions, e.g. also include the impact of family relations in tax law, social security law etc. Please mention whether or not the family or family institutions are constitutionally protected. In case of a federal or pluralist system, mention the respective competences.
3. Describe the (direct, indirect, etc.) applicability of international human rights instruments in your legal system, and their enforcement by the judiciary.

Chapter II. Substantive contractualisation

§ 1. In general

4. Describe the general boundaries of substantive private autonomy in private law (e.g. *bona mores*, public order etc.).
5. If applicable, describe any general (statutory or judicial) boundaries of contractual freedom in family law. Some legal systems e.g. explicitly prohibit contracting parties to derogate from statutory provisions in regard of marital rights and obligations or parental authority (e.g. art. 1388 French Civil code). Other legal systems may have developed a particular regime of family law agreements in case law, with higher or lower scrutiny applying.

§ 2. Vertical family law

6. Shortly describe the parent-child family relation(s) in your legal system. Who are the legal parents? Who is instituted with parental authority? What does parental authority encompass? Which alimony obligations exist? Spend one page at the most.
7. Describe if and how legal parenthood may be contractually established or excluded. Think of anonymous or discrete birth, agreements on (artificial) insemination, use of gametes or embryos, (open) adoption agreements etc.
8. Describe if and how a person can be contractually vested with parental authority as a whole, or with aspects thereof only (if applicable).
9. Can parents – i.e. persons with parental authority over a child – conclude contracts with civil effect in regard of the content of educational choices, particularly upon divorce or separation? Think of religious education (and circumcision), school career, etc.
10. Can parents – i.e. persons with parental authority over a child – conclude contracts with civil effect in regard of the housing of the child, particularly upon divorce or separation?
11. Can parents – i.e. both legal parents and any person exercising parental authority over a child – dissolve the parent-child relation, in a contract between them or with the (major) child?

§ 3. Horizontal family law

12. Shortly describe the horizontal family law relation(s) in your legal system. Which types of partnerships are recognised by law? Shortly describe the

legal conditions of formation, the default content in primary family law (not property law) and the legal conditions of dissolution.

13. Formation. Would it be possible either to opt in or opt out substantive or formal conditions to enter into a relation? A possible substantive condition may be a contract by which an adult person promises not to marry before reaching an age that is higher than the legal marriageable age. A possible procedural condition might be the requirement to ask the consent to the marriage from the chieftain, the family council, grandparents etc.
14. Non-patrimonial content. What is the legal effect, if any, of contracts on the non-patrimonial rights and obligations between partners, if applicable? Under personal mag be understood: the obligation to live together, to have sexual intercourse, the prohibition of adultery, support etc. Why are contracts valid/invalid?
15. Patrimonial content. What is the legal effect, if any, of contracts on the patrimonial rights and obligations between partners, if applicable? One may think e.g. of a patrimonial valuation of the help by a woman to her ill husband. One may think of the exclusion of certain income or the calculation of a spouse's contribution to the household expenses. Why are contracts valid/invalid?
16. Dissolution. Would it be possible either to opt in or opt out substantive or formal conditions to dissolve a relation? A substantive condition might be the exclusion of certain grounds for (no-)fault divorce. A procedural condition might be the requirement of the consent of a family council etc.
17. Dissolution. Please describe the possibilities, if any, to conclude an agreement on post-divorce support. If applicable, shortly describe the difference between support duties on the one hand and division of property on the other, and the relation between the two.

Chapter III. Procedural contractualisation

§ 1. Jurisdiction

18. Which ADR-techniques whereby parties resolve or settle their conflicts themselves are applied in your legal system in general (e.g. mediation, family councils etc.)? Distinguish between in-court and out-court ADR.
19. Please elaborate if, and how, the techniques mentioned in Q18 are applied in family law matters. Clarify whether or not parties are informed on the availability of such techniques and whether or not the court can order them to attend an information session or even try to achieve results through ADR. Describe whether or not (*ad hoc* or advance) ADR-clauses can be agreed upon, and how they are enforced (penalty clause etc.).
20. Which ADR-techniques whereby parties have their conflicts settled by a third party are applied in your legal system in general (e.g. arbitration)? Distinguish between in-court and out-court ADR.

21. Please elaborate if, and how, the techniques mentioned in Q20 are applied in family law matters. Describe whether or not (*ad hoc* or advance) ADR-clauses can be agreed upon, and how they are enforced (penalty clause etc.).

§ 2. Recognition

22. *A priori* review. Describe whether or not agreements reached through ADR (Q19 and Q20) need to be confirmed (or homologated, approved etc.) *a priori* by a State court and which conditions and standard of judicial review apply.
23. *A priori* review. Describe whether or not family contracts outside the scope of ADR need to be confirmed (or homologated etc.) *a priori* by a State court and which conditions and standard of judicial review apply.
24. *A posteriori* review. Describe the standard of judicial review, if any, in regard of declaring a family agreement null and void, or without effect, on the grounds of unequal bargaining positions.
25. *A posteriori* review. Describe the standard of judicial review, if any, in regard of modifying a family agreement *ex nunc*, on the grounds of unforeseen circumstances that result in unfair results.
26. *A posteriori* review. Describe the standard of judicial review, if any, in regard of modifying a family agreement *ex nunc*, on other grounds than Q25 and Q26. Think of agreements that shift financial responsibility for a family member from the family towards the State social security system.
27. Elaborate to what extent 'the best interest of the child' may allow courts to modify a family agreement *ex tunc* or *ex nunc*.
28. Additional comments. Feel free to add any additional information you think important for the topic of our research.